IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF TENNESSEE
NORTHERN DIVISION

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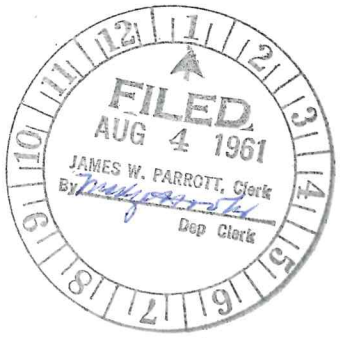

JOHN L. LEWIS and JOSEPHINE ROCHE, as Trustees of the UNITED MINE WORKERS OF AMERICA WELFARE AND RETIREMENT FUND, and HENRY G. SCHMIDT, Trustee,
Plaintiffs,

v.

JAMES M. PENNINGTON, RALPH E. PHILLIPS and BURSE PHILLIPS, individually and trading as PHILLIPS BROTHERS COAL COMPANY,
Defendants,

v.

UNITED MINE WORKERS OF AMERICA,
Cross-Defendant.

Civil Action No. 3431

OPINION RENDERED FROM THE BENCH

July 31, 1961

This case was tried to a jury and the Court and consumed approximately five weeks of trial time. The jury returned a verdict on May 19, 1961 in response to two verdict forms, the pertinent parts of which read as follows:

"1. Did the cross-defendant, U.M.W., engage in a combination or conspiracy so as to unreasonably

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restrain trade or monopolize or attempt to monopolize commerce among the several states outside and beyond the exemption created by the anit-trust statutes to a labor organization as alleged by cross-plaintiff, Phillips Brothers Coal Company?"

The jury answered "yes".

"2. If your answer to Question 1 is Yes, was cross-plaintiff, Phillips Brothers Coal Company, damaged in its business or property as a direct and proximate result of the conspiracy?"

The jury answered "yes".

"3. We find in favor of cross-plaintiff, Phillips Brothers Coal Company, and fix its damages in the amount of $90,000.00."

The other verdict form is as follows:

"1. Did the Trustees engage in a combination or conspiracy so as to unreasonably restrain trade or monopolize commerce among the several states, as alleged by the original defendant, Phillips Brothers Coal Company?"

The jury answered "yes".

For convenience the International Union will be referred to as U.M.W.; James M. Pennington, et al, as Phillips Brothers; and Messrs. John L. Lewis, Henry G. Schmidt and Miss Josephine Roche as Trustees.

U.M.W. has moved the Court to set aside the verdict

of the jury and render a judgment in its favor, and has urged in its support three separate grounds which, for practical purposes, raise the question of the sufficiency of the evidence to support the verdict of the jury.

U.M.W., in the alternative, has moved for a new trial and urged in its support 68 separate grounds. Several of the grounds set forth in the alternative motion are directed to the question of the sufficiency of the evidence.

The effect of the finding of the jury is that the U.M.W. conspired with large coal companies to stabilize prices in the coal industry around the year 1950 in violation of Sections 1 and 2 of the Sherman Anti-Trust Laws.

Some of the circumstances relied upon by Phillips Brothers to support their contention that the parties combined and conspired to fix the cost of production of coal so high that the small operators could not operate successfully are: That the large operators and the union agreed to make every effort to put all producers of coal under union contract with the U.M.W. That after 1950 wages were increased without waiting for the previous contract between the union and the operators to expire. That the increases were geared to meet the abilities of the major companies to pay. That the increases were forced on the small companies with knowledge that they could not pay them. That the large coal companies contested controversial provisions in the wage

agreements prior to 1950, for example, those on union security, welfare, days of work, labor costs, rates of pay, while the large operators subsequent to this period permitted the Union to write these provisions into the wage provision contracts without protest. That one purpose of the unlawful agreement between U.M.W. and the large coal operators was to drive Phillips Brothers and other small operators out of business.

It is claimed that the Union was given control of the Welfare Fund; that Union membership clauses in the contract which were legal prior to 1950 continued to be observed by U.M.W. and by the large coal operators; that the Union used its funds to finance some of the major companies; that it purchased stock in one or more coal companies and advanced large sums of money to Mr. Eaton to invest in the West Kentucky Coal Company and accepted stock in that company as a collateral security for such advancements; that the U.M.W. worked hand in hand with this company and other large companies to drive small coal operators out of business.

It is claimed that the Union and the large coal operators knew that the small operators could not pay the wages and royalties stipulated in the wage agreement of 1950 and amended from time to time during the material period involved in this lawsuit.

The question for decision by this Court is whether

there is any evidence to support the verdict of the jury that U.M.W. combined with business groups to restrain trade and monopolize the coal industry in interstate commerce. The preinciple is so well established as not to require citation of authority that it is a violation of the law for a union to combine with employer groups to suppress competition or to monopolize an interstate industry. Allen Bradley Co. v. Local 3, Electrical Workers, 325 U.S. 797 (a case which has been referred to often today in the course of argument); Carpenters v. U. S., 330 U.S. 395.

There is some proof in the record that Union representatives and large coal operator representatives discussed stabilization of prices at one time or another during the critical periods referred to in the cross-claim.

In passing upon a motion of this character, the Court is required to follow certain rules, some of which will be mentioned.

First, a conspiracy may be inferred from things done by the alleged conspirators. Loew's, Inc. v. Cinema Amusements, Inc., 210 F. 2d 86, 93.

The Supreme Court, in discussing the subject of conspiracy, has stated:

> "A conspiracy is to be viewed by the Court as a whole; the integral parts thereof are not to be weeded out and inquired into separately."

U. S. v. Patten, 226 U.S. 525 (This case has also been referred to by counsel during the argument today.)

Second, it is the duty of the Court to take the view of the evidence most favorable to Phillips Brothers and to sustain the verdict if there is substantial evidence to support it. Lavender v. Kurn, 327 U.S. 645; Magnolia Petroleum Co. v. Howard, (C.A. 10), 193 F. 2d 269.

It is rare for a conspiracy to be established by direct evidence. Eastern State Retail Lumber Dealers Assn. v. U.S., 234 U.S. 600.

Conspiracies are ordinarily proved by circumstances. Loew's, Inc. v. Cinema Amusements, Inc., supra, 93.

Third, damages may not be recovered in a conspiracy case unless they are shown **with reasonable certainty to have resulted from the wrongs of the conspirators** but the injured party will not be deprived of damages because of uncertainty as to the amount. Story Parchment Co. v. Patterson Paper Co., 282 U.S. 555.

Fourth: The question of the amount of damages is for the jury provided the injured party has established by the preponderance of the proof with reasonable certainty that he has sustained damages as a direct and proximate result of the wrongful acts of the alleged conspirators.

". . . raising, depressing, fixing, pegging

or stabilizing the price of a commodity in interstate or foreign commerce is illegal per se." U. S. v. Socony-Vacuum Oil Co., 310 U.S. 150.

Fifth: It is not necessary to find specific intent to restrain trade or to build a monopoly in order to find that the anti-trust laws have been violated. It is sufficient that a restraint of trade or monopoly results as a consequence of the wrongs of the alleged conspirators. U. S. v. Patten, supra, 543; U. S. v. Masonite, 316 U.S. 265, 275.

Our Sixth Circuit has stated that the trial judge does not sit as a 13th juror as does the trial judge in the state courts of Tennessee. In discussing this subject, the Court quoted from the case of Tennant v. Peoria & P.U. Ry. Co., 321 U.S. 29, 35, as follows:

"Courts are not free to reweigh the evidence and set aside the jury verdict merely because the jury could have drawn different inferences or conclusions or because judges feel that other results are more reasonable."

Then follows the statement that,

"It would be a usurpation of judicial authority, in the absence of any showing of bias, prejudice, passion, corruption or caprice upon the part of the jury where there is in the record

substantial evidence to support the amount awarded by a jury as damages to the plaintiff, should the trial judge presume to set aside the verdict, or to reduce it, merely because the judge himself would not have awarded so large an amount had the case been tried to him without a jury." Werthan Bag Corp. v. Agnew, 202 F. 2d 119. See Spero-Nelson v. Brown, (C.A. 6), 175 F. 2d 86.

Counsel for Phillips Brothers have reviewed the evidence in their briefs in detail and have undertaken to point out various parts of the evidence which they claim support their theory that a conspiracy was shown.

Counsel for U.M.W. have likewise reviewed the evidence in detail and have pointed out certain portions of the evidence which they claim sustain their contention that the evidence is insufficient to support the charge of conspiracy.

The Court has given careful consideration to these briefs. As stated at the outset of the hearing, the briefs cover some 366 pages. At this point the Court will digress from the main subject to state that although the jury verdict was returned on May 19, 1961, and the last brief was not filed until July 28, 1961, and the case was not set for argument until today, namely, July 31, 1961,

the Court had a purpose in not pushing or prodding the attorneys in the early filing of their briefs. The Court granted numerous extensions of time in which to file the briefs. The purpose was to give counsel plenty of time to prepare thorough briefs, as the Court recognizes that the case presents complex issues of fact and of law.

As previously indicated, the briefs have been given careful consideration. We have heard extended oral arguments and from the record as a whole, the Court is of the opinion, and finds, that there is substantial evidence to support the verdict of the jury in the cross-claim against the U.M.W. and, therefore, overrules the motion of U.M.W. for a judgment notwithstanding the verdict of the jury.

Only brief mention will be made of the U.M.W.'s motion for a new trial because what the Court has previously said is sufficient to dispose of a number of the grounds urged in support of the motion for a new trial.

The first six grounds of this motion again raise the question of the sufficiency of the evidence. Nothing further need be said concerning this question.

Grounds 7 through 61, inclusive, complain of the rulings of the Court on various questions of

evidence. It is the opinion of the Court that it did not commit prejudicial error against the U.M.W. in its rulings on the objections to certain portions of the evidence. We do not believe that it is either proper or necessary at this time to take up separately the various rulings and repeat the reasons given by the Court for its action during the course of the trial. These rulings have been thoroughly discussed by the parties in their briefs and they were thoroughly discussed during the trial.

Ground No. 62 complains of the action of the Court in failing to submit to the jury U.M.W.'s Requests No. 37, 49, 50, 53, 53A, 58 and 63. The Court believes that it charged revised Request No. 53A verbatim. The Court further believes that it gave Requests No. 50 and 53 as supplements to its original charge.

The other charges, Nos. 37 through 63, were charged in substance, except Request No. 58, and as to that request the Court was of the opinion, and is now of the opinion, that it would not have been proper to charge that request.

The Court is of the opinion that Ground No. 63 is without merit and is therefore overruled.

Ground No. 64 is general and does not require a discussion.

Grounds No. 65 and 66 also complain of certain portions of the charge. It is the opinion of the Court that these grounds are without merit and are, therefore, overruled.

Ground No. 67 asserts that the Court erred in permitting the consolidation for trial of the Trustee's action against Phillips Brothers with the cross-action of Phillips Brothers against U.M.W. It is claimed that U.M.W. was improperly joined in the action under Rule 13(h) of the Federal Rules of Civil Procedure. That the original answer raised the defense of the contract being made pursuant to a conspiracy in violation of the anti-trust laws. That a counterclaim was filed against the Trustees and a cross-claim was filed against the U.M.W. That the Court granted the motion for an order under Rule 13(h) to bring the U.M.W. into the case as a cross-defendant. That service was had upon U.M.W. and the Trustees moved to quash the service of process. That amendments and motions to amend the answer, the cross-claim and counterclaim were filed in which the conspiracy was described and set up as a

defense to the original claim of the Trustees. That it was also the basis of the counterclaim against the Trustees and the basis of the cross-claim against the U.M.W. That under these circumstances the Court had no right to allow the case to be continued against U.M.W. after the claim for affirmative relief against the Trustees had been withdrawn. Rule 15(c) of the Federal Rules of Civil Procedure relates amendments back to the date of the original pleading. The motion to quash the service of process was denied.

It is the opinion of this Court that inasmuch as the cross-claim charged U.M.W. with being a co-conspirator in the same conspiracy raised as a matter of defense against the Trustees' claim, the Union was properly brought into the case under Rule 13(h). Lesnik v. Public Industrials Corp., 144 F. 2d 968.

Where there is service of process and where federal jurisdiction is present, the Court may try the ancillary claim regardless of the disposition made of the original claim. Pierce v. Perlite Aggregates, 110 F. Supp. 684; Switzer Bros., Inc. v. Chicago Card Board Co., 252 F. 2d 407. See Emmerich v. May, 130 F. Supp. 426; U. S. v. Milhan, 15 F.R.D. 459.

Rule 13 contemplates bringing in third parties where the subject matter raised is to qualify or defeat

the original claim of the plaintiff against the original defendant. The purpose of the rule is to avoid circuity of action and to dispose of the entire matter at one time. Blair v. Cleveland Twist Drill Co., 197 F. 2d 842.

Rule 20(a) provides:

"All persons may be joined in one action as defendants if there is asserted against them jointly, severally or in the alternative, any right to relief in respect thereof or arising out of the same transaction, occurrence, or series of transactions or occurrences and if any question of law or fact common to all of them will arise in the action."

Rule 21 provides:

"Parties may be dropped or added by order of the Court on motion of any party or of its own initiative at any stage of the action and on such terms as are just."

The purpose of these rules is to require that all disputes relating to the same subject matter be settled in one lawsuit.

As previously indicated, it is the contention of U.M.W. that the dismissal of the counterclaim brought about a dismissal of the cross-claim. This contention seems to run counter to Rule 20(a), which is as follows:

"A plaintiff or defendant need not be interested in obtaining or defending against all of the relief demanded. Judgment may be given for one or more of the plaintiffs, according to their respective rights to relief and against one or more defendants according to their respective liabilities."

Rule 54(b) provides:

"When more than one claim for relief is presented in an action, whether as a claim, or counterclaim, cross-claim, or third-party claim, the Court may direct the entry of a final judgment upon one or more but less than all of the claims only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment. In the absence of such determination and direction, any order or other form of decision, however designated which adjudicates less than all of the claims shall not terminate the action as to any of the claims, and the order or other form of decision is subject to revision at any time before the entry of the judgment adjudicating all of the claims."

Aside from the aforementioned rule, it is the

opinion of the Court that it had the right to treat the cross-claim against the U.M.W. as an original suit. The question of conspiracy was involved in both of the suits. That is, the question was involved in the defense to the claim of the Trustees and it was involved in the claim of Phillips Brothers against U.M.W. It does not seem feasible to this Court to have a five weeks trial in the U.M.W. phase of the case and also a five weeks trial on the Trustees phase of the case when the matter of conspiracy could just as well have been settled in one trial.

Ground No. 68 asserts that there is no material evidence that U.M.W. conspired with each of the coal companies which are alleged to be co-conspirators, and the Court erred in failing to sustain U.M.W.'s motion for a partial directed verdict as to each of the alleged co-conspirators.

It is to be observed that it was not necessary for the proof to show that U.M.W. conspired with all of the coal companies named in the complaint in order for Phillips Brothers to establish a cause of action but only one or more of them. This ground of the motion, in the opinion of the Court, is also without merit.

Mention should be made at this time of the claim of U.M.W. that the Court erred in admitting evidence bearing on the question of conspiracy before the damage period

and subsequent to the damage period. Specific mention should be made of this question because of the repeated insistence of U.M.W. that the Court committed prejudicial error in admitting this character of testimony. The jury was told that such evidence was admitted for whatever bearing, if any, it had on the alleged conspiracy but that it was not admitted as bearing on the question of damages and the jury should not consider it on the question of damages.

It is the opinion of the Court that since a general conspiracy was charged such evidence was clearly competent as bearing on the question of whether a conspiracy existed during the crucial period. Buckeye Powder Co. v. Hazard Powder Co., 205 F. 827, 830; Hillside Amusement Co. v. Warner Bros. Pictures, 7 F.R.D. 260; Wellman v. U. S., (C.A. 6), 227 F. 2d 757; Federal Trade Commission v. Cement Institute, 333 U.S. 683.

For the reasons indicated, the Court is of the opinion and holds that the motion of U.M.W. for a judgment notwithstanding the verdict of the jury and the alternative motion of U.M.W. for a new trial, and all of the grounds urged in support of these motions, are without merit and are therefore overruled.

This brings us to the Trustees' motion to set aside the verdict of the jury and to enter judgment in their

favor for $55,982.62 with interest. The motion is based upon the proposition that the evidence is insufficient in law to sustain the verdict of the jury that the Trustees engaged in the conspiracy charged in the counterclaim.

The overt acts charged against the Trustees are:

(a) The Trustees paid benefits only to members of U.M.W.

(b) The Trustees required the beneficiaries of the trust to picket or perform other acts for the U.M.W. in order to obtain or retain pension benefits, or acquiesced in the doing of these things by the beneficiaries.

(c) The Trustees, as a punitive measure, brought legal actions to recover royalties on coal produced.

(d) The Trustees held out to the men in the industry that the Fund was under Union control.

(e) The Fund, in fact, was under the domination and control of the U.M.W.

The Court charged the jury that these acts standing alone were not sufficient to establish that the Trustees were co-conspirators.

The Court further charged the jury that the acts of individuals, unless the Trustees actually authorized the unlawful acts, if any, or ratified such acts, if any, after actual knowledge thereof, would not bind the Trustees so as to make them parties to the alleged conspiracy.

The Court further charged that the Trustees, in their official capacity, had no legal right to require or not to require the beneficiaries of the Fund to picket on behalf of U.M.W. in labor matters; that the Trustees were legally obligated to collect all monies due the Fund and to use reasonable means to make such collection, including the bringing of suits; that the Fund "was created by a trust instrument contained in the National Bituminous Coal Wage Agreement of 1950 pursuant to Section 302 of the Taft-Hartley Act, and the wording of the trust agreement was in accordance with the requirements of the Taft-Hartley Act. The trust instrument provides for payment of benefits to employees of signatory operators. . . "

Action of a majority of the Trustees is required to bind the Fund. See Van Horn v. Lewis, 79 F. Supp. 541.

In the opinion of the Court there is no substantial evidence to support the verdict of the jury that a majority of the Trustees participated in the alleged conspiracy. There is no evidence that either Miss Josephine Roche or Mr. Henry G. Schmidt or Mr. Charles A. Owen, now deceased, (those parties being the only parties, except Mr. John L. Lewis, who served the trust fund after 1950), had any dealings with large coal operators from which it could be inferred that they agreed,

combined, or conspired to stabilize coal prices in the bituminous coal industry in interstate commerce.

The actions of Mr. Lewis alone without authorization or consent of a majority of the Trustees would not be sufficient, in the opinion of the Court, to bind the Fund or to show that the Trustees conspired with the large coal operators to drive a small operator out of business. If it had been shown that Mr. Lewis controlled the actions of the other Trustees at the time this alleged conspiracy was formed, this might present a different question.

In the opinion of the Court there is no evidence to support the verdict of the jury that Mr. Lewis, for himself and another of the Trustees, entered into the conspiracy so as to bind the Trustees either individually or in their capacity as trustees or to bind the Trust Fund.

The charge that the Trustees were conspirators seems to have been directed at Mr. Lewis. This can very well be understood inasmuch as Mr. Lewis served in a dual capacity. He was president of the U.M.W. during the material period and also chairman of the Fund during this period.

Counsel for Phillips Brothers pointed out in their brief that Mr. Lewis made certain statements in his

testimony given on discovery to the effect that the U.M.W. and some of the large coal operators decided to stabilize prices, but some of his testimony during the trial was not entirely consistent with that testimony. If there is a sound basis for such contention, we do not believe that this is sufficient to sustain the verdict of the jury that the Trustees participated in the conspiracy.

The evidence is reasonably clear that Union membership was not a prerequisite for obtaining benefits from the Fund after 1950. In that connection, it must be recalled that in 1951 the Trustees published a brochure setting forth in detail the requirements of pension benefits, not one of which was Union membership. Trustees Roche, Schmidt and Lewis each testified that benefits from the Fund have been paid to non-Union members as well as to Union members. Such was also the testimony of counsel Mitch.

The evidence is insufficient to show that the Trustees instituted suits for the purpose of eliminating small operators. Trustees Roche and Schmidt testified that the matter of institution of suits was left in the hands of counsel Mitch for the most part.

The evidence is insufficient to show that the Trustees required pensioners to picket for the U.M.W. in order to obtain or retain benefits of the Fund.

The evidence is insufficient to show that the

Trustees held out to industry employees that the Fund was under Union control. The Trustees testified positively that the Union did not dominate or control the Fund. The evidence is insufficient to show the contrary.

It is true that there are some suspicious circumstances in the record not only as to these matters but also as to other charges against the Trustees. However, a juror's verdict cannot be based upon suspicion alone. N.L.R.B. v. Sun Shipbuilding & Dry D. Co., (C.A. 3), 135 F. 2d 15, 31.

Substantial evidence means more than merely the suspicion of the existence of a fact. Hazel-Atlas Glass Co. v. N.L.R.B., (C.A. 4), 127 F. 2d 109, 117.

Having found that there is no substantial evidence to support the verdict of the jury that the Trustees engaged in the conspiracy as charged by Phillips Brothers, it follows as a matter of contract that the Trustees are entitled to recover unpaid royalties due them under the contract signed by Phillips Brothers, but the Trustees are not entitled to recover the royalties that accrued before a majority of the employees of Phillips Brothers became members of the Union. At the time Phillips Brothers signed the National Bituminous Coal Wage Agreement of 1950, the U.M.W. did not represent a majority of their employees and therefore was not the bargaining agent for

the employees. We think that a fair interpretation of the record shows that a majority of the employees of Phillips Brothers joined the Union on April 25, 1955. The Trustees, therefore, are entitled to recover unpaid royalties that accrued after that date. The Court bases this conclusion on the principles announced in the case of International Ladies Garment Workers' Union, AFL-CIO v. N.L.R.B. and Bernhard-Altmann Texas Corporation, U. S. Supreme Court, June 5, 1961.

In view of the foregoing conclusions, it is not necessary for the Court to determine the question of whether the Trustees would be deprived of recovery if there had been evidence to support the verdict of the jury that the Trustees joined in the conspiracy, as charged by Phillips Brothers.

This leaves the final question in the case for decision, which is, the amount of the attorneys' fees to which the attorneys for Phillips Brothers are entitled.

This Court first considered the question of attorneys' fees in a case of this character in New Amusements Corporation v. Knox-Tenn Theatres, Inc., et al, Civil Action No. 3390 on the docket of this court.

The single recovery in that case was $25,000.00. The total hours of work performed by the attorneys who represented plaintiff were 2,533 hours. The amount of trial time was around 195 hours. The fee fixed in that case

was $30,000.00.

The Court next considered attorneys' fees in the case of Volasco Products Company, et al, v. Lloyd A. Fry Roofing Company, Civil Action No. 3525. The total hours of work by plaintiffs' attorneys was approximately 3459 hours. The trial consumed around five calendar weeks. The single recovery was $100,000.00. The attorneys' fees allowed were $60,000.00. These cases are now on appeal in the Sixth Circuit Court of Appeals at Cincinnati.

In the New Amusements Corporation case, supra, the Court said:

"The anti-trust statute, 15 USC, Section 15, requires the Court to fix the reasonable fee, so the Court has a statutory duty to perform in fixing the fee.

"The word 'reasonable' is a variable term in all situations but probably more variable when used in relation to attorneys' fees. Fixing the fees is a matter that addresses itself to the discretion of the trial court, but this means a sound discretion. The amount of the fee should be reasonable and fair to the attorneys who render services and to the litigants who are required to pay the fee.

"The decisions, which have dealt with this

subject, support the assertion that the word 'reasonable' is a variable term because these courts have differed widely in determining what were reasonable attorney's fees in a number of cases in which the attorney's fee question was involved.

"The trial court in one of these cases fixed a fee as high as $225,000, and the upper court reduced that fee to $75,000.

"What is the meaning of that decision? One meaning is obvious, namely, that the trial court had a different view from that of the appellate court.

"In another case the trial court fixed a fee so low that it was tripled in the appellate court. That case also points up the fact that the courts take different views as to what is a reasonable attorney's fee.

"It is obvious that there are not criteria by which trial courts may fix reasonable attorney's fees with mathematical certainty. There are factors which have been alluded to by other courts in suits for treble damages, which should be taken into consideration by the trial court in fixing fees. Brief mention will be made

of these factors.

"(1) Whether the attorneys who asked for the fee had the benefit of a prior judgment in the case in which the fee is to be fixed.

"(2) Standing of counsel at the bar.

"(3) Time and labor spent.

"(4) Magnitude and complexity of the litigation.

"(5) Responsibility undertaken.

"(6) Amount recovered.

"(7) Knowledge of the Court of the case by reasons of conferences, motions, pre-trials and other matters that take place preliminary to the trial on the merits and during the trial.

"Two other factors have been suggested. One, that the Court should find out what plaintiff's counsel is going to be paid, if anything, by his client and add to that a sufficient amount as will make the fee reasonable. Two, what would be a fair fee to plaintiff's attorney should he win the case and should plaintiff alone be required to pay it.

"One of the last named factors is advocated by a District Court Judge in the First Circuit, and the other by a judge in the District of Columbia.

All factors are discussed in the case of Noerr Motor Freight v. Eastern Railroad Presidents Conference, et al, (D.C. E.D. of Pa.), 166 F. Supp. 163.

"A percentage of the single recovery is not a controlling yardstick in fixing fees as determine by the majority of the courts. One line of cases indicates that a percentage of the single damage should be used in fixing the fee; while another line of cases indicates that the single damage and the treble damage should be used in fixing the fee.

"This Court is of the opinion that both sums should be considered, and having done that, it should fix a fair fee for the services rendered.

"In many cases the courts have fixed fees greatly in excess of one third of the single damage recovery. A district judge of the First Circuit discusses some of these cases in the much-referred to case of Cape Cod Food Products v. National Cranberry Association, (D.C., Mass.), 119 F. Supp. 242, 243.

"For example, in Straus v. Victor Talking Machine Co., (2 CA), 297 F. 791, single damages

allowed were $23,894.71; after appeal, attorneys' fees were reduced from $35,000 to $30,000. Rankin Co. v. Associated Bill Posters of U. S., etc., (2 CA), 42 F. 2d 152, single damages slightly over $101,000, counsel fees $50,000. Emich Motor Corp. v. General Motors Corp., (7 CA), 181 F. 2d 70, 73, $60,000 single damages, $40,000 counsel fees.

"There can be added to this list of cases a case from our own Sixth Circuit, namely, Roy W. Darden and Roy Darden Industries, Inc., v. Jesse H. Besser, Besser Manufacturing Co. and Stearnes Mfg. Co., Inc., 257 F. 2d 285, wherein the trial court fixed the fee at $10,000 on a single damage recovery of $15,000, and the appellate court, Judges Martin, McAllister and Miller sitting, held that the trial court had abused its discretion in fixing the fee of $10,000 and raised the fee to $30,000."

The attorneys for Phillips Brothers handled the case in an efficient manner. Mr. John A. Rowntree, the attorney who put in the most time on the case, has had experience in anti-trust cases. He was one of the attorneys in the New Amusements Corporation, supra, case, and also in another anti-trust case pending in the Northeastern Division

of this court but which has been transferred to Knoxville. He has had twenty years or more experience in the practice of law.

Mr. Jerome Templeton, another attorney for plaintiffs, although having had more than twenty years experience as a practitioner, has not had previous experience in anti-trust litigation.

Mr. Claude Robertson, an associate of Mr. Rowntree, had practiced a little in excess of two years at the time of the trial of this case.

The record in this case shows that Mr. Jerome Taylor, associate of Mr. Templeton, performed ten hours of work; Mr. Harley G. Fowler, a partner of Mr. Rowntree, 200 hours; Mr. Templeton 370 hours; Mr. Robertson 1,189 hours, and Mr. Rowntree 2,792 hours, making a total of 4,461 hours. A part of this work was necessarily performed in the defense of the claim of the Trustees against Phillips Brothers.

If the amount of recovery of $90,000.00 by Phillips Brothers and the amount claimed by the Trustees of $56,000.00, in round figures, is worked out on a percentage basis, we would find that approximately 62 per cent of the work performed by counsel was performed in recovering the $90,000.00 in the anti-trust case.

The trial of this case consumed around five calendar

weeks, and a record was made of 3,539 pages of transcript, and 175 exhibits, many of which contained numerous pages.

The attorneys for U.M.W. bring into clear focus the admonition of the appellate court of the Seventh Circuit in the case of Milwaukee Towne Corp. v. Loew's, Inc., 190 F. 2d 561, the pertinent part of which is as follows:

> "And we are disturbed because in our sober judgment this exorbitant allowance, if it should become a precedent, is calculated to bring both the bar and the bench into public disrepute. More than that, the possibility that the anti-trust laws might develop into a racketeering practice should not be enhanced by the allowance of exorbitant and unreasonable attorney fees. It should not be made more profitable than it is for a person to become the victim of a conspiracy in restraint of trade. Already the victim is permitted to use as a yardstick for measuring his damages what he would have gained as a member of or a beneficiary of the conspiracy, and is mandatorily awarded a judgment for three times the amount thus found. Certainly Congress did not intend to impose a further penalty upon the defendants under the guise of 'a reasonable attorney's fee,' and

yet the allowance here is more than 50% of the damages as determined by the court."

Fixing attorneys' fees always presents a difficult question. The Court fixes the attorneys' fees in this case at $55,000.00, believing that this is fair compensation when all factors are considered.

United States District Judge

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