

Court of Appeals Versus the FCC

By John Carmody

The U.S. Court of Appeals, in what is considered a landmark decision, has ruled that a New York broadcaster had the right to decide that a disc jockey's personal attack in 1973 against Rep. Benjamin Rosenthal (D-N.Y.) did not violate the Federal Communications Commission's fairness doctrine.

The court chided the FCC for making "its own judgment" on the facts of the incident, involving station WMCA, "instead of judging the objective reasonableness of the licensee's determination."

In effect, the 3-0 ruling severely narrows the FCC's power to interpret the personal attack rules governing broadcasters.

Rep. Rosenthal had complained to the FCC in March 1973 that WMCA, owned by Straus Communications, Inc., had violated the personal attack rules of the fairness doctrine when it failed to notify him that he had been called a "coward" during a phone-in talk show March 8.

Straus Communications had maintained that the remark had not come during a "discussion of a controversial issue of public importance," as required by the rule.

Thus, Straus contended, it had been under no obligation to notify Rosenthal of

the attack, send him a transcript of the incident or give him a reasonable opportunity to respond to WMCA.

A key issue was a two-hour time difference during the morning of March 8, when Rosenthal's name was mentioned. Sometime after 10 a.m., disc jockey Bob Grant had been conducting a discussion of the then important national meat boycott, of which Rosenthal was a leader.

The station attempted to call the congressman for a comment, which he refused. Grant and Rosenthal reportedly had differences in the past.

About two hours later, another caller, after a totally unrelated discussion about some moth-balled government ships at Haverstraw, N.Y., in the court's words, "launched into extravagant praise of Grant."

"Well, when I hear about guys like Ben Rosenthal," Grant replied to the caller, "I, I have to say I wish there were a thousand Bob Grants 'cause then you would have . . . wouldn't have . . . a coward like him in the U.S. Congress. Thank you for your call, sir."

Rosenthal heard of the 12:45 p.m. remark and sent a telegram to WMCA demanding a transcript. The station complied, but did not tell him of the earlier boycott-oriented discussion, nor did it offer Rosenthal an opportunity to respond to Grant. Rosenthal then filed a complaint with the FCC.

The FCC's Broadcast Bureau originally fined WMCA \$1,000 because of the attack on Rosenthal's character. But the full commission, while concurring that the remark was a violation, dropped the fine, in part because of the time lapse between the two conversations.

Straus Communications appealed the FCC ruling, charging it had improperly applied the personal attack rule in finding a violation and that the rule, as applied, violates the constitution. Tacit in the case, of course, was the issue of Rep. Rosenthal's power to influence the FCC in a matter involving a congressman.

Friday's decision, in which Judges Skelley Wright, Harold Rosenthal and Malcolm R. Wilkey concurred, found that the station had made a "strong argument," which would "require from the commission a careful statement of why those arguments do not reasonably support the station's conclusion."

Instead, said the court, the FCC made its own judgment instead of judging "the objective reasonableness of the licensee's determination."

In returning the case to the FCC, the court suggested that the agency "would carry a heavy burden to find . . . a violation of the personal attack rule"—language which attorneys interpret to mean "don't touch this decision."