

**Warren Television Corporation and International Hod Carriers' Building and Common Laborers' Union of America, Construction and General Laborers Local No. 836, AFL-CIO, Petitioner.**  
*Case No. 6-RC-2400. July 7, 1960*

**DECISION AND ORDER**

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, a hearing was held before Donald J. Meyers, hearing officer. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

Upon the entire record in this case, the Board finds:

The Employer, a Delaware corporation, has its sole place of business in Warren, Pennsylvania. It owns and operates a master television antenna located on a mountain top near Warren, Pennsylvania, which is located in an immediately adjoining valley. By means of this master antenna, television signals are received from television stations located in New York, Pennsylvania, and Canada. Such signals are transmitted by coaxial cables which are attached to telephone poles and are ultimately transmitted to the television sets of the Employer's subscribers. The Employer does not broadcast in the usual sense but owns, installs, maintains, and services the coaxial cables for which it charges its approximately 3,200 customers, all of whom are located within a 1-mile radius of Warren, an installation fee plus monthly rental. Community antenna television systems such as that involved herein are known in the trade as CATV's.

The Employer's gross revenue during the past 12-month period was approximately \$130,000, all derived from customers in the manner indicated above. It makes no out-of-State sales and its out-of-State purchases totaled \$12,500. The Employer's only affiliate, Warren Service Corporation, a wholly owned subsidiary franchised to sell, install, and service water softener tanks, had less than \$1,000 out-of-State sales, and its out-of-State purchases totaled \$14,300. The total of intrastate purchases, detailed in the record as to source and type for all accounts over \$200 for the Employer and over \$100 for its subsidiary, were \$19,600 and \$2,900 respectively. The Employer denies that it is engaged in the communications business and urges dismissal of the petition because its operations fail to meet any other of the Board's established criteria for asserting jurisdiction.

As the majority of intrastate purchases of the Employer and its subsidiary come from clearly local sources, it appears extremely doubt-

ful that any substantial amount could be classified as indirect inflow. Moreover, assuming that all of such purchases were so classified, the combined total of direct inflow of \$26,800 plus the combined total indirect inflow of \$22,500 would still fall short of meeting the \$50,000 minimum established by the Board as the standard for asserting jurisdiction in nonretail enterprises.<sup>1</sup> Nor do the combined operations of the Employer and its subsidiary meet the minimum of \$500,000 per annum gross volume of business established by the Board for retail enterprises.<sup>2</sup>

However, the question remains whether the Employer's business falls within the classification of communication systems, or an essential part thereof, for which the Board has established a \$100,000 gross volume of business standard for the assertion of jurisdiction.<sup>3</sup> The instant case is the first occasion the Board has had to deal with this issue.<sup>4</sup> As noted above, the Employer argues that its operations do not constitute a part of a communications system but are merely an extension of the individual subscribers' own television antenna since it neither originates a program nor converts the signal itself into an intelligible picture. As support for its position, the Employer relies upon an exemption from the excise tax imposed upon commercial communications granted by the Internal Revenue Service for facilities such as those involved here.

We find merit in the Employer's position. The record clearly discloses that the Employer makes no payments to television stations for the reception of the signals; does not contract with them to distribute their signals; is not franchised by any governmental authority; and is not licensed or regulated by the Federal Communications Commission. Although we do not regard the decisions of the FCC<sup>5</sup> as necessarily dispositive of the issue before us, the FCC has determined that it has no jurisdiction over CATV, and this conclusion must of necessity rest upon a determination that CATV is not an intervening link in the chain of communications or an integrated part of a communication system, but is merely an auxiliary service. Our own evaluation leads us to conclude that the Employer's operations merely service the existing communication at the receiving end for the consumer. This function consists of installing, maintaining, and servicing the cables which are, under the special circumstances, an extension of the consumer's own television antenna. In this connection we note that the Fourth

<sup>1</sup> *Siemons Mailing Service*, 122 NLRB 81.

<sup>2</sup> *Carolina Supplies and Cement Co.*, 122 NLRB 88.

<sup>3</sup> *Raritan Valley Broadcasting Company, Inc.*, 122 NLRB 90. Cf. *Hanford Broadcasting Company (KNGS)*, 110 NLRB 1257.

<sup>4</sup> *Palm Springs Community Television Corporation*, 106 NLRB 1144, involved a similar type of operation but because the impact of the Employer's operations upon interstate commerce was *de minimis* it was unnecessary to pass upon the issue of whether its operations were a part of communications.

<sup>5</sup> *Frontier Broadcasting Company v. Collier*, 16 RR 1005 (April 1958), petition for reconsideration denied (April 1959), FCC Docket No. 12443.

Circuit, in *Lilly v. U.S.*,<sup>6</sup> relied upon by the Employer, similarly concluded that community antenna service is a mere adjunct of the television receiving set.

In view of the foregoing, and upon the basis of the entire record in this case, we conclude that the Employer's operations do not constitute a communications system or an essential part thereof. Thus, we find that the jurisdictional standards established for such systems are not applicable to this type of operation. As the Employer's operations do not meet any of the Board's established jurisdictional standards, we shall dismiss the petition.

[The Board dismissed the petition.]

**MEMBER JENKINS, dissenting:**

I cannot agree with the conclusion of my colleagues that the Employer's operations do not fall within the general classification of instrumentalities and channels of commerce, more specifically, channels of communications, and since the Employer's gross volume of business meets this standard established by the Board, I would assert jurisdiction in this case.

I cannot, as my colleagues do, equate the Employer's operations here to an antenna owned by an individual attached as an adjunct to his television set, nor do I regard as significant the fact that the Employer neither originates a program nor makes it intelligible. It seems to me elementary that neither of these criteria are prerequisites to a finding that the Employer is engaged in the communications industry. In many types of communication systems the operation involved neither creates the message nor receives and translates it but constitutes the necessary mechanism by which the intelligence is transmitted or relayed from the originator to the receiver.

To evaluate intelligently and classify the Employer's operations it is necessary to place it in proper perspective and consider its relationship to the overall scheme of the field of communications to which its operations relate. Fortunately, responsible branches of the Federal Government, namely, the Senate Interstate and Foreign Commerce Committee and the Federal Communications Commission, have made inquiries and received considerable testimony on this subject matter to which we may appropriately refer for reliable information concerning this industry.

CATV, together with TV translators, TV "satellite" stations, and TV repeaters, are auxiliary services of the television broadcasting industry. The FCC has made an inquiry into the impact of these auxiliary services upon the orderly development of television broadcasting, and, on April 12, 1959, under Docket Number 12443, issued its report and order. This report discloses that television auxiliary

<sup>6</sup> 238 F. 2d 584.

service enterprises became established in areas too remote in distance or isolated by terrain from regular television broadcasting stations to receive regular off-the-air reception. According to FCC estimates, approximately 75 percent of such service is provided by CATV. Of the three other types of auxiliary service, two (the satellite and the translator) have developed under FCC rules and policies. The relationship of all four types of auxiliary service to communications is practically identical, differing only in the *modus operandi*.<sup>7</sup> Authoritative opinion and action of the FCC not only places the three smallest of the four existing auxiliary services of the television broadcasting industry within the classification of communications but also within the jurisdiction of the FCC.<sup>8</sup> That the largest auxiliary service, the CATV service, is a rapidly increasing factor in communications was noted by the Commission from the substantial increase in pending applications for microwave common carrier facilities regulated by it which would serve CATV's in new communities. Thus, as a matter of background to an informed evaluation and determination of the appropriate classification of the CATV industry, we should examine the operations of that industry itself.

A community antenna system (CATV) as described by the FCC consists of a receiving antenna, located on a high elevation so as to receive signals to best advantage, and wire lines, whereby the signals received are transmitted to the receiving sets of the subscribers in the community, together with necessary amplifying equipment and sometimes equipment to convert the signal from the channel on which it is received to another channel at which it appears on the subscriber's set.<sup>9</sup> As to the source of their signals the Commission report discloses that:

<sup>7</sup> Translators, like CATV, serve areas and populations which because of distance or terrain cannot receive acceptable television service otherwise. They pick up television signals and rebroadcast them on channels in the higher portion of the UHF band from that originally broadcast and are not permitted by the Commission to originate any broadcast material themselves or to rebroadcast any signal except that of a broadcast station or another translator. Satellite stations, on the other hand, although auxiliary services, are authorized by the Commission to operate as a regular station, except that they are not required to broadcast locally originated programs or maintain studios but are encouraged to develop with the hope that they will extend their operations to service the local needs of their community by providing local programming. Repeaters which developed without the authorization of the FCC are similar to the authorized translators except that retransmission of television signals are on VHF rather than UHF channels.

<sup>8</sup> With respect to repeaters, the Commission concluded that it would be in the public interest to authorize the operation of the VHF repeaters within the limits which would afford due protection against interference with other users of the radio spectrum including aerial navigation service. But, because of a present prohibition against the licensing of broadcast facilities constructed without prior Commission authorization and because of a need to clarify existing law concerning operator requirements, the Commission decided to take no further steps toward licensing of VHF repeater operators until Congress could act on proposed legislative amendments dealing with these matters.

<sup>9</sup> The FCC report further describes the operations of CATV as follows:

Typically the CATV uses the lowest VHF channels on the subscriber's set; this necessitates conversion of the signals of any higher VHF or UHF stations which are carried on the system. The systems, which are generally business enterprises con-

The CATV's carry on their system stations located both nearby and at a distance. The presentation of the programs of distant stations is in many cases made possible by use of microwave common carrier facilities which pick up the signals of the station at a point relatively near its location and relay them to the distant CATV's receiving antenna. . . . In most cases where microwave transmission is involved, the CATV community is well over 100 miles from the city where the station is located.

It appears that CATV's also exist in communities where small broadcasting stations are presently operating. That CATV's are in competition with local television broadcasting stations, which are unquestionably a part of communications for our purposes, was not disputed.<sup>10</sup>

It appears that in those instances where small stations operate in the same area served by CATV the additional signals provided by the auxiliary service splinter the existing audience, appreciably diminishing the value of the local signal as an advertising media. Moreover, as national advertisers, both spot and program, become aware that they are obtaining coverage of the small markets in this manner, they are not inclined to buy the small-market coverage but concentrate on metropolitan stations carried into the small market via CATV. In addition, since the small stations are optional, national program sponsors tend not to include these small stations in their network shows. Thus the CATV, by picking up and relaying the metropolitan shows, is able to present a full lineup of the popular shows which the local station is unable to obtain and present. As a result the local stations become even less of a desirable advertising buy both with respect to sponsored programs and for spot advertising. Moreover, where local stations are ordered for network programs they may not be interconnected with any network and, therefore, the programs must be presented by kinescope or film at a later date. Because the auxiliary service is able to present the same program in the local market on a

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ducted for profit, obtain revenue by charging subscribers. . . . The systems range in number of channels from 1 to 7, and in a very few instances more than 7, many of them have expanded their facilities in recent years, and a substantial majority, at least three quarters of the approximately 550 identified systems, now have at least 3 channels. Typically each station occupies one channel on the system. In some instances, however, it appears that some kind of switching arrangement is used whereby either the system or the microwave common carrier facility supplying it, presents a selection of programs from more than one station for each channel. . . . However, a number of CATV's have additional channels on which no television station signals are presented; on these, sometimes "closed circuit" telecast of programs or advertising are presented, while in other cases the extra channel is used for FM music. . . .

<sup>10</sup> The National Community Television Association in fact argued before the Commission that free competition is the best form of regulation, and the FCC expressed uncertainty only with respect to "at what point in terms of size of the market or auxiliary, the number of signals brought in, etc., this impact becomes serious enough to threaten the station's continued existence or serious degeneration of the extent and quality of service"

live basis, the value of the program when presented on a delayed basis by the local station is greatly lessened. A similar situation exists with respect to feature or syndicated film where first runs are on the larger-market stations first and presented in the local market as first runs later. Where the CATV's are able to present the film by picking up its telecast in the large market from the metropolitan station its presentation by the local station becomes in fact a second run.

These examples of the form of competition with local television stations growing out of the operations of the CATV system where the two exist in the same community gives a clear indication of the type of operations engaged in by CATV and of its relationship to television communications even in locations where no local station exists but where there is available CATV auxiliary service. More importantly, the nature of the competition itself clearly establishes that CATV does not merely compete with local TV stations via another media but is operating in the same media presenting the same type of, if not the identical, material or intelligence originated by the television communications industry. Thus, the classification of the operation engaged in by CATV and by local stations is substantially the same—that of presenting to the local community the television broadcasts available from television networks or large metropolitan broadcasting stations. Two technical differences are apparent, neither of which affects the classification of the type of operation involved. One is the fact that the small television station is required under its regulation and license from the FCC to maintain studios and present a certain minimum amount of local programming and to rebroadcast the signals of other stations or networks only with permission, whereas the CATV's, having established themselves without FCC's licensing or approval, carry on their operations without regard to such statutory restrictions.<sup>11</sup> However, it appears that some CATV's have engaged in local programming by means of slides and spot advertising. The other principal difference is the mode by which the signals are transmitted to the receiver of the watching public. In contrast to the local television station which sends its signal on the air available to all in the community within the authorized range of the station, the CATV's provide this service to subscribers only by means of coaxial cable. With respect to the latter, there would appear to be little difference in principle from that involved in the various forms of pay television undergoing intermittent experimentation under FCC regu-

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<sup>11</sup> In this connection the Commission observed, "it appears that usually the CATV's do not attempt to obtain . . . consent [of the stations whose signals they transmit] and in some cases carry the programs of stations which have expressly forbid them to do so," and accordingly recommended to Congress that CATV should be required to observe the provisions protecting property rights in broadcast material. It is also noted that suits against certain CATV's by broadcasters concerning such property rights are presently in litigation in the courts. For these reasons I would give no weight to the fact that the Employer here makes no payments to television stations for reception of their signals.

lation. A television set attached to CATV equipment, unlike an extended antenna to which my colleagues would equate it, will not without special additional engineering and switching attachments, pick up any signal other than those transmitted by the CATV service. All other signals, including those of any generally available local station, are cut out and can be received only if carried on one of the CATV bands.

Although the Federal Communications Commission did not assert jurisdiction over CATV's because it found that this particular type of auxiliary service did not fall within specific statutory language,<sup>12</sup> the FCC did regard CATV as engaged in communications and a proper subject for Federal regulations, and stated its recommendations to Congress accordingly. In this respect the Commission, in its report and order in Docket No. 12443, stated:

We have no doubt that, as the broadcasters urge, CATV's are related to interstate transmission (regardless of where the station retransmitted is located, the signal often originates, via network, in New York or elsewhere). Therefore it appears to us that there is no question as to the power of Congress to regulate CATV's, or to give the Commission jurisdiction to do so, if it desires. But, as an administrative agency created by Congress, we are of course limited by the terms of the organic Statute under which we were created, and must look to that Statute to find the extent of our jurisdiction and authority.

After this most comprehensive and authoritative analysis of the CATV industry by the Federal Communications Commission, so emphatically placing CATV operations in the midst of and as an integrated part of communications, I can find no persuasive argument for the position taken by my colleagues. To the extent that their position may coincide in part with the opinion of the Fourth Circuit in *Lilly v. U.S.*<sup>13</sup> I would advance the observation that an analysis of the Court's decision discloses that the issue was limited to the strict construction of the statute imposing a Federal excise tax upon com-

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<sup>12</sup> The Commission found that (1) CATV did not qualify as a "common carrier" of "wire service" within the meaning used in the Communications Act because "it is the CATV, rather than the subscriber, who determines what signals are to be carried on the system"; (2) CATV's are engaged in the distribution *by wire* of television programs and not covered by the strict language of the act regulating "transmission *by radio* of writing, signs . . . including . . . receipt forwarding and delivery of communications . . ."; and (3) CATV's are not subject to the provision forbidding "rebroadcast" of a "program or any part thereof of another broadcasting station without the express authority of the originating station," that provision which predated the advent of television related to "rebroadcast" as "reproduction by radio of the broadcast waves" and did not cover "reproduction or distribution by wire as in the case of CATV's" The Commission therefore found "no present basis for asserting jurisdiction or authority over CATV's" except to the extent they are already regulated with respect to their radiation of energy

<sup>13</sup> See footnote 6, *supra*.

mercial "wire and equipment service," of a type specified therein, "and all other similar services."<sup>14</sup> In its opinion, the Court observed that:

No community television antenna system was in existence when the statute first imposing this tax was passed and such systems could not have been in the contemplation of Congress.

It was therefore necessary for the Court to determine whether CATV's "furnished a service similar to the ones taxed" before they could "fall within the reach of the statute." In this connection the Court decided:

It is clear . . . that if it be considered a service, it is in no way similar to the services which are specifically mentioned in the statute . . . Congress has never taxed television transmission or reception. It is admitted that a booster station maintained by a transmitting station would not be subject to the tax.

Thus, it is apparent that what the Court was called upon to decide there was whether CATV furnished a service similar to the one taxed by the statute which exempted television transmission or reception, and not whether CATV constituted a part of television transmission rather than reception. That in the process of reaching its conclusion the Court regarded community antenna service as a "mere adjunct of the television receiving set with which it was connected and . . . in no way a communication service or facility such as it was the purpose of the statute to tax" is in no way a definitive determination as to the status of CATV operations as part of communications generally.

I should like to emphasize that both the FCC and the Court, in the decisions discussed above, were confined to specific statutory provisions and definitions passed by Congress before scientific advances gave rise to the creation of CATV and were determining legal jurisdiction under those statutes. We are not similarly limited by specific statutory provisions in determining the issue before us. Legal jurisdiction, under the statute we are called upon to administer, is abundantly clear from the evidence presented in this case. Rather, we are attempting to evaluate the operations of the industry, of which the Employer is a part, and to determine its relationship to the field of communications for classification purposes under our self-imposed jurisdictional standards.

On the basis of the foregoing I believe there is no room for doubt, and would hold that CATV is a part of the communications industry. As such, it is subject to the standards announced by the Board as a basis for asserting or declining jurisdiction over a particular employer

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<sup>14</sup> The portion of the statute involved, entitled "Telegraph, Telephone, Radio and Cable Facilities," section 3465, subsection (a)(1)(B), reads as follows: "A tax equivalent to 8 percent of the amount paid for any wire and equipment service (including stock quotation and information services; burglar alarm or fire alarm services, and all other similar services, but not including services subscribed in subparagraph (A))."

whose operations fall within that classification. As the Employer's commerce data meets the established minimum standard for communications, I would assert jurisdiction in this case.

**Squaw Valley Development Corp. and/or Squaw Valley Lodge and Operating Engineers, Local Union No. 3, International Union of Operating Engineers, AFL-CIO. Case No. 20-CA-1714. July 12, 1960**

**DECISION AND ORDER**

On March 24, 1960, Trial Examiner William E. Spencer issued his Intermediate Report in the above-entitled proceeding, finding that the Respondent had engaged in and was engaging in certain unfair labor practices and recommending that it cease and desist therefrom and take certain affirmative action, as set forth in the copy of the Intermediate Report attached hereto. Thereafter, the Respondent filed exceptions to the Intermediate Report and a brief in support thereof.

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its powers in connection with this case to a three-member panel [Chairman Leedom and Members Bean and Fanning].

The Board has reviewed the rulings made by the Trial Examiner at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the Intermediate Report, the exceptions and brief, and the entire record in the case, and hereby adopts the Trial Examiner's findings, conclusions, and recommendations with the following corrections.<sup>1</sup>

**ORDER**

Upon the entire record in this case, and pursuant to Section 10(c) of the National Labor Relations Act, the National Labor Relations

<sup>1</sup> The Trial Examiner found the Respondent's statements to employees that it would curtail operations and contract out maintenance work, rather than deal with the Union they had designated to represent them, constituted interference, restraint, and coercion within the meaning of Section 8(a)(1) of the Act. He stated in this connection that "The complaint did not allege independent 8(a)(1) violations of the Act, but the matter on which these findings are made was fully litigated." While we agree that the matter was fully litigated, we note also that the complaint did allege that the Respondent, by warning that it "would contract out its maintenance work or close down the whole operation seven months a year because of the union activities of the employees," violated Section 8(a)(1) of the Act. The Trial Examiner's recommended order required the Respondent to cease and desist from such conduct, but this provision was inadvertently omitted from the notice to be posted by the Respondent. We shall therefore amend the notice to conform with the order.

Footnote 8 of the Intermediate Report refers to the Respondent's letter offering reinstatement to the dischargees as an "offer of unspecified work . . ." While we agree with the finding that the offer was inadequate for the other reasons set forth in the Intermediate Report, we note that the letter was an offer of "the same work as last winter."