Trade Regulation Reporter - Trade Cases (1932 - 1992), United States v. Central States Theatre Corp., Center Drive-In Theatre Co., and Midwest Drive-In Theatre Co., and Frank D. Rubel, additional defendant., U.S. District Court, D. Nebraska, 1961 Trade Cases ¶69,948, (Feb. 9, 1961)

United States v. Central States Theatre Corp., Center Drive-In Theatre Co., and Midwest Drive-In Theatre Co., and Frank D. Rubel, additional defendant.

1961 Trade Cases ¶69,948. U.S. District Court, D. Nebraska. Civil No. 0117. Dated February 9, 1961. Rulings in open court on form of decree.

Sherman and Clayton Acts

Justice Department enforcement—Injunctive relief—Terms of decree—Territorial scope—Visitorial powers.—The court refused to restrict the scope of its order to the territory in which the practices complained of had occurred, or to restrict the visitorial powers conferred on the Government (as to these, it noted that should the Government examinations or supervision be considered excessive, the respondent could obtain relief from the court if appropriate).

For the plaintiff: Earl A, Jinkinson, Francis C. Hoyt and Joseph E. Paige, Attorneys, Department of justice, Chicago, ill., and William C. Spire, U. S. Attorney, Omaha, Neb.

For the defendants: Yale C. Holland and Clarence E. Heaney of Kennedy, Holland, DeLacy & Svoboda; Yale Richards, for Midwest Drive-In Theatre Co., all of Omaha, Neb.

DELEHANT, District Judge (Retired, serving by assignment) [*In full text*]: I ask all of you to believe that I have considered very carefully, and repeatedly, and with thorough sympathy for the position of the defendants, the controversy which is urged before me this morning. It is correct to say, as has been said, that we have already had one rather informal hearing upon the form and content of the decree to be entered in this case, and that the Court indicated preliminary viewpoints touching those subjects, and recommitted the preparation of a decree to counsel for the Government. In accordance with that recommitment some weeks ago, a form of judgment was transmitted which I immediately studied and to which I was promptly alerted to the possibility of the tendering of objection. I know quite well that counsel have among themselves undertaken, and I am sure in good faith on both sides, to arrive at a practical working judgment or decree. I take it that the Government wants what, without cynicism, I shall characterize as all it may reasonably get in the way of a decree, and yet I have no thought that it is consciously arbitrary in its demands. I take it, also, that the defendants should be very pleased to reach a point where they might appropriately consider that there was an end to this litigation. To that end, the defendants probably, and I believe sincerely, would be willing to accept, though somewhat reluctantly, a decree with which, as Mr. Holland rather graphically puts it, they could live, and do that with the abandonment of an appeal. The Court may not tailor its decree to the desire that there be no appeal. Perhaps that is not an inappropriate desire, and yet, it is a consideration which the Court may not properly entertain on an occasion of this character. If there should be an appeal, it should be taken. If the Court now is in, or in the actual entry of this decree should fall into, error, then the Trial Court should be reversed. Reversals are an occupational hazard of the job that a Judge assumes when he accepts appointment to a position of this character, and he should not feel too delicate about them because they are as inevitable as death and taxes, and I know of no one who has avoided or evaded them. Certainly, I have not.

[*Territorial Restrictions*]

There are two principal features to which in the now tendered form of decree exception is taken, and a very respected and lawyer-like suggestion made that there should be modification. One of these has to do with the territorial latitude of the proposed decree. And it seems to lie in this, that whereas the proofs here deal with what the Court has found to be a violation of the Sherman Act occurring, within what the Government has been

pleased to characterize and define as the Omaha area, the decree applies to the operations of the several defendants wherever they may be conducted. Now it does appear that two of these theatres are conducted by people who, I believe, are entirely engaged in the management of those theatres within the so-called Omaha area. One other is, as Mr. Holland has suggested this morning, conducted by a corporation which has a theatre operation elsewhere in Nebraska, and as Mr. Holland says, another in Texas, although the record, if not silent on that point, is not very eloquent about it. I confess I am not definitely aware of the Texas operation of Mr. Gould's company. I don't say that there is nothing on the subject in the record for I have had no opportunity to search the record again upon that point. As to Central States it does rather clearly appear here that it is engaged in the management and operation, or both, of theatres in both Iowa and Nebraska other than and beyond those located within the so-called Omaha area. So, the proposed decree contemplates injunctive action binding upon the defendants, or some of them, and potentially of course upon all of them, without limitation to the Omaha territory within which the proofs were completely tendered. I have not believed and do not believe that that is a real objection to the decree as submitted. It is, indeed, a matter which the Court might consider in territorially limiting the scope of the decree, but I do not believe that it is a mandatory limitation, and I consider that in this instance it is entirely appropriate that the decree in its operation be not limited thus territorially to the so-called Omaha area.

To that extent, therefore, I overrule the objections which, although not formally made here, are tendered very competently informally before the Court.

[*Visitorial Rights*]

The second, and I think equally urged point, possibly the more seriously urged point, has to do with the so-called visitation clause which is IV of the proposed decree. It has, of course, to be read in association with the shorter paragraph appearing as V because the reservation of the jurisdiction of the Court over the case is for protective purposes on all hands. It is there as much to protect the defendants against unwarranted oppression as it is to protect the Government against potential frustration of the decree I refer now to paragraph V.

I have repeatedly examined section IV, and while I am not without sympathy with the position which the defendants take, I do not feel disposed to acquiece in it. I do not consider that the visitorial rights therein outlined are calculated to be oppressive. I assume, in entering any decree that the Government will not administer it after the fashion of a witch hunt. If it does, then although it is the Government that is acting, the Government is not above the power of the Court to intercept it in its action; and if demands be made by the Government in furtherance of the visitorial authority or if an effort be made without formal demand oppressively to intrude into the affairs of the defendants, the defendants are not without resources. They may, with very considerable punctuality, apply to this Court for interceptive orders, and if they have ground for them, they will get them. They do not have to submit to Governmental tyranny. I believe that a reasonable right of observation of the affairs of a defendant which has encountered adverse results in litigation of this character is not intolerable and is actually to he expected, and I proceed upon the assumption that the Government of the United States in the enjoyment of the rights thus granted is not going to be irresponsible.

Therefore, I allow paragraph IV to remain. And broadly, I deny the objections to the form of judgment submitted and grant the motion for the entry of judgment hut with these modifications, which I shall acknowledge as being in the nature of the fruits of a “fly-speck” hunt and perhaps something reflecting no credit on the breadth of vision of the judge who offers them. They have to do pretty largely with grammatical conceptions in which I freely acknowledge I may be mistaken. I shall cite them and at the conclusion of the references, I shall inquire of counsel for the Government whether it desires to have me make the alterations in the form submitted or desires to the contrary to submit a completely new form.

(a) On page one, in the fourth line, strike out the word “and” and place a comma after the word “court.”

(b) On page three, in the seventh line, strike out the word “to” and for it substitute the word “of.”

(c) On page four, in the second line of the page, strike out the final letter of the word “theatres,” so that the reference will be to “theatre season” instead of “theatres season.”

(d) In subsection (e) and in the seventh line thereof substitute the word “resort” for the word “report” which I think involves the correction of a typographical error, and in the final line of subsection (e) strike out the last four words and rephrase them so that they will read, “was actively to be sought.”

(e) On page six, add to the paragraph numbered IX the words “or theatre,” so that the expression will be “at any theatres or theatre.”

(f) On page eight, in line five of paragraph VIII insert between the word “deny” and the word “to” the word “both,” and thereafter strike the word “both,” which is now the first word in the seventh line of that paragraph.

(g) On page ten, in paragraph numbered XII, and in the tenth line thereof, strike the word “might,” being the second from the last word, and substitute for it the word “may.”

Those are all of the modifications that occur to me and they have nothing to do with any legal matter. They are purely constructional items.

I now inquire of counsel whether he would prefer to recast the instrument or to have me make the corrections in ink and use the form that is submitted.

Mr. Hoyt: I think corrections in ink would be satisfactory.

By the Court: Does counsel for the defendants have any objections to that?

I should be glad to do it, but before I would presume to do it, I wanted to out line what I had in mind, and I do it with a rather frank apology. Yet there are some phrases that I think could be made a little bit better.

Very well. The Court will be in recess subject to call.