IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEBRASKA

UNITED STATES OF AMERICA, Plaintiff, v. CENTRAL STATES THEATRE CORPORATION; CENTER DRIVE-IN THEATRE COMPANY; and MIDWEST DRIVE-IN THEATRE COMPANY, Defendants, and FRANK D. RUBEL, Additional Defendant.	)	CIVIL ACTION NO. 0117 [Entered February 9, 1961]

FINAL JUDGMENT

Plaintiff, United States of America, having filed its complaint herein on March 30, 1956 and amendments thereto on January 16, 1957; issues having been tried and testimony having been taken; the Court, having filed a memorandum opinion on August 29, 1960, now pursuant thereto makes the following findings of fact and conclusions of law to wit:

FINDINGS OF FACT

I

The defendant, Central States Theatre Corporation, has not had and does not now have a license to do business in Nebraska, but through 1954 and 1955, and thereafter until the time of trial, that corporation, in the way of its managerial services to Omaha Drive-In Theatre, actually was transacting business within the State of Nebraska, which is coterminous with the District of Nebraska.

II

At all times hereinafter mentioned the defendant, Central States Theatre Corporation, actively participated in the management of the theatre known as 76th & West Dodge Drive-In Theatre,

owned by Omaha Drive-In Theatre Company, and the theatre known as Council Bluffs Drive-In Theatre, owned by Midway Drive-In Theatre Company and the managerial services performed by the defendant Frank D. Rubel in connection with those theatres are referable to his employment by Central States Theatre Corporation.

III

In participating in the meeting of February 4, 1955 at the Blackstone Hotel in Omaha, Nebraska and in the events which occurred thereafter incident to that meeting the defendant Frank D. Rubel was acting for the defendant Central States Theatre Corporation and such participation was an aspect of that company's transaction of business in Nebraska.

IV

At the aforesaid meeting of February 4, 1955, which was participated in by Frank D. Rubel for defendant, Central States Theatre Corporation, Bernard Dudgeon, local manager of Omaha Drive-In Theatre Company, operator of 76th & West Dodge Drive-In Theatre, J. Robert Hoff, President of defendant Midwest Drive-In Theatre Company, operator of Airport Drive-In Theatre, and Herman S. Gould, Secretary-Treasurer and managing officer of defendant Center Drive-In Theatre Company, operator of 84th & Center Drive-In Theatre, the participants agreed as follows:

(a) That they would undertake to join in a group advertisement of Drive-In Theatres containing both publicity advancing the claims of such theatres generally, and also individual advertising of each exhibitor concerning its own programs, with the understanding that all cooperating theatres would share ratably in paying the charge for the generalized part of the advertisement, and each theatre would pay the charge for its individual advertising, with the understanding that the total

expense of such advertisement to each theatre should not exceed $120 per week; and it was further agreed that advertising by an individual theatre of first-run pictures or stage attractions should be left entirely to the choice, both in respect of the manner of offering the publicity and on the score of cost, of the exhibiting theatre.

(b) That a fair minimum price for regular individual admissions would be sixty-five cents, with the exception of what were called "Buck Nights," and no exhibitor should conduct a "Buck Night" more frequently than once a week until after September 1st, and that they also agreed that their respective theatres would follow that program respecting admission prices.

(c) That a schedule of refreshment prices was suggested but that no agreement or undertaking was made that any such price schedule would by any operator be put into effect. However, it was generally agreed that the refreshment price schedule theretofore observed by each of the represented theatres was essentially conformable to that schedule, with the reservation of the fact that their respective practices in the quantities of items of refreshment individually sold varied considerably, and that their quoted prices varied accordingly.

(d) That the represented theatres had an economic interest in having all labor contracts in the enterprise within the Omaha area expire at a common date, and that, with a view to bringing about such a practice, no new labor contract should be agreed to for application to any

represented theatre which should extend beyond the end of the 1955 Drive-In Theatre season.

(e) That without formal motions, votes or record, the men attending the meeting agreed that (a) to the extent only that they had reached an agreement, supra, respecting wages to snack bar employees, and ramp boys, newspaper advertising in the Omaha World-Herald, minimum admission prices, with limitation upon the resort to "Buck Nights," and the achievement of a common expiration date of labor contracts; and (b) subject to verification of the details of the points on which they had agreed, their respective theatres would, in their 1955 season then about to open, follow the program thus agreed upon.

While no arrangement was made for any further meeting, the participants in the meeting left it with the impression that they would have such a further meeting at which it was desired that Mr. Ralph Blank or Mr. William Miskell and Mr. Solomon John Francis might be present. The collaboration in the contemplated program of Sky View Drive-In Theatre and Golden Spike Drive-In Theatre was desired, and as the Court believes and finds, was actively to be sought.

(f) The combination or conspiracy is to be regarded as persisting even though the parties to it failed actively to carry it forward to effect.

V

The contention of the defendants that it was further agreed at the meeting that if Ralph Blank and Solomon John Francis, or either of them, refused or failed to adhere to, and conform with the agreement made at the aforesaid meeting, such agreement would

not be regarded as effective at all, is rejected.

VI

Ralph Blank, for Sky View Drive-In Theatre Company, not only did not assent to, but took affirmative action against, the outlined program. Under date of July 8, 1955 he caused his attorney to transmit to the Assistant Attorney General of the United States in charge of the Antitrust Division a complaint about the competitive practices in relation to Sky View Drive-In Theatre, not only of the four theatres represented by the defendants hereto, but also of Golden Spike Drive-In Theatre, in which Solomon John Francis was and is interested. The Department of Justice was thus activated. Shortly a Grand Jury investigation was set on foot, and this litigation was started.

VII

None of the operators of any of the four theatres represented at the meeting of February 4, 1955 erected its admission price structures on the basis of the engagement entered into at that meeting. In reality, each operator pursued essentially the same price policy it followed through 1954. And this is equally applicable not only to the season of 1955 but to each subsequent season.

VIII

Since February 4, 1955 there has been no group advertising in the Omaha World-Herald - or any other newspaper - in behalf of the four theatres represented at the meeting on that date, or any of them. Nor have they, or any of them, observed or attempted to observe, any maximum prescription in reference to weekly advertising expenditures. The provisions reflected in Frank D. Rubel's memorandum in relation to advertising simply have not been observed. And no attempt has been made by or in behalf of any operator of one of those theatres to observe them, or any of them.

IX

The evidence does not warrant or support an informed finding either as to the wages paid by the operators of 76th & West Dodge Drive-In Theatre, the 84th & Center Drive-In Theatre, the Airport Drive-In Theatre, and Council Bluffs Drive-In Theatre, or any of them, in the 1955 season, or thereafter, to snack bar employees, or ramp boys, or as to their respective available menus and unit prices for refreshments. There is some evidence in the record upon both of these points, but not enough to establish a practice on either of them in or at any theatres, or theatre.

X

It is not shown that the labor contracts of any of the theatres have been altered or re-made, or otherwise affected by, or in consequence of, the engagements at the February 4, 1955 meeting. Nor is the status of such contracts, current as of the date of trial, intelligibly established.

XI

Actually, the several understandings, arrived at in the meeting of February 4, 1955, were never carried into practical effect. And that finding is not impaired by the circumstance that the admission price policy followed in 1955, and thereafter, by the four Drive-In Theatres involved, conformed essentially to the agreement of February 4, 1955 upon that feature. It conformed also to the practice respecting admission prices which those theatres had respectively observed through 1954. Even in the matter of admission prices, they took no action by which essential change was brought about.

XII

The Court does not declare or find that, after the meeting of February 4, 1955, the participants in that meeting entered into any supplemental agreement formally abandoning any practical introduction of the engagements they made at the meeting. On the

contrary, by their failure, through inaction, to re-assemble and re-affirm their adherence to the program agreed upon, and thus to get it under way, they suffered it to remain inoperative. In the event, it proved to be abortive.

CONCLUSIONS OF LAW

I

Under the plain language of Title 15, U.S.C., Section 22, the defendant, Central States Theatre Corporation, was properly made a defendant hereto and, once made a defendant, it was amenable under the same section of the Statute to service "in the district of which it is an inhabitant" and was subject to effective service of process in the Southern District of Iowa.

II

Defendant Frank D. Rubel was properly made a defendant herein and properly served herein.

III

It was not necessary that either the defendant Central States Theatre Corporation or the defendant Frank D. Rubel be served with process within this District.

IV

Interstate commerce is involved in the leasing of moving pictures for exhibition in the Omaha area Drive-In Theatres, their transportation to, withdrawal for exhibition from, and return to the Omaha offices of the several motion picture distributors, and their handling in successive transportation into and out from Omaha for numerous exhibitions, while they remain within the reach and control of the distributors' Omaha offices.

V

Among the Drive-In Theatres in the Omaha area, and especially among the four represented at the February 4, 1955 meeting, were two which were located in Iowa. Any movement of pictures from the

Omaha offices of distributors to either of those two theatres, or from either of those two theatres back to such Omaha offices, was openly and directly made in interstate commerce, even though the exhibitors came after the films and returned them to the distributors' office.

VI

If it were granted that the business operations of the Drive-In Theatres in question were wholly local that character would not be decisive in this litigation. Wholly local business restraints can produce the effects condemned by the Sherman Act.

VII

The vital aspects of the agreement reached at the February 4, 1955 meeting were the engagement respecting minimum admission prices, and the program incident to advertising in the Omaha World-Herald. The evidence does not support plaintiff's allegation of the making of an agreement respecting refreshment prices nor plaintiff's allegation that there was an agreement to threaten a boycott of any distributors providing pictures for exhibition in Drive-In Theatres at prices less than those agreed upon. The understandings regarding the weekly wages of snack bar employees, ramp boys and the expiration dates of labor contracts are of remote significance.

VIII

The agreement respecting minimum admission prices and advertising in the Omaha World-Herald was calculated and designed unduly and unreasonably to restrain trade and commerce in the motion picture industry. Its normal and natural effect, if carried into execution, would be to deny both to the potential patrons of Drive-In Theatres in the Omaha area the opportunity to observe moving pictures at Drive-In Theatres at admission prices arrived at in free, unrestrained competition between the exhibitors, and to the distributors in interstate commerce of motion pictures

the benefits of an open, free competitive market in the leasing for exhibition of their pictures, and finally to restrict and diminish the volume of newspaper advertisement, whereby publicity, designed to attract the attention of patrons, would be given to the exhibitors' respective programs. And a contract calculated to effect these results, without more, is by Title 15, U.S.C., Section 1, "declared to be illegal." The illegality is not obviated by the comparative "smallness" of the commerce thus to be affected. Obviously, too, a contract of that character constitutes those who engaged in its formulation a combination and conspiracy in restraint of trade and commerce.

IX

A price fixing contract or combination is illegal per se under the Sherman Act.

X

The activities after the meeting of February 4, 1955 of the participants in it, looking to its effective operation, were few, of brief duration, and narrowly limited in their reach. The admission price policies of those theatres during and since the 1955 season are attributable rather to inaction in persisting in the 1954 price structure than to conformity to the agreement of February 4, 1955. The failure of Solomon John Francis and Ralph Blank to join in the program resolved upon at the meeting very early disclosed both the almost certain practical inoperability of the program, and its probable peril.

XI

It is not necessary in a proceeding by the United States under Title 15, U.S.C., Section 4, to prevent and enjoin the violation of Title 15, U.S.C., Section 1, under an agreement made, or combination or conspiracy erected, in violation of the latter section, that the United States prove, or even plead, either that the contract was actually effective through post agreement

operations to, and did, accomplish its illegal purpose, or that the contracting parties possessed the power to accomplish such purpose, or that an overt act was done in furtherance of the contract. The contract or combination itself supports the proceeding.

XII

On the question as to whether or not injunctive relief should be granted the Court is convinced that it would not be prudent or proper to refuse to grant injunctive relief adequate in its reach to assure obedience by the defendants and each of them to Title 15, U.S.C., Section 1, and that such relief should be granted. As to all of the defendants, they remain in positions in which they are able to, and unless restrained, may be expected to, take active steps to set their program on foot. Their engagement of February 4, 1955 sufficiently reflects their will to do it, if and when they shall suppose they may proceed with impunity. Good reason appears, therefore, to exist for the entry of an injunctive order designed to prevent the further violation of Title 15, U.S.C., Section 1, and a judgment and decree to that end should be made and given herein.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED as follows:

I

The provisions of this Final Judgment applicable to a defendant shall apply also to its or his officers, directors, agents, representatives, and to all persons acting or claiming to act on their behalf and to those persons who at the time of its dissolution were shareholders or stockholders of Midwest Drive-In Theatre Company.

II

Since February 4, 1955, the defendants have been parties to a combination and conspiracy in unreasonable restraint of interstate commerce in the exhibition of motion picture films in violation of Section 1 of the Act of Congress of July 2, 1890, entitled "An Act to protect trade and commerce against unlawful

restraints and monopolies," commonly known as the Sherman Act, as amended.

III

The defendants are each perpetually enjoined from entering into or taking any part in any agreement, understanding, or concert of action with each other or any other person engaged in the exhibition of motion picture films to fix, establish, or maintain prices to be charged for admission to their theatres or amounts to be expended for newspaper advertising for theatres.

IV

For the purpose of securing compliance with this Final Judgment and for no other purpose, any duly authorized representative of the Department of Justice shall upon written request of the Attorney General or the Assistant Attorney General in charge of the Antitrust Division and on reasonable notice to any defendant, made to its or his principal office, and subject to any legally recognized privilege, be permitted:

(a) Access during the office hours of said defendant to all books, ledgers, accounts, correspondence, memoranda and other records and documents in the possession or under the control of said defendant relating to any matters contained in this Final Judgment; and

(b) Subject to the reasonable convenience of said defendant and without restraint or interference from it or him, to interview officers or employees of such defendant, who may have counsel present, regarding such matters; provided, however, that no information obtained by the means provided in this section shall be divulged by the Department of Justice to any person other than a duly authorized representative of such Department except in the course of legal proceedings to which the

United States is a party for the purpose of securing compliance with this Final Judgment or as otherwise required by law.

V

Jurisdiction is retained for the purpose of enabling any of the parties to this Final Judgment to apply to the Court at any time for such further orders and directions as may be necessary or appropriate for the construction or carrying out of this Final Judgment, for the amendment or modification of any of the provisions thereof, for the enforcement of compliance therewith and for the punishment of violations thereof.

VI

The defendants are hereby ordered to pay all costs to be taxed in this case.

s/ John W. Delehant
United States District Judge

Dated: February 9, 1961