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2  
3 IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA  
4 IN AND FOR THE COUNTY OF ALAMEDA  
5 BEFORE THE HONORABLE JAMES A. RICHMAN, JUDGE  
6 DEPARTMENT 31

7 ----oOo----

8 DAVID ADELSON, et al.,  
9 Plaintiffs,

**COPY**

10 vs.

Case No. 814461-0

11 PACIFICA FOUNDATION, a California  
12 nonprofit corporation,  
13 et al.,

14 Defendants,

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16 REPORTER'S TRANSCRIPT OF PROCEEDINGS  
17 U.S. POST OFFICE BUILDING  
18 June 23, 2000

19 A P P E A R A N C E S:

20  
21 For the Plaintiff:

DAN SIEGEL  
Attorney at Law

22  
23 For the Defendants:

DANIEL RAPAPORT  
Attorney at Law

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26  
27 Reported by:  
28 ANNIE MENDIOLA  
CSR #9837

1 June 23, 2000

Afternoon Session

2 ----oOo----

3 P R O C E E D I N G S

4 THE COURT: Case No. 814461-0, Adelson versus  
5 Pacifica Foundation.

6 MR. RAPAPORT: Good afternoon, Your Honor. Daniel  
7 Rapaport appearing on behalf of defendant.

8 MR. SIEGEL: Good afternoon. Dan Siegel and Hunter  
9 Pyle appearing on behalf of the plaintiffs, David Adelson,  
10 et al.

11 THE COURT: Well, the tentative ruling here was to  
12 deny the preliminary injunction. Mr. Pyle called, so fire  
13 away, Mr. Siegel or Mr. Pyle.

14 MR. SIEGEL: Okay. Your Honor, I'm not sure exactly  
15 where to begin and it would help if the Court could focus my  
16 remarks in terms of the issues that you're most interested in.

17 THE COURT: Well, I'll attempt to do that, but I  
18 will say that obviously the tentative ruling is just that.  
19 It's tentative. But I would say that you've got an uphill  
20 battle, because as I read this record, and I emphasize the  
21 record, because I'm not terribly persuaded with the evidence  
22 put forth on behalf of the petitioners.

23 In no particular order, I would say that there's no  
24 showing of irreparable harm. I'm not persuaded that there's a  
25 demonstration of a reasonable probability that the moving  
26 parties will prevail on the merits. Balancing the equities,  
27 somewhat intertwined with irreparable harm, I don't see  
28 irreparable harm, and, frankly, I don't see any harm. There's

1 a lot of argument about extreme harm in the papers. I don't  
2 see harm to the moving parties. I mean, this thing has been  
3 in place for some period of time and no demonstration of bad  
4 things happening. But in addition to that, there's  
5 Mr. Crigler -- how do you say it?

6 MR. SIEGEL: "Crigler."

7 THE COURT: -- Crigler puts forth evidence that if  
8 there hadn't been some changes, some risk of losing funding.  
9 And so I think balancing the equities significantly favors the  
10 defendants. And I would say superimposed on all of that is,  
11 notwithstanding how it's couched, I basically view this as a  
12 mandatory injunction.

13 So I don't know where you want to start, but there's  
14 a lot of stuff you're going to have to deal with. You might  
15 want to start with the man -- you guys say it's not a  
16 mandatory injunction. As I read what you're asking to do is  
17 basically say put the people that we want on and take off the  
18 people that went on, and that's not the status quo. That's  
19 changing the status quo.

20 Go ahead. I'm here to listen. It's been an  
21 interesting case all the way along, but you're not here on  
22 demurrer anymore. You've gotten by that. You did. And here  
23 we are and so....

24 MR. SIEGEL: There is a lot to argue and perhaps it  
25 will be helpful, for me anyway, to set the context or at least  
26 argue by analogy.

27 We talk about the applicability of injunctive relief  
28 and the need to prevent harm and we learned the analogy of the

1 wrecking ball that's about to knock over the historic  
2 building. So people rush in to court and ask the court to  
3 halt that wrecking ball while you decide whether the building  
4 could be knocked down or not.

5 I would suggest that in this situation, it's not  
6 exactly a wrecking ball. It's an effort to take down the  
7 historic building brick by brick. And as time goes on, I  
8 think we've demonstrated in the record, the bylaw changes and  
9 the changes in Pacifica's governance that we're concerned  
10 about are being implemented.

11 When we filed this action, there were five at-large  
12 members of the board of directors. Now there's nine. There's  
13 a meeting every three or four months or so. By the time we  
14 come in here again, there will be 15 or 20. And the ability  
15 of the Court to reconstruct the situation as it existed prior  
16 to the -- what we contend to be the unlawful adoption of  
17 bylaws, becomes more and more difficult. That's why we  
18 decided to come in and request this preliminary relief because  
19 we see the months slipping by and the situation becoming more  
20 and more difficult to resurrect.

21 But to go back to the initial issue --

22 THE COURT: This really is off the point, there are  
23 expedited trial dates, try the whole thing. Three or four  
24 months, have it to trial if you want to.

25 MR. SIEGEL: That will probably be our next step.  
26 The case gets more and more complicated. Appears now that  
27 there is a complete rupture among the existing National Board  
28 members, and actually the next time you see us, we're going to

1 be back in here --

2 THE COURT: Perish the thought, Mr. Siegel.

3 MR. SIEGEL: -- seeking to amend the complaint once  
4 again to realign several of the defendants as plaintiffs, and  
5 we will be doing that. But while we're again fiddling, as  
6 they say, the station and the foundation continues to burn.

7 I thought that we had perhaps gotten over on  
8 demurrer the issue of whether our clients as Local Advisory  
9 Board members are considered members of the corporation. If  
10 we hadn't, I think --

11 THE COURT: I don't really -- that's not anything I  
12 mentioned. And I'm not really -- I can't say that I've  
13 addressed that in any great detail. If I thought -- you're  
14 talking about the standing issue. I thought there was no  
15 standing. That would have been, I guess, one of the first  
16 things I said. That's not really in my framework at this  
17 point in time.

18 MR. SIEGEL: But in order to satisfy the standing  
19 requirement, we had to convince the Court that under  
20 California law our folks are members of this foundation or at  
21 least --

22 THE COURT: You had to plead it. I don't remember  
23 all that was said in the course of those demurrer hearings,  
24 but ... so you pleaded it. I mean, the fundamental issue on  
25 the merits, it seems to me, deals with what the vote, what was  
26 needed, whether it was a vote or nomination. Start with that,  
27 if you want.

28 What's the record that you think there is on that?

1 There's nothing from your side, save the reply declaration of  
2 Mr. Franck, that remotely deals with this as an evidence  
3 piece. Ms. Gendelman has all sorts of conclusory stuff. I  
4 don't understand she was ever there. Maybe she was as a  
5 visitor. How does she -- what's the evidence of the vote?  
6 I've got O'Dell. I've got the transcript. I've got Makela  
7 talking in the transcript. Acosta, Lane, Millspaugh, all of  
8 those people talk about what in fact happened. I've got you  
9 being at the meeting on September the 27th of 1997.

10 MR. SIEGEL: Right, which is a very peculiar event  
11 in and of itself.

12 THE COURT: I'm just talking about what's the  
13 evidence that's in the record.

14 MR. SIEGEL: I understand. And there is evidence in  
15 the record beyond various hearsay statements and speculation.  
16 Including, you have a transcript of the September 1997 meeting  
17 where the now president of the board of directors reading the  
18 bylaws as they appear to her until she had been briefed by  
19 counsel, I suppose, states quite spontaneously and we think as  
20 a binding admission that the bylaws did not require any action  
21 by the National Board to seat those persons who had been  
22 elected by the Local Advisory Boards.

23 THE COURT: When you say "a binding admission,"  
24 let's put that in context, because I've read the bulk of the  
25 transcripts to the extent they're before me. It's my  
26 recollection that was her first -- I'm not taking sides here.  
27 I'm dealing with what the record is.

28 She's brand new to this thing. She may read it that

1 way. And O'Dell says, right away, no, that isn't how it has  
2 been done. And Makela says, no, nomination is different than  
3 vote. How can that be a binding admission? Because she's the  
4 head person?

5 MR. SIEGEL: And then on the next page, Roberta  
6 Brooks says we better get the lawyers on this to draft some  
7 new bylaws because I understand, Ms. Berry, how you read the  
8 current bylaws as you do.

9 Let's go to Peter Franck's declaration, because I  
10 think Peter Franck's declaration is not hearsay, not  
11 speculation. He was the president and CEO sitting in the seat  
12 that Mary Frances Berry occupies today saying that back in  
13 1984, we went through a process which we understood to be one  
14 of replacing the former system of election by the National  
15 Board with election by the Local Advisory Boards. And we went  
16 through the process twice.

17 The first time around, our previously conservative  
18 attorney said that we needed CPB'S or FCC'S approval of this,  
19 so ... and then they submitted it on the wrong form. And then  
20 we did it again and we amended the bylaws. And we amended the  
21 bylaws, not only so that they said what now Your Honor say  
22 they say, but also so that they meant what we say they say.  
23 And it seems to me that that's evidence which is more  
24 persuasive than either the after-the-fact testimony of whether  
25 it's people on our side like Sherry Gendelman or the people on  
26 the other side who are not there like David Acosta or Mary  
27 Berry or anyone else.

28 The fact of the matter is that you have -- I don't

1 want to speak too fast -- you have bylaws which have a pretty  
2 apparent meaning to them, and I think the Court previously  
3 recognized that. And now we have competent evidence of their  
4 legislative history which confirms that they mean what they  
5 say and they say what they mean.

6 So we believe that it should be clear even if the  
7 level of proof needed at the preliminary injunction stage that  
8 our clients, as members of the Local Advisory Board are,  
9 number one, entitled to vote for National Board members,  
10 entitled to recall their National Board members if that's what  
11 they choose to do and certainly we're entitled to vote on  
12 bylaw changes which take away their right to vote. And they  
13 haven't been allowed to do that and they haven't been allowed  
14 to play the role established for them in the bylaws of  
15 electing National Board members.

16 Now, I just want to say one other thing about that  
17 issue, which I'm now appearing, at least inferentially, as a  
18 witness. When you look at the transcript of that meeting,  
19 again Exhibit K to Berry's declaration, and she and the others  
20 talk about what went on at that meeting, and it is a verbatim  
21 transcript, I think it would be hard for this court or anyone  
22 else to conclude that at that meeting the directors took any  
23 action on the bylaws. It seems pretty apparent to me that  
24 what they were doing is delegating their attorneys to come up  
25 with some language and present it to the board for adoption at  
26 a future time.

27 The reason I emphasize that, Your Honor, is that,  
28 according to the defendants in this case and other documents



1 that they've presented, the bylaws are actually amended at  
2 that September 1997 meeting. And we think, among other  
3 things, it shows an absolute fabrication on their part and a  
4 total unwillingness to bind themselves to any sort of ethical  
5 or accurate statement of the facts. Again, you just can't  
6 read that transcript and say that any bylaw changes were  
7 adopted.

8 THE COURT: I didn't have the whole transcript.  
9 They didn't put in the whole transcripts and neither did you.

10 MR. SIEGEL: They put in the transcript of the  
11 entire discussion of bylaws. You may not know that, but there  
12 are other -- but that in a sense is a --

13 THE COURT: So what are you saying? That all of the  
14 people who have testified under oath from the defense side are  
15 basically gilding the lily to put a nice spin on it?

16 MR. SIEGEL: That's probably a nice way to put it.  
17 They may even have testified as to what they felt reality was.  
18 They may have testified that they believed they were electing  
19 Local Advisory Board nominees to the National Board.

20 But what they believed, in a sense, just like our  
21 folks believe is not particularly relevant. You have to go  
22 back to what the bylaws actually say and what do the people  
23 who wrote them and pass them mean for them to say.

24 THE COURT: When you say what they believe, that  
25 gets me back -- it's not a numbers deal. But tell me, Franck,  
26 as I understand Franck's testimony, he stopped being involved  
27 in '84. And everybody -- and Gendelman wasn't there.  
28 Everybody else was there for differing -- O'Dell was there

1 from '77 to '97. I don't know O'Dell from a load of wood. I  
2 don't know why he would be gilding the lily. I mean, making  
3 stuff up. Some of these people have very significant, you  
4 know ... I guess you're saying Crigler is putting his bar  
5 number out on the point to say what he says happened, and  
6 that's an interesting thing. He gives reasons why they do  
7 what they do, and I don't have any reason, you know, nothing  
8 before me to say the reason is made up or pretextual or  
9 whatever you want to call it.

10 MR. SIEGEL: I don't believe that Crigler has put  
11 his bar number up in that sense, Your Honor. I think what's  
12 happened, and this is getting a little bit de hors the record,  
13 as they say, is that CPB gave them a piece of advice which we  
14 can argue about until we're blue in the face, that's neither  
15 here nor there. But what was necessary for them to do in  
16 order to follow CPB's advice was to adopt a resolution or a  
17 working standard that said that no one could sit on both  
18 boards at the same time. And in fact, that's what Crigler  
19 said was required for them to do in paragraph six of his  
20 declaration and that's what they did. But they used this  
21 specter of CPB's concern to make changes that went far beyond  
22 anything that CPB demanded and indeed more than Crigler said  
23 CPB demanded. They had a small problem. According to CPB,  
24 you can't have people sitting on the Local Advisory Boards and  
25 the National Boards at the same time. They changed that. And  
26 we don't have a problem with that. We never challenged that.  
27 But under the guise of responding to CPB's concerns, they went  
28 much further and said, henceforth, Local Advisory Boards will

1 not elect National Board members. CPB never said you can't do  
2 that. They haven't been able to cite regulation or rule or  
3 federal statute which says you can't do that.

4 So what we think happened and indeed what some of  
5 the National Board members, Pete Bramson gave us a  
6 declaration, will testify, is that some of the leadership of  
7 the board essentially stampeded the rest of them with the CPB  
8 bogeyman. And that's why we're here where we are today.  
9 That's why that bylaw was passed, whether it was in '97 or  
10 '99, it was passed under the threat of CPB will get us if we  
11 don't.

12 THE COURT: All of that, I take it, goes to the  
13 likelihood of prevailing on the merits, I would say. Let's  
14 deal with that.

15 MR. RAPAPORT: Do you want me to deal with that now?

16 THE COURT: I think that's easiest way to do that.

17 MR. RAPAPORT: I guess my first observation has to  
18 be the issue before this Court is really whether without a  
19 trial it's going to dismantle Pacifica Foundation. Counsel  
20 was referring to the credibility of witnesses, things that  
21 aren't in the record. It sounds to me like what he should be  
22 doing is focusing on a trial rather than this motion for  
23 preliminary injunction.

24 If you want to look at the merits, the showing that  
25 has been made on behalf of the plaintiff is really quite weak.  
26 The declarations proffered by the plaintiffs are inadmissible.  
27 A perfect example is Ms. Gendelman's supplemental declaration.  
28 She says she was with KPFA LAB since 1996. She purports to

1 authenticate documents that were prior to the time she got  
2 there on meetings that she isn't even listed as attending.

3 Now, I notice Mr. Siegel is too good of a lawyer to  
4 believe that he thinks he can rely on the joint legislative  
5 audit committee as evidence. Clearly hearsay. Even that  
6 report doesn't recommend any action.

7 Mr. Franck is another case. Mr. Franck may tell us  
8 what he really thinks, what he really believes.

9 By the way, I point out, he did not hold the same  
10 position as Dr. Berry. There used to be a position called  
11 president. After Mr. Franck in 1984 was censored by the KPFA  
12 staff at KPFA LAB and the National Board --

13 THE COURT: That's not before me.

14 MR. RAPAPORT: That's my point. Not before you.  
15 We're not here to try -- if you want to test credibility,  
16 that's the place to do it.

17 Your Honor, on the merits, I just disagree with  
18 Mr. Siegel. He's dead wrong on the bylaw issue. First, did  
19 the bylaws materially change? No, they didn't materially  
20 change. The 1984 bylaws allowed for the very first time the  
21 LAB to have input into the process. They weren't entitled to  
22 nominate. Thereafter, the board would not elect a director  
23 other than an at-large director if they'd not been nominated  
24 and approved by the majority of the station board. This was a  
25 prerequisite to board approval. But board approval was still  
26 required. This interpretation is confirmed by the 1991  
27 amendment in Exhibit F. Always conspicuously absent by the  
28 exhibits proffered by the plaintiff which says that at least

1 one LAB nominee shall be a person of color. It did not say  
2 each station board shall elect a person of color.

3 Further, even Mr. Franck's exhibits contradict his  
4 declaration. He claims that an 1982 organization and  
5 procedure memorandum states the board's intent. This was  
6 certainly not a basic or organic document of Pacifica's, as  
7 Mr. Franck concludes. But even the document states and I'll  
8 quote here, "When a vacancy occurs on the representation of  
9 any station, this station board shall nominate a person to  
10 fill the vacancy," unquote. That was Mr. Franck's Exhibit B.  
11 It did not say that the board -- station board will elect.

12 Mr. Franck then cites the last sentence of that  
13 memorandum to the effect that those nominated will normally be  
14 approved by the board. First, even if the memo does in fact  
15 confirm a board resolution, it merely confirms that the board  
16 had authority to make the resolution.

17 Second, Mr. Franck takes three pages of his  
18 declaration to explain to us that that resolution never was  
19 adopted.

20 And third, this document, if it stated a policy, was  
21 not a change in bylaw. The basis of this change is 5150,  
22 which requires a change in the bylaw, not a change in the  
23 resolution.

24 The board had the power to undertake the change.  
25 The board has the power to rescind the change.

26 Most significantly, Your Honor, you have to look at  
27 the board's practices. Our declarations are replete with  
28 people who were there. Jack O'Dell, who will -- I say is a

1 particular fellow and very -- he wouldn't have signed this.  
2 We went through iterations to make sure it was darn right.

3 THE COURT: That's not before me either.

4 MR. RAPAPORT: I'll withdraw it, Your Honor.

5 But I think that if you look at board practices,  
6 we've proven that every nominee was nominated by the LAB or  
7 nominated as an at-large member was voted on by the board.

8 And take a look at Exhibit K, Exhibit I, the various  
9 declarations. I mean, what would have been the point to seat  
10 these directors if the motion failed and the person still  
11 would be seated?

12 The power to elect these directors was known to  
13 everybody, and particularly Mr. Siegel. Mr. Siegel recognized  
14 the local boards were weak and that the board had authority to  
15 change the bylaws. That's Exhibit K where he gets up and  
16 makes those statements.

17 But even more significant is when he gives the  
18 report to his constituency, which is Exhibit Q, and he says  
19 that things seem to be going pretty well. It clearly shows he  
20 understood that the board had the authority to increase the  
21 number of at-large representatives and that the LAB's  
22 nominated, not elected board members.

23 But even more significant than that is Exhibit P,  
24 the letter that started this lawsuit. Exhibit P is  
25 Mr. Siegel's letter pursuant to 5710 of the Corporations Code.  
26 And that letter is a letter that must be sent before these  
27 types of lawsuits can be brought and must contain what the  
28 claims are. But if you go to Exhibit P, Mr. Siegel doesn't

1 complain a whit about what happened in September of 1997. In  
2 fact, he admits in that letter that LAB nominees had always  
3 been required to be, quote, "approved by the National Board,"  
4 unquote.

5 The plaintiffs take a lot of time and trouble to  
6 stress the fact that the LAB nominees were elected pretty much  
7 unanimously and seems to be that it was unanimously after they  
8 were being nominated by the LAB. And so the argument is this  
9 was a pro forma approval by the board.

10 The question, Your Honor, is not how the power was  
11 exercised. The question was who had the power. Ironically,  
12 if all of these LAB nominees were elected by the board, then  
13 the bylaw change could hardly be material and adverse.

14 Second, if such events -- if these people got on the  
15 board, then where's the irreparable harm? They routinely got  
16 on the board. They don't have a reason to be here today on  
17 preliminary injunction.

18 Now, Pacifica has really consistently vested all of  
19 the right to elect directors to the board itself and has shown  
20 great difference to the LAB nominees. But the consensus it  
21 has had in adopting the recommendation of the LAB doesn't  
22 change the governance and structure of the organization. The  
23 current bylaws still, Exhibit H, still give the LAB the right  
24 to nominate. No more, no less. There's no harm, no foul.

25 If you want, Your Honor, I'll address the issue of  
26 the at-large directors.

27 THE COURT: I don't think that's necessary.

28 Anything further on that issue?

1 MR. SIEGEL: I'm sorry but I just think we're going  
2 backwards on this issue, but let me...

3 When we were here before on the issue of demurrer,  
4 the issue that was squarely posed to the Court was do the  
5 plaintiffs have standing. The plaintiffs could only have  
6 standing if they were members of Pacifica. They're not  
7 members of Pacifica by virtue of anything in the articles or  
8 bylaws that says they were members. We argued they were  
9 members by virtue of California Corporations Code which  
10 defines as members anyone who has the right to vote for  
11 members of the National Board or the board of directors. And  
12 I believe --

13 THE COURT: Mr. Siegel, again, I don't remember what  
14 was said, but that -- I mean, you do know about the difference  
15 between demurrers and facts. People can plead anything. And  
16 I have some recollection of sitting here, some of these people  
17 were probably here, saying this is what the papers say, how  
18 are those papers implemented. That would have been important.

19 Now I'm starting to get some feel -- at a  
20 preliminary injunction stage, and then some judge or jury is  
21 going to get the feel for it and watch people cross-examine  
22 and watch Mr. O'Dell squirm in his seat and Mr. Franck be the  
23 greatest witness that ever lived. That's what trials and  
24 cross-examination is about.

25 I wouldn't put any solace in the fact that you got  
26 by a demurrer. I'm not dealing with the standing question.  
27 I'm dealing with what, as I read this record, what happened  
28 here as a matter of reality. And I get back to what I said at



1 the beginning. I have Ms. Gendelman, who for a very short  
2 period of time, making a bunch of conclusions. And then I  
3 have other people who aren't making conclusions.  
4 Interestingly which nobody focuses and I'm not saying it's the  
5 end of the world. I find very significant Mr. Lane who  
6 doesn't testify about votes at all at the board meeting. He  
7 says I was a member of LAB at WFFW, wherever that station is,  
8 and he said we didn't elect anybody. We nominated people.  
9 That's what he says. You're saying that's false. That's what  
10 he says in this declaration.

11 MR. PYLE: Because with respect to that particular  
12 Local Advisory Board, the president and vice-president elected  
13 by the Local Advisory Board were automatically the individuals  
14 who became members of the governing board.

15 THE COURT: I don't have that before me, Mr. Pyle.  
16 That shows how one group dealt with the bylaw issue.

17 MR. SIEGEL: What I'm afraid of is that the Court is  
18 focusing on our weaker evidence and not focusing on stronger  
19 evidence. If you want to disregard Ms. Gendelman's  
20 declaration --

21 THE COURT: Tell me your best evidence. Is it  
22 Franck? Tell me what you have that's evidence.

23 MR. SIEGEL: First of all, Mr. Rapaport wants the  
24 Court to focus on his Exhibit F. What do the bylaws say? The  
25 bylaws say a member must receive the nomination and vote of a  
26 majority of the station board. And every time we discuss  
27 this, no matter how many times, I'll expect Mr. Rapaport to  
28 leave off the word "vote" from the language and me to

1 emphasize the word "vote." It says "vote." And I would  
2 submit it means vote.

3 So the next question is is that an accidental slip  
4 of somebody's word processor? Should we read the word vote  
5 out of the bylaws?

6 So then we get to the Franck declaration. Franck  
7 wrote the bylaws. He says we had a discussion in 1984. We  
8 wanted to be sure that the LAB members got to choose their  
9 National Board representatives. So we wrote the bylaws in  
10 order to effectuate that plan that we had when I was president  
11 and CEO of the organization. Whether that's different seat  
12 than that held by Mary Frances Berry, I don't know, but...

13 THE COURT: So that's your evidence. And you agree  
14 that his testimony under oath is he left in '84. So what does  
15 that mean?

16 MR. SIEGEL: The law was written in '84. It  
17 wasn't --

18 THE COURT: Mr. O'Dell says something directly  
19 contrary to that. Mr. Acosta says something directly contrary  
20 to that. And the fact that you want to use Ms. Berry as a  
21 binding admission, to use your words, I think in some ways  
22 maybe indicates what's really happening here. Obviously not  
23 very precise. She reads it in a way that's favorable to you  
24 out of the shoots. Right? And the people that have been  
25 there longer say no, that isn't how it is. You'll make some  
26 mileage out of that before a judge and a jury, but you're  
27 saying it's totally crystal clear. You look at the four  
28 corners of this and this is how it must be and I'll have six

1 or seven different witnesses that say that isn't how it is.

2 MR. SIEGEL: Let me take the next step from there.

3 THE COURT: Sure.

4 I need to give Annie a break.

5 (Recess taken.)

6 MR. SIEGEL: Just mention briefly -- I appreciate  
7 the Court's patience and attention.

8 I think if we move from the language to the  
9 legislative history of the language, the next thing I just  
10 want to bring to the Court's attention is the practice. I  
11 guess, that's the third leg of what you're going to decide on.  
12 And I would point out, and I think Mr. Rapaport would agree  
13 with me on this that, number one, every person elected and  
14 voted upon by a Local Advisory Board from 1984 through 1999  
15 was approved unanimously by the National Board. And if you  
16 look at the minutes, it's done in an extremely perfunctory  
17 way. What -- and I think this may be as a chit on the other  
18 side is that there was always a vote of some kind.

19 Mr. Rapaport's right. If you look at the minutes,  
20 people were more than just shown a seat. There was a motion  
21 passed and it's interesting to look at the language of the  
22 motions. Some say we move to seat Mr. Acosta. Some say we  
23 move to formally seat Ms. Brooks. Other say we accept  
24 Mr. Jones and so on. But there always is a motion of some  
25 kind, but it's always unanimous and it's always perfunctory.

26 If you contrast that, and I think this is an  
27 important point, if you contrast that with the National  
28 Board's treatment of the at-large members, there it's a real

1 election. You see debate. You see people speaking for and  
2 against. You see secret ballots and you see a two-thirds  
3 choice. So I would submit that even given the evidence that  
4 supports the defendant's position and all the declarations  
5 that there's a quite qualitatively different treatment of  
6 at-large people as compared with LAB chosen people.

7 But beyond that, I will submit to you as a matter of  
8 law it doesn't really matter. If the LAB got to elect people  
9 to the National Board, whether those choices were ratified by  
10 the National Board or not, does not change the fact that they  
11 were elected by the Local Advisory Board, that they had the  
12 right to vote on the people who go to the National Board. And  
13 under that, because of that right, California law provides  
14 that they then are members, which is the standing issue, but  
15 it goes beyond the standing issue. And that's where I think  
16 we were having maybe a miscommunication there. Standing is  
17 one issue. In this case, though, standing confers certain  
18 rights that flow from standing, including the right to vote on  
19 bylaws which take away your power as elector. That's pretty  
20 much that on that issue.

21 The other thing I wanted to say, and getting back to  
22 the Court's initial issue, are we talking about a mandatory or  
23 prohibitory injunction? And I would, again, acknowledge that  
24 this has elements of both. I suppose we thought we were using  
25 language creatively when we said that what we're asking for is  
26 a prohibitory injunction because we're prohibiting Pacifica --  
27 we want the Court to prohibit Pacifica from doing anything  
28 which is inconsistent with the bylaws before they were

1 unlawfully changed. And so it is a prohibitory injunction in  
2 that sense. But as defendant's point out, that also includes  
3 perhaps taking people off the board, which then has elements  
4 of both mandatory and prohibitory.

5 We've got a bottom line position here, Your Honor.  
6 Bottom line is --

7 THE COURT: What is the significance of the fact  
8 that it's mandatory? It may be mandatory completely, but  
9 evidently in part the cases are onerous. The showing that you  
10 have to make for a mandatory injunction it says, "Granted only  
11 in extreme cases where the right is clearly established."

12 That's Teachers Insurance & Annuity. Davenport versus Blue  
13 Cross is the same.

14 And what do I do with that? Is that what you're  
15 saying you clearly established the right that your....

16 MR. SIEGEL: No. Obviously what we're trying to do  
17 is put this in terms of prohibitory injunction in order to  
18 have lesser of a burden because we understand the difference.  
19 And my sense in reading the cases and might be different than  
20 yours, the courts define injunctions as prohibitory or  
21 mandatory, depending upon whether they want to grant them or  
22 not. And --

23 THE COURT: I don't know what court you've been  
24 talking to. It isn't this court.

25 MR. SIEGEL: When you prohibit people from violating  
26 bylaws, that's a prohibitory injunction. It may have some  
27 mandatory functions to it.

28 THE COURT: Have you read the Teachers Institute

1 Insurance case? The injunction that was sought was to refuse  
2 to enjoin the defendant from refusing to reinstate the  
3 workers. The court said what? That was compelling them to be  
4 rehired.

5 You're asking me to refuse to seat and allow people  
6 to participate. That says to me throw them off. Says to me  
7 put on Mr. Imani. That's what you're asking.

8 MR. SIEGEL: And since you're not going to do  
9 that....

10 THE COURT: But let me ask you this question because  
11 I found it interesting in your reply brief in footnote one,  
12 you say Meyburg versus The Superior Court has grounds for a  
13 court to intercede in corporate activities. That's an old  
14 case. So I went and read it. And I'm reading here from page  
15 341. "It is also contended that the restraining order was an  
16 unwarranted interference with the internal affairs of a  
17 foreign corporation and an attempt to direct or control the  
18 election of directors thereof." This is the important part.  
19 "As noted, the Court in fact did not attempt to remove any  
20 officer or director or suspend the exercise of any corporate  
21 function or official privilege of any officer of the  
22 corporation." That's not helpful.

23 MR. SIEGEL: The case is only helpful on the general  
24 point of the Court's involvement to ensure that the bylaws and  
25 articles of the corporation are followed.

26 THE COURT: I hope they are. But that gets me --  
27 let's talk about, in a sense, the first thing I said. But  
28 where is the irreparable injury? If they're doing all

1 terrible things, you're right. It's being undone a brick at a  
2 time, however you described it. If in six months you win  
3 after a full-blown trial, you can throw off all these people.  
4 Maybe they can do an enormous amount of harm in six months, I  
5 don't know.

6 THE DEPUTY: Order in the court.

7 THE COURT: At least you've got a bunch of  
8 witnesses.

9 MR. SIEGEL: That was -- I didn't plan that.

10 THE COURT: Would have been good if you had. It was  
11 pretty good.

12 MR. SIEGEL: I was going to get to what our  
13 fall-back position here, bottom line position.

14 And that is we would ask the Court to freeze the  
15 status quo on the board of directors. We're now up to 19. We  
16 don't want to go to 25 or 28. And that is that brick at a  
17 time. And you know the reason that it's hard to undue is  
18 this: We're talking about an organization which in its whole  
19 history has been poor, financially poor. And we are hoping,  
20 my clients are hoping, to get it back to where we think it  
21 should be and restore democratic management and so on. We  
22 don't want to ruin the organization in the process, don't want  
23 to bankrupt the organization in the process. So we're  
24 concerned about the current board hiring people. They've  
25 moved the national headquarters from Berkeley, where they  
26 bought a building to house the national headquarters, to  
27 Washington. We're worried about. Okay. They're going to  
28 enter into lease agreements, might buy a piece of property in

1 Washington. Those are the sorts of things.

2           If we win the case, and I'm confident we will win  
3 the case, we re-assume authority over the board of directors,  
4 then we're faced with all the situations where we're waisting  
5 the members money by either undoing contracts and having to  
6 pay employees off or trying to break leases that are going to  
7 cost us money to do that. And what's the kind of harm I'm  
8 talking about. Certainly as a legal matter, you can undo a  
9 lease, buy your way out of an employment contract. But these  
10 are financially costly matters to an organization that tries  
11 to put its pennies together to provide a function of providing  
12 a certain kind of radio programs. That's the kind of  
13 irreparable harm. That's not as dramatic as the building  
14 being torn down, but it will harm the organization.

15           THE COURT: I don't have any anything in the record  
16 that remotely supports any of that stuff.

17           MR. RAPAPORT: It's not a negotiation when you come  
18 to a motion for preliminary injunction. You can't move for  
19 one thing and switch gears when it looks like you're not going  
20 to get what you want.

21           I would say also a poor organization doesn't get  
22 rich risking its funding on public broadcasting.

23           THE DEPUTY: Order in the court.

24           MR. RAPAPORT: Your Honor, if I may.

25           If counsel believes that -- Your Honor, if I may.

26           If counsel believes and has evidence in the future  
27 that some particular act is threatened, I have no doubt he'll  
28 try and take appropriate action, but there is no evidence in



1 the record. We're talking about the bogeyman here and I would  
2 request that the motion be denied.

3 I'd also point out that I read the Meyburg case this  
4 morning and I noted that it said that it was a case regarding  
5 contempt of court as well and, really, it had little or  
6 nothing to do with this proceeding.

7 THE COURT: Submitted?

8 MR. RAPAPORT: Yes, Your Honor. Submitted.

9 THE COURT: Okay. I'm not persuaded that this is an  
10 appropriate case for the issuance of a preliminary injunction.  
11 So the tentative ruling will become the order of the Court.

12 I think you've prepared an order, Mr. Rapaport.

13 MR. RAPAPORT: I have a clean one. It's identical,  
14 without the proposed part.

15 MR. SIEGEL: Approved as to form.

16 THE COURT: Well, I'm sure we'll see one another  
17 again. Away you go.

18 MR. SIEGEL: Thank you, Your Honor.

19 MR. RAPAPORT: Thank you, Your Honor.

20 (Proceedings were concluded.)

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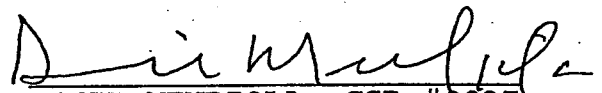
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1 STATE OF CALIFORNIA )  
2 COUNTY OF ALAMEDA )

3  
4 I, ANNIE T. MENDIOLA, CSR No. 9837, do hereby  
5 certify that I am an Official Court Reporter of the Superior  
6 Court of the State of California, and that as such I reported  
7 the proceedings had in the above-entitled matter at the time  
8 and place set forth herein;

9 That my stenographic notes were thereafter  
10 transcribed into typewriting under my direction; and that the  
11 forgoing pages constitutes a full, true and correct  
12 transcription of my said notes.

13  
14  
15   
16 ANNIE MENDIOLA, CSR #9837

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18 Dated: July 5, 2000

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