TV - Regulation - FCC

IN ALL FAIRNESS...

Since 1927, Congress, the courts and the FCC have been grappling with the problem of ensuring that the air waves will not become the private property of special pleaders

First of three parts
By Martin Mayer

TV Guide Oct 10-16 1970

On Nov. 27, 1964, radio station WGCB in the town of Red Lion, Pa. (pop. 5594) carried a talk by the right-wing revivalist preacher Rev. Billy James Hargis, who denounced a New York reporter named Fred J. Cook, author of an unflattering book about Barry Goldwater. In the course of his lecture, the Rev. Mr. Hargis said that Cook had been fired from the New York World-Telegram for fabricating charges against city officials and had then worked for a "Communist-affiliated" magazine (The Nation). Cook heard about the program, was aggrieved, and requested time to reply.

The Red Lion Broadcasting Co., owner of the station, was controlled by people who were not going to let anybody the Rev. Mr. Hargis thought might be a Commie use their microphones free of charge; and they turned Cook down. Cook then went to the FCC, which verified that Mr. Hargis had indeed said what Cook complained of, ordered WGCB to broadcast the reporter's reply, in comparable time, under the terms of the agency's "Fairness Doctrine." WGCB still said no, and appealed to the courts.

For reasons nobody can now explain (the program involved was produced outside the industry and the station which refused the reply was a trivial one), the National Association of Broadcasters came to the aid of WGCB—"as though," says Cory Dunham, NBC vice president and general attorney, "this stuff was really *broadcasting*." NAB intervention increased the likelihood that this case would become the occasion for a major Supreme Court pronouncement on this subject—and, indeed, it did.

In June 1969, the Supreme Court unanimously upheld the FCC position in an expansive opinion by Justice Byron R. White, generally considered one of the more conservative judges on that bench. The FCC, Justice White announced, had not only the authority but even the obligation to promulgate and enforce rules of fairness in broadcasting—and the obligation derived not only from the Communications Act but from the First Amendment to the Constitution. Moreover, the Doctrine applied not only to cases where an individual had been personally attacked, but also to situations where statements made over the air had presented only one side of a controversial issue. Whether or not such statements were presented as an editorial, any station broadcasting them incurred an obligation to offer comparable time to people holding opposing views. Station owners, Justice White concluded, had "no right . . . to prevent others from broadcasting on 'their' frequencies."

Presently, nearly five years after the original program, Cook received his opportunity to tell the good burghers of Red Lion, Pa., what he thought of the Rev. Mr. Hargis and his friends. And Richard W. Jencks, president of the CBS Broadcast Group, received a letter from a Pennsylvanian asking the network to "acknowledge that it enjoys no Constitutional right to exercise editorial freedom" and to give him some time on the Walter Cronkite show to present his views on some subjects he believed Cronkite had discussed unfairly. Obviously, the rules of the broadcasting game had changed. In May, after mulling over Justice White's opinion for almost a year, the FCC staff sent out a notice of proposed rule-making to solicit some ideas on exactly what the new rules ought to be.

There is a fair amount of odd and important history here.

Congressmen and senators have always been most interested in seeing to it that broadcasters in their areas do not use their transmitters to work for the election of rival candidates. There being no way to compel broadcasters to help the incumbent, the Congressmen have settled for a requirement of neutrality. Section 18 of the Radio Act of 1927—later copied word for word into Section 315 of the Communications Act of 1934—re- →

quires that if any qualified candidate for office receives time on a broadcasting station all opposing candidates must have "equal opportunities" for time of their own. If the candidate bought his time, opponents must have the right to buy equivalent time at equivalent prices; if he was given his time, his rivals must be given "equal time" (words which do not, incidentally, appear in the law). In 1927, and again in 1934, both houses debated amendments which would have required broadcasters to deal fairly with issues as well as with candidates for office; and both times the decision was to keep Congressional hands off.

But the Commission was licensing people to operate broadcasting stations "in the public interest." As early as 1929, it proclaimed that "public interest requires ample play for the fair and free competition of opposing views . . . of issues of importance to the public." Throughout the 1930s, the Commission insisted that broadcasting stations should not have views of their own on any issue. "A truly free radio," the Commission wrote in 1941, chastising station WAAB in Boston, "cannot be used to advocate the causes of the licensee. . . . In brief, the broadcaster cannot be an advocate."

Eight years later, the FCC reversed itself and gave broadcasters the right to editorialize, provided they then made time available "for the expression of the contrasting views of all responsible elements in the community"—and the Fairness Doctrine was born. The first station actually forced by the FCC to give away time for expression of a conflicting view was WLIB in New York in 1950. Fair Employment Practices legislation was then pending in the Congress, and WLIB carried some statements praising the idea that job discrimination for reasons of race or creed should be prohibited by law. The FCC told the station to make time available to some responsible spokesman who wanted to argue that job discrimination was a good thing.

Through the 1950s, the Commission moved gingerly about the area of fairness. The new Doctrine applied at first only to editorials. It was (and still is) called into play only upon a protest to the Commission that a program presented only one side of a controversial issue of public importance. It did not (and probably still does not) require a station to give free time to the author of the complaint; the station remained free to exercise its editorial judgment in choosing a "responsible spokesman" for the other side.

In fact, the Doctrine was rarely invoked. Most stations did not editorialize, or restricted their comments to noncontroversial matters. Those that did editorialize mostly recognized their responsibilities, and gave time to dissenters on request without any need for orders from the FCC. This tradition, incidentally, still lives in radio. During the 1969 antiballistic-missile debates, some 600 stations carried a "Life Line" program supporting the Pentagon's requests. The World Peace Broadcasting Foundation, through the device of "a courteous letter," got 265 of them to carry a taped anti-ABM program, unsponsored, in reply.

In 1959 the FCC, in a truly cockeyed decision, forced Congress to look at all these questions once again. Lar Daly, a perennial, clowning candidate for mayor of Chicago, had protested that WBBM-TV refused to give him "equal time" under Section 315 to balance news clips showing Mayor Richard J. Daley (a candidate for reelection) in action on his job—for example, greeting the President of Argentina on his arrival at the Chicago airport. On Lar Daly's petition, the FCC ordered the station to give him time comparable to that occupied by the news films about Mayor Daley, and proclaimed that, in general, appearances on news shows would have to be distributed equally to all candidates for office during a campaign.

In effect, the Commission had ruled

air elected public officials off the air during election season—most lawyers believed the Lar Daly ruling would prohibit coverage of the Republican and Democratic National Conventions unless the stations also carried coverage of, say, the Vegetarian and Prohibition conventions. Congress hastily wrote into the Communications Act an amendment to Section 315, exempting news programs from any obligation to cover all candidates equally.

A number of congressmen and senators were concerned that the language of the amendment might also free the news shows from the requirement to be "fair," and several wrote further amendments to make the Fairness Doctrine a matter of law rather than just an FCC policy statement. These amendments were rejected as unnecessary, because there already was, as a conference committee report had it, a "basic policy of the 'standard of fairness' . . . imposed on broadcasters under the Communications Act." As no such language can be found in the act, the FCC (and later the Supreme Court) not unreasonably took the conference report as an endorsement of what the FCC had been doing.

Throughout the 1960s, public objections to alleged "unfairness" by broadcasters beat an increasingly rapid tattoo on the door of the FCC complaints department. Standard operating procedure at the agency calls for each such complaint to be forwarded to the station concerned for reply, with a copy of both complaint and reply inserted in the file that must be consulted when the station's triennial application for renewal of its license is being considered. Most complaints are frivolous or worse. Prof. Harry Kalven Jr. of the University of Chicago Law School dug up one incident in which an irate viewer who disagreed with Walter Lippmann complained that CBS had been unfair in broadcasting Lippmann's opinions; and the FCC not only forwarded the complaint but later chastised the network for failing to respond to its letter with sufficient promptness.

Here and there, the Commission or its staff did order reluctant stations to present opposing views. One station was required to give time to the DuBois Clubs after broadcasting a paraphrase of J. Edgar Hoover's attack on them as part of a Communist conspiracy; another was told to give time to the John Birch Society after a commentator had accused the Birchers of advocating violent tactics. The two most dramatic episodes in the application of the Fairness Doctrine have been the Commission's insistence that broadcasters make time available (free) to anticigarette crusaders to counteract the influence of cigarette commercials—and its refusal (some issues being still too hot to handle) to require stations to make time available to atheists to balance the impact of religious broadcasts.

As late as 1968, however, Chairman Rosel Hyde of the Commission could tell a Congressional committee that no TV station had ever lost its license for failure to abide by the Fairness Doctrine, and Professor Hyman Goldin of Boston University could stress that no network had ever been ordered to provide time for reply to anything produced by the network itself. In 1970, neither of these statements still held true. WXUR of Media, Pa., controlled by the fundamentalist preacher, Dr. Carl McIntire, has been ordered off the air on charges of blatant and continuing unfairness. And NBC has been told to provide time in the former Huntley-Brinkley slot to permit a spokesman for the Aircraft Owners and Pilots Association to proclaim the safety and utility of the private plane.

The NBC case will almost certainly wind up before the Supreme Court, one way or another. It grows out of a strip of five three-to-five-minute features about air-traffic congestion and safety presented on consecutive Huntley-Brinkley programs in Novem- →

continued

ber of last year. One segment of the script looked at the role of general aviation and raised questions about the desirability of having a lot of private planes flying near the airports used by commercial airlines. NBC reporters were in touch with the Owners and Pilots Association, and when they asked for suggestions about where to go to interview "typical" private pilots, the Association (with a warning that nobody was "typical") sent them off to Zahn's Airport on Long Island, not far from Kennedy International.

Liz Trotta interviewed a number of people who flew planes out of Zahn's. One even offered to take his plane up and turn over the controls to his 12-year-old son, to demonstrate how easy it is to fly. The film chosen for the show was of a personable, 46-year-old furniture dealer who told a little story of the day the radio in his rented plane conked out while he was flying near Kennedy, which meant that the air-traffic controllers could not reach him with any information he perhaps should have known. His amiable amateurism was presented beside the obvious professionalism of a uniformed American Air Lines captain.

The next day a flood of mail began pouring into the offices of Congressmen and FCC staffers and Commissioners, protesting the unfairness of the episode on Huntley-Brinkley. The Commission's Division of Complaints and Compliance made a formal determination that the five-part series had been "fair" in presenting all sides of the airport congestion story, but that the Nov. 5 episode had been "unfair" because the choice of an unrepresentative private pilot had left the impression that general aviation is less safe than commercial aviation.

NBC's reply was that the Commission had no right in law or logic to substitute its judgment for a reporter's judgment on who is a representative pilot. The NBC brief also argued that the impression left with the viewers was, after all, true—the minimum standard for private pilots is much lower than the minimum for airline pilots.

But the FCC cannot possibly accept truth as a defense. Even if we were willing to leave the determination of "truth" to employees of a government bureau, three overworked people in the Complaints and Compliance Division can't begin to investigate whether a reporter is right or not. And the private pilots were indeed treated negatively on NBC—as they have been in other explorations of air-congestion problems in the newspapers, in FAA hearings and in Congress.

The private pilots are in a corner: they do seem likely to lose in the next few years a number of privileges. Their chances in their struggle will be affected (though probably not decisively) by the plausibility of those who represent them to the public; understandably, they want to make that choice themselves. But a news show is not an advertisement where a client can tell the copywriter who is to say what. There is no skill more essential to the journalist—and no right more important to the maintenance of a free press—than that of selecting the exemplars of a group or advocates of a cause. In an age when libertarians worry (not unreasonably) about the "chilling effect" of this or that law or ruling or Vice Presidential speech, somebody other than the broadcasters and their lawyers should be concerned about the prospect of government agents looking over the shoulders of newsmen and second-guessing them about whom to put on the air.

Over the long pull, the answers to the enormously difficult questions in the Owners and Pilots case will have a profound impact on television news and on all who get their information from the images on the screen. END

Next week: Another aspect of fairness: the relative rights of the President and of his critics in the use of television.