



Court of Appeals Affidavit Order
Defendant

July 26, 1917

Masses Publishing Co. v. Patten

Str:

You will please take notice that a
of which the within is a copy, was this day
duly entered in the within-entitled action, in
the office of the Clerk of the

Dated, N. Y., , 19

Yours, etc.,

U. S. Attorney.
Attorney for Defendant.

To

Attorney for

(ORIGINAL)

E 14-25

~~Circuit Court~~
~~District Court,~~
~~Second Circuit~~
SOUTHERN DISTRICT OF NEW YORK

MASSIS PUBLISHING COMPANY

PATTEN, Postmaster of
the City of New York.

AFFIDAVIT AND ORDER to show
Cause, against Stay of Impound-
ment, pending appeal: with
supporting & opposing Affidavits

FRANCIS G. CAFFEY,

United States Attorney.
Attorney for Deft.

Due service of a copy of the within is hereby
admitted.

NEW YORK,

July 27

, 1917

Gilbert E. Roe

Solicitor Attorney for Complain

To

Gilbert E. Roe, Esq.
Solicitor Attorney for Complain

See memo. 8/4/17
C. H. N. C. P.

US Circuit Court of Appeals:

Masses Publishing Co. v

T. G. Patterson, Postmaster City of NY

State of Vt

County of Windsor

W. H. Samar being duly sworn says that he is Solicitor for the Post Office Department; deponent has read the affidavit of Merrill Rogers verified the 31st day of July 1917, submitted in opposition to this motion and denies that Mr. Rogers ever offered to strike from the August issue of The Masses any matter which deponent or the Postmaster General might hold to be objectionable.

Deponent did decline to specify to Mr. Rogers the particular portions of said issue to which objection was taken but explained to him at the time that in view of the possibility of indictment ~~by~~ under the penal sections of the Espionage Act such action by deponent would embarrass the Dept of Justice should indictments be thereafter found; further that there was no authority of law for the Post Office Dept or the Solicitor thereof to censor matter before publication but it was the duty of the Dept. ^{and the Postal Service} under the law to decline to transmit non-mailable matter presented for mailing or which is found in the mails.

Sworn to before me this
nd day of August, 1917.

Ida P. Calcagni,
Notary Public.

W. H. Samar

UNITED STATES CIRCUIT COURT OF APPEALS.
FOR THE SECOND CIRCUIT.

- - - - - X
MASSES PUBLISHING COMPANY, :
Complainant Respondent, :
-against- :
T. G. PATTEN, Postmaster of the City: :
of New York, Defendant Appellant. :
- - - - - X

State of New York,)
County of New York,) ss:
Southern District of New York.)

FREDERICK G. MULKER, being duly sworn, deposes and says that he is Superintendent of Second Class Matter in the Post Office at New York, N. Y. That between the 13th and 16th days of July, 1917, deponent talked over the telephone with a person who described himself as Merrill Rogers, Business Manager of Masses Publishing Company. Mr. Rogers in this telephone conversation stated that a motion had been made to enjoin the Postmaster from treating "The Masses" as non-mailable matter within the meaning of the Espionage Act, but that he desired in case the motion was determined favorably to the Masses Publishing Company, that the Postmaster should not forward the approximately two thousand copies of the August issue of "The Masses" which he was holding, but should permit the publishers to withdraw them from the Post Office, as he had made other arrangements.

Deponent stated to Mr. Rogers that the Postal Laws and Regulations required that matter which is non-mailable under the Act of June 15, 1917 shall be disposed of as the Solicitor of the Post Office Department shall direct. Thereafter, and on or about the 26th day of July, 1917, a letter was received by Mr. Patten, the

Postmaster, a copy of which is hereto annexed.

Sworn to before me this

27th day of July, 1917.

Frederick G. Mueller

Carl Brecher

NOTARY PUBLIC BRONX CO. NO. 72
CERTIFICATE FILED IN N. Y. CO. NO. 477
REGISTERS NO. BRONX CO. NO. 969
REGISTERS NO. N. Y. CO. NO. 9041
MY COMMISSION EXPIRES MAR. 30, 1919

The

M A S S E S

THE MASSES PUBLISHING COMPANY, INC.

New York.

34 Union Square East

July Twenty-five
1917

Thomas G. Patten, Postmaster,
Post Office,
N. Y.

Dear Mr. Patten:

In view of the recent decision handed down by Judge Hand, requiring you to allow the August issue of THE MASSES to go through the United States mails, I ask you instead of releasing these shipments which you have on hand, to hold them until such time as I can send a truck for them. It is so late in the month that those particular shipments will be useless and I must have the copies to fill my subscription mail. If you will give directions to Mr. Mulker in the Assistant Postmaster's office, I will get in touch with him later and arrange details.

Thanking you for the courtesy, I am,

Very truly yours,

Merrill Rogers,

Business Manager.

MR:JAE
ES&AU
12646

Pol 1 UNITED STATES CIRCUIT COURT OF APPEALS ,

FOR THE SECOND CIRCUIT.

THE MASSES PUBLISHING COMPANY,
Complainant-Respondent,

against

T. G. PATTEN, Postmaster of the
City of New York,
Defendant-Appellant.

State of New York,)
) ss:
2 County of New York,)

GILBERT E. ROE, being duly sworn

deposes and says that he is the attorney for the complainant
in the above entitled action, and has appeared in all proceed-
ings in this Court and in the District Court, for said com-
plainant. That shortly after the entry of the injunction
order herein by Judge Hand, from which defendant has given
notice of appeal, deponent was advised by Mr Barnes, that de-
fendant might and probably would appeal from said order.

3 Thereupon deponent offered to stipulate and sent to Mr Barnes,
and the defendant, a writing to the effect that if defendant
desired to prosecute his appeal, deponent would waive any
point that might be made against the hearing of said appeal
by the Circuit Court of Appeals, arising out of the fact
that the August issue of "THE MASSES" had, pursuant to the
order of July 28th, been permitted to be transmitted through
the mail, and deponent is authorized on behalf of the com-
plainant, to make said stipulation and will make the same
in case the stay herein asked for is refused. This will
enable the defendant and the postal authorities to have a
construction of the Act from the Circuit Court of Appeals or

from the Supreme Court, if an appeal thereto is taken and entertained, of the recent statute called the Espionage Act. If, on the other hand, the stay asked for is granted, the case will become a moot case before it can be heard in the United States Circuit Court of Appeals, so far as the complainant and appellee is concerned, since long before that time the August 1917 issue of "THE MASSES", now held in the Post Office contrary to said order of July 26th, 1917, will have become entirely useless, and the question of complainant's right to have the same transmitted through the mails will have become wholly a moot question, and even though the complainant finally succeeded in the litigation he could not be benefited in the least. Under these circumstances and for the reasons stated in the affidavit of Merrill Rogers, verified this 31st day of July, 1917, it is respectfully submitted that the motion should be denied and the temporary stay vacated.

Subscribed and sworn to before me
this 31st day of July, 1917.

John W. Scott *Gilbert E. Ror*

NOTARY PUBLIC, KINGS CO. NO. 405
KINGS CO. REG. NO. 9165
CERT. FILED IN N. Y. COUNTY NO. 436
N. Y. COUNTY REG. NO. 9358

UNITED STATES CIRCUIT COURT OF APPEALS,
FOR THE SECOND CIRCUIT.

THE MASSES PUBLISHING COMPANY,
Complainant,
Respondent,

against

T. G. PATTEN, Postmaster of the
City of New York,
Defendant,
Appellant.

State of New York,)
) ss:
County of New York,)

MERRILL ROGERS, being duly sworn on oath, says,
that he is the business manager of the complainant. That
deponent makes this affidavit in opposition to the motion
for a stay in this proceeding, pending the appeal which the
defendant has taken from the injunction order made and
entered herein on July 26, 1917, requiring the defendant to
transmit the August 1917 issue of "THE MASSES" through the
mails. As showing the diligence with which the complainant
has moved in this matter, the following is submitted:

The August 1917 issue of "THE MASSES" was presented
to the New York Post Office for mailing in the usual way, on
or about July 3d, 1917. On or about July 5, 1917, The
Masses Publishing Company received a telephone message from
the Post Office Department, in response to an inquiry address-
ed to it to the effect that "THE MASSES" was being held
awaiting further advices. On the same day The Masses Pub-
lishing Company received the following letter:

"4

"Business Manager,
The Masses,
34 Union Sq.E,
New York, N.Y.

Gentlemen:

Confirming the information telephoned to you today you are informed that according to advice from the Solicitor for the Post Office Dept. the August 1917 issue of the 'Masses' is non-mailable under the act of June 15th, 1917.

Very respectfully,

T.G. Patten,
Per John F. Murphy,
Asst. Post Master."

On July 6, 1917, Business Manager of The Masses

"5

Publishing Company went to Washington and interviewed Mr Lamar, Solicitor for U. S. Post Office, who refused to state what provision of the law it was claimed the August issue of "THE MASSES" violated, or what particular portions of the magazine were objected to. Deponent at that time offered to strike out from said magazine any matter which the

Solicitor for the Post office Department might hold to be objectionable. The Solicitor refused to specify anything.

Deponent then returned from Washington to New York, conferred with the owners of "THE MASSES" and on July 9th, 1917, re-

"6

tained counsel. On July 12th The Masses Publishing Company through its counsel filed a Bill in Equity in the United States District Court, for the Southern District of New York to enjoin the Postmaster from excluding the magazine from the mails, and prepared the necessary affidavits and made a motion returnable before United States District Judge Learned Hand, who was then hearing motions on July 16th, for a temporary injunction. On July 16th, defendant appeared by Assistant U. S. District Attorney Mr Barnes, who secured an adjournment to July 21st. The matter was argued all day on July 21st, and on July 24th Judge Hand handed down an extended opinion

"7 sustaining "THE MASSES" on all points, and directing the issuance of the injunctional order. On July 25th the injunctional order was served with notice for settlement on July 26th, on which latter date the order was duly entered. On July 26th the present stay was granted, and the order to show cause here under consideration was signed.

Deponent respectfully shows that to continue the stay asked for, means

"8 FIRST: The entire loss of so much of the August 1917 issue of "THE MASSES" which is circulated through the mails. That is substantially one-half of the total circulation of The Masses Publishing Company, which is about twenty-five thousand monthly. Of course if this issue of "THE MASSES" is held until an appeal can be decided, it is valueless, and, moreover, the dissatisfaction of the subscribers in not receiving the magazine, and the violation of the advertising contracts which is involved in the failure to have the issue delivered, as agreed, will work irreparable injury. The advertising contracts of The Masses Publishing Company amount to several hundred dollars per month and constitute a large part of the income of The Masses Publishing Company, and its business will be substantially broken up and destroyed by withholding this issue from the mails. The issuance of the stay asked for also deprives The Masses Publishing Company of all benefit of the legal proceeding that it has taken, and the decision rendered in its favor by the Court after the most careful and painstaking argument and consideration. In employing counsel, bringing the action, preparing the necessary affidavits, and in other ways, The Masses Publishing Company has incurred and paid hundreds of

"9

"10 dollars in the legal proceedings thus far taken, all of which goes for nothing if the stay is granted. It is an entirely proceeding useless/xxxxxx to drag The Masses Publishing Company into the Circuit Court of Appeals if this stay is granted on this appeal, for long before the appeal can be heard, all injury that the Post office Department can do to The Masses Publishing Company, will have been done.

SECOND: Another hardship that will be imposed upon the Masses Publishing Company, if this stay is granted, arises from the fact that it will be unable to get out the subsequent or other numbers of its magazine with any assurance that the magazine can be mailed. The next issue may and doubtless will be suppressed by the Post Office Department, no matter what it contains, for the attitude of the Post office Department in refusing to specify anything objectionable before the suppression of the August issue, and in virtually objecting to the entire magazine when it came into the Court, makes it very probable that the next and subsequent issues will all be suppressed. Complainant's only remedy is to start a suit in equity and apply to the Court, as it did in the case of the August issue. If, then, a stay is to be granted in each case, as would probably follow from the precedent established in granting it in the first case, the complainant is without any remedy in the Courts at all.

On the other hand, the decision of the United States District Court for the Southern District of New York, rendered after the most careful consideration, is to the effect that there was nothing in the August 1917 issue of "THE MASSES", which violated the law. It is the law of this case and must remain so, at least until reversed, that the August 1917 issue of "THE MASSES" is a legal publication, and

"13

there can be no force in the contention that the public will be injured by its distribution through the mails. Moreover, "THE MASSES" is being distributed on the newsstands and freely sold, and there is no suggestion that it forms the basis for any sort of prosecution. The use of the mails, therefore, for distributing the magazine, cannot possibly injure the public, while the refusal of the mails to the complainant will, as above pointed out, work irreparable injury. Moreover, the Post Office authorities have given it out that they expect to move against the suppressed

"14

publications to deprive them of their second-class mail privileges, on the ground that they are not regularly published so as to entitle them to the privileges of second-class mail, and in this way also The Masses Publishing Company can be wholly ruined, even if it should attempt to get out another and subsequent issues if the stay asked for is granted. The refusal of the Post Office Department through the Solicitor, to specify any portion of "THE MASSES" as objectionable, ought, as deponent is informed and believes, deprive defendant of any standing in a court of

"15

equity. The Masses Publishing Company simply desired to obey the law. It was ready to accept whatever the Post Office might say was objectionable, rather than to be excluded from the mails, even though it was confident that such matter was not objectionable. It was not disputed at the argument, and will not be disputed here, that such offer was made to the Solicitor of the Post Office Department by The Masses Publishing Company, and was refused by it.

The required postage on the August 1917 issue of "THE MASSES" was duly paid to the Post Office Department,

"16

New York City, when the issue was presented for mailing, and is still retained by the said defendant.

For the foregoing reasons it is prayed that the stay heretofore granted may be vacated and that the motion for a stay pending the appeal be denied.

Subscribed and sworn to before
me this 31st day of July, 1917.

John M. Scott

Meill Rogers

NOTARY PUBLIC, KINGS CO. No. 405
KINGS CO. REG. No. 9165
CERT. FILED IN N. Y. COUNTY No. 435
N. Y. COUNTY REG. No. 9358

UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE SECOND CIRCUIT.

-----X
MASSES PUBLISHING COMPANY,
Complainant Respondent,

-vs- 45

T. G. PATTEN, Postmaster of the
City of New York,
Defendant Appellant.
-----X

ORDER TO SHOW CAUSE.

On reading and filing the annexed affidavits of Earl B. Barnes, verified the 25th day of July, 1917, and William J. Etgen, verified the 26th day of July, 1917, and it appearing to me that an interlocutory decree for an injunction pendente lite has been granted in the above entitled action and that an appeal therefrom has been duly taken to the Circuit Court of Appeals for the Second Circuit, and that sufficient cause exists for the granting of a stay pending determination of said appeal, NOW, on motion of Francis G. Caffey, United States Attorney for the Southern District of New York, it is hereby

ORDERED that the complainant respondent herein show cause, if any it have, before the undersigned, one of the Judges of the Circuit Court of Appeals for the Second Circuit at the U. S. Court and P. O. Building, in the village of Windsor, State of Vermont

on the 2nd day of August 1917 at 11 —
o'clock in the fore noon or as soon thereafter as
counsel can be heard, why an order should not issue herein

staying any action under and pursuant to the interlocutory
decree herein ^{of} the 26th day of July, 1917,
pending the determination of the appeal therefrom to the
above entitled court.

ORDERED FURTHER that service of this order
and of the affidavits hereto annexed upon the attorney
for the complainant respondent on or before 28th day
of July, 1917, shall be sufficient service, and that com-
pliance with said interlocutory decree be stayed until
further order of this court, or of the undersigned

Dated: Jul 26. 1917 C. M. Haugh
W. C. Judge

DISTRICT COURT OF THE UNITED STATES
SOUTHERN DISTRICT OF NEW YORK.

-----X
MASSES PUBLISHING COMPANY,
Complainant,

-vs-

IN EQUITY
E 14-225.

T. G. PATTEN, Postmaster of the
City of New York,
Defendant.

-----X
CITY OF NEW YORK,)
STATE OF NEW YORK, ; ss:
COUNTY OF NEW YORK,)

EARL B. BARNES, being duly sworn, says that he is an Assistant United States Attorney for the Southern District of New York and has charge of the defense of this case. This action is brought to compel the defendant, Postmaster of the City of New York, to forward through the United States Mails the August 1917 issue of a monthly publication called "The Masses". The bill of complaint herein was filed and served upon the defendant on July 13, 1917 and his time to answer has not yet expired. By order to show cause, dated July 12, 1917, a motion for an injunction pendente lite was brought on for hearing before The Honorable Learned Hand, a Judge of the District Court of the United States for the Southern District of New York, and, on July 21, 1917, argument of said motion was heard by Judge Hand, and on July 24th thereafter an opinion was filed directing that the usual interlocutory decree for an injunction pendente lite be granted. On July 25th the United States Attorney was duly served with a proposed order directing an injunction pendente lite and noticed for settlement for July 26th, 1917 at 10:30 A.M.

The United States Attorney for the Southern District of New York has been instructed by the Attorney General of the United States to take an appeal on behalf of the defendant herein to the Circuit Court of Appeals for the Second Circuit from the order to be entered in accordance with Judge Hand's opinion, and that it is the desire of the Department of Justice that application be made pursuant to Section 129 of the Judicial Code for a stay of said interlocutory decree pending determination of said appeal by said Circuit Court of Appeals.

The grounds upon which a stay, as aforesaid, is requested, are that the defendant in refusing to forward the August 1917 issue of "The Masses" through the United States Mails acted under the directions of the Postmaster General of the United States pursuant to advice to that official from the Attorney General of the United States, the Judge Advocate General of the United States, and the Solicitor for the Post Office Department of the United States that the said issue was non-mailable matter within the meaning of Title XII of the Act Approved June 15, 1917; that certain cartoons and articles in said issue are believed by the Department of Justice to be in violation of Section 3 of Title I of said Act in that they consist of wilfully false statements made with intent to interfere with the operation or success of the military or naval forces of the United States and to promote the success of its enemies, in that they attempt to cause insubordination, disloyalty, and refusal of duty in the military and naval forces of the United States and obstruct the enlistment and recruiting service of the United States to the injury of the service and of the United States; that the effect of the interlocutory decree directed by Judge Hand in this case (unless a stay thereof pending appeal

be obtained) will be to disseminate through the United States Mails literature that the officials of the Post Office Department believe to be unlawful and of a character highly prejudicial to the successful conduct of the present war and injurious to the interests of the whole people of the United States; that unless a stay of said interlocutory decree is granted pending the determination of the appeal to this court, the purpose sought to be accomplished by the institution of this suit will have become effected and the injury to the United States sought to be avoided by the officials of the Post Office Department will have been accomplished even though it should develop that Judge Hand's decision on said motion was in error.

Deponent requests an order directing a stay of the order granting an injunction pending the determina-

UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE SECOND CIRCUIT.

-----X
MASSES PUBLISHING COMPANY,
Complainant Respondent,

-vs-

IN EQUITY
E 14-225.

T. G. PATTEN, Postmaster of the
City of New York,
Defendant Appellant.

-----X
Village
~~CITY~~ OF HANOVER)
COUNTY OF *Grafton*) ss:
STATE OF MASSACHUSETTS,)
New Hampshire

WILLIAM J. ETGEN, being duly sworn, deposes
and says that he is Chief Clerk of the Civil Department
of the United States Attorney's Office for the Southern
District of New York; that he has charge of the dockets
wherein the record is kept in this case; that on the
26th day of July, 1917, an injunction ^{*prudent etc*} was duly
^{*herein*} issued by the Honorable Learned Hand, United States District
Judge for the Southern District of New York; that on
the same day an appeal ^{*therefrom*} was duly taken to the Circuit Court
of Appeals for the Second Circuit.

vorn to before me this)
26th day of July, 1917.)

Wm J. Etgen

Jonathan A. Frost,
Notary Public.