

FCC MAIL SECTION

Before the
Federal Communications Commission
Washington, D.C. 20554

OCT 21 2 57 PM '94

DISPATCHED BY MM Docket No. 93-135

In re Applications of

THE PETROLEUM V.
NASBY CORPORATION

File No. BRH-890601VB

For Renewal of License
of Station WSWR (FM)
Shelby, OhioTHE PETROLEUM V.
NASBY CORPORATIONFile Nos. BTCH-921019HX
and BTCH-921019HYFor Transfer of Control
of Station WSWR (FM)
Shelby, Ohio**Appearances**

Ann C. Farhat, on behalf of The Petroleum V. Nasby Corporation; Norman J. Goldstein, James W. Shook and Y. Paulette Laden, on behalf of the Chief, Mass Media Bureau.

**INITIAL DECISION OF ADMINISTRATIVE LAW JUDGE
EDWARD LUTON**

Issued: October 12, 1994;

Released: October 20, 1994

I. PRELIMINARY STATEMENT

1. This proceeding involves the applications of the Petroleum V. Nasby Corporation (Nasby) for 1) the renewal of license to operate Station WSWR (FM) on Channel 261A at Shelby, Ohio, 2) the transfer of control of Station WSWR (FM). The applications were designated for hearing by the Federal Communications Commission on June 14, 1993 (*Hearing Designation Order and Notice of Opportunity for Hearing for Forfeiture (HDO)*, FCC 93-241, 8 FCC Rcd 4035 (1993); 58 Fed. Reg. 34050 (June 23, 1993)). The issues are:

- (1) To determine the effect of Thomas L. Root's federal and state convictions on the basic qualifications of The Petroleum V. Nasby Corporation.
- (2) To determine, pursuant to Section 310 (d) of the Communications Act of 1934, as amended, and Section 73.3540 of the Commission's Rules, whether Thomas L. Root and Kathy G. Root engaged in the unauthorized transfer of control of The Petroleum V. Nasby Corporation.

(3) To determine, in light of the evidence adduced pursuant to the above issues, whether grant of the renewal application of The Petroleum V. Nasby Corporation will serve the public interest, convenience and necessity.

(4) To determine, in light of the foregoing, whether approval of the pending applications to transfer control of The Petroleum V. Nasby Corporation will serve the public interest, convenience and necessity.

The initial presentation of the evidence with respect to Issue 1 was assigned to the Mass Media Bureau (MMB or Bureau). The burden of proof on all issues rested with Nasby.

II. FINDINGS OF FACT**A.**

2. Nasby is the licensee of Station WSWR(FM). PVN Ex. 1. Thomas L. Root was one of three directors of Nasby and was its corporate secretary from prior to May 1983 until he resigned those positions on March 21, 1990. Jnt. Ex. 1. Root served as general counsel and communications counsel of Nasby from prior to 1983 until his resignation on April 25, 1990, providing services from the law offices he maintained in Washington, D.C. Jnt. Ex. 1, PVN Ex. 2. Root was also a shareholder of Nasby until June 23, 1989, at which time he sold his remaining 15.6% interest to his parents for consideration. Jnt. Ex. 1. Changes in the stock ownership of Nasby reflecting that 1) Root, individually, and as a custodian for the benefit of his minor children, no longer held stock in Nasby, 2) Root's resignations as an officer and director of Nasby (on March 21, 1990), and 3) his resignation as legal counsel for Nasby (on April 25, 1990), were reported to the FCC in an amendment filed on April 27, 1990 to Nasby's 1989 annual ownership report and to Nasby's June 1, 1989 renewal application (File No. BRH-890601VB). Jnt. Ex. 1; MMB Ex. 11, MMB Ex. 12.

3. For a period of time prior to his resignation from positions with Nasby, Thomas L. Root represented applicants for FM construction permits in licensing proceedings before the Federal Communications Commission. Some of the license applicants Root represented were formed by Sunrise Management Services, Inc. ("Sunrise"). On March 21, 1990, a 33 count federal indictment was returned against Root in the United States District Court for the District of Columbia. Root was indicted on four counts in the United States District Court for the Southern District of Illinois on June 21, 1990. The Illinois criminal action was consolidated with the action in the United States District Court for the District of Columbia on September 11, 1990. Stip. at Pp. 1-2; Mass Media Bureau Exhibit (hereinafter "MMB Ex.") 1, MMB Ex. 2.

4. Mr. Root entered a plea agreement in the consolidated federal proceeding and was adjudged guilty on January 17, 1992, of two counts of altering, forging and counterfeiting public records, three counts of wire fraud and one count of transport of stolen monies obtained by fraud. Root's misconduct, which occurred in the context of application licensing proceedings before the Commission, included, *inter alia*, the submission of a counterfeit Federal Aviation Administration "No Hazard" determination in a Commission licensing proceeding in 1988, and the forging, in January 1989, of a counterfeit order of an Administrative Law

Judge of the Commission. The licensing proceedings did not involve Nasby in any way. On January 17, 1992, as a result of the convictions in the consolidated federal proceeding, Root was sentenced to a term of 33 months in federal prison, where he is now serving his sentence. Stip. at p.2; MMB Exs. 1, 2, 3.

5. State court indictments were also returned against Root in North Carolina and Florida in connection with events surrounding the formation of construction permit applicants by Sonrise. On June 4, 1990, three indictments were returned against Root in Nash County in North Carolina. On October 26, 1990, in North Carolina, Thomas L. Root pleaded no contest to 90 counts of selling an unregistered security, 90 counts of failing to register as a securities dealer, and 180 counts of securities fraud in violation of North Carolina statutes, and four counts of conspiracy. The misconduct in question took place as early as 1986. On August 28, 1992, the State of North Carolina entered a Judgment and Commitment for all counts to which Thomas L. Root pled no contest; Root was sentenced to 15 years in prison to be served concurrently with his federal sentence. Stip. at Pp. 2-3; MMB Exs. 4, 5, 6.

6. On August 13, 1990, an indictment was returned against, *inter alia*, Thomas L. Root in Pinellas County of the State of Florida. On January 10, 1991, a superseding indictment was filed against Root in Pinellas County. On June 23, 1992, in Florida, Root pleaded no contest to charges of racketeering, conspiracy to commit racketeering, organized fraud, organized securities fraud, and sale of unregistered securities. The misconduct took place as early as 1986. On June 23, 1992, Root was adjudicated guilty of one count of racketeering, one count of conspiracy to commit racketeering, three counts of organized fraud, one count of organized securities fraud, 20 counts of sale of unregistered securities, and 20 counts of securities fraud. He was sentenced to 15 years in prison to be served concurrently with the North Carolina and the federal charges. Stip. at p. 3; MMB Exs. 7, 8, 9.

7. Director and shareholder meetings of P. V. Nasby were held annually in May. From prior to 1983 until his resignation on October 31, 1988, David L. Williamson was the general manager of Nasby's station. Also, from before 1983, Williamson was one of three Nasby directors, Nasby's president and treasurer, and a Nasby shareholder. He resigned his positions as a director, president and treasurer on March 15, 1989. Williamson relinquished his Nasby stock in May 1989. Petroleum V. Nasby Ex. (hereafter "PVN Ex.") 2. Timothy J. Moore succeeded Williamson as the general manager of WSWR, and as a Nasby director, its president and its treasurer.

8. While holding his corporate offices and prior to his stock divestitures, Thomas L. Root attended corporate meetings of Nasby. PVN Exs. 1-3; Tr. 84. During their respective tenures, Williamson and Moore presided at these meetings. Financial information having to do with station operations was typically made available to shareholders at the meetings and Root was available to answer questions and explain legal issues which may have arisen regarding stock ownership. At the board meetings which followed, the financial status of the station was discussed, Nasby officers were elected, and the salary of the general manager was set. Root attended these meetings and exercised his vote on all matters coming before the board. PVN Ex. 1-2; Tr. 84.

9. Station debt financing would from time to time require the participation of members of Nasby's board of directors. When Moore became Nasby's acting general manager in November 1988, Moore assisted Root, who was an officer and Nasby board member (at a time when Moore had not yet been elected to such positions) in negotiations for station loan refinancing with WSWR's local Shelby, Ohio, bank. PVN Ex. 1. Root, as Nasby's secretary, executed the financing documents in November 1988 on behalf of Nasby and provided his personal guarantee. Moore's predecessor Mr. Williamson also negotiated loan financing with Nasby's bank from time to time and executed loan documents as the president of Nasby which loans also required Williamson's personal guarantee. In August 1988, when the station was experiencing financial difficulties, including a threat of action by the Internal Revenue Service, Mr. Williamson informed Mr. Root; Root, in turn, advanced to Nasby the \$40,000 needed to satisfy the Internal Revenue Service.

10. From before 1983 until November 1988 when David Williamson resigned as the general manager of WSWR, Williamson had sole access to the station's checking accounts. PVN Ex. 2. From November 25, 1988 until September 7, 1993 (when in the course of discovery in this proceeding Moore found that Root's name had not been removed at the time of Root's resignations in March 1990), Root also had bank signature authority. During Moore's entire tenure, Root did not sign any WSWR checks.

11. Williamson testified that during his tenure at WSWR, he exercised complete control over all of the day-to-day operations of the station, with no assistance from the other two Nasby directors, Root and Emma D. Slone. Williamson was solely responsible for all employment policies and practices (hiring, firing and setting of employee salaries), and all station employees reported to Williamson. He also determined the station's format and its programming and its commercial policies. PVN Ex. 2. Like Williamson, Moore testified that during his tenure he, too, exercised complete control over the day-to-day operations of WSWR, including the establishment and implementation of employment policies and practices, programming and commercial policies. PVN Ex. 1; Tr. 58-59.

12. Moore testified that he had no knowledge that Root was under any criminal investigation; nor did Root ever inform him or the other Nasby officers or board members that he (Root) was under investigation by any federal or state authority. PVN Ex. 1. In March 1990 Moore received a letter of resignation from Root which stated that Root was resigning as an officer and director of Nasby. No reasons for Root's resignations were stated in the letter and Moore does not recall speaking with Root at that time to ascertain Root's reasons for resigning his corporate positions.

13. Nasby's renewal application was initially granted by the Commission on April 27, 1990; however, the grant was set aside on May 31, 1990. MMB Ex. 11, p. 25; MMB Ex. 12, p. 28. No specific reason for the return of the application to pending status was stated. *Id.* The renewal application and the transfer applications filed by Nasby on October 19, 1992 were designated for hearing on June 14, 1993 for the resolution of the stated issues. Following receipt of the May 31, 1990 letter from the Commission rescinding the station's license renewal, Moore contacted Root (who no longer served as Nasby's legal counsel) as he was "quite surprised by the letter" which stated no reason for the action taken by the Commission. Root informed

Moore that he had no idea why the Commission rescinded the station's license renewal grant. Root, unsolicited by Moore, did remind Moore in this telephone conversation of the need to file an annual ownership report in June 1990 and Root assisted in the preparation of the report which Moore filed. Nasby had not secured new counsel at this juncture. In subsequently securing new legal counsel, Moore was made aware for the first time of the FCC's concerns involving Root and the potential effect those concerns could have on the station's license renewal.

14. Following his divestiture of stock interests in Nasby, and resignations as an officer and member of Nasby's three-person board, Root did not attend or participate in any way in any corporate meetings of Nasby. Moore testified that since 1990 he has prepared all meeting notices and minutes of Nasby and has otherwise maintained the corporate record book upon receipt of the book from Root following Root's resignation in April 1990 as the station's legal counsel. *Id.*, p. 6. Other than the assistance in the preparation of an annual ownership report filed by Moore on behalf of Nasby in June 1990 shortly following Root's resignation as legal counsel and prior to Nasby's securing new legal counsel, Root has provided no assistance to Nasby. *Id.*, pp. 6-8; Tr. 66-67.

15. Throughout the entire time that Root served as one of three directors of Nasby and as corporate secretary, as well as the time subsequent to his resignations from positions with Nasby and divestiture of his stock interests, Root has not been involved in the day-to-day management, operation or control of Nasby and Station WSWR(FM). PVN Ex. 1, pp. 3-7; PVN Ex. 2, pp. 3-8; PVN Ex. 3, pp. 2-4.

16. Moore (and his predecessor Williamson), would from time to time, consult Root, who served as the station's legal counsel. PVN Ex. 1, pp. 6-7; PVN Ex. 2, pp. 7-8. Root's counsel was sought from time to time for the review of contracts, inquiries regarding Commission matters, including questions relating to contests, lotteries, and political advertising. Root also represented Nasby in connection with the filing of ownership information and applications. PVN Ex. 1, pp. 5-7; PVN Ex. 2, p. 8. Root was relied upon and handled the maintenance of the Nasby corporate book.

B.

17. As of May 29, 1989, Thomas L. Root, individually, owned 120.25 shares of Nasby stock representing 24.5% of the total issued and outstanding stock of the corporation. He also held 50 shares as custodian for his minor children, representing 10% of the total issued and outstanding stock of Nasby. *Stip.* at p. 3.

18. On May 30, 1989, Root acquired another 100 shares, representing 20% of Nasby's total issued and outstanding stock and on May 31, 1989, he transferred the 50 shares held by him as custodian for his minor children to the children as gifts. Thus, as of May 31, 1989, Root owned 220.25 shares of Nasby stock individually. *Stip.* at Pp. 3-4.

19. On June 1, 1989, Root transferred 50 of his own shares to the corporation as treasury shares in return for the forgiveness of a corporate debt which he had assumed. Also on that date, Root transferred 100 Nasby shares to his minor children as gifts. Thus, Root was left with ownership of 70.25 shares, or 15.6% of the total Nasby shares issued and outstanding. On June 23, 1989, Root transferred that remaining stock to his parents. *Stip.* at p. 4.

20. On June 1, 1989, Root's wife, Kathy G. Root, transferred 25 shares of Nasby stock individually owned by her to her minor children as gifts. This left Mrs. Root with a balance of 33 Nasby shares owned individually, representing 7.3% of the issued and outstanding Nasby stock, and 50 shares, or 11.1%, which she held as custodian for her minor children. *Stip.* at p. 4.

21. The foregoing ownership changes were first reported in an April 27, 1990, amendment to Nasby's 1989 annual ownership report and to Nasby's June 1, 1989, renewal application. On October 19, 1992, Nasby filed FCC Form 315, a transfer of control application seeking *nunc pro tunc* approval of the foregoing transactions. *Stip.* at p.4; MMB Ex. 11. Cumulatively, these transactions resulted in more than 50% of the Nasby stock being transferred. On October 19, 1992, Nasby also filed a second FCC Form 315 seeking approval of the proposed transfer of 70.25 shares of Nasby stock from Thomas L. Root's parents to the law firm of Ginsburg, Feldman & Bress. The second application is contingent upon Commission grant of the first application for transfer of control. Ginsburg, Feldman & Bress were attorneys for Thomas L. Root, and the proposed transfer is to cover legal fees. *Stip.* at pp. 4-5; MMB Ex. 12; Tr. 64, 65.

22. Kathy G. Root testified that it had been her intention as well as her husband's to establish a trust for their third child, Travis S.C. Root, who was born in 1987. In December 1986, trusts had been established for the Roots' two other children -- Thomas P.J. Root (age 12) and Leslie J.L. Root (age 9). Kathy G. Root and her husband commenced the establishment of the trust for their son Travis in 1988 in order to "even things up" for all three children. It was Kathy G. Root's understanding from her husband that the stock transactions, which were gifts to their minor children in order to make them all equal in their respective Nasby stock ownership, were structured so as to permit the stock transfers without exceeding the \$10,000 per donee per annum gift tax ceiling, based on the fair market value of Nasby stock at the time of \$400 per share. PVN Ex. 4, p. 1. Kathy G. Root testified that she was not aware of, nor did she focus on, the possibility that the transfers could result in the need to seek prior FCC approval, since in her mind the stock being redistributed for estate planning purposes would not result in anyone holding a majority interest in the station. *Id.*, p. 2. Consequently, Ms. Root never discussed the possible need for filing an application with her husband, whom she assumed would handle whatever paperwork was necessary to effectuate the transfers. *Id.* As President of Nasby, Moore signed stock certificates relating to the ownership changes which are the subject of the first transfer of control application. Root never advised Moore that prior FCC approval should be obtained in connection with the stock transactions. Current Nasby counsel informed Moore in the fall 1992 that the stock transactions may have required prior Commission approval. PVN Ex. 1.

III. CONCLUSIONS OF LAW

A.

23. Evidence of conviction for misconduct constituting a felony is relevant to the Commission's evaluation of an applicant's or licensee's character. *Character Policy Statement*, 5 FCC Rcd. 3252 (1990). That is because such a conviction raises questions about whether an applicant or

licensee has the requisite propensity, or inclination, to obey the law. And in making the necessary determination, mitigating factors are to be taken into account. Thus, in a particular case, the Commission will consider "the willfulness of the misconduct, the frequency of the misconduct, the seriousness of the misconduct, the nature of the participation (if any) of managers or owners, efforts made to remedy the wrong, overall record of compliance with FCC rules and policies, and rehabilitation." The applicant/licensee in this case is Petroleum V. Nasby, and it has neither been convicted of or even accused of criminal conduct of any kind. It is therefore difficult to see how this case is rationally concerned with Nasby's propensity, or inclination, to obey the law. The question arises only because of Nasby's association (an association now plainly unfortunate) with a former principal who, without doubt, violated several significant laws in significant respects. In the presiding officer's view, however, Thomas Root's criminal taint provides no basis for imputing his criminal activities to the innocent Nasby.

24. The Commission has suggested that it is particularly sensitive to a principal's individual criminal acts involving broadcasting or any application before the Commission. In *Chapman Radio and Television, Co.*, 57 fcc 2d 76 (1975), modified on other grounds, 45 R.R.2d 239 (1979), an applicant's principal was not qualified to be a Commission licensee where the principal had been convicted of four felony counts of "conspiring to obstruct, delay, and affect commerce... by extortion and under color of official right." However, the applicant itself was found qualified to be a Commission licensee because the applicant had no reason to doubt the principals' character when he entered the corporation, knew nothing of the principal's subsequent criminal conduct, and the criminal conduct did not involve broadcasting or any application before the Commission. In *Sand e Broadcasting Co., Inc.*, 61 F.C.C. 2d 305(1976), the Commission was faced with a renewal applicant whose application was challenged by a third party. The petitioner provided evidence that a 35% shareholder of the licensee, who also had served as an officer and director, had been convicted on three counts of grand larceny and three bad check charges, resulting in his having received a sentence of from zero to seven years in a state prison. The criminal activities and the principal's ownership in the station ran concurrently; a loan from a separate company, 50% - owned by the principal and which was involved in the criminal conduct, financed the purchase and operation of the station; and, the other one-half owner of the separate company, who remained a 35% shareholder of the licensee, was associated with the principal and the station during the same period of time. On these facts, the Commission declined to order an evidentiary hearing. In the Commission's view, it was significant that no facts showed the principal to have been involved in the day-to-day operations of the radio station. Even more importantly, the principal's acts did not involve broadcasting or any application before the Commission and the principal was removed from the corporation prior to his felony convictions.

25. Certain of Thomas Root's misconduct occurred precisely in the context of broadcast licensing proceedings before the Commission, including the forging of a counterfeit order of an Administrative Law Judge and the submission of a counterfeit Federal Aviation Administration "No Hazard" determination. Those transgressions, however, bore no relation to the applicant/licensee in this case -- P.

V. Nasby -- and were simply a consequence of Root's wholly unrelated representation of various clients in pursuit of his private law practice. Nasby had nothing to do with Root's conduct of his private law practice. In *West Jersey Broadcasting Co.*, 90 F.C.C. 2d 363(1982), an illegal settlement payment was made by an applicant to secure the withdrawal of a competitor. The condemned activity was undertaken by some of the applicant's principals on behalf of, and with the intent to benefit, the applicant itself. Unremarkably, the Review Board found the licensee unqualified to receive a renewal of its license. Further, in rejecting the licensee's request that the license be renewed in the name of a principal who had not been involved in the illegal payoff, the Board observed that the Commission will not "atomize a licensee into its molecular elements for a gratuitous adjudication on the discrete qualifications... of individual shareholders." *West Jersey, supra*, at 371. Read literally, and without a particularized context, the quoted language could mean, as seemingly urged by the Bureau, that in no case does the Commission distinguish between guilty and innocent principals, and it is enough if even one of an applicant's principals is convicted of felonious misconduct. However, *Chapman, supra*, and *Sande, supra*, indicate that that is not the law.

26. Root was a Nasby shareholder, a director, its secretary and Nasby's corporate counsel. In carrying out these roles, he necessarily had some involvement in the ongoing affairs of the corporation. Root reviewed matters as the corporate attorney and was an active board member who voted on all matters coming before the board. He signed loan documents, gave his personal guarantee to a lending source and, on one occasion, advanced Nasby the sum of \$40,000 with which to satisfy an Internal Revenue Service obligation. Contrastingly, however, Root was not involved in the day-to-day operations of the radio station. The management, operation and control of the station rested with Timothy J. Moore, the president of Nasby and its general manager since 1988 (first acting, then permanent), and prior to Moore, David L. Williamson. Furthermore, long prior to his federal convictions in January 1992 and state convictions thereafter, Root was no longer an officer, director and shareholder of Nasby, and had ceased serving as legal counsel. The other Nasby principals had no prior knowledge of the activities which led to Root's convictions. Root did not participate in any corporate meetings of Nasby after his resignations as an officer, director and legal counsel, and divestiture of his stock ownership. He had no further connection or involvement with Nasby, other than assistance with an ownership report due to be filed shortly after Root's resignation as legal counsel and prior to Nasby's having secured new counsel.

27. Root's participation in Nasby was not so pervasive as to implicate the Commission's concern in this case, i.e., Nasby's propensity to obey the law. The criminal activities do not support a denial of Nasby's application for the renewal of its license.

B.

28. Nasby concedes that stock transactions cumulatively involving the transfer of more than 50% of Nasby's issued and outstanding stock took place in May and June 1989. Although Section 310 (d) of the Communications Act, as amended prohibits the transfer of a license except upon

grant of a transfer application by the Commission, Nasby did not seek prior Commission approval for these transactions.

29. Even where an unauthorized transfer of control has occurred, the removal of a license is not always warranted unless the transfer was accompanied by a deliberate attempt to conceal it through misrepresentation. *Deer Lodge Broadcasting, Inc.*, 49 R.R. 2d 1317 (1981); *Stereo Broadcasters, Inc.*, 49 R.R. 2d 1263 (1981); *Silver Star Communications - Albany, Inc.*, 6 FCC Rcd. 6905 (1991). The Nasby transfers took place in 1989 prior to Root's indictments. When Root was first indicted in March 1990, Nasby's pending renewal application was amended and the ownership report submitted with the renewal application was also amended; the amendments set out the ownership changes. Then, when Nasby secured new communications counsel, the cumulative stock transfers were brought directly to the Commission's attention by the filing of the transfer of control application herein.

30. There has been no intentional deception by Nasby. Because Nasby has never attempted to misrepresent or conceal the facts bearing on ownership, the circumstances do not reflect adversely on Nasby's character qualifications so as to warrant denial of license renewal.

31. Nasby's neglect made possible repeated violations of Section 310 (d) of the Communications Act and Section 73.3540 of the Commission's rules. For that serious misconduct, a forfeiture in the amount of \$4,000.00 will be imposed.

ULTIMATE CONCLUSIONS

32. Thomas L. Root's federal and state convictions do not disqualify the innocent Petroleum V. Nasby Corporation.

33. Nasby permitted an unauthorized *de jure* transfer of control to occur, in violation of Section 310 (d) of the Communications Act of 1934, as amended, and Section 73.3540 of the Commission's rules. The imposition of a forfeiture penalty pursuant to Section 503 (b) of the Communications Act is warranted.

34. In light of the evidence adduced, Nasby remains qualified to be a Commission licensee.

Accordingly, IT IS ORDERED that Nasby's application for renewal of its license, and 2) applications for transfer of control, are granted. IT IS ALSO ORDERED that the Petroleum V. Nasby Corporation forfeit to the United States the sum of \$4,000.00 for violation of Section 310 (d) of the Communications Act.¹

FEDERAL COMMUNICATIONS COMMISSION

Edward Luton
Administrative Law Judge

¹ In the event exceptions are not filed within (30) days after the release of this Supplemental Initial Decision, and the Commission does not review the case on its own motion, this Initial

Decision shall become effective fifty (50) days after its release pursuant to Section 1.276 (d) of the Commissions Rules.