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Jan. 8
Jan. 19

BETWEEN:

RADIO IBERVILLE LIMITÉE .... APPELLANT;

AND

BOARD OF BROADCAST GOVERNORS ..RESPONDENT.

Broadcasting—Radio Broadcasting—Appeal from order of Board of Broadcast Governors—Notice to licensee of alleged infraction—Opportunity to licensee of being heard re alleged infraction—Board's power to order suspension of licence—Waiver by licensee of particular statutory requirement—Conclusion reached by Board in absence of admission or other material to support it—Power of Court on appeal from order of Board—Broadcasting Act, S of C. 1958, c. 22, ss. 12(5) and 15(1) and (3)—Radio (AM) Broadcasting Regulations, s. 4(1).

Section 15(1) of the *Broadcasting Act* reads.

15. (1) Whenever in the opinion of the Board any licensee has violated or failed to comply with any condition to his licence as described in subsection (5) of section 12 or in subsection (1) of section 13, the Board may, after notice has been given to the licensee of the alleged violation or failure and an opportunity has been afforded to the licensee of being heard, order that the licence be suspended for a period not exceeding three months, but such order is not effective until the expiration of ten days after the making thereof.

On September 30, 1964 the Board of Broadcast Governors issued a notice to the appellant reciting that in its opinion the appellant had failed to comply with a condition of its licence under the *Radio Act* by failing to enter certain information in its program log of April 24, 1964, appointing a time and place at which the appellant would be heard with regard to the failures in question and notifying the appellant that the evidence of such failures might be examined at the offices of the Board The president of the appellant company attended at the offices of the Board and on October 24 he wrote to the Board setting out his position with respect to the matters referred to in the notice In the letter he admitted certain inaccuracies in the station's program log during the week of April 19 to April 24 but did not admit all of the failures set out in the notice

At the Board hearing the president of the appellant company made a statement in which he referred to his letter but he was not questioned by the members of the Board, and the Board never did consider the evidence referred to in the notice as in its opinion the interested party had acknowledged a violation of the Regulations

By an order which recited that the Board was of the opinion that conditions of its licence in the several respects set out in the notice the Board suspended the appellant's licence for one week.

On appeal from the order of the Board

Held. That under the provisions of s 15(1) of the *Broadcasting Act* the licensee is entitled to notice of any alleged violation or failure in respect to which the power of the Board is to be invoked and exercised and to a reasonable opportunity to present his answer or defence on the question of whether or not the alleged violation or failure has in fact occurred as well as to make representations as to the extent to which suspension of the licence would be warranted or appropriate in the particular circumstances

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2. That the notice, by reciting that the Board was of opinion that the appellant had failed to comply with the terms of its licence, obscured what ought to have been one of its prime objects, viz., to tell the appellant that the matter of an alleged failure by it to comply with the terms of its licence would be considered at the time and place mentioned and that the appellant would have an opportunity to be heard on the question whether it had so failed or not.
3. That s. 15(1) of the *Broadcasting Act* requires that an "opportunity . . . of being heard" with reference to the question as to whether there has been a violation or failure to comply with any condition of the licence be "afforded" to the licensee and the "opportunity . . . of being heard" offered to the appellant by the notice of the Board under consideration was insufficient to comply with the statutory requirement.
4. That the power of the Board to order suspension arises only when the statutory requirements are fulfilled and while there is no doubt that it is open to the Board to exercise the power when the right of a licensee to insist on a particular requirement has been waived, either expressly or by necessary implication from his conduct, on the facts there had been no such waiver.
5. That the Board's decision with respect to the appellant's alleged failure to properly log its commercial spots and flash announcements as set out in the notice, which was not admitted by the appellant either in the letter or at the hearing is not sustainable in point of law as it is a conclusion reached in the absence of any admission or other material to support it, and this alone would invalidate the order of the Board under consideration since the suspension was presumably awarded in respect of both this failure and the failure with respect to logging programs.
6. That the Court's power under s. 15(3) of the *Broadcasting Act* to "alter . . . the order" cannot be exercised to substitute its own judgment of an appropriate suspension for the failure in respect of which the Board's opinion is sustainable, nor is there any provision for referring the matter back to the Board for the imposition of such suspension as it may regard as appropriate for that failure.
7. That the appeal is allowed and the order of the Board rescinded.

APPEAL from an order of the Board of Broadcast Governors.

The appeal was heard by the Honourable Mr. Justice Thurlow at Ottawa.

P. E. Fortin, Q.C. and *Brian A. Crane* for appellant.

D. S. Maxwell, Q.C. for respondent.

The facts and questions of law raised are stated in the reasons for judgment.

THURLOW J. now (January 19, 1965) delivered the following judgment:

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This is an appeal pursuant to s. 15(3) of the *Broadcasting Act* S. of C. 1958, c. 22 from an order made by the Board of Broadcast Governors suspending for one week the appellant's licence under the *Radio Act* R.S.C. 1952, c. 233 to operate radio station CHRS. Such an appeal may be taken only on a question of law and the power of the court on such an appeal to "affirm, alter or rescind the order" is exercisable only for the purpose of giving effect to the court's judgment on such question of law.

The authority of the Board of Broadcast Governors to suspend a licence granted by the Minister of Transport under the *Radio Act* is contained in s. 15(1) of the *Broadcating Act* which provides as follows:

> 15. (1) Whenever in the opinion of the Board any licensee has violated or failed to comply with any condition to his licence as described in subsection (5) of section 12 or in subsection (1) of section 13, the Board may, after notice has been given to the licensee of the alleged violation or failure and an opportunity has been afforded to the licensee of being heard, order that the licence be suspended for a period not exceeding three months, but such order is not effective until the expiration of ten days after the making thereof.

It will be observed that the power conferred by this subsection is exercisable only when the Board is of the opinion that the licensee has "violated" or "failed to comply with" a condition of his licence "after notice has been given to the licensee of the alleged violation or failure and an opportunity has been afforded to the licensee of being heard." In my opinion this means that the licensee is entitled to notice of any alleged violation or failure in respect to which the power of the Board is to be invoked and exercised and to a reasonable opportunity to present his answer or defence on the question of whether or not the alleged violation or failure has in fact occurred as well as to make representations as to the extent to which suspension of the licence would be warranted or appropriate in the particular circumstances.

The facts on which the appeal to this Court is to be determined are set out in an agreed statement of facts filed at the commencement of the hearing. This statement shows that the proceedings leading to the order under appeal began with a notice to the appellant issued by the Board over the signature of its chairman on September 30, 1964 entitled

"In the Matter of Radio Iberville Limitée

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NOTICE OF HEARING"

and reading as follows:

TAKE NOTICE THAT the Board of Broadcast Governors is of the opinion that Radio Iberville Limitée, licensee of radio station CHRS, has failed to comply with a condition of its licence as described in subsection (5) of Section 12 of the Broadcasting Act (7 Elizabeth chap. 22) in that the said licensee failed to enter in its program log of April 24, 1964, information concerning programs, commercial spots and flash announcements broadcast by station CHRS on that day, contrary to the provisions of subsection (1) of Section 4 of the Radio (A M.) Broadcasting Regulations (SOR/64-49, enacted 15 January 1964);

AND TAKE NOTICE THAT the said Board pursuant to the provisions of Section 15 of the Broadcasting Act hereby sets Tuesday, the 3rd day of November, 1964, at the hour of 10:00 o'clock in the forenoon at Christ Church Cathedral Hall in the city of Ottawa in the Province of Ontario as the time and place at which Radio Iberville Limitée shall be heard pursuant to the provisions of subsection (1) of Section 15 of the Broadcasting Act with regard to the failure above stated;

AND FURTHER TAKE NOTICE THAT the evidence of such failure may be examined by the said licensee at the offices of the Board upon appointment made with the Secretary of the said Board.

Section 12(5) of the *Broadcasting Act* provides that:

Every licence issued before or after the coming into force of this Act is subject to the condition that the licensee will comply with the provisions of this Part and the regulations.

The relevent portions of the Regulation referred to in the notice read as follows:

4 (1) Each station shall maintain a program log, in a form acceptable to the Board, and shall cause to be entered therein each day the following information·

. . .

(*d*) the title and brief description of each program broadcast, the name of the sponsor or sponsors, if any, the time at which the program began and ended and a notation whether the program was reproduced or was a live origination;

(*e*) the time and duration of each commercial spot or flash announcement broadcast, the total commercial time in each sponsored program and the name of the sponsor of each such announcement and program;

It is agreed that prior to giving the notice the Board had not considered any evidence or reached any opinion with respect to the alleged failure of the appellant to comply with the conditions of its licence and it is also admitted that the Board intended to give the appellant an opportunity to explain or contradict by evidence and argument any evidence against it.

Following service of the notice on the appellant on October 7, 1964, Mr. Bernard Turcot who was both the

president of the appellant company and the general manager of its radio station visited the Board's office where certain tape recordings and the program log of the appellant's station were shown to him and on October 24 he wrote a five-page letter to the Board setting out his position with respect to the matters referred to in the notice as well as with respect to certain other matters which had also been brought to his attention and which may have indicated breaches by the appellant of the same and of some other regulations during the week of April 19 to April 24. With respect to the broadcasting of commercial spots and flash announcements by CHRS the letter raised a question of what was required to be entered in the appellant's log but contained no admission of any "failure" by the appellant to comply with the applicable regulation in the logging of such broadcasts for April 24, 1964. With respect to programs the letter admitted that the log entries with respect to two programs broadcast during the week of April 19 to 24 had been incorrect in that a program which had lasted from 2.30 p.m. to 4.00 p.m. was by inadvertence entered in the log as having lasted from 2.30 p.m. to 3.30 p.m. and a program which lasted from 6.00 p.m. to 7.00 p.m. was entered as having lasted from 6.00 p.m. to 6.30 p.m. The latter was also referred to as a daily program. The letter concluded with the following:

In resumé, the undersigned, in his actual official capacity of president and still majority shareholder of Radio-Iberville Limitée, declares that:

I recognize that, during the week of April 19th to 24th, 1964, in its logging and operation, radio station CHRS has violated, at least technically and without any intent of disrespect or disregard for the Board, some of the Board's radio regulations;

These violations occurred without the consent and knowledge of the undersigned, who took corrective measures as soon as learned of it;

Radio-Iberville Limitée and radio station CHRS, in as much as the undersigned will have control and responsibility of its operations, will abide by the decision that the Board will take concerning a possible suspension, after considering the foregoing explanations.

Respectfully yours,
"B. Turcot"
Bernard Turcot. (CHRS)

P.S. I will be present at the November 3rd public hearing and will be available for questioning, if the Board so desires.

When the matter came before the Board on November 3, 1964, counsel for the Board stated that the item of business was "for a hearing under Section 15 of the Broadcasting Act that the licence of Station CHRS be suspended for a failure to comply with a condition of its licence, to wit, Section 4(1) of the Radio (AM) Broadcasting Regulations." He then read section 15 of the Act, the notice and an affidavit of service thereof, and after suggesting to the Board that both Mr. Turcot and a proposed purchaser of the shares of the appellant company be heard he invited Mr. Turcot to speak. Mr. Turcot thereupon stated that he was not present when the summons was served, that he had heard of the alleged violation through CBC newscasts, had subsequently met counsel for the Board at the Board's office and had later filed with the Board his letter of October 28 explaining "under what circumstances the alleged violation happened, and, right now, (would) limit (himself) to reading for the record the last page of that statement." He then read the portion thereof quoted above and stated he was available for questioning if the Board so desired. No questions were asked. Counsel for the proposed purchaser was then heard but made no admission beyond agreeing with Mr. Turcot. Counsel for the Board thereupon suggested that if the Board wished he would summarize what the offence was but the Board appears to have regarded that as unnecessary. That completed the hearing. On November 5 the Board convened in camera and decided that the appellant's licence should be suspended for one week and that the Board's order should issue on November 16. Neither at this meeting nor at the previous meetings mentioned in the agreed statement of facts was there any consideration by the Board of the tape recordings and station log as in the opinion of the Board the interested parties had acknowledged a violation of the regulations.

The order was issued on November 16 and reads as follows:

WHEREAS the Board of Broadcast Governors having reached the opinion that Radio Iberville Limitée, licensee of radio station CHRS had failed to comply with a condition of its licence, in that the said licensee failed to enter in the station's program log of April 24th, 1964, information concerning programs, commercial spot and flash announcements, as required by subsection (1) of Section 4 of the Radio (AM) Broadcasting Regulations (SOR/64-49, dated 15 January 1964);

AND WHEREAS the Board by Notice to the said licensee appointed the hour of ten o'clock in the forenoon on Tuesday the 3rd of November A.D. 1964 at Christ Church Cathedral Hall in the City of Ottawa, in the Province of Ontario, as the time and place for the said licensee to be heard;

AND WHEREAS the said licensee, by its representatives was heard by the Board at the said time and place with regard to the said failure;

NOW THEREFORE the Board of Broadcast Governors, pursuant to the provisions of Section 15 of the Broadcasting Act, orders that the licence issued to Radio Iberville Limitée for the operation of radio station CHRS be suspended for a period of one week.

On the appeal to this Court the first point taken on behalf of the appellant was that the notice did not comply with the statutory requirement that the appellant be given notice of the "alleged violation or failure" since it recited that the Board was of the opinion that a failure had occurred and even though the Board had not in fact reached such an opinion and in fact intended to hear the appellant on the question the purport of the notice was that the Board had already formed its opinion on the failure in question and proposed to hear the appellant only on the question of the suspension to be imposed therefor. The substance of this submission is I think that while the notice states that the appellant will be heard at the time and place mentioned therein the character of the "opportunity ... of being heard" that was afforded to the appellant by the notice of September 30, 1964, did not comply with the statutory requirement inasmuch as it did not afford the appellant an opportunity of being heard on the question whether it had failed to comply with a condition of its licence. In answer to this submission counsel for the Board pointed to certain expressions in the notice itself and in Mr. Turcot's letter of October 24 as well as in a letter written on October 20 by solicitors for the proposed purchaser as indicating both that the notice was not open to such a construction and that it was not so interpreted by the recipient. It is, however, a curious and, I think, not unimportant fact that such matters in the nature of a defence as were raised were put in a letter and sent to the Board before the hearing rather than reserved, as one would expect them to be, until the case against the appellant had been presented at the proposed hearing. In my opinion the utmost that can be said for the notice is that by reciting that the Board was of the opinion that the appellant had failed to comply with the terms of its licence it obscured

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what ought to have been one of its prime objects, viz., to tell the appellant that the matter of an alleged failure by it to comply with the terms of its licence would be considered at the time and place mentioned and that the appellant would have an opportunity to be heard on the question whether it had so failed or not. While it did not clearly state that the appellant would not be heard on the merits as to the alleged failure neither did it clearly convey that the appellant would be heard on that question Nor is it shown either that the appellant was given notice at a later stage that it would be heard on the merits of whether or not the alleged failure had occurred or that it was given an opportunity to be heard on that question. Moreover, while there are expressions in the letters which I have mentioned which are open to the interpretation that the writers construed the notice as meaning that the appellant would be heard on the merits of the alleged failure the expressions in Mr. Turcot's letter, which is the only letter that I regard as being relevant, and his conduct throughout are in my opinion equally consistent with the view that he was under the impression that no such opportunity was being given.

In my opinion, section 15(1) requires that an "opportunity... of being heard" with reference to the question as to whether there has been a violation or failure to comply with any condition of the licence be "afforded" to the licensee and the "opportunity... of being heard" offered to the appellant by the notice of September 30, 1964 was insufficient to comply with the statutory requirement.

It was, however, urged by counsel for the Board that even if the notice was deficient in form any right of the appellant to insist on a proper notice had been waived. The appellant, it was said, had had notice that it would be heard and it stood by without objecting that it had not been given notice of a hearing on the merits of the alleged failure while the Board proceeded to a conclusion, that the appellant owed a duty to the Board to object if it considered that the Board did not have the right to proceed to a conclusion but that instead of raising any such objection the appellant in the last paragraph of Mr. Turcot's letter, which was read at the hearing, expressed willingness to abide the decision which the Board might take.

In my opinion there was no such duty on the appellant to object on pain of losing its rights if it failed to do so. The power of the Board to order suspension arises only when the statutory requirements are fulfilled and while I do not doubt that it is open to the Board to exercise the power when the right of a licensee to insist on a particular requirement has been waived, either expressly or by necessary implication from his conduct, mere failure to object by a person not shown to have been aware of the true position in circumstances such as I have described wherein no opportunity to be heard on the merits with respect to the imputed failure was ever offered to him, in my opinion constitutes neither waiver nor conduct from which waiver should be implied. Moreover, the expression of willingness to abide the decision of the Board is plainly limited to what the Board may properly decide and is also expressed as conditional on the Board "considering the foregoing explanations" and there is nothing in the case to suggest that the Board did so. I am accordingly of the opinon that the appellant did not waive its right to be afforded "an opportunity . . . of being heard" with reference to its "alleged failure" to comply with the condition to its licence and that the Board's order cannot be sustained.

There is, however, a further ground on which I propose to rest this judgment. Despite the fact that the failure to make entries in the log with respect to commercial spots and flash announcements broadcast on April 24, 1964, as set out in the notice, was not admitted either in Mr. Turcot's letter or at the hearing, and that no other material was considered by the Board, the order recites that the Board is of the opinion that the appellant has failed in this respect to comply with the condition of its licence. The Board's conclusion on this particular subject, which, it may be noted, arises under a different paragraph of the regulation from that relating to the logging of programs and is therefore a separate subject-matter, is therefore not sustainable in point of law as it is a conclusion reached in the absence of any admission or other material sufficient to support it. This in my opinion invalidates the order since the suspension was presumably awarded in respect of both this failure and the failure (if what occurred can be so described) to comply with Regulation 4(1)(*d*) with respect to the logging of programs.

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It was submitted that the Court might alter the order by striking out the reference to commercial spot and flash announcements but this, in my view, would not cure the defect. Having concluded that there was no basis for the opinion expressed in the first recital of the order that the appellant had failed to enter in its log information concerning "commercial spot and flash announcements", the Court could, I think, in the exercise of its power to "alter . . . the order", delete the recital of that opinion from the order. However, the foundation for the Board's order that the appellant's licence should be suspended for one week was its opinion that the appellant had failed to comply with a condition of its licence in that it had failed to enter in its log for April 24, 1964, information concerning "programmes, commercial spot and flash announcements", and the order for suspension of the appellant's licence does not purport to be the Board's order or to represent its judgment with respect to the supportable portion of its opinion alone. To amend the opinion of the Board as expressed in its order while leaving the suspension unaltered would thus in substance and in effect be to award a suspension for the supportable portion of the Board's opinion. In my opinion such a course is not open to the Court on this appeal. The Court's power under s. 15(3) of the *Broadcasting Act* to "alter . . . the order" cannot, in my view, be exercised to substitute its own judgment of an appropriate suspension for the failure in respect of which the Board's opinion is sustainable, nor is there any provision for referring the matter back to the Board for the imposition of such suspension as it may regard as appropriate for that failure. Accordingly, as the order for suspension of the appellant's licence for one week could be regarded neither as the order of the Board in respect of the sustainable portion of its opinion nor as the order of this Court, if the suggested deletion from the recital of the Board's opinion were made the fourth paragraph of the order would have to be deleted as well, leaving the order with no operative clause. The effect would be to rescind the order.

The appeal will therefore be allowed and the order of the Board suspending the appellant's licence will be rescinded. There will be no order as to costs.

Judgment accordingly.