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TEXAS OUTLAW RADIO:
THE PRELUDE TO
UNITED STATES V. GREGG ET AL. (1934)

THESIS

Presented to the Graduate Council of the
North Texas State University in Partial
Fulfillment of the Requirements

For the Degree of

MASTER OF SCIENCE

BY

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Denton, Texas

May, 1983

MB

Aipperspach, Mac R., Texas Outlaw Radio: The Prelude to United States v. Gregg et al. (1934). Master of Science (Speech Communication and Drama), May, 1983, 98 pp., bibliography, 75 titles.

Unlicensed radio stations in 1933 tested the Radio Act of 1927 as to whether or not the Federal Radio Commission (FRC) had the right to regulate radio stations whose signals were allegedly intrastate. The FRC believed it could regulate such radio stations and proceeded to confiscate equipment, charge individuals with violation of the law, and bring them to trial, either in an injunction hearing, a criminal trial, or both.

The most formidable case was that of United States v. Gregg et al. The challenge was met by the FRC and the judge, whose decision is still quoted in legal documents. The decision upheld the Radio Act of 1927 and the FRC's right to regulate all radio stations, licensed or unlicensed.

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CHAPTER I

INTRODUCTION

Background

The process of regulating the broadcast industry has been difficult since the very first days of radio. Lawrence W. Lichty writes that if one examines the history of the Federal Radio Commission (FRC) and its successor, the Federal Communications Commission (FCC), the problems now seem to have been present since the beginning of commercial radio in the United States.¹ The attempts to pass effective laws to deal with the problems usually appeared to be too little, too late.

One of the bills passed by the United States Congress to help regulate the broadcast industry was the Radio Act of 1927. The bill was the first major piece of legislation enacted since the Radio Act of 1912. The new act created the FRC and assigned the commission the responsibilities of handling station licenses, renewals, and changes in facilities.²

During the seven years the FRC existed, the decisions it made were often challenged in the courts. Some of the landmark cases were the FRC v. Nelson Bros. Bond & Mortgage Co. (1933),³ General Electric Co. v. FRC (1929),⁴ and United

States v. American Bond & Mortgage Co. (1929).⁵ These cases answered questions concerning the right of Congress to regulate radio communications. Congress had power under the "commerce clause" of the U. S. Constitution to provide for reasonable regulation and radio did fall into the category of commerce even if it did use invisible electromagnetic waves to reach its audience.

Court rulings in the American Bond & Mortgage Co. case and the Nelson Bros. Bond & Mortgage Co. touched on the regulation of intrastate transmission of radio. According to Sydney W. Head, even though a station's intended service area was within a state, broadcasting was regarded as interstate.⁶ The implication was that even if a station's signal was entirely within a state—intrastate transmission—the FRC had the right to regulate such a station because there was no other way to control possible interference.

Despite the implication, over 100 radio stations went on the air in 1933 without FRC permission. These unlicensed stations claimed the right to broadcast without federal regulation because their signals were allegedly intrastate. Most of the stations were located in Texas, Louisiana, Mississippi, and Arkansas.⁷ More than sixty of the stations were in Texas.⁸ They were scattered across the state in cities such as Lubbock, Big Spring, Plainview,

Stamford,⁹ and Dallas.¹⁰ These stations became known as "outlaw" stations.¹¹

With the use of highly sensitive receivers, the FRC's engineering division was able to determine that the outlaw stations' signals were crossing state boundaries, or were interfering with signals from outside the state. Using that evidence, the FRC was able to stop the transmissions of most of the outlaw stations. Indictments and convictions were credited with reducing the number operating illegally.¹²

Not all of the stations' operators, however, ceased their challenge to the FRC to regulate them. These operators contended the power they used was so low it did not cause their transmissions to cross state lines. Their signals did not interfere with signals from without the state, they said. Using these arguments, one of the outlaw station operators did pursue this contention into the federal courts. The station was called "The Voice of Labor." Located in Houston,¹³ it was owned by Paul E. Gregg, M. E. Morrow, and Sewall Myer. The case is referenced United States v. Gregg et al.¹⁴

United States v. Gregg et al. is important because it specifically and finally answered the question of regulating alleged intrastate radio transmissions. The previous decisions in FRC v. Nelson Bros. Bond & Mortgage Co. and United States v. American Bond & Mortgage Co. had

dealt with stations whose transmissions crossed state lines.¹⁵ The Gregg decision, however, gave the FRC the right to regulate radio stations even though their signals could not be heard outside the state.¹⁶

Purpose of the Study

The purpose of this study is to detail this chapter of legal American history in the regulation of radio transmissions and the licensing of stations. The outlaw radio stations provided a direct challenge to the FRC whose mission it was to create order out of the chaos that existed before its debut. The right to license all radio stations operating in the United States was essential to this mission.

Research Questions

This study answered the following research questions:

1. What were the events that led to the scores of outlaw radio stations going on the air?
2. In Texas, where were the stations located, who were the operators, and what reasons did they use to justify their going on the air?
3. What methods did the FRC use to force the outlaw stations off the air?
4. Why did the Voice of Labor persist in its fight with the FRC?
5. Specifically, what authority did the decision of

United States v. Gregg et al. give the FRC? Was this consistent with previous court rulings on similar cases?

Justification

The case of the outlaw radio stations is of great importance to the history of broadcasting in the United States because of the challenge to the FRC of its right to regulate stations with alleged intrastate transmissions. United States v. Gregg et al. answered with final authority the right of the FRC to require a license for all radio stations, even those whose signals could not be heard outside the state.

Review of Literature

Scholarly research on the outlaw radio stations has not been found. Standard bibliographical sources list no works dealing with either the domestic outlaw radio stations or the federal court case, United States v. Gregg et al.

A paper entitled "Methods Used in Obtaining Evidence for Prosecution of Unlicensed Broadcast Stations" was presented at a New Orleans meeting of radio engineers in December, 1933,¹⁷ but the paper was never published.¹⁸ Other scholarly journals and periodical listings make no reference to the outlaw radio stations.

The material that has been located on the illegal stations has come from contemporary newspapers, magazines,

and newsletters. Broadcasting magazine has several articles on the outlaw stations, as does a newsletter, NAB Reports. Government publications, such as the annual report of the Federal Radio Commission, make references to the stations but do not go into extensive detail. Legal texts merely cite United States v. Gregg et al., if it is mentioned at all.

Scope and Limitations of the Research

This study deals with the Texas outlaw radio stations only. It describes where the outlaw stations were located, who the operators were, and what arguments, if any, were used in broadcasting without a license. The reasons why the operators attempted to fight the FRC will be discussed, particularly in relation to those who operated Houston's "Voice of Labor." Particular emphasis has been given to the "Voice of Labor" and the case United States v. Gregg et al. The implications of the decision will be discussed as it applies to the regulation of broadcast transmissions and not to any other possible interpretations of the interstate commerce clause for other businesses.

Procedure

The procedure of this study took the form of historical research. It covered the period of April, 1933, through January, 1934. This is the approximate period

during which the illegal stations went on the air and when the case, United States v. Gregg et al., was decided.

Primary sources of material came from court records, FRC records, and contemporary newspapers, magazines, and newsletters. Secondary source material was not located.

Organization of the Thesis

The study of the Texas outlaw radio stations is broken into five chapters.

I. Introduction

II. The Appearance of the Texas Outlaw Radio Stations and the FRC's Efforts to Control Them

III. The Prosecution of the Outlaw Stations

IV. Houston's Voice of Labor and U. S. v. Gregg et al.

V. Summary and Conclusions

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²Erwin G. Krasnow and Lawrence D. Longley, The Politics of Broadcast Regulation (New York: St. Martin's Press, 1973), p. 12.

³53 S. Ct. 627 (1933).

⁴31 F. (2d) 630 (App. D.C. 1929).

⁵31 F. (2d) 448 (ND Ill 1929).

⁶Sydney W. Head, Broadcasting in America, 2nd ed. (Boston: Houghton Mifflin, 1972), p. 370.

⁷"Institute News and Radio Notes: New Orleans Section," Proceedings of the Institute of Radio Engineers, 22 (February 1934), p. 141.

⁸"QRD? QRD? QRD?" Radio News, 15 (January 1934), p. 436.

⁹"18 Named In Suit Against Broadcast 'Outlaws' In Texas," Broadcasting, September 1, 1933, p. 32.

¹⁰"Unlawful Radio Stations Trailed," Dallas Morning News, April 26, 1933, Sec. II, p.5.

¹¹"18 Named In Suit Against Broadcast 'Outlaws' In Texas," p. 32.

¹²"Institute News and Radio Notes: New Orleans Section," p. 141.

¹³"Relentless Drive on Texas 'Outlaws' Promised as Dalrymple Aids Prosecution," Broadcasting, December 1, 1933, p.18.

¹⁴5F. Supp. 848 (SD Texas 1934).

¹⁵"Hundred Stations Violating Radio Rules in Texas," Dallas Morning News, December 5, 1933, p. 2.

¹⁶₅ F. Supp. 848 (SD Texas 1934)

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CHAPTER II

THE APPEARANCE OF THE TEXAS OUTLAW RADIO STATIONS AND THE FRC'S EFFORTS TO CONTROL THEM

Unlicensed radio stations became a major concern of the Federal Radio Commission in 1932. Prior to that year the annual reports of the FRC did not mention such stations. The 1933 annual report, covering the fiscal year 1932, does note unlicensed radio stations and listed fourteen cases that were in litigation.¹

This summary of cases referred to unlicensed stations not only in Texas, but also in Nebraska, Pennsylvania, New Jersey, and New York. It is in this group of court cases that the first unlicensed station in Texas is mentioned. I. C. Lankford, of Seymour, pleaded guilty to a charge of unlawfully operating a radio station and was fined five hundred dollars and sentenced to ten days in jail.²

Other states in this country experienced unlicensed stations. It was Texas, however, that was singled out time and again in the news media as they reported the FRC's efforts to silence these stations. An April newsletter, for example, noted in 1933 that the FRC and the Department of Justice were looking into reports that some thirty

low-powered radio broadcasting stations were on the air in Texas, operating without licenses.³

This report is perhaps the earliest record of such stations being on the air and of the government's attempts to control them. More extensive coverage about these stations occurred during the latter half of 1933. The earliest mention of an unlicensed radio station by a local publication was in the Denton Record-Chronicle on March 10, 1933.

A 15-minute radio program from DNTX, local station, will present children's music for the children of Denton every Saturday morning at 10:30 o'clock, it has been announced. The programs will be under supervision of Mrs. P. M. Brickey and Mrs. Lon. A. Speer. The first of the programs will be given tomorrow morning.⁴

DNTX was an unlicensed radio station even though the published announcement gave the appearance of the radio station's being legitimate. The operators were indicted by a federal grand jury in October, 1933, on three counts of illegally operating a radio station.⁵

Dallas newspapers began to report the government's actions against unlicensed radio stations in April, 1933. The coverage began after an inspector for the FRC, W. D. Johnson, announced that there were more than thirty low-powered radio stations being operated at various points in the state. The announcement came after a tour

by the inspector⁶ and it was the information that found its way to the national newsletter mentioned above.

The Dallas Morning News, whose parent company held the license for radio station WFAA, did more than merely report on the drive against the unlicensed radio stations. The newspaper also wrote several editorials denouncing the stations and calling their operators the meanest of frauds.⁷ The newspaper, reporting about Johnson's tour, quoted the official as saying that at least one or more stations were planned for operation in Dallas, "right under our noses."⁸

Catching the operators of the unlicensed stations provided a problem for investigators because of the stations' irregular operation.⁹ Often they would operate only during the day because at night signals from out-of-state radio stations could cause possible interference. In this way they avoided interference with the signals of stations that were licensed.¹⁰ This alleged nonconflict would be used as a defense argument by radio operators who were unlicensed.

In early May, 1933, orders were issued to FRC inspectors at the Dallas office allowing them to seize the equipment used in the illegal radio broadcasting operations. According to the Dallas Morning News, the FRC estimated that there were now sixty unlicensed radio stations operating in the United States. Half of them were located in Texas.¹¹

One of the reasons given for the large number of illegal stations in Texas was the reported existence of an association that was to assist the unlicensed operators fight possible litigation. The Dallas Morning News wrote, "Direct evidence about this association, it is understood, is already in the hands of the inspectors and more is being gathered."¹²

The association referred to was the Texas Independent Radio Advertising Association. The National Association of Broadcasters (NAB), in its report to members, detailed the organization in Texas and reprinted a story from the May 17, 1933 issue of the Brownwood Bulletin. It listed the board of directors of the association and the number of radio stations in Texas eligible for membership. Among the board members were E. J. Turner of Denton and Howard Cox of Temple. Both would be tried later for operating an illegal radio station.¹³

By the time the Texas Independent Radio Advertising Association met in Brownwood, E. J. Turner had already been charged for the unlawful operation of a radio station. He was charged on May 9, 1933, with violating the federal radio act and a bond of one thousand dollars was set. The charge said Turner had unlawfully operated a radio broadcast station for "transmission of energy or communication or signals by radio from a point in Texas to a point in Oklahoma."¹⁴

Even though the FRC was already moving against the operators of unlicensed stations in Texas, the meeting in Brownwood was well attended.

Thirty-five stations were represented in person or by proxy at today's meeting. There are 57 stations in Texas eligible for membership, most of whom have joined the organization.¹⁵

The unlicensed stations were considered to be profitable operations, for operating costs were low and the stations successfully solicited advertising. Catching the unlicensed operators required extensive work by the government, however. Because the stations broadcast irregularly, photographs of their equipment had to be taken for evidence in court. The FRC also had to have evidence of the actual transmission of programs by the radio stations before they could present the case in court.¹⁶

The number of unlicensed stations in Texas grew as the months passed. By July, 1933, there were sixty unlicensed stations in Texas. Of these the operators of ten were to have been prosecuted. The trial had been set for June 26, 1933, in Lubbock, but the special grand jury called was dissolved before the scheduled date.¹⁷ By August, 1933, the number of unlicensed stations in Texas had increased to about 160. According to FRC Inspector W. I. Abbott, the increase had been so rapid, that he believed, if the unlicensed stations were not stopped, the number could reach five thousand.¹⁸ His fears were groundless, however,

because there never were five thousand unlicensed stations in Texas. The total never exceeded 160 stations.

During the summer months of June, July, and August, 1933, the Federal Radio Commission said little about the unlicensed stations except as noted above. It was, however, continuing to gather evidence against the unlicensed stations and in late August the acting Chairman of the FRC paid a visit to Texas. According to initial announcements, Colonel Thad H. Brown was to confer with his inspectors in Texas to check on how the Commission's economy program was operating. Brown was to visit the FRC offices in Dallas, San Antonio, Houston, Galveston, and Beaumont.¹⁹

A day after the announcement of Brown's visit, nineteen persons were charged in Lubbock for the operation of unlicensed radio stations.²⁰ One of those charged was another member of the Texas Independent Radio Advertising Association, the Rev. Sam Morris of Stamford.²¹ Others charged were:

C. A. Paulger and Joe Stanton of Lubbock, charged with operating an unlicensed station from the Fundamentalist church here; Mr. and Mrs. E. J. Turner and Mr. and Mrs. F. H. Meier of Van Antwerp; Ed Pierce, Curry H. Jackson, Willis Brooks and F. W. Burson of Plainview; A. F. McCellan, Cleve Langford and Bill Adams of Stamford, charged jointly with Rev. and Mrs. Morris; Ed. F. Howser and E. W. Brown of Big Spring, and Glenn Leach and E. K. Antwerp.²²

The E. J. Turner charged in Lubbock was the same individual charged earlier in the year for the operation of an unlicensed station in Denton. Later in the year Turner wrote a letter from Plainview on a letterhead that read "Radio Station HBTX, The Voice of Hill County, Hillsboro, Texas, E. J. Turner, Owner, A. H. Cox, Manager."²³

A. H. Cox, incidentally, who was listed as the manager of HBTX, had been indicted earlier in the year on a separate charge of operating an unlicensed radio station. That station was located in Temple, Texas.²⁴

Colonel Brown arrived in Dallas on August 23, 1933. He did confer with inspectors of the FRC, as announced, but after his meeting, the acting FRC chairman told reporters that the fight would continue against radio stations that were violating the Commission's rules.²⁵ Two days later, Brown announced that seven cases of illegally operated radio stations would be handled by U. S. District Attorney Clyde Eastus.²⁶ The cases were scheduled to be presented to a federal grand jury the following month in Amarillo.²⁷

After the visit to Texas by Colonel Brown there were several arrests of operators of unlicensed stations. Texas field inspectors reported that all but four of the operations in West Texas had ceased broadcasting. The West Texas shutdowns resulted in the filing of twelve cases with U. S. District Attorneys. Initially it was announced

that several cases were to be tried in Fort Worth, two in San Antonio, two in Houston, and one each in Beaumont and Amarillo.²⁸ Not all of the cases, however, went to court.

With the arrival of September, 1933, the Federal Radio Commission continued to have success in stopping the broadcasts of unlicensed stations. Several convictions had occurred in other sections of the United States. The harshest sentence was handed down against a St. Louis, Missouri resident, George W. Fellowes. He was sentenced to one year and one day in prison, but upon the discovery that he was an alien, he was deported.²⁹ No sentence in Texas ever neared the length of time assigned Fellowes.

The NAB reported that Colonel Brown was quite pleased with his trip to Texas, particularly in the actions taken to stamp out the unlicensed radio stations.

Colonel Brown is much gratified over the results of his trip, as he feels it is absolutely essential to stamp out, by drastic measures if necessary, all unlicensed radio stations to eliminate interference and provide good reception for listeners of duly authorized stations.³⁰

The newsletter went on to report that Brown felt the economy program, the initial stated purpose of his trip to Texas, had not reduced the efficiency of the FRC field force.³¹

The legal proceedings against the arrested operators of unlicensed radio stations began in October, 1933, and continued through November. One of the operators was

Henry Clay Allison, the owner of KYRO in Fort Worth.³²

Another was Curry Jackson, of Abilene, who was also tried on a charge of operating a radio station without a license, as were Albert Cox and Fred Bitterman, who operated an unlicensed station in Temple.³³ E. J. Turner was tried in Sherman for operating an unlicensed radio station in Denton.³⁴

On November 24, 1933, a trial took place in Houston; United States v. Gregg et al. Because it did not involve criminal charges but was rather an injunction proceeding, it was called an equity case. The defendants were the operators of the "Voice of Labor," Sewall Myer, Paul E. Gregg, and M. E. Morrow.³⁵

Although the government was successful in gaining indictments against unlicensed radio station operators in the last half of 1933, the FRC added additional manpower. Prohibition was officially ended after the national general elections in early November. Because of this the pursuit of those who sold illegal alcoholic beverages began to wind down.³⁶ With the end of Prohibition, the prohibition director, Major A. V. Dalrymple, was assigned new duties. He was named a special assistant to the Attorney General and assigned as an investigator for the Federal Radio Commission. His first assignment was reported in the Dallas Morning News: "Dalrymple left Washington last week to investigate reports of wave-length "bootlegging" in Texas."³⁷

Major Dalrymple arrived in Texas just as the trials began for Jackson, Cox and Bitterman. Jackson, the Abilene radio station operator, was sentenced to ten days in jail on November 17, 1933, but Dalrymple did not play an important role in the trial.³⁸

The government team for the Jackson trial was Ben S. Fisher, the assistant general counsel for the FRC; A. D. Ring, the Commission's chief broadcasting engineer; and Leroy Schaaf, the head of the Commission's license division. They told reporters after the Jackson trial that in the following days they would be in Waco, Houston, and Sherman. Fisher also said additional cases of unlicensed radio stations were being investigated in Austin, Denison, and Brownwood.³⁹

Four days after the Jackson conviction, the federal government had another conviction of an unlicensed operator. Albert Cox and Fred Bitterman were convicted in Waco, and Major Dalrymple served as a part of the prosecution team.⁴⁰ At the same time, testimony was filed in federal court in Fort Worth that was taken in October in the KYRO case. The presiding judge, Glenn Smith, recommended to U. S. District Judge Wilson that KYRO be permanently enjoined.⁴¹

The "Voice of Labor" equity case was heard in Houston on November 24, 1933.⁴² Three days later the next criminal trial was held in Texas on a charge of operating an unlicensed station. E. J. Turner, his wife, and Dick Saye,

were tried on charges of operating an unlicensed radio station in Denton.⁴³

During this trial Major Dalrymple took an active part in the prosecution. Even though Dalrymple was the government's prosecutor and Ben Fisher his assistant, the government lost the case. Judge Randolph Bryant had charged the jury that unless the state proved that the signals from the Denton radio station, DNTX, had crossed the Oklahoma-Texas state line, the former operators were not guilty of the charges against them. The jury found the defendants not guilty. It was the first such case lost by the government in Texas.⁴⁴

While the Denton case was being tried, Major Dalrymple told reporters that the FRC had about one hundred cases to investigate involving unlicensed radio stations. He said, however, that many of the operators were young men who would quit when told that what they were doing was illegal.⁴⁵

In December, 1933, Broadcasting magazine reported the successful prosecution of the Jackson case, the Cox and Bitterman case, and the permanent injunction proceedings against Clay. The article noted that when the Jackson case was first tried, it had ended in a hung jury. It also noted that the injunction proceedings against the "Voice of Labor" in Houston and the criminal trial of E. J. Turner were still pending.⁴⁶

After the flurry of court cases in November, the federal activity of prosecuting unlicensed operators in Texas slowed. Federal officials believed that the successful prosecutions of Jackson, Cox, and Bitterman were instrumental in persuading other unlicensed radio stations to stop operating in Texas.⁴⁷

Two other cases were also successfully prosecuted. H. C. Allison was tried on December 12, 1933, on a criminal charge of operating an unlicensed radio station. Of the seven counts against him, he was found guilty of one,⁴⁸ and was fined 250 dollars.⁴⁹ The other case was the last major test of the Federal Radio Commission to control unlicensed radio stations in Texas. It was against the "Voice of Labor" in Houston. On January 11, 1934, Federal Judge T. M. Kennerly permanently enjoined the station from further operation. The judge ruled that the station had interfered with radio signals from licensed stations. Kennerly's decision was succinctly summarized by the Houston Chronicle: "The judge upheld the [R]adio [A]ct of 1927 which prescribed a license for stations."⁵⁰

NOTES

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²Ibid., p. 8.

³"Investigating Unlicensed Texas Stations," NAB Reports, April 22, 1933, p. 28.

⁴"Radio Music Program For Denton Children," Denton Record-Chronicle, March 10, 1933, p. 4.

⁵United States v. E. J. Turner, Mrs. E. J. Turner and Dick Saye, Indictment, 643 (ED Texas 1933).

⁶"Radio Inspectors Go After Outlaws," Daily Times Herald, April 26, 1933, p. 11.

⁷"Bootlegging Radio," Editorial, Dallas Morning News, May 10, 1933, Sec. II, p. 2.

⁸"Unlawful Radio Stations Trailed," Dallas Morning News, April 26, 1933, Sec. II, p. 5.

⁹Ibid.

¹⁰"Radio Inspectors Go After Outlaws," p. 11.

¹¹"Bootleg Radio Stations Will Be Confiscated," Dallas Morning News, May 5, 1933, Sec. II, p. 1.

¹²Ibid.

¹³"NAB Protests Unlicensed Stations," NAB Reports, June 17, 1933, p. 68.

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- 17"60 Texas 'Outlaws' Face Prosecution," Broadcasting, July 1, 1933, p. 14.
- 18"Unlicensed Radio Stations to Feel Government's Rule," Dallas Morning News, August 27, 1933, p. 12.
- 19"Radio Stations Inspection Due," Fort Worth Star-Telegram, August 21, 1933, p. 3.
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- 26"Several Illegal Radio Stations Unearthed by Federal Official," Dallas Morning News, August 26, 1933, Sec. II, p. 1.
- 27"Illegal Broadcasting Offensive Is Launched," Fort Worth Star-Telegram, August 26, 1933, pp. 1-2.
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- 31Ibid.
- 32United States v. Dr. Henry Clay Allison, Testimony, 780 (ND Texas 1933).
- 33"Judge Defers Sentences in Radio Trial," p. 5.
- 34"Denton Radio Trial Opens," Sherman Daily Democrat, November 27, 1933, p. 7.

- 35 "Labor Voice Radio Station Case Studied," Houston Chronicle, November 24, 1933, p. 13.
- 36 "Prohibition Law Killed as 36 States Vote Wet," Dallas Morning News, November 8, 1933, p. 1.
- 37 "Former Pro Chief Gets Radio Commission Job," Dallas Morning News, November 15, 1933, p. 5.
- 38 "Unlicensed Radio Station Operator at Abilene Jailed," Daily Times Herald, November 18, 1933, p. 1.
- 39 "Radio Board Chiefs Here," Daily Times Herald, November 19, 1933, Sec. II, p. 1.
- 40 "Judge Defers Sentences In Radio Trial," p. 5.
- 41 "Permanent Silencing of KYRO Recommended," Fort Worth Star-Telegram, November 22, 1933, p. 8.
- 42 "Labor Voice Radio Station Case Studied," p. 13.
- 43 "Plead Not Guilty In City Radio Case," Denton Record-Chronicle, November 27, 1933, p. 4.
- 44 "Jury Acquits In Denton Radio Case," Denton Record-Chronicle, November 28, 1933, p. 1.
- 45 "Have A Simile On Major Dalrymple, Federal Attorney," Sherman Daily Democrat, November 28, 1933, p. 7.
- 46 "Relentless Drive on Texas 'Outlaws' Promised as Dalrymple Aids Prosecution," Broadcasting, December 1, 1933, p. 18.
- 47 "Unlicensed Stations Prosecuted," NAB Reports, December 9, 1933, p. 248.
- 48 "Chiropractor Found Guilty in Radio Case," Houston Chronicle, December 13, 1933, p. 11.
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CHAPTER III

THE PROSECUTION OF THE OUTLAW STATIONS

The appearance of the unlicensed radio stations in Texas was noted in the Seventh Annual Report of the Federal Radio Commission to the Congress. The report by the acting General Counsel, George B. Porter, stated,

During the past few months violations have increased in the southwest section of the United States, particularly in the State of Texas₁ where the State borders are far removed.

The unlicensed radio stations, Porter continued, asserted that they had a right to go on the air without approval of the Federal Radio Commission.

This illegal operation is based on the claim that the radio transmission is not interstate or does not interfere within the State with an interstate signal.²

This claim also appeared in newspaper articles reporting the federal government's efforts to stop the unlicensed stations.³ The argument that these stations were not broadcasting an interstate signal but rather an intrastate signal was also included in a legal brief filed for E. J. Turner.⁴

The FRC Collects Evidence on the Outlaws

The collection of evidence against unlicensed radio stations in Texas began in 1932.⁵ It was not until early

1933, though, that it was revealed that the FRC was gathering evidence to use against the stations. An FRC inspector, W. D. Johnson, admitted, however, that the action was difficult because the stations operated so irregularly.⁶

The evidence that was necessary to prosecute an unlicensed operator included several things. The FRC had to have actual proof that it heard the illegal broadcast and evidence of its transmission.⁷ To offer proof that the broadcast was heard, the government would call as witnesses both government employees and local citizens.⁸ To back the evidence about transmission being possible, pictures were taken of the equipment used by these stations for transmission. Eventually permission was given FRC inspectors that allowed them to seize the equipment and use it as evidence.⁹

The seizure of equipment by the Federal Radio Commission concerned some of the unlicensed operators. They contended that they were being deprived of their property rights.¹⁰ Although this argument never played a large role in the shutting down of those unlicensed stations that lost in the courts, it was answered in the case United States v. Gregg et al. The judge wrote that an unlicensed station had no defensible position to argue because of "well settled rules of law."¹¹

The detection of the unlicensed radio stations took the efforts of amateur radio operators and licensed radio stations, and of listeners who were annoyed by the occasional interference of the unlicensed operations.¹² One reason for the elusiveness of the stations was the low wattage used in transmission. Some were using ten to fifteen watts of power, and others even less.¹³ The unlicensed station in Denton was alleged to have operated with just one watt of power.¹⁴ These unlicensed stations also operated mostly during the daytime hours. Thus, the operators contended, they avoided interfering with licensed stations operating on the same frequency whose signals traveled greater distances at night.¹⁵

An editorial in the Dallas Morning News on May 10, 1933, came out strongly against the unlicensed radio stations. It acknowledged the use of low power by the operators, but it also pointed out another fact, the movement from place to place by unlicensed operators.

As detection through mechanical means is comparatively easy once the Government is aware the illegal station is operating, the radio bootlegger is of necessity a bird of rapid passage.¹⁶

One of the operators later prosecuted by the federal government and who moved often was E. J. Turner. He was first charged with operating an unlicensed station in Denton.¹⁷ Later he was indicted for operating an unlicensed station in West Texas.¹⁸ Turner also had an

interest in a station in Hillsboro which was also unlicensed.¹⁹ Involved with the operation of the Hillsboro station was A. H. Cox, who was prosecuted for the operation of an unlicensed station in Temple.²⁰

The primary argument of the unlicensed operators was their claim that they were only involved in intrastate broadcasting. They said such broadcasting was not subject to federal regulations but rather subject to state laws.²¹ The "Voice of Labor" in Houston testified that it had obtained permission from the State of Texas to operate as a business.²²

The federal government's primary strategy was to prove that the radio stations' signals did cross state lines and were thus interstate.²³ Although this argument was used by the FRC inspectors, there was no implication that if a radio station's signal was truly intrastate that it would not be prosecuted. According to Colonel Thad H. Brown, of the Federal Radio Commission:

The law is quite plain upon this subject that Section 1 of the [R]adio [A]ct of 1927 specifically states that a license must be secured before the use or operation of any apparatus for the transmission of energy, communications or signals by radio . . . and that Section 20 provides that actual operation of all transmitting apparatus in any radio station must be conducted by a person holding an operator's license issued to him by the Federal Radio Commission.²⁴

If the FRC was able to gain a conviction of an unlicensed operator in court, the maximum penalty that

could be assessed was five years in prison and a fine of five thousand dollars.²⁵ The radio operators in Texas, found guilty of operating an unlicensed station, were never assessed such a severe sentence.

Prosecution of Unlicensed Operators

United States v. Curry Jackson

The first case of an unlicensed operator that went to a criminal trial in 1933, in Texas, was that of Curry Jackson. Jackson was found guilty in the operation of an unlicensed station in Abilene, but it took two jury trials to reach the verdict. The first trial ended in a hung jury. He was sentenced to ten days in jail after the second trial.²⁶

Jackson's indictment by the federal grand jury charged him with violation of the Radio Act of 1927. He was accused of "willfully, unlawfully, knowingly and feloniously" communicating from within the State of Texas to a point beyond the borders of the state on August 6, 1933. The indictment said his transmission was heard in Hobbs, New Mexico.²⁷

There were two counts in the indictment. The first was for the transmission of a signal beyond the state line. The second charged him with violation of Section 20 of the Radio Act of 1927 on August 6, 1933. According to Section 20, operation of an apparatus "for the transmission

of energy, communications and signals by radio" required a license. The first count was in violation of Section 1 of the Radio Act of 1927 which read that a license was required to send signals from within a state to without the state.²⁸

To prove its point on the first count the FRC prosecutors subpoenaed Harry Burnett, the Chief of Police of Hobbs, New Mexico. He was the only out-of-state resident subpoenaed.²⁹

During the trial, Jackson's attorney, John J. Watts, attempted to have the presiding judge, William H. Atwell, instruct the jury to find Jackson not guilty on the charge of transmitting across the state line. In a hand-written letter he asked that such an instruction be made if the government could not prove beyond a reasonable doubt that Jackson's radio station was heard on ordinary receiving sets.³⁰ Such an instruction to the jury was never made.

Jackson's attorney made mistakes in the defense of his client. On a motion to quash the indictment, which was filed November 14, 1933, the day of the trial, Watts apparently submitted the motion which was intended for the use in defending another individual indicted by a federal grand jury. The name "Samuel (Sam) N. Morris" was at the top of the page but a line had been drawn through it and Jackson's name hand-written on top of Morris' name. The motion to quash the indictment had three points, but the

third point stated that Jackson "didn't broadcast to Oklahoma to interfere with the public interest, convenience and necessity of the people."³¹ Jackson was not charged with broadcasting to Oklahoma in his indictment, but to New Mexico.³²

On the other points to have the indictment quashed, Watts stated that in no part of the indictment did it say that Jackson's station was so operated that the signals went beyond the state borders. He contended that the station was operated as intrastate commerce only and that for such a reason a license was not required by law.³³

An additional plea was made by Watts in an attempt to stop the trial of Jackson. The attorney said that Congress intended the Radio Act of 1927 to deal only with interstate commerce and foreign radio transmission. He contended also that the "borders" of the state were not clearly defined as to which borders were meant, and that the type of receiving sets used to pick up Jackson's signal, moreover, were not clearly identified. Watts, in his defense of Jackson, claimed that the Radio Act of 1912, in spirit, was carried over to the Radio Act of 1927.

This chapter is intended to regulate all forms of interstate and foreign transmission and communications within the United States, its territories and possessions.³⁴

He also wrote:

. . . [N]othing in this act shall be construed to apply to the transmission and exchange of radiograms or signals between points situated in the same state.³⁵

United States v. Fred Bitterman and Albert Cox

The second criminal trial in Texas of an unlicensed radio station operator, in 1933, took place in Waco. Charged jointly were Albert Cox and Fred Bitterman. They were accused of operating radio station "Tem-Tex" at Temple without a license and with interfering with the signals of radio station KOMA at Oklahoma City, Oklahoma.³⁶

The indictment lodged five counts against the two men but each count was for the same offense. Cox and Bitterman were charged with operating their unlicensed radio station on January 26, 27, February 2, 4, and 7. Each day of operation was considered one count.³⁷

Cox and Bitterman went on trial on November 20, 1933. The two men were found guilty on all five counts the same day, but U. S. District Judge Robert J. McMillan deferred the announcement of a sentence until November 22, 1933.³⁸ When the sentence was pronounced, Bitterman was fined one hundred dollars and sentenced to twelve months in the United States Detention Farm at La Tuna, Texas. Cox was fined two hundred dollars and also sentenced to twelve months in jail at La Tuna. The jail terms were suspended for both men.³⁹

During the course of the trial, the government produced two witnesses who testified they had heard "Tem-Tex" on four or five occasions and that it had interfered with KOMA. During his oral charge to the jury, Judge McMillan pointed out that although the government had produced witnesses testifying to the interference, the defense had produced witnesses who testified to the contrary. In summary, the judge said, there seemed to be no doubt that Cox and Bitterman were the operators of "Tem-Tex," nor was there doubt a station in Oklahoma City had signals coming into Texas. The final question, he said, was whether or not the Temple radio station had interfered with the Oklahoma station's signals.⁴⁰

With the conviction of Cox and Bitterman, the federal officials from the FRC were confident that the point was being made that unlicensed radio stations were illegal. Ben Fisher, the assistant General Counsel, told the news media that the conviction of Jackson, Cox, and Bitterman for the operation of radio stations without a license would prove that the government was determined to stop illegal radio stations in Texas. Fisher said:

All stations, irrespective of power, operate in violation of the radio act unless they secure a license from the [F]ederal [R]adio [C]ommission. All present-day broadcast apparatus will send signals out of state or will interfere with signals coming into the state, either or which constitutes a violation of the radio act.⁴¹

The testimony in the trial of Cox and Bitterman again brought out the question of whether or not the Radio Act of 1927 was clear in its definitions. Judge McMillan, in his charge to the jury, discussed the problem. He first noted that the Radio Act was intended to regulate all forms of interstate and foreign radio transmission and to provide for the use of the channels for short periods of time, subject to licenses. He then pointed out that it was a violation of the law to send radio signals beyond the state border, even if the law did not say to what extent and to what degree the interference had to be. The judge then addressed the validity of the law.

Now a good deal has been said here with regard to whether this is a good law or a bad law and what the purpose of the law is. I want to say this to you: You are sworn here as jurors to enforce the law. I am telling you what the law is; I have read it to you. You are not concerned with whether this is a good or a bad law. As long as it stays the law, it is your business and everybody else's to obey it, and it is my business and your⁴² business to enforce it until it is repealed.

On this final point the Dallas Morning News had a comment in an editorial a few weeks later. The editorial supported the government's efforts to stop the unlicensed radio stations, but it said the present control act had some ill-conceived guidelines,

. . . for the reason that it substitutes for the technical allocations of radio engineering a purely artificial division of frequencies and wave lengths. But even the worst of control⁴³ acts would be better than no control at all.

United States v. Dr. Henry Clay Allison

A third case involving an unlicensed radio station operator was that of Henry Clay Allison of Fort Worth. Allison's case extended over several months because the government not only pressed criminal charges but also held an injunction hearing. Whereas only criminal trials were held in the two previous cases, Allison not only had a criminal trial but also a civil trial.

The injunction hearing against Allison was held on October 2 and 3, 1933, but the testimony was not filed until November 18, 1933.⁴⁴ The criminal trial of Allison was held on December 12, 1933, and he was sentenced on December 16, 1933.⁴⁵

Allison was indicted on nine separate counts. The counts were not all identical as in the trial of Cox and Bitterman. Counts 1, 4, and 8 stated that Allison had not obtained a radio station license to broadcast. Counts 2, 5, and 9 said that on three different occasions Allison had no operator's license. Counts 3, 6, and 7 charged Allison with the interference of licensed stations from outside of Texas with signals from his broadcasts.⁴⁶

During the trial, Counts 2 and 5 were quashed. The jury in Allison's criminal trial found him innocent on all of the other indictments, but one--Count 9. This count

stated that on September 14, 1933, Allison had no operator's license when his station's signal went into Oklahoma.⁴⁷ Allison was fined 250 dollars.

Allison was unique among the operators who were tried for operating an unlicensed radio station. He had owned a licensed radio station before his involvement with an unlicensed station. During testimony, Allison told the court he had owned KFJZ in Fort Worth for about two years and then sold his interest to H. C. Meachem.⁴⁹

The Fort Worth resident was a chiropractor and he bought radio time in the Fort Worth area to talk about his profession. This was after he sold KFJZ. Allison testified he purchased time on KFQB and KTAT and spoke for fifteen minutes, once a week. During his testimony, he charged that because of complaints from members of the medical community, his programs were cancelled by the radio stations.

After this Allison approached KFJZ, the station he once owned, about purchasing time. At first the station refused to sell him time but Allison said he appealed to the FRC. Allison reportedly told the FRC that he was speaking on politics during his program and after the appeal, KFJZ yielded, but allegedly charged double the normal rate. WBAP, also in Fort Worth, did the same thing, according to Allison.⁵⁰

During the testimony in his civil trial, Allison stated that he had attempted to gain a license to operate a radio station of his own after selling KFJZ. The attempts were made in 1928 and 1929. While being questioned by his defense counsel, Clarence E. Farmer, Allison said his application was rejected "because there was too many stations in Texas."⁵¹ After waiting four years in attempting to gain permission to put his own station on the air and experiencing difficulty in purchasing air time, he then began to think of other ways to put his own station on the air.⁵²

The question of the government's not issuing licenses for new radio stations was raised earlier in the trial when Allison's counsel called U. S. District Attorney Clyde Eastus to the witness stand. Eastus testified that in his conversations with the acting Federal Radio Commission chairman, Thad Brown, he got the impression that no new licenses would be issued.

He just said this: That all of the kilocycles or time had been allotted that could be allotted in Texas under radio locations . . . and that there was not any room for any further station in Texas, without interference; and there was not going to be any licenses issued to anybody.⁵³

The statement made by Brown and quoted by Eastus about the issuance of licenses was addressed a couple of years later in an article published in the Harvard Business Review. The article, in reviewing radio

regulation and politics of the late 1920's and early 1930's said that despite the passage of a bill known as the White Act, the FRC felt the South and Southwest were less highly developed than other parts of the country. The White Act stated that broadcasting facilities were to be distributed fairly among the different states.⁵⁴

The attitude of the FRC caused problems. The Commission believed that if the programs on radio could be received by the listener, it was of little concern where the radio station was located. Southerners, though, felt otherwise. They felt it was a matter of pride and said the "damn Yankees" were inflicting their tastes and tunes on the South. This sectionalism began in the late 1920's and continued for several years, thus leading to the irritation among individuals promoting radio in the South. Even an FRC commissioner from Mississippi was criticized for not working harder for the South in gaining new radio station allocations.⁵⁵

Allison's idea of going on the air with his own unlicensed station was suggested to him by an employee of KFJZ. Truett Kimzey offered to put the station on the air for one hundred dollars. Allison testified that as a result of this suggestion, he checked the law, felt safe, and believed there was such a great need to discuss various questions on the air, that he conceived of KYRO. He said he chose the specific call letters because it sounded like "chiropractor."⁵⁶

Allison claimed during the injunction hearing that he had filed for a broadcast license on June 14, 1933, but that it was returned by the Federal Radio Commission as being incomplete. The FRC also said Allison had erred in applying for a regional channel.⁵⁷ Allison went on the air despite the rejection and the first count of his federal indictment stated he broadcast "willfully, unlawfully, knowingly and feloniously" about June 30, 1933.⁵⁸

The broadcasts that Allison made over KYRO, which he called "The Voice of Freedom," were monitored by the FRC. The government began efforts to enjoin Allison's station and during the hearing in October produced a transcription of a talk Allison made on September 9, 1933. During his talk he told the audience of the efforts of the federal government and what he called its "alleged accomplices" to enjoin his station. He appealed on the air for funds to post bond that he anticipated in having to pay later in the day. Exhorting his audience,

They are after me with blood in their eyes
and I am not surprised. When I hear the
many, many reports--of people who are changing
their minds constantly about the old ways of
getting well and about the dominating
tyrannical methods that are being used to
force people into medication and to know that
I have up-rooted with my own feeble efforts
that practice, that practice that has such a
firm hold as it has on people, I cannot
expect else other than that they are going to
do their very best.⁵⁹

Allison apparently made attempts on his own to find the individuals who were allegedly cooperating with the

federal government in gaining evidence about his broadcasts. Offered as an exhibit by the government was a telegram that had been sent to an amateur radio operator in Marietta, Oklahoma. The telegram was sent to Harold Stafford.

Please assist [I]nspector Newcomb if he calls on you tomorrow but give out no information to anyone else as Allison's minions expected visit Marietta to learn names of witnesses and intimidate them caution J. W. Stafford to know nothing of our visit including yourself to his home.

The telegram was signed, W. I. Abbott, U. S. Radio Inspector.⁶⁰

As noted above, Allison was found guilty on only one of the nine counts against him. One final effort was made to annul the verdict of the jury. The defendant claimed the verdict should be set aside on three points: (1) no operator's license was needed for intrastate radio, (2) that there was no evidence the defendant actually operated the equipment personally, and (3) that because he was found not guilty on the six other counts, and two having been quashed, the count he was found guilty on should be made void.⁶¹ The motion was not granted, Allison was fined 250 dollars, and KYRO was permanently silenced.

United States v. E. J. Turner

Despite successes such as this, the government did not always win its prosecutions of unlicensed radio

operators. A few days after the convictions of Jackson, Cox, and Bitterman, E. J. Turner was placed on trial for the unlicensed operation of DNTX, in Denton. Turner's lawyer was Clarence Farmer, the same counsel Allison had employed.

Farmer's representation of Turner was thorough. Numerous briefs were filed. The briefs requested that a motion be granted to bar prosecution of Turner and that the indictments be quashed.

Turner, his wife, and an employee of DNTX, Dick Saye, were each indicted on three counts. The first two counts charged the trio of transmitting radio signals over state boundaries, and doing so without a license. Specifically, the first count charged the defendants with broadcasting across the Oklahoma-Texas state line. The second count accused the three of interfering with signals coming from a radio station beyond the state boundary. The third count said the three operated a radio station without an operator's permit.⁶²

In his motion to have the indictments quashed, Farmer used many of the same arguments he had used in the Allison case. He said the first count should be quashed because it was not sufficiently stated if the "effects" of the signal of DNTX were extending beyond the borders of Texas. He contended that the law which his clients allegedly violated was meant for interstate commerce and not

intrastate commerce. He also noted that the "effects" of the Turner broadcasts were not proven to have been received by ordinary receiving sets that were used by the ordinary public in the State of Oklahoma.⁶³

The argument in the motion to quash the second count said that the indictment did not sufficiently charge the crime of interference of Turner's signal with that of another station. Farmer pointed out that the indictment never stated which radio station Turner allegedly interfered with.

It is not alleged how the interference was done, whether by cross talk, blanketing, or hetrodyne [sic], nor is it alleged on what killocycle [sic] the interference was made.⁶⁴

The motion to quash the third count stated that the Turners were operating an intrastate radio station, not an interstate radio station. Thus they were not required by law to have a license. In this motion an attempt was made to shift the blame from Turner and his wife by stating that the Turners were not really the ones involved with the "actual operation" of the "transmitting apparatus."⁶⁵

Farmer, in his brief to bar the prosecution of Turner, continued his explanation as to why his clients did not need a license to operate an intrastate radio station.

The Radio Act of 1927 has been held to be constitutional within the scope to which Congress intended it to apply, that is, interstate commerce under the Commerce Clause of the Federal Constitution; and it was never intended to apply to

intrastate commerce by radio where the broadcasting or use of apparatus does not interfere with the reception of broadcasting by radio of licensed stations.⁶⁶

On a second point in his plea to bar the prosecution, Farmer wrote that subsection (d) of Section 1 of the Radio Act of 1927 was unconstitutional because it was vague, indefinite and uncertain.⁶⁷ The subsection that Farmer attacked reads:

That no person, firm, company, or corporation shall use or operate any apparatus for the transmission of energy or communications or signals by radio . . . within any State when the effects of such use extend beyond the borders of said State, or when interference is caused by such use or operation with the transmission of such energy, communication, or signals from within said State to any place beyond its borders, or from any place beyond its borders to any place within said State, or with the transmission or reception of such energy, communications, or signals from and/or to places beyond the borders of said State.⁶⁸

Farmer's main point was that the wording was vague as to what was the border of a state. The question was whether or not it meant the entire boundary or only a part. In attacking this section of the Radio Act, Farmer also said there was a lack of a clear definition as to what type of receiver and under what conditions was it unlawful for an intrastate signal to cross the borders of a state.⁶⁹ The contention was that ordinary receiving sets would not pick up the signal. In the injunction hearing against the "Voice of Labor" in Houston, testimony there indicated that

the government went to considerable effort to detect signals from unlicensed stations.⁷⁰

The last major point that Farmer made in his attempt to bar the prosecution of Turner dealt with interference. Farmer wrote that there was no clear definition as to what type of interference was condemned by the law.

The object Congress had in the regulation of the use of the radio was for the public interest, convenience and necessity, in order that there might be protection for the people in the use of the radio for their mental edification, and to prevent great confusion. Congress did not intend to prevent the use of radio by local communities within the state of apparatus of low power that would not extend very far . . .⁷¹

In conclusion, Farmer wrote:

Congress never intended to give a monopoly to a few great corporations and deprive the people of their state rights in the use of radio.⁷²

This concluding thought was addressed in the article quoted above from the Harvard Business Review.

E. Pendleton Herring wrote that whether or not it was deliberate, the FRC seemed to follow a policy of favoring primarily the big commercial interests. He noted that CBS and RCA owned several stations each and then provided programming for more than an additional 170 stations. To illustrate his point, Pendleton wrote that in 1931, the courts ruled that RCA had violated the Clayton Act. The Radio Act of 1927, he stated, forbade the renewing of licenses to businesses which were guilty of unlawful

monopoly. Pendleton claimed that the FRC interpreted the law so that although RCA might have been guilty of monopoly in its practices, it was with equipment rather than with actual broadcasts, thus the corporation could continue to operate its radio stations.⁷³

The trial of Turner lasted one day and the jury verdict was one of acquittal. Perhaps the case was lost by the government because of the instructions given to the jury by Judge Randolph Bryant. Before the case went to the jury, Judge Bryant agreed with Turner's defense counsel that the second count of the indictment should be quashed. This count was the one not clearly indicating with what station Turner's signal allegedly interfered.⁷⁴

During its deliberations, the jury asked Judge Bryant if they could find Turner guilty of operating a radio station without a license, but not guilty of sending a signal into Oklahoma. The judge, in his charge to the jury, said the entire case hinged on whether or not the signal was truly interstate. When he received the jury's question he reiterated that charge. The defendants were found not guilty a few minutes later.⁷⁵

While the testimony phase of the trial was in progress, the government testified that Turner's radio station had interfered with a station's signal from Kansas City. FRC Inspector W. I. Abbott testified that while in Denton,

he found that Turner's signal was on the same frequency as the Kansas City Station.

During cross-examination, Abbot was questioned as to whether or not Turner's radio station's signal went into Oklahoma. Abbott replied that he did not have an instrument with him to test the field intensity of the radio station while monitoring Turner's station.⁷⁶ Later the defense called to the witness stand, Jack Mahan, a resident identified as living in a rural area of Oklahoma, just across the Red River. Mahan testified that he had talked with a government inspector who was rigging up a radio receiving set in the woods. The inspector was quoted as saying, "I've found what I've been looking for, but can't get it very plainly." According to Mahan, the official at first said he was listening for radio signals from the Gainesville, Texas airport, but later admitted he was trying to catch signals from an illegally operated radio station and "could get a signal from Denton but not very plainly."⁷⁷

Another witness called by the defense was Quinby Self, an automobile salesman in Denton. Self testified that he had contracted for some advertising on the station operated by Turner, but quit when the station could not be heard more than six miles away.⁷⁸

With the convictions of Cox and Bitterman, and Jackson in criminal trials, the enjoining of Allison's station and

then later his conviction, and the acquittal of Turner, the federal government had but one other case remaining in Texas involving an unlicensed radio station. This was the "Voice of Labor" in Houston. The court injunction hearing took place on November 24, 1933, a date actually between the criminal trials of Cox and Bitterman, and that of Turner and Allison. The granting of the injunction came in the new year. The hearing and judicial decision on the "Voice of Labor" is United States v. Gregg et al.

NOTES

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²Ibid.

³"Federal Officials Waging Campaign On Bootleg Radio," Dallas Morning News, November 20, 1933, p. 8.

⁴United States v. E. J. Turner, Mrs. E. J. Turner and Dick Saye, Plea to Bar Prosecution, 643 (ED Texas 1933), p. 1.

⁵"Report of the General Counsel," Sixth Annual Report of the Federal Radio Commission to the Congress of the United States for the Fiscal Year 1932 (Washington: United States Government Printing Office, 1932), p. 14.

⁶"Unlawful Radio Stations Trailed," Dallas Morning News, April 26, 1933, Sec. II, p. 5.

⁷"Bootleg Radio Stations Will be confiscated," Dallas Morning News, May 5, 1933, Sec. II, p. 1.

⁸"Denton Radio Case Is Lost," Sherman Daily Democrat, November 28, 1933, p. 9.

⁹"Bootleg Radio Stations Will Be Confiscated," Sec. II, p. 1.

¹⁰United States v. Paul E. Gregg, et al., Defendants' Original Answer, 600 (SD Texas 1933), p. 6.

¹¹United States v. Paul E. Gregg, et al., Opinion, 600 (SD Texas 1933), p. 27.

¹²"Bootleg Radio Stations Will Be Confiscated," Sec. II, p. 1.

¹³"Investigating Unlicensed Texas Stations," NAB Reports, April 22, 1933, p. 28.

¹⁴United States v. E. J. Turner, Mrs. E. J. Turner and Dick Saye, Plea to Bar Prosecution, 643 (ED Texas 1933), p. 3.

¹⁵"Radio Inspectors Go After Outlaws," Daily Times Herald, April 26, 1933, p. 11.

¹⁶"Bootlegging Radio," Editorial, Dallas Morning News, May 10, 1933, Sec. II, p. 2.

¹⁷"Violating Radio Act Is Charged," Denton Record-Chronicle, May 10, 1933, p. 8.

¹⁸"19 Are Charged With Radio Act Violations," Fort Worth Star-Telegram, August 23, 1933, p. 2.

¹⁹E. J. Turner, Letter to U. S. District Attorney, November 5, 1933, United States v. E. J. Turner, Mrs. E. J. Turner and Dick Saye, 643 (ED Texas 1933).

²⁰"Judge Defers Sentences In Radio Trial," Daily Times Herald, November 21, 1933, p. 5.

²¹"NAB Protests Unlicensed Stations," NAB Reports, June 17, 1933, p. 68.

²²United States v. Dr. Henry Clay Allison, Testimony, 780 (ND Texas 1933), p. 1007.

²³"19 Are Charged With Radio Act Violations," p. 2.

²⁴"Several Illegal Radio Stations Unearthed by Federal Official," Dallas Morning News, August 26, 1933, p. 1.

²⁵"Unlicensed Radio Stations to Feel Government's Rule," Dallas Morning News, August 27, 1933, p. 12.

²⁶"Unlicensed Radio Station Operator at Abilene Jailed," Daily Times Herald, November 18, 1933, p. 1.

²⁷United States v. Curry Jackson, Indictment, 1328 (ND Texas 1933), p. 1.

²⁸Ibid., pp. 1-2.

²⁹United States v. Curry Jackson, Subpoena, 1328 (ND Texas 1933).

³⁰John J. Watts, Letter to Judge Wm. H. Atwell, November 14, 1933, United States v. Curry Jackson, 1328 (ND Texas 1933).

³¹United States v. Curry Jackson, Motion to Quash Indictment, 1328 (ND Texas 1933), p. 3.

³²United States v. Curry Jackson, Indictment, 1328 (ND Texas 1933), p. 1.

³³United States v. Curry Jackson, Motion to Quash Indictment, 1328 (ND 1933), p. 2.

³⁴United States v. Curry Jackson, Plea to Bar Prosecution, 1328 (ND Texas 1933), p. 4.

³⁵Ibid.

³⁶"Judge Defers Sentences In Radio Trial," p. 5.

³⁷United States v. Fred D. Bitterman and Albert Howard Cox, Indictment, 3115 (WD Texas 1933).

³⁸"Judge Defers Sentences In Radio Trial," p. 5.

³⁹United States v. Fred D. Bitterman and Albert Howard Cox, Judgment, Sentence and Order, 3115 (WD Texas 1933), p. 3.

⁴⁰United States v. Fred D. Bitterman and Albert Howard Cox, Oral Charge to Jury, 3115 (WD Texas 1933), pp. 3-8.

⁴¹"Judge Defers Sentences In Radio Trial," p. 5.

⁴²United States v. Fred D. Bitterman and Albert Howard Cox, Oral Charge to Jury, 3115 (WD Texas 1933), pp. 4-5.

⁴³"Radio Control," Editorial, Dallas Morning News, December 12, 1933, Sec. II, p. 2.

⁴⁴United States v. Dr. Henry Clay Allison, Testimony 780 (ND Texas 1933).

⁴⁵United States v. Dr. Henry Clay Allison, Docket, 5689 (ND Texas 1933).

⁴⁶United States v. Dr. Henry Clay Allison, Indictment, 5689 (ND Texas 1933), pp. 1-9.

⁴⁷United States v. Dr. Henry Clay Allison, Verdict of the Jury, 5689 (ND Texas 1933).

⁴⁸United States v. Dr. Henry Clay Allison, Docket, 5689 (ND Texas 1933).

⁴⁹United States v. Dr. Henry Clay Allison, Testimony, 780 (ND Texas 1933), pp. 1135-6.

⁵⁰Ibid., pp. 1135-8.

⁵¹Ibid., p. 1137.

⁵²Ibid., p. 1138.

⁵³Ibid., pp. 1025-6.

⁵⁴E. Pendleton Herring, "Politics and Radio Regulation," Harvard Business Review, No. 2 (January, 1935), p. 169.

⁵⁵Ibid.

⁵⁶United States v. Dr. Henry Clay Allison, Testimony, 780 (ND Texas 1933), pp. 1138-9, 1151.

⁵⁷Ibid., p. 1140.

⁵⁸United States v. Dr. Henry Clay Allison, Indictment, 5689 (ND Texas 1933), p. 1.

⁵⁹United States v. Dr. Henry Clay Allison, Government Exhibit No. 15, 780 (ND Texas 1933).

⁶⁰United States v. Dr. Henry Clay Allison, Government Exhibit No. 12, 780 (ND Texas 1933).

⁶¹United States v. Dr. Henry Clay Allison, Motion to Annul Verdict, 5689 (ND Texas 1933).

⁶²United States v. E. J. Turner, Mrs. E. J. Turner and Dick Saye, Indictment, 643 (ED Texas 1933).

⁶³United States v. E. J. Turner, Mrs. E. J. Turner and Dick Saye, Motion to Quash Indictment, 643 (ED Texas 1933), pp. 1-2.

⁶⁴Ibid., p. 2.

⁶⁵Ibid., p. 3.

⁶⁶United States v. E. J. Turner, Mrs. E. J. Turner and Dick Saye, Plea to Bar Prosecution, 643 (ED Texas 1933), p. 1.

⁶⁷Ibid., p. 2.

⁶⁸Frank J. Kahn, ed., Documents of American Broadcasting (New York: Appleton-Century-Crofts, 1968), pp. 35-6.

⁶⁹United States v. E. J. Turner, Mrs. E. J. Turner and Dick Saye, Plea to Bar Prosecution, 643 (ED Texas 1933), p. 2.

⁷⁰United States v. Paul E. Gregg, et al., Testimony, 600 (SD Texas 1933), pp. 10,-3.

⁷¹United States v. E. J. Turner, Mrs. E. J. Turner and Dick Saye, Plea to Bar Prosecution, 643 (ED Texas 1933), p. 3.

⁷²Ibid.

⁷³"Politics and Radio Regulation," pp. 175-6.

⁷⁴"Denton Radio Case Is Lost," p. 9.

⁷⁵Ibid.

⁷⁶"Denton Radio Trial Opens," Sherman Daily Democrat, November 27, 1933, p. 7.

⁷⁷"Denton Radio Case Is Lost," p. 9.

⁷⁸Ibid.

CHAPTER IV

HOUSTON'S "VOICE OF LABOR" AND U. S. V. GREGG ET AL.

Background

The "Voice of Labor" in Houston was perhaps the ultimate test of the federal government's efforts to shut down an unlicensed radio station in Texas. The radio station had the sponsorship of a labor organization and was incorporated under the laws of Texas,¹ a manager who had had several years of experience in radio,² and a lawyer as a stockholder.³ The operation of the "Voice of Labor" appeared to be the most coordinated effort of any of the unlicensed stations in Texas to stay within the Radio Act of 1927 as interpreted by those connected with the project.

The hearing to enjoin the station took place on November 24 and 25, 1933, in Houston.⁴ The testimony on the case centered mainly on two points, (1) whether or not the radio station was interfering with other licensed radio stations, and (2) how the federal government monitored the radio station. The testimony was not as extensive or time consuming as it was in the case of Henry Clay Allison. Rather than filling seven bound volumes, only one bound volume of testimony was necessary to reproduce the testimony.

The radio station's operation was apparently well known because the Manager, Paul E. Gregg, had been called as a defense witness in the Allison injunction hearing. In fact, it is from this hearing that much of the station's background comes to light, along with its philosophy.

Gregg, the person who would be named in the "Voice of Labor" case, was called to testify on October 11, 1933, in Fort Worth.⁵ Clarence Farmer, Allison's defense counsel, questioned Gregg about the operation of the "Voice of Labor" and why it went on the air.

Gregg testified that the "Voice of Labor" was an unlicensed radio station established by the members of the Houston Allied Trades Council. The council was the chief labor organization in Houston, and was under the sponsorship of the Texas and American Federation of Labor.⁶ The "Voice of Labor" received a charter and was incorporated under state law. This action was completed before the station went on the air.⁷ This was an important fact, defense lawyers believed, because the contention that unlicensed stations were subject only to state laws was a point that operators of such stations cited when questioned about their legality.⁸

Gregg told the court that the educational committee of the Houston Labor and Trade Council had initially been interested in purchasing a radio station. The committee ran

into problems, however, whenever they attempted to buy a radio station that was already on the air. Gregg told about an attempt to buy KXYZ, which was owned by Jesse Jones. Jones reportedly wanted 85,000 dollars for his interest. The committee felt this was too high a price for the station and so the deal was never completed.⁹ Gregg testified that an effort was also made to purchase KFTM but that this transaction also failed.¹⁰ No reason was given as to why the effort failed.

While the efforts were being made to purchase an already established radio station, Gregg said it was learned that stations were going on the air without licenses. The question of legality was raised with Sewall Myer, an attorney of the Texas Federation of Labor.¹¹ Myer, who was to become a co-owner of the "Voice of Labor," told Gregg that if radio stations remained intrastate in the coverage of their signals, then it was his opinion that they did not need a license to go on the air.¹² Thereafter efforts began to put on the air a new radio station.

During the testimony in the injunction hearing for Dr. Allison, attorney Farmer asked Gregg why the "Voice of Labor" was deemed necessary. The responses were strikingly similar to those given by Allison. "I will ask you if the interstate stations in Houston had given labor a square deal?" asked Farmer. Gregg answered they had not. Farmer then asked if the interstate radio stations had

collaborated and charged excessive prices for air time. Gregg responded, "They did, and all three newspapers are dominating them."¹³ As this line of questioning was taking place, the attorney for the prosecution, Alex M. Mood, was objecting to both the questions and the answers. The presiding jurist, Glenn Smith, however, did not respond either to sustain or overrule the objections.¹⁴

Allison's defense counsel, Clarence Farmer, then asked Gregg if his unlicensed radio station was meeting the public's convenience, interest, and necessity. Gregg replied in the affirmative. Farmer then asked if the radio station had experienced any opposition. Gregg told him that there was opposition from the businesses that owned the other radio stations. He accused them of trying to maintain a monopoly.¹⁵

A question was raised about the "Voice of Labor" and whether or not it had been found to be within its constitutional rights. Gregg replied that it had been found to be so.¹⁶ The reference was to charges that had been filed against the "Voice of Labor" about operating a station illegally. At that point in the government's efforts against the unlicensed station, no action had been taken, and Gregg said the station was "absolved" of any wrongdoing.¹⁷

As Gregg was concluding his testimony, Farmer asked him what the "Voice of Labor" hoped to accomplish with its

broadcasts. Gregg replied that the Trade Council of Houston was interested in seeing jobs given people. He believed this could be partially accomplished by radio and said that his organization hoped to force the Radio Commission to recognize officially the "Voice of Labor."¹⁸

The manager of the "Voice of Labor" said his station would be happy to come under federal guidelines if the FRC was willing to establish stations of low power. Gregg believed that establishing new stations would create jobs and his vision was to have a radio station in every county and city in the United States. He proposed that all of the stations be assigned to one frequency with no more power than twenty five watts. This type of assignment, he said, would allow the existing broadcasting services to continue without interference.¹⁹

The call for the creation of low-powered radio stations was not without precedent. Farmer, who was the defense counsel for both Allison and E. J. Turner, had discussed the creation of numerous low-powered radio stations in Canada in a brief filed in behalf of Turner. Farmer claimed that local communities should be allowed to use radio for local matters. He pointed out that the United States and Canada were cooperating "in the use of more than one hundred stations of very low power to serve the local communities in the Dominion of Canada."²⁰

The FRC Files Against the "Voice of Labor"

About a month after the testimony in the Allison injunction hearing, the federal government made its move to gain an injunction against the "Voice of Labor." Criminal charges were never filed against any of the owners or operators, thus no indictments were ever returned by a federal grand jury. In its attempt to gain an injunction against the unlicensed radio station a Bill of Complaint was filed. The legal document was filed November 13, 1933.

The government was thorough in preparing for the injunction hearing. It listed, step-by-step, its complaints against the station. The following is a summary of the eight points.

1. The United States Government has the right to prevent and remove those who obstruct interstate and foreign commerce, and this includes radio.

2. The defendants are in violation of the Radio Act of 1927, and without a license or authority are involved in broadcasting. The broadcasts are of such nature that they are interfering with interstate commerce and foreign commerce.

3. None of the defendants since January 1, 1933, has held a license or has been given the authority to operate a radio apparatus for transmission.

4. The defendants have been broadcasting since July 1, 1933, without securing a license and will continue to do so unless they are restrained by the courts.

5. The apparatus used by the "Voice of Labor" is located in the Sam Houston Hotel, in Houston. It is a low-powered transmitter broadcasting upon the frequency of about 1310 kilocycles.

6. The signals from the radio station operated by the defendants, during the month of August, 1933, interfered with the signals of radio station KRMD, Shreveport, Louisiana, a radio station licensed by the FRC.

7. The signals from the radio station operated by the defendants, during the month of August, 1933, transmitted to points beyond the borders of the State of Texas, and to ships at sea. This is in violation of Section 1, of the Radio Act of 1927.

8. The defendants, by operating their radio station, have and will continue to transmit signals which will reach other states, and will cause interference with radio stations within Texas and other states that have a right to broadcast.²¹

On the day the enjoining hearing was held, November 24, 1933, Sewall Myer, the attorney for the defendants, filed an answer to the Bill of Complaint. In a ten-page rebuttal, Myer attempted to justify the existence of the "Voice of Labor." The legal brief

admitted that the radio station had been broadcasting since early August, 1933, on the frequency of 1310 kilocycles. Myer noted that during the first days of broadcasting the radio station ran tests to determine the distances the station's signals carried. These tests were conducted with receivers set up as far away as Galveston and Beaumont. During this time, he wrote, the station's power was reduced from fifteen watts to about three watts.²²

Myer claimed that the radio station changed its antenna design when it realized how far the signal travelled. Not only was the station's antenna removed from the roof of the Sam Houston Hotel, some one hundred feet above the ground, and placed in a closet about fifteen feet off the ground, but the antenna was changed to a loop antenna to cut down the transmitting distance. Myer said this action was taken so the station would not violate the law on the crossing of state lines by radio signals.²³

Myer pointed out that the frequency of 1310 kilocycles was classified by the FRC as a "local" channel. A local channel was designed to serve only a small area, generally the city in which the station was located. The nearest station on the same frequency, according to Myer, was in Shreveport, Louisiana, two hundred miles from Houston. That station operated with one hundred watts of power. Myer wrote that the "Voice of Labor" had a radius of twenty-five miles and it broadcast only during daylight hours. This too, he

said, was to avoid having the signal cross state lines during the nighttime hours when signals carried farther. The station, moreover, changed its broadcasting hours in order to conform to daylight changes.²⁴ This last claim, however, was later contradicted.

Myers' brief, which he titled, the "Defendants' Original Answer," went on to extoll the radio station's mission.

These Defendants specially deny that said station is operated primarily as a commercial venture and for profit. To the contrary Defendants say that said station is operated principally and absolutely free of charge for educational, religious, charitable, labor and other such purposes.²⁵

The brief then stated that the policies governing the radio station were dictated and controlled by the Houston Labor and Trades Council. The purpose of the station was to furnish the laboring people of Houston information necessary to remain in touch with those matters affecting working people.²⁶

To explain its programming, Myer wrote that men from labor circles spoke each day on the station about labor issues. These talks, he claimed, included calls to support the President in his efforts to restore the nation to normalcy. The lawyer noted that the station also provided free time for the broadcast of religious services. Myer asserted that the "Voice of Labor" provided a much more valuable public service for Houston than did the occasional

"local" service station from Shreveport whose signal sometimes reached Houston under extraordinary circumstances.²⁷

Myer then criticized the government's effort to stop the broadcasts of the "Voice of Labor." He called the attempts unreasonable regulation on radio broadcasting and complained that if the station's equipment was confiscated, the government would be taking property without due process of law.²⁸

Myer returned to his argument about the station's operating on a "local" channel. He claimed that the frequency of 1310 kilocycles was allocated for local radio stations; and it would be an unreasonable amount of regulation, he said, if neither the "Voice of Labor" or another station was allowed to use the frequency. Furthermore, he continued, if the Radio Commission were to designate all radio frequencies as being interstate, this too would be an unreasonable amount of regulation, thus destroying the lawful business of intrastate broadcasting.²⁹

Finishing his argument, Myer wrote,

That unless and until it is pleaded and proven that the Federal Radio Commission has a real need or use for this 1310 channel in this local area in Harris County, Texas, any attempt to prevent its use by "The Voice of Labor" is unreasonable, unconstitutional, arbitrary and void.³⁰

In his conclusion, Myer appeared to bargain with the FRC. He stated that the defendants would gladly accept a license from the Federal Radio Commission if one was

offered, or would even be willing to apply for one. If the "Voice of Labor," would interfere with an assigned radio station in the future, it would then discontinue such interference, he asserted. Then, as a sort of sidelight, Myer questioned how the "Voice of Labor" could interfere with the Shreveport radio station when a licensed station was broadcasting from Greenville, Texas. This station, he wrote, was broadcasting with fifteen watts of power and was closer to Shreveport than Houston.³¹

Testimony in United States v. Paul E. Gregg, et al.

The testimony portion of United States v. Paul E. Gregg, et al. was not nearly as lengthy as in the Allison case. Only one and a half days were necessary.³²

The first person called to the witness stand was an electrical engineer employed by the FRC. Inspector A. D. Ring described the transmitter and antenna used by the "Voice of Labor." At times he became so technical it was difficult for the participants to understand what he was saying. At one point, Myer said, "I heard the witness answer, but I can't understand what he said."³³

Ring told the court that the "Voice of Labor" transmitter did not meet FRC standards. Rather than being within fifty cycles of its designed frequency, the engineer said it was doubtful if it was within five hundred or one thousand cycles of its designed frequency. Giving

an example of the transmitter's alleged unreliability, Ring said that on November 22, 1933, he used a car radio, and located about three and one-half miles from the transmitter, picked up the "Voice of Labor" at both 1300 and 1320 kilocycles. Both of these frequencies, he testified, had radio signals coming into Houston from stations located outside the State of Texas. In fact, Ring stated, he found the "Voice of Labor" blanketing frequencies from 1285 to 1335 kilocycles. This coverage, he said, interfered with a radio station's transmission from Cincinnati, Ohio, which reached Houston.³⁴

During the cross-examination of Ring by the defense, Myer asked,

Isn't it a fact that even if the Voice of Labor were not on the air that these other stations on the 1310 frequency would be heterodyned and affected by the carrier waves of the other 30 or 40 licensed stations?³⁵

Immediately Ben Fisher, the FRC's attorney, objected.

Your honor, we want to object to that line of questions, as not being proper. Those are licensed stations which are conceded to have some interference, and have a right to.

Judge T. M. Kennerly overruled the objection, stating he would hear out the testimony of Inspector Ring.³⁶

Two witnesses were called by the prosecution. They testified that they heard the "Voice of Labor" at sea. A radio operator on the Coast Guard cutter, "Saranac," told the court that he heard the "Voice of Labor" on his ship

radio on August 1, 1933, while near Galveston, but that about thirty miles out to sea the signals faded.³⁷ The day the radio operator said he heard the signals was prior to the reduction of signal strength by the "Voice of Labor."

Another prosecution witness was L. L. McCabe, an inspector for the FRC. He testified that he had inspected the transmitter of the "Voice of Labor" about the time the station went on the air. He stated that in listening for any possible interference, he heard the "Voice of Labor" in Galveston, on August 3, 1933, and it was interfering with the Shreveport station. In November, McCabe said, he heard the station interfere with KTSA, in San Antonio, which was on a frequency of 1290 kilocycles. Despite the alleged interference, McCabe testified that no complaints were filed.³⁸

During the cross-examination of McCabe, the witness reported the efforts he took to try to catch the signal of the "Voice of Labor" at sea. McCabe went aboard the "Saranac" and used the Coast Guard cutter's two hundred and ten foot antenna. The FRC inspector told the court that the regular antenna was either forty or sixty feet in length for receiving signals, and that the longer antenna was used for sending signals, but that this time the longer antenna was used for receiving.³⁹ At this point the prosecution interrupted.

We object, your honor, as long as they heard it on that boat ~~it~~⁴⁰ is immaterial what they heard it on.

McCabe testified that he heard the "Voice of Labor" on all three antennas but that reception was the best on the two hundred and ten foot antenna. The defense counsel then pointedly asked McCabe, "Did you hear it on the short ones?" McCabe replied, "I don't know."⁴¹

The defense then called its witnesses, most of whom had some type of experience with radio. One of them was R. W. Gilmer, who worked for the Research Department of Humble Oil. Gilmer told the court he had had experience in propagation matters, having built two low-powered transmitters for Humble Oil for geophysical work. He testified, in his opinion, the Louisiana radio station's signals would not reach Houston under normal conditions. He also said the "Voice of Labor's" signal, using only three watts of power, would not limit the service area of the Shreveport station which broadcast with one hundred watts of power.⁴²

The following day, November 25, 1933, W. D. Mounce was called to the stand by the defense. According to the amateur radio operator, who said he had about eight years experience, if the signal from the Shreveport radio station were to reach Houston, then the "Voice of Labor" would be interfering with its signal. But, he said, with some

thirty other radio stations broadcasting on the same frequency, a signal reaching Houston from Shreveport was highly improbable.⁴³

After Mounce's testimony, one of the station's stockholders, M. E. Morrow, was called. Morrow told the court he was an officer of the "Voice of Labor" but his job was with Humble Oil in the Geophysics Department where he worked on sub-surface exploration. He had been with Humble Oil for about four or five years and had helped in the construction of radio transmitters and receivers. He also said he had worked with R. W. Gilmer and W. D. Mounce.

Morrow testified that he had talked with Humble Oil engineers about the "Voice of Labor." He estimated he had checked with about eight to ten engineers about the "Voice of Labor's" transmitter design. One of these engineers, he said, was a co-designer of the Trans-Atlantic telephone system.⁴⁴

Morrow told the court that he was the individual responsible in determining if any other radio station was on the same frequency as the "Voice of Labor." He said he found no other radio station on the frequency of 1310 kilocycles within a fifty to sixty mile radius of Houston. The only station he found relatively close to Houston was in Dublin, and that station broadcast only intermittently.⁴⁵

According to Morrow, there was some cross-talk and heterodyne at night on 1310 kilocycles, but none during

the day. He concluded, therefore, that as there was no service in the Houston area on 1310 kilocycles, the "Voice of Labor" was within the law to go on the air.⁴⁶

The co-owner of the "Voice of Labor" then testified that he had also advised using the frequency of 1310 kilocycles because at one time there had been another radio station on that frequency in Houston. The Houston Post-Dispatch had operated a one hundred watt station on 1310 kilocycles but had left the air at the owner's request, not the FRC, according to Morrow.⁴⁷

Under further questioning by the defense counsel, Morrow told the court that he believed the "Voice of Labor" could operate legally during the daylight hours. To this the prosecution objected.

Now, your honor, I wish to object to this line of testimony. It doesn't matter when they operate, day or night, they are operating illegally and without a license, and there is no such things as picking your hours and saying, "We can operate legally during that time."⁴⁸

Judge Kennerly overruled the objection.

I will hear it and decide the legal questions when I come to consider the evidence.⁴⁹

Morrow testified that the "Voice of Labor" was concerned about crossing the state line at night with its signals because of the greater distances such signals travel at night, that was why the station broadcast only during the day. Morrow said that he had noticed, in

checking the station's signal, that when the station signed off some heterodyne could be heard from a point of three or four blocks beyond the transmitter. During the day, Morrow said, the radio station's signal gave fair service in a radius of about twenty miles and this covered about ninety percent of the population of Houston.⁵⁰

In an effort to rebut Ring's testimony from the previous day, Morrow testified that he checked the night before to hear if the "Voice of Labor" was off in its frequency. He traveled about sixty miles from Houston and had heard no stations on 1300, 1320, or 1330 kilocycles; on 1310 kilocycles, there was heterodyne even when the "Voice of Labor" left the air.⁵¹

During cross-examination, Morrow testified that the "Voice of Labor" was owned in three equal parts by him, Paul E. Gregg, and Sewall Myer. He also verified the station had never applied for a license.⁵²

Morrow was then asked why he had chosen 1310 kilocycles when there were other frequencies available that could also be considered "local" channels. The station's co-owner replied once again that he had chosen this frequency because another radio station in Houston had at one time broadcast on this same frequency.⁵³

The questioning then turned to the time chosen for the station to sign off for the day. Fisher asked why the

"Voice of Labor" stayed on the air until six o'clock instead of signing off at sunset,

You heard Mr. Ring's testimony, that sundown is night with the [C]ommission?⁵⁴

Morrow responded,

Night time with us is six o'clock. The commissioner is not Lord Almighty. From time immemorial six o'clock--until six o'clock has been evening.⁵⁵

At the conclusion of Morrow's testimony, the government's prosecutor asked why the station never applied for a license. Morrow said,

We have not applied because we knew there wasn't a remote possibility of getting one. . . . Mr. McCabe said this state was over its quota, and it would be useless to apply for a license, and said he did not think the Federal Radio Commission would entertain it at all.⁵⁶

Another defense witness was J. C. Skinner, a radio technician who had held an amateur radio license since 1929. Skinner told the court he had worked with the "Voice of Labor" and had been in on the decision to choose the frequency of 1310 kilocycles. He also testified that he was present when the FRC inspector, A. D. Ring, looked at the station's transmitter. He said Ring did not use any instrument to measure the transmitter's frequency, but only asked questions. Skinner said he did not know how Ring could conclude the transmitter was off by five hundred cycles.⁵⁷

The last defense witness was Sewall Myer, the defense counsel. Much of his testimony was a repeat of his "Defendant's Original Answer." He did, however, tell the court that the "Voice of Labor" was not organized to make a profit.⁵⁸

The injunction hearing was then concluded, it would be more than six weeks later when Judge Kennerly announced his decision: to grant a permanent injunction against the "Voice of Labor." After the judge's decision was filed, the Houston Chronicle asked Myer for a comment. He replied, "I will have nothing to say except the Voice of Labor will go off the air."⁵⁹

The Judge's Opinion

U. S. District Judge T. M. Kennerly issued a thirty-two page report on his decision granting the injunction against the "Voice of Labor." He noted that the radio station intended to continue to broadcast unless enjoined. He then addressed specific points in the government's case. On the point in which the government charged that the "Voice of Labor" was broadcasting to other states, Kennerly wrote that he did not find this to be true "under ordinary conditions."⁶⁰ He also did not sustain the government's contention that the "Voice of Labor" was interfering with the signals of licensed radio stations within the borders of Texas. He said he could not sustain

the charge that the station was interfering with the signals of licensed stations whose broadcasts were received in other states. Specifically mentioning the signals of the "Voice of Labor" heard aboard the Coast Guard cutter, these, said the judge, were not enough to sustain the government's charge against the station.⁶¹

The judge noted that there were times when the "Voice of Labor's" service and nuisance areas conflicted with other radio stations. His reference to the nuisance area was to the area in which heterodyne or cross-talk would occur. He did sustain the government's charge that the "Voice of Labor" on, or approximately the same frequency, interfered with the transmission of radio stations outside of Texas, to points within, particularly in the Houston area.⁶²

Dealing with the claims of the "Voice of Labor" that it was performing a service for the people of Houston, particularly for those involved in labor, Judge Kennerly said he found no difficulty in agreeing with them.

However, such allegations, and the evidence offered in support thereof, under the Law, present no defense to Complaint's Bill if, as I have concluded and hereinafter discuss, Complaint is right in the contention that the Radio Act of 1927 and Amendments prohibit Defendants from operating their broadcasting station without a license from the licensing Power under such Act, and such Act is valid under the Federal Constitution.⁶³

With that argument, Kennerly ruled that the defendants were prohibited by the Radio Act of 1927 from operating

a radio station without a license. The judge wrote, "The Radio Act of 1927 expressly repealed previous Acts, and must be looked to for the answer."⁶⁴ This statement was used to counter allegations that previous radio acts gave radio stations the right to broadcast if they were intrastate.⁶⁵ Referring to Section 1 of the Radio Act of 1927, the judge said that the government had the right to regulate radio by the granting of licenses in order to maintain control over all channels. Kennerly underlined portions of the section that he believed were particularly pertinent: a radio station was not to be operated so as to interfere with another radio station's signal from either within the state or without, unless a license has been granted. Kennerly wrote, "Words could hardly be plainer. It is clear that Defendants are prohibited by such Act from so operating without a license under such Act."⁶⁶

The judge then proceeded to answer the question whether or not Congress had the right to regulate intrastate broadcasting. Numerous court cases were cited. The first was Houston East and West Texas v. United States or the "Shreveport Rate Case," which Kennerly used to support the right of Congress to regulate intrastate commerce in order to "protect and foster interstate commerce." The case involved railroads, but the judge believed it was relevant

to broadcasting. It involved an attempt to charge greater rates for certain interstate transportation than for intrastate transportation.⁶⁷

Another case, also involving a railroad company, cited by Judge Kennerly, was Colorado v. U. S. It concerned a railroad company that wanted to abandon a line completely within a state's borders. Because its operation was purely intrastate, the company said the Interstate Commerce Commission had no jurisdiction. The U. S. Supreme Court ruled otherwise.⁶⁸

Quoting from another U. S. Supreme Court decision--once again involving a railroad company--(Southern Railway Company v. U. S.), Kennerly continued in his efforts to uphold the right of Congress to control intrastate traffic.

And this is so, not because Congress possesses any power to regulate intrastate commerce as such, but because its power to regulate interstate commerce is plenary, and competently may be exerted to secure the safety of the persons and property transported therein and of those who are employed in such transportation, no matter what may be the source of the dangers which threaten it.⁶⁹

Kennerly concluded:

In the light of these cases and many others that may be cited, I have no difficulty in concluding that the Congress may lawfully, as has been done in this Act, require the licensing and regulation of Intrastate Radio Broadcasting Stations where, as here, the operation thereof interferes with interstate commerce.⁷⁰

Addressing briefly the argument that the Radio Act of 1927, which required a license to broadcast and operate a radio station, as being unreasonable, Kennerly poised a rhetorical question. What would happen, he asked, if there was sufficient number of unlicensed intrastate radio stations? The result, he answered, "could and would not only interfere with, but destroy, all Interstate Radio Broadcasting."⁷¹

Kennerly commented on the defendants' claim that they would be unlawfully deprived of their property rights if enjoined. He first noted that the defendants themselves stated they thought a license would not be issued to them even if they applied for one. This may or may not have been true, Kennerly wrote, but even if the assumption were correct, the defendants have no defensible position to argue, because of the "well settled rules of law." Citing Federal Radio Commission v. Nelson, the judge said that even in those situations in which there was a licensed radio station in existence, the FRC had the right to delete such a station if deemed necessary.⁷²

Nearing the end of his decision, Kennerly asserted that the defendants did not have a right to use the frequency of 1310 kilocycles even if the frequency was not presently assigned to someone. The defendants still needed to apply for a license, and if they were not happy with his decision, they had the right to appeal.⁷³

Finally, Judge Kennerly ruled that the "Voice of Labor" was permanently enjoined from broadcasting without a license. He pointed out that the defendants did have a right to apply for a license if they so wished.⁷⁴

NOTES

¹United States v. Dr. Henry Clay Allison, Testimony, 780 (ND Texas 1933), p. 1007.

²Ibid.

³United States v. Paul E. Gregg, et al., Testimony, 600 (SD Texas 1933), p. 247.

⁴Ibid.

⁵United States v. Dr. Henry Clay Allison, Testimony, 780 (ND Texas 1933), p. 1007.

⁶Ibid.

⁷Ibid.

⁸"NAB Protests Unlicensed Stations," NAB Reports, June 17, 1933, p. 68.

⁹United States v. Dr. Henry Clay Allison, Testimony, 780 (ND Texas 1933), pp. 1018-19.

¹⁰Ibid.

¹¹Ibid., p. 1037.

¹²Ibid., p. 1038.

¹³Ibid., p. 1039.

¹⁴Ibid.

¹⁵Ibid., pp. 1039-40.

¹⁶Ibid., p. 1040.

¹⁷Ibid., p. 1038.

¹⁸Ibid., pp. 1041-42.

¹⁹Ibid.

²⁰United States v. E. J. Turner, Mrs. E. J. Turner and Dick Saye, Plea to Bar Prosecution, 643 (ED Texas 1933), p. 3.

²¹United States v. Paul E. Gregg, et al.; Bill of Complaint, 600 (SD Texas 1933), pp. 1-4.

²²United States v. Paul E. Gregg, et al., Defendants' Original Answer, 600 (SD Texas 1933), p. 2.

²³Ibid., p. 3.

²⁴Ibid., pp. 3-4.

²⁵Ibid., p. 4.

²⁶Ibid., pp. 4-5.

²⁷Ibid., p. 5.

²⁸Ibid., p. 6.

²⁹Ibid., pp. 6-7.

³⁰Ibid., p. 8.

³¹Ibid., pp. 8-9.

³²United States v. Paul E. Gregg, et al., Testimony, 600 (SD Texas 1933).

³³"Labor Voice Radio Station Case Studied," Houston Chronicle, November 24, 1933, p. 13.

³⁴United States v. Paul E. Gregg, et al., Testimony, 600 (SD Texas 1933), pp. 17-25.

³⁵Ibid., p. 49.

³⁶Ibid., pp. 49-50.

³⁷Ibid., pp. 126-7.

³⁸Ibid., pp. 81-92, 114.

³⁹Ibid., pp. 101-3.

⁴⁰Ibid., p. 103.

⁴¹Ibid., p. 104.

⁴²Ibid., pp. 142-56, 178.

⁴³Ibid., pp. 184-208.

⁴⁴Ibid., pp. 209-12.

⁴⁵Ibid., p. 213.

⁴⁶Ibid., pp. 213-14.

⁴⁷Ibid., pp. 216-17.

⁴⁸Ibid., pp. 218-19.

⁴⁹Ibid., p. 219.

⁵⁰Ibid., pp. 219-24.

⁵¹Ibid., pp. 235-41.

⁵²Ibid., p. 247.

⁵³Ibid., p. 249.

⁵⁴Ibid., p. 252.

⁵⁵Ibid.

⁵⁶Ibid., pp. 264-65.

⁵⁷Ibid., pp. 268-79.

⁵⁸Ibid., p. 283.

⁵⁹"'Labor Voice' Radio Station Is Enjoined,"
Houston Chronicle, January 11, 1934, p. 1.

⁶⁰United States v. Paul E. Gregg, et al., Opinion,
600 (SD Texas 1933), pp. 3-6.

⁶¹Ibid., pp. 7-8.

⁶²Ibid., pp. 9-11.

⁶³Ibid., p. 14.

⁶⁴Ibid., p. 15.

⁶⁵United States v. E. J. Turner, Mrs. E. J. Turner
and Dick Saye, Plea to Bar Prosecution, 643 (ED Texas 1933),
p. 2.

⁶⁶United States v. Paul E. Gregg, et al., Opinion,
600 (SD Texas 1933), p. 16.

⁶⁷Ibid., p. 17.

⁶⁸Ibid., p. 18.

⁶⁹Ibid., p. 19.

⁷⁰Ibid., p. 26.

⁷¹Ibid., p. 27.

⁷²Ibid.

⁷³Ibid., pp. 28-31.

⁷⁴Ibid., pp. 31-2.

CHAPTER V

SUMMARY AND CONCLUSIONS

Summary

The decision of United States v. Gregg et al. did not put an end to unlicensed radio stations. For several years after the decision the annual reports of the Federal Communications Commission (FCC) listed the number of unlicensed stations that were being investigated. Never again, though, did the commission offer in detail its efforts against the stations as in 1932 and 1933. Texas was no longer singled out as the main perpetrator of unlicensed radio stations in the United States. In fact, after the Gregg case, contemporary newspapers no longer had reports or editorials about any unlicensed stations.

Although Judge T. M. Kennerly found the "Voice of Labor" guilty of violating the signals of radio stations from outside of Texas, his opinion was much more complete than just deciding the "Voice of Labor" hearing. This is what separates United States v. Gregg et al. from the other cases tried in Texas. All of the cases reviewed, except one, were criminal trials rather than enjoining hearings. Thus, the accused were either found guilty or innocent by a jury, sentenced if guilty, and the end of the case.

Testimony from the criminal trials was not saved and so other than accounts in the newspapers, no further information is available as to reasons for the verdicts.

The one exception was the civil trial of Dr. Henry Clay Allison. The testimony saved was voluminous but it was testimony actually heard by a jurist substituting for the federal judge of the district. When the permanent injunction was granted several weeks later no lengthy written decision was issued.

As discussed in Chapter IV, the "Voice of Labor," was perhaps the best organized unlicensed station in Texas, the least inclined to make a profit, genuinely interested in serving the public, and its operators the most qualified and least inclined to flee when investigated by the federal government. With this type of formidable challenge, the government responded in kind, prepared a thorough case, and the judge in issuing his opinion fully explained his actions.

Perhaps the most significant development of the judge's decision, which was raised in the other cases discussed, was the strength of the Radio Act of 1927.

Clearly and distinctly, Judge Kennerly wrote that the Radio Act of 1927 repealed the Radio Act of 1912, except for the parts incorporated into the law written in 1927. Thus he gave teeth to the law that federal officials had to work with. Citing the numerous railroad case hearings involving the Interstate Commerce Act, the judge laid to rest the

argument that if a radio station's signal was truly intrastate it was not subject to regulation.

Paul Gregg, in his testimony in the Allison hearing, had envisioned every locality in the United States having its own twenty five watt radio station, and all stations using the same frequency. This, he said, would eliminate any interference with other, more powerful stations. On the surface the suggestion appears to be sound, but upon reflection, if the radio stations were to be unlicensed and brought about because of a particular cause, who was to stop a second crop of unlicensed stations with a cause of their own. Regulation would be necessary or chaos would be the end result.

Impact of the Decision

The decision of Judge Kennerly was necessary for the future of broadcasting in the United States. When United States v. Gregg et al. was heard, the only means of broadcasting commercially was by amplitude modulation (AM). During the investigations and testimony, several times FRC inspectors stated that under certain circumstances no AM radio signal was truly intrastate. Because AM signals are highly reflective at night in the atmosphere and because it travels in ground waves, it is difficult to control.

With the advent of frequency modulated (FM) radio in the future, and television, the decision of the judge and the court cases he cited gave the federal government the strength it needed to regulate the broadcast industry. Depending upon the viewpoint, this was indeed fortunate, because FM radio signals are line-of-sight and so an FM radio station's coverage is totally dependant on the height of the antenna, the terrain, and signal strength. The limitations are more inherent than AM radio and low-powered FM radio stations could very easily be intrastate at all times. But because of the powers given in United States v. Gregg et al., and other decisions consistent with the case, unlicensed FM radio stations apparently have not been a problem.

Conclusions

There may have been some benefits because of the unlicensed radio stations. Several times, during testimony, unlicensed operators said they had been told that Texas had met or exceeded its quota. The quota system was eliminated shortly after the largest wave of unlicensed stations subsided. As a result, no operator could argue that he went on the air illegally because he knew he would not be granted a license even if he were able to meet government requirements.

One of the forces behind the unlicensed stations was the need for radio stations to serve local communities.

The local community's needs were barely being met by the signals of a radio station that may have been one thousand miles away and available only at night. Local communities needed to have at least some stations that knew what the local needs were.

Profit was an incentive for the unlicensed radio station operators. Certainly not all of the stations went on the air for noble reasons. There were the fly-by-night operators, moving from city to city, staying one step ahead of federal officials. Service, however, still seemed to be a force and the few witnesses whose testimony is available for review appear to have welcomed a local radio station. If there was a common bond among the unlicensed station operators the profit and service motives would be the most logical bonds. Except for the Texas Independent Radio Advertising Association, the unlicensed operator was an independent.

The decisions rendered in the cases were consistent with those in other parts of the nation. Federal Radio Commission reports indicate that its efforts to eliminate the operators was quite successful. The E. J. Turner case, in which the defendants were found not guilty, was an exception. Had the presiding judge allowed more latitude for the jury, a guilty verdict may have been returned too, just as in the other cases.

Judge Kennerly, in his written decision on the "Voice of Labor," illustrated how consistent the guilty verdicts or injunctions were in stopping unlicensed radio stations. His opinion lists more than one dozen decisions made in less than a decade. Many of the decisions he cited involved railroad companies, but using these decisions along with the available court cases involving radio, he gave a convincing argument why the federal government had the right to regulate radio, even if it was intrastate.

A question raised by the defendants that was not addressed by Kennerly was the definition of "borders" in the Radio Act of 1927. Perhaps the question did not need answering because those who claimed the law was vague on this point were perhaps attempting to only muddy the issue. There really seems to be little doubt that the borders were those of Texas, no matter which state it was adjacent to. Except for Curry Jackson, all of the unlicensed operators were accused of interfering with signals of radio stations coming into Texas, so the question was probably moot.

A second question raised by several defendants dealt with the means to monitor the unlicensed stations. Judge Kennerly answered this question to a certain extent when he noted the use of the Coast Guard cutter "Saranac" to monitor the "Voice of Labor" at sea. The judge did not state whether or not an unlicensed station's signals had to be heard on a receiver available to the public, but he did

note that a signal had to be heard under normal conditions. The implication appears to be that the receiver should be similar to that available to the public.

The case of United States v. Gregg et al. was necessary in developing the legal legacy of radio law. The development of the law needed cases such as United States v. Gregg et al., FRC v. Nelson Bros. Bond & Mortgage Co., and General Electric Co. v. FRC. The cases were necessary to define the shades of gray perceived by radio station operators. As in United States v. Gregg et al., the intention of some unlicensed operators was good, but even low-powered stations on one frequency for a community could not be an exception. Regulation was necessary to avoid chaotic conditions such as those that occurred in the years prior to the Radio Act of 1927.

Suggestions for Future Study

There are possibilities for future studies in the case of unlicensed radio stations. Many other states had unlicensed stations begin operations about the same time as Texas, so these cases could be reviewed as to their reasons for going on the air. The study could include what actions were taken to eliminate them and were federal officials as active in their control as in Texas.

Another study could be made as to the existence of unlicensed stations in the 1980's. Are there any now,

particularly in areas such as New York City where the population is highly fractionalized and perhaps believes it is not being served by the traditional radio stations?

Other considerations for suggestions: what impact did the unlicensed radio stations have in the granting of new licenses once the quota system was eliminated; were communities that had an unlicensed station more likely to have received a licensed station than those communities who did not?

The unlicensed radio station operator may have been a rogue at times, but often he was also a concerned citizen. In all, though, he was an entrepreneur who saw an opportunity when there was one and tried to make it work.

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