

Mr. Nachman: I don't know whether we will object to this or not, Your Honor. It is a little difficult to tell just what it is and where it came from.

The Court: Well, the handwriting seems to be very legible. What does it purport to be, Mr. Embry?

Mr. Embry: It purports to be a memorandum of his own, Your Honor, compiling the figures with respect to the circulation of the paper in Alabama for the period of time I have asked him about.

[fol. 396] The Court: He made the memorandum himself?

Mr. Embry: Yes, sir.

The Court: I will let it in and give you an exception.

Mr. Nachman: Well, I didn't know whether I was going to object to it or not. Could we find out when and where he made this memorandum and from what records he extracted it from?

The Witness: I extracted these from my own records.

Mr. Nachman: Where did you do it?

The Witness: In New York City.

Mr. Nachman: From the records there. In other words, you made this memorandum in New York City. Is that correct?

The Witness: That's correct, sir.

Mr. Embry: We offer it, Your Honor.

(Yellow sheet of paper dated 1960 containing handwriting and figures offered and received in evidence and identified as Defendants' Exhibit No. 4.)

Direct examination. (Continued)

By Mr. T. Eric Embry:

Q. Now, Mr. Waters, I show you Defendants' Exhibit No. 4 which we have offered and which His Honor has admitted into evidence which is your memorandum containing your figures. In order to ask you a question and whether you need to refer to this or not, I don't know, but if you do you may do so. During 1960 what was the daily circulation by all means, that is to say, by sales of The New York Times Company newspapers to retail dealers,

shipped from New York as you have described and paid for as you have described, to retail dealers done in the same fashion as you have described and by mail subscription. What was the average daily circulation of The New York Times newspaper in 1960?

A. About three hundred ninety daily copies.

[fol. 397] Q. What was the average during 1960 and assume the same facts for which I laid a predicate in my prior question, that is, sales by all methods and means of the Sunday New York Times newspaper in 1960 in Alabama?

A. About twenty-four to twenty-five hundred.

Q. During this same period of time, what was the—

Mr. Nachman: Just a minute. Aren't the records of The New York Times more specific than that? About twenty-four or twenty-five hundred?

Mr. Embry: Well, I asked him for an average.

The Court: Go ahead.

By Mr. T. Eric Embry: (Continuing)

Q. On Sunday—is it different each Sunday? I have asked you for your best average.

A. It differs from day to day.

Q. Is that figure which you have given us in response to that question the best average that you are able to compute with respect to that daily fluctuation?

A. Yes, sir.

Q. I mean, Sunday fluctuation.

A. Sunday fluctuation. Yes, sir.

Q. Now, what was your average daily circulation of The New York Times newspaper in 1960?

A. Do you mean national?

Q. Yes, sir.

A. Over six hundred fifty thousand daily.

Q. What is your average Sunday circulation of The New York Times newspaper nationally during 1960?

A. Over one million three hundred thousand.

Q. Now, Mr. Waters, with respect to the year 1959 I will ask you to tell His Honor whether there is any substantial difference in number in the circulation of the news-

paper in Alabama than that which you have testified to about in 1960?

[fol. 398] A. Very little.

Q. Now, is that true also with respect to the national circulation in 1959? Is there any substantial difference in those figures than that of 1960 in the national figure?

A. The 1960 figures have gone up.

Q. Nationally?

A. Nationally. Yes, sir.

Q. By that may I deduce from what you are saying that the Alabama circulation stayed about the same but the national figures have risen?

A. That is correct, sir.

Q. What change has there been in the national circulation daily of approximately six hundred fifty thousand and the Sunday circulation of one million three hundred thousand in 1960 over what it was in 1959?

A. An increase of about thirty-five thousand Sunday.

Q. Has there been any substantial change in the daily since 1959?

A. That has increased also.

Q. To what extent? Tell us what extent if you know and if you can approximate it in 1959 and '60—

A. About twenty thousand daily.

Q. About twenty daily and about thirty-five Sunday?

A. That's right, sir.

Q. Does the circulation department of The New York Times Company that is under your control and management at the present time own any property, real estate, chattels, personal property of any kind in the State of Alabama or has it during 1959 or 1960?

A. No, sir.

Q. Does the Circulation Department of your newspaper, The New York Times Company, maintain an office in the State of Alabama at the present time or has it at any time from the present date during the year 1960 back through 1959?

A. No, sir.

Q. Are there any residents of the State of Alabama who are employed by the Circulation Department of The New York Times Company?

A. No, sir.

[fol. 399] Q. Has there been at any time from the present date back through the year 1959?

A. No, sir.

Q. Do you have any listings of the circulation department in any directories or telephones or any other mediums such as that in the State of Alabama listing your office in the Circulation Department?

A. No, sir.

Q. Have you had from any time to the present date back through the year 1959?

A. No, sir.

Q. Now, undoubtedly you will be asked questions with reference to this on Cross Examination and so I would like to ask you now do you have and have you compiled for our information—have you compiled for our information the names of those dealers, retail and wholesale dealers, to whom you have sold your products on orders from them sent to your office in New York City as you have testified?

A. Yes, sir.

Q. And to whom you testified you have shipped these papers from New York City?

A. Yes, sir.

Mr. Nachman: We have no objections.

By Mr. T. Eric Embry: (Continuing)

Q. How do you get these papers to the wholesale and retail dealers at the time you testified you shipped them? By what means of transportation is the paper gotten to these people?

A. The paper is dispatched from our New York office to the various terminals and we take advantage of the best transportation facilities available and to get papers down into Alabama we use the regular postal mail service and we also take advantage of rail service in baggage cars and also we ship papers into Alabama from New York by airplane or they transfer in Washington from the earliest possible train out of Washington.

Q. Now, at the time you make use of these means of [fol. 400] transportation, do you ship those newspapers to whomever they are shipped and I will get into that procedure later—do you ship those to them prepaid and do you part with those papers when you place them on the means of transportation employed?

A. We pay for all the transportation. We pay for every bit of it.

Q. Those papers that you ship by the means and methods that you have described are sent to those wholesale dealers or retail dealers whichever the case may be and I will ask you is that what they are charged for? Are they charged for what you ship to them?

A. Yes, sir.

Q. Is it that which you are paid for?

A. Yes, sir.

Q. Do you receive payment for that in New York City at the home office of the newspaper?

A. At the home office of The New York Times.

Mr. Embry: Now, we had an exhibit prepared and identified as Defendants' Exhibit No. 5—

Mr. Nachman: Excuse me. There is one question that I want to ask about that exhibit. I don't think I am going to object to it, on the lower portion of it where you show "Direct Accounts" and where you list cities, is it sometimes correct that there is more than one direct account in that city?

The Witness: Not as a rule.

Mr. Nachman: But in some instances there may be. Is that what you mean by saying, not as a rule?

The Witness: In some instances there could be.

Mr. Embry: We offer Defendants' Exhibit No. 5 into evidence as there is no objection to it.

(One yellow sheet of paper listing wholesalers and "Direct Accounts" in handwriting, offered and received in evidence and identified as Defendants' Exhibit No. 5.)

[fol. 401] By Mr. T. Eric Embry: (Continuing)

Q. Is that a memorandum of yours, Mr. Waters, listing the wholesale dealers to whom you ship The New York

Times newspaper in Alabama and the retailers or the persons whom you described as Direct Accounts?

A. Yes, sir.

Mr. Embry: May I just read it, Your Honor? It is very short.

The Court: Yes. Go ahead.

Mr. Embry: These are the wholesale dealers to whom you ship the newspaper. "Luni News Agency, Dothan, Alabama. Carter's News Agency, Mobile, Alabama, Montgomery News Company, Montgomery, Alabama. Anderson News Company, Florence, Alabama. Gadsden News Company, Gadsden, Alabama. Jefferson News Company, Birmingham, Alabama." Is that correct, Mr. Waters?

The Witness: Yes, sir. That's correct.

By Mr. T. Eric Embry: (Continuing)

Q. Now, the direct accounts are the retail dealers you have shown there—in that instance you have shown the names of the towns only. I will read them to you. "Alexander City, Alabama. Bessemer, Alabama. Greenville, Alabama. Ozark, Alabama. Selma, Alabama. Talladega, Alabama. Tuscaloosa, Alabama. Tuskegee, Alabama." You have also listed Tuskegee Institute. What does that mean?

A. It means that there is a dealer in Tuskegee who gets newspapers also.

Q. Now, are any of these dealers that you ship to direct that you call retail dealers or direct accounts—I notice you don't list them by names in those cities. Do you know the names of those people? I didn't ask you to get the names but do you recall them? They may be interested in knowing who they are if you know.

Mr. Nachman: We have got the records here.

By Mr. T. Eric Embry: (Continuing)

Q. Now, was that to whom you shipped in 1960 the New [fol. 402] York Times newspaper by the methods which you have described in your previous testimony?

A. Yes, sir.

Q. Did you ship in 1959 to those same people?

A. Approximately those same people.

Q. To your knowledge, did any of those people that you have just testified about in the accounts you have mentioned in your memorandum, Defendants' Exhibit No. 5—are any of those during 1960 or 1959 handling The New York Times newspaper exclusively to the exclusion of other newspapers and periodicals?

A. No, sir.

Q. Are they just regular news dealers?

A. They are just regular news dealers so far as we know. They write in for the paper and no doubt, the direct accounts handle magazines and probably local papers and everything else.

Q. What we all think of as news dealers.

A. News dealers, yes.

Q. Now, during 1960 and 1959 have you ever sent anyone from your office, an employee of The New York Times Company or anyone else, into the State of Alabama in connection with the circulation of the New York Times newspaper either to solicit circulation or to promote circulation or to supervise or to check on the method and efficiency of anyone to whom you sold the newspaper in Alabama with respect to the circulation thereof?

A. No, sir.

Q. Is there any employee in your department, The Circulation Department of The New York Times Newspaper, whose job or duty it is either requires or permits that person under your direction or anyone else's direction to enter the State of Alabama for any of the purposes that I outlined in my previous question with respect to the circulation of The New York Times newspaper?

A. No, sir.

Q. Do you have any employee during this period of time of 1960 or 1959 or have you had during that period of time, who has entered the State of Alabama and called upon any of these wholesale or retail or direct accounts dealers with [fol. 403] respect to the circulation or with respect to any other of the affairs of The New York Times newspaper?

A. No, sir.

Q. Does your department do anything within the State

of Alabama by any employee of The New York Times Company or has it done anything during 1960 or during 1959 to solicit subscriptions or circulation—subscriptions or circulation of The New York Times newspaper?

A. No, sir.

Q. Have you, at the present time, or anyone who is an employee of The New York Times Company in your department or during 1960 or 1959 ever attempted either in the State of Alabama or from without the State of Alabama to supervise or direct the activities of any person, firm or corporation or partnership or any kind of entity in Alabama with respect to the affairs of the circulation, the sale or the distribution of The New York Times newspaper in Alabama?

A. No, sir.

Q. All right. That's all.

Cross examination.

By Mr. Sam Rice Baker:

Q. Mr. Waters, what steps do you take to improve your circulation in Alabama?

A. None whatsoever.

Q. None whatsoever?

A. That's right.

Q. In shipping these newspapers, Mr. Waters, you say that they are all prepaid in New York.

A. We pay the entire charges whether air freight, postal rates or railroad rates.

Q. Are any papers shipped on consignment?

A. No, sir.

Q. Is any credit ever given for unsold papers?

A. Yes, sir.

[fol. 404] Q. How is that handled?

A. That's handled when the dealer or the wholesaler has what we call an irregularity in arrival. For instance, it could be twenty-four hours late. There may be something wrong in route from New York to the destination. They notify us of this irregularity and we send them a claim card and they send back to us the claim card.



Mr. Embry: What do you send them?

The Witness: A claim card. That's spelled c-l-a-i-m.  
Claim card.

By Mr. Sam Rice Baker: (Continuing)

Q. Go ahead.

A. And they return that to us with the amount of copies unsold for that day and credit is allowed.

Q. How do you determine whether an irregularity in delivery has occurred?

A. They take that to the baggage man.

Q. Who do you mean by they?

A. Whoever receives the papers whether it be the dealer or the wholesaler. He takes that to the destination point.

Q. That's the baggage man in Alabama, isn't it?

A. That's right.

Q. And you have prepaid the freight on those shipments.

A. Yes, sir.

Q. So that when those papers leave New York the carrier is your agent, isn't he?

Mr. Embry: We object to that, Your Honor. That's a question of law for the Court.

The Court: Yes. Go ahead.

Mr. Baker: Who has the risk of loss on those papers during transit?

Mr. Embry: We object to that, if the Court please. It is a question of law and invades the province of the Court.

The Court: Well, if there is any agreement between them—of course, I don't know.

[fol. 405] Mr. Embry: He didn't ask him whether there was any agreement in respect to—

Mr. Baker: Does your contract for sale—does your contract of sale call for The New York Times to bear the risk of loss of those papers during transit?

Mr. Embry: We object to that, if the Court please. There is no evidence of any contract sale, Your Honor.

The Court: I will let it in and give you an exception.

Mr. Embry: We except.

The Witness: We have no contract.

By Mr. Sam Rice Baker: (Continuing)

Q. Have any papers ever been lost during transit between The New York Times and Alabama?

A. Yes, sir.

Q. Who bore the risk of loss?

A. The New York Times in New York.

Q. The New York Times bore the risk of loss and the baggage man handles claims for delayed papers in the State of Alabama for papers that don't get there on time, doesn't he?

Mr. Embry: We object to that, if the Court please. Don't answer that. What baggage man? When and where? What kind of claim? He doesn't define any area of any kind. The witness would have to interpret the question in order to answer it.

The Court: What is your theory on that, Mr. Baker?

Mr. Baker: My theory is, Your Honor, that he just testified that he gave credit for papers that were delayed in transit and I asked him whether or not he investigated how they were delayed. He testified that he had the local dealer take it to the local baggage man.

The Court: I think it would be admissible. Let me give you an exception to each question along that line.

Mr. Embry: We except, Your Honor. He said he furnished claim cards and they allowed it when they sent it in—

[fol. 406] The Court: Well, we will get the general background of it—

Mr. Embry: We except.

The Witness: What is the question, sir?

Mr. Baker: Mr. Reporter, read the question, please.

The Reporter: Question: "The New York Times bore the risk of loss and the baggage man handles claims for delayed papers in the State of Alabama for papers that don't get there on time, doesn't he?"

The Witness: That is correct, sir.

By Mr. Sam Rice Baker: (Continuing)

Q. What does the local baggage master have to do, that is, what forms does he fill out, what certification does he make in order for The New York Times to pay a refund on delayed papers?

Mr. Embry: We object to that, if the Court please. It calls for matters between other parties, *Res Inter Alios Acta*—

The Court: I will let it in.

Mr. Embry: We except.

The Court: Let me ask this question. When you have these transactions with the baggage man and the dealer goes down there to see about the train being late and to file some kind of a claim, is the baggage man paid anything by *The New York Times*?

The Witness: No, sir. We furnish the cards.

By Mr. Sam Rice Baker: (Continuing)

Q. You furnish what?

A. We furnish the postal card or claim card.

Q. What is on that claim card? Do you have one with you?

A. No, sir. I do not. That's just a form of an irregularity notice, incompletes, late arrivals and things like that.

Q. Is it a printed form?

A. A printed card, yes, sir.

Q. It is a printed card furnished by *The New York Times*.

[fol. 407] A. Yes, sir. A postal card.

Q. How does the baggage man get that card?

A. The dealer brings it over to him.

Q. The dealer brings it to him and he fills it out—

A. That substantiates his claim.

Q. And the baggage man fills it out and signs it.

A. Just signs the card.

Q. Who fills it out?

A. The dealer fills it out. He has to put the date of the irregularity on it.

Q. You require the baggage man to sign that.

Mr. Embry: We object to what he requires. There is no evidence that—

The Court: Well, you can ask what the custom is perhaps.

By Mr. Sam Rice Baker: (Continuing)

Q. Well, do you pay the claim without the signature of the local baggage man?

A. The claims are so nil that we recognize them in New York. There is no way for the Pennsylvania Railroad or any railroad to check on irregularities in newspapers.

Q. My question was, do you pay them without the signature of the local baggage man on your claim form?

A. We do.

Q. But it is customary to require—

A. It is customary for the party to bring it over to the baggage man and have him sign it.

Q. Now, Mr. Waters, I show you a group of exhibits numbered from 276 to 309. I have got them arranged by years and I will first show you a 1960 bill and I will ask you to identify them and state exactly what they are. They are part of the original records of The New York Times, aren't they?

A. That's correct. Must I refer to each one of these?

Q. No. You may just identify the whole group if you will.  
[fol. 408] A. The first one I have here is Exhibit No. 277. This is a record of our billing showing the amount of copies drawn for the month, Sundays, cash payments and also credits allowed. The second sheet is a credit return voucher which indicates that this wholesaler returned forty-one daily copies.

The Court: What do the letters "L. E." mean? Does that mean Late Edition?

The Witness: Daily copies. We refer to the daily issue and the Sunday issue. It shows credit allowed and also shows returns under Sunday which also has been allowed for the full amount.

By Mr. Sam Rice Baker: (Continuing)

Q. How many dailys and how many Sundays did he return in that credit memorandum?

A. He returned forty-one dailys and thirty-one Sundays.

Mr. Embry: For what period of time? Is that indicated there?

By Mr. Sam Rice Baker: (Continuing)

Q. Can you state what issue it was that was returned?

A. This would be for the month of November, 1959. It would be from November 1st up through November 30th.

Q. How many did he return during that time?

A. Forty-one daily papers and thirty-one Sundays.

Q. Does it show what issue?

A. It shows the issues right out here on the left hand column. No. 1 indicates the 1st of the Month, No. 2 indicates the 2nd of the month and so forth.

Q. Does it show how many he returned of each issue?

A. Yes, sir.

Q. Are those the late shipments that you testified about?

A. I presume so.

Q. Well, I notice—

A. Yes, I'm sorry. It is late. It indicates Sundays late and incomplete.

[fol. 409] Q. What does incomplete indicate?

A. That indicates that a part of the Sunday paper is missing. It could not be sold and probably got lost in route.

Q. Those figures do not indicate that he returned the entire late issue, do they?

A. Looking at this, I would think he has done so due to the fact that there are some days in there that he does not show any return.

Q. Don't those figures indicate that he returned a different amount of papers on different days?

A. That's right, sir.

Q. Then, he evidently sold some and returned some, didn't he?

A. That's right.

Q. So, you do give credit for unsold merchandise, do you not?

Mr. MacCloud: Your Honor, we object to that. That's an argumentative type question.

The Court: I believe that would be a shorthand rendition of collective fact—I will give you an exception.

Mr. MacCloud: Your Honor, he hasn't stated in his question under what circumstances they would give credit for the merchandise—

The Court: You may bring that out on Re-Direct Examination. I think it is permissible. I will give you an exception.

Mr. MacCloud: We except.

By Mr. Sam Rice Baker: (Continuing)

Q. You do give credit for unsold newspapers, do you not?

A. That's right.

Q. Now, that's just one credit memorandum to this account. Let's turn over and take up the next credit memorandum. What is the date of that credit memorandum?

Mr. Embry: Your Honor, he is being examined about these papers as exhibits and they haven't been formally introduced into evidence. He is treating them as though they were in evidence and therefore I want to at this time make our objection—

[fol. 410] Mr. Baker: Well, we will offer them in evidence now.

Mr. Embry: All right. Let me make my objection then. I don't know what the numbers of these exhibits are consecutively—

The Court: I believe it is 276 to 309.

Mr. Embry: Then, to these exhibits 276 to 309, Your Honor, we object and as grounds for our objection we say that they are incompetent, irrelevant and immaterial evidence and that insofar as any of these exhibits purport to cover the matters contained in those exhibits for any period of time otherwise than during the month of April, 1960 that they are immaterial, irrelevant and incompetent evidence for the reason that they are too remote in point of time in respect to the time about which they purported service of process was obtained upon this defendant on April 21st and April 26, 1960. They wouldn't shed any light on the issue before the Court in respect to the doing of business or not by this defendant during the pertinent period of time about which the Court is inquiring on the Motion to Quash. It is not calculated to prove or disprove any of the grounds of defendants' motion to quash in this case and again, with respect to the period of time involved

any of those—otherwise than those exhibits relating to the period of time of April, 1960 are too remote in that regard. The matters sought to be shown by the offer of the exhibits and each of them separately and severally doesn't have any evidentiary value with respect to the activities of this defendant in the State of Alabama during the period of time which is pertinent to the inquiry before the Court in respect to doing business by this defendant in the State of Alabama at or near the time of the attempted service of process in April of 1960. The exhibits separately and severally fail to shed any light on the issue of whether this cause of action accrued from or arose from the doing of any business, the performance of any work or service by this defendant in the State of Alabama at or near the time of the attempted service of process upon it as set forth in the affidavit Mr. Nachman attached to the Complaint or as an incident of any of that work, service or the doing of business or the performance of work or service by this defendant in the State of Alabama at a pertinent time subject to the inquiry [fol. 411] before the Court on the issue of whether it was doing so as is alleged in the affidavit attached to the Complaint. We would like, if it is agreeable with opposing counsel, to have the same type agreement we had with respect to these other documents without the necessity of having to interrupt him when he refers to any one of them and let the record show that it is stipulated that the objection and all grounds thereto would be assigned to each reference to the document and to each document and to each of the numbered exhibits as they are referred to and throughout the examination of the witness about them without the necessity of restating it and with the privilege on our part to add any more specific grounds if that is occasioned by the nature of the question asked of the witness and with the stipulation that if the occasion demands it to permit the Court Reporter to actually and physically to imprint in the transcript, if there is a transcript, those particular objections to the particular documents in question. Is that agreeable, Mr. Baker?

Mr. Baker: Yes, sir.

Mr. Embry: Your Honor, Mr. Loeb called my attention to one other ground of objection which I overlooked and

which I would like to add to the others. That is, that each of the documents without exception of the numbered exhibits, 276 through 309, as offered in evidence shows on the face of the document shows that the entry of the material, and according to the testimony of Mr. Waters, the entry of the information on the document was made in New York and the payment received in New York, the credit given if the occasion arose for the giving of credit, and that was given in New York and the records themselves are kept and maintained in New York and they therefore do not reflect any activity in Alabama on the part of this defendant.

The Court: I will let them in and give you an exception to the Court's ruling.

Mr. Embry: We except, if the Court please.

[fol. 412]

NEW YORK TIMES COMPANY ASSIGNMENT OF ADDITIONAL  
GROUNDS OF OBJECTIONS

Mr. Embry: Under the stipulation and agreements had throughout the hearing on the Motion to Quash in the L. B. Sullivan case wherein it was agreed that counsel for The New York Times Company could assign any additional grounds of objections to questions propounded to the various witnesses and to the introduction of documentary evidence that they saw fit to do, such stipulation being for the purpose of saving the Court's time on the original hearing, the defendant, The New York Times Company, wishes to and does assign the following additional grounds of objection. To each objection made originally to questions propounded to the witnesses and the introduction of documentary evidence, that the questions called for a mental operation of the witness and not facts and that the questions called for an answer which does not tend to prove or disprove whether Don McKee and John Chadwick were agents of The New York Times Company so that purported service upon McKee would constitute valid service upon this defendant. It does not tend to prove whether or not The Times did business in Alabama or whether the cause of action attempted to be stated in the complainant's cause accrued



from or was incident to the doing of business or performance of work or service in Alabama by The New York Times Company or its agents, servants or employees and that these same grounds of objection apply to the introduction of the various exhibits offered by the Plaintiff. Further grounds of objection to questions propounded to the various witnesses as well as to the introduction of documentary evidence are that the question and the evidence sought to be adduced by an answer thereto and the documents would not be material or legal evidence such as would authorize a construction by the Court of Section 199 (1) of Title 7, Code of Alabama, 1940, that would permit the Court to assert jurisdiction over the person of The New York Times Company, a corporation, and to admit such evidence for such purpose would be such a misapplication of the law as would deprive this defendant of its property without due process of law in contravention or violation of the Fourteenth Amendment of the Constitution of the United States and in contravention or violation of Article 1, Section 6 of [fol. 413] the Constitution of Alabama, 1901, and would deny to this defendant equal protection of the law in contravention or violation of the Fourteenth Amendment of the Constitution of the United States and would constitute an abridgement of freedom of the press in contravention or violation of the First Amendment to the Constitution of the United States, taken together with the Fourteenth Amendment of the Constitution of the United States and would impose an unreasonable burden upon Inter-State Commerce in contravention or violation of Article I, Section 8, of the Constitution of the United States and such questions and the evidence sought to be adduced therefrom and such documents would be illegal and immaterial as a basis for the Court construing or holding that Don McKee was an agent of this defendant upon whom service of process might be had so as to support a holding by the Court that any purported service upon him would subject this defendant to the jurisdiction of this Court and the admission of such evidence and the holding on the basis of such evidence that he was an agent so as to subject this defendant to the jurisdiction of this Court, would deprive this defendant of

its property without due process of law in violation of the Fourteenth Amendment of the Constitution of the United States and in violation of Article 1, Section 6 of the Constitution of Alabama, 1901, and would deny to this defendant equal protection of the law in violation of the Fourteenth Amendment of the Constitution of the United States and would abridge freedom of the press in violation of the First Amendment to the Constitution of the United States, taken together with the Fourteenth Amendment of the Constitution of the United States and would impose an unreasonable burden upon Inter-State commerce in violation of Article 1, Section 8 of the Constitution of the United States.

[fol. 414] (The New York Times Company credit memorandum for the years 1959 and 1960 and various papers attached thereto, offered and received in evidence and identified as Plaintiff's Exhibits 276 through 309.)

By Mr. Sam Rice Baker: (Continuing)

Q. Aren't those records, Exhibits 276 through 309, the records that you prepared this memorandum marked Defendants' No. 4 from?

A. No, sir.

Q. Are they a part of the regular records of The New York Times Company?

A. These are part of the original records of The New York Times Company.

Q. And they were furnished to the Plaintiff pursuant to a Court Order to Produce, were they not?

Mr. Loeb: That is already in. He already testified to that.

The Witness: Yes, sir.

By Mr. Sam Rice Baker: (Continuing)

Q. What records were the figures in Defendants' Exhibit No. 4 compiled from?

A. Well, this here is from memory. We have already gone over the figures and this is our estimated figure of the national circulation—the figures on Alabama were taken off the records.

Q. In other words, Defendants' Exhibit No. 4 was not prepared from any records whatsoever but was prepared from your own recollection. Is that correct, sir?

Mr. MacLeod: Your Honor, we object to that. That is an argumentative type question on the part of Mr. Baker [fol. 415] and mis-stated what the record just said and we would like to ask the Court to instruct Mr. Baker not to attempt to abuse our witness when he is on the witness stand—

The Court: I don't think Mr. Baker would abuse a witness. Let me give you an exception. I think he may ask that question to find out how the memorandum was prepared.

Mr. MacLeod: We except.

Mr. Loeb: Your Honor, Mr. Waters didn't say that all of that memorandum was prepared from memory. He said that the national figures were from his recollection but that the Alabama figures were prepared from the records.

The Court: Well, won't the Record show that?

Mr. Loeb: But not the question that followed it, Your Honor. The question that followed it made the assumption that—made the assumption which Mr. Waters did not say—he didn't say that it all came from his memory—

Mr. Baker: My first question was, if the Court please, state what records Defendants' Exhibit No. 4 was prepared from and I repeated it. State what records Defendants' Exhibit No. 4 was prepared from.

The Witness: The records right here in my hand.

By Mr. Sam Rice Baker: (Continuing)

Q. What records are they?

A. These are records which I submitted which you have copies of.

Q. Are they part of the original and permanent records of The New York Times?

A. Yes, sir.

Mr. Baker: We don't have any copies of these, Your Honor.

Mr. Embry: You are welcome to those if you want them.

Mr. Baker: That's not the point, Mr. Embry. They were not produced in response to the Court Order.

Mr. MacLeod: Which item are you talking about?

[fol. 416] Mr. Nachman: Your Honor, we assumed that the records that were introduced were the circulation records for 1959 and 1960 which the Order called for.

Mr. Embry: Your Honor, there is a great deal of excitement going on here because a mathematical calculation has been made from all this volume of evidence which was a calculation of the total sum of some figures and that's what this is.

The Court: Go ahead.

By Mr. Sam Rice Baker: (Continuing)

Q. All right. Now, let's go back to Exhibit No. 277 and turn to the second credit memorandum. We have covered the first one. What does that memorandum show in the way of credit for returned newspapers?

A. It shows that he returned fifty-five dailies and received credit and shows that he returned ninety-eight Sundays—one hundred eight Sundays and received credit for ninety-eight. That's right. He returned one hundred eight Sundays and received credit for ninety-eight.

Q. What is the total amount of credit given on that credit memorandum?

Mr. Embry: Your Honor, we object to that. The credit memo speaks for itself.

The Court: Well, I can read it but let him show—let him state what it shows there. What does it say?

The Witness: It shows \$24.65, Your Honor.

The Court: What is the retail price of the Sunday edition just for the information of the Court? Is it about 25¢ or what?

Mr. Loeb: Your Honor, this wouldn't reflect the retail price. This would reflect only the wholesale price.

By Mr. Sam Rice Baker: (Continuing)

Q. What period of time does this memorandum cover?

A. October, 1959.

Q. Once again, I will ask you if it doesn't show a return of papers in odd lots and odd numbers?

[fol. 417] A. Yes, sir.

Q. So that the dealer did not return all of any late issue.

Mr. Embry: We object to that question, Your Honor. It assumes that a return was made because it was late rather than being returned because it was an incomplete issue or because of some other irregularity that was testified about.

The Court: I will let it in and give you an exception.

Mr. Embry: We except.

Mr. Baker: That's correct, isn't it?

Mr. Embry: What is your ruling, Your Honor?

The Court: I will let it in and give you an exception.

Mr. Embry: I thought that was Your Honor's ruling but I wanted to be sure. We except.

The Witness: He didn't return all of the unsold papers?

By Mr. Sam Rice Baker: (Continuing)

Q. All the papers delivered that arrived late.

A. I would take it that he has.

Q. Well, now, don't those figures vary?

A. Yes, sir.

Q. Don't they indicate again that he sold some papers and returned some papers?

A. Yes, sir.

Q. All right, sir. What is your next credit memorandum? All of these are for the Carter News Agency in Mobile on Exhibit No. 277. What is the total amount allowed for returns on that credit memorandum?

A. That shows fifty-six daily and one hundred four Sundays.

Q. How much in dollars?

A. It shows \$26.00.

Q. Again I ask you doesn't it show the return of papers in odd lots and odd amounts?

Mr. Embry: We object to that, if the Court please. There is no definition as to what is meant by odd lots and odd amounts. It is an indefinite quantity.

[fol. 418] The Court: Well, I think the Court has an

understanding to what is meant by odd lots and odd amounts. I will give you an exception.

Mr. Embry: We except.

The Court: You may ask him what an odd lot was, if you wish.

The Witness: It does show a different figure for each day.

By Mr. Sam Rice Baker: (Continuing)

Q. Again, doesn't it show that some papers were sold and some were returned?

A. That's right.

Q. What period of time does that credit memorandum cover?

A. December, 1959.

Q. Still on Exhibit No. 277, what is the next credit memorandum shown thereon?

Mr. Embry: Your Honor, we are going to interrupt if we may and I object on the basis of the obvious and patent ground that these exhibits speak for themselves and a reading of them is uncalled for by the witness and I might state to Your Honor that if we are going to read each of these exhibits I feel that we might be here throughout the month of August—

Mr. Baker: Well, it won't take any longer than Mr. Embry's objections and that's for sure.

The Court: Well, go ahead.

Mr. Embry: We except.

By Mr. Sam Rice Baker: (Continuing)

Q. What does the next sheet show with reference to the return of merchandise?

A. It shows forty-five daily and seventy Sundays.

Q. How much in dollars?

A. It shows \$17.98.

[fol. 419] Q. Once again I will ask you if the returns are not in odd lots and odd amounts?

A. Yes, sir.

Q. Again, does not that credit memorandum indicate that some papers were sold and some were returned?

A. I wouldn't say so. It is possible a full order was returned in some cases on these memoranda.

Q. Does this column show the number of papers that were returned?

A. Yes, sir.

Q. What do these figures there indicate? Is that the month?

A. Over there on the left is the month. That's the printed figure.

Q. The printed figures are the months?

A. Yes, sir.

Q. In other words, only one paper was returned?

A. One paper was returned on January 4th and one paper was returned on January 5th and so forth.

Q. Well, then, certainly the full lot was not returned.

Mr. Embry: We object to that, Your Honor. That's argument.

The Court: Yes, I think that would be argumentative.

By Mr. Sam Rice Baker: (Continuing)

Q. Turning now to the next credit memorandum, what period does that cover?

Mr. Embry: Are you still on Exhibit No. 277?

Mr. Baker: That's right.

The Witness: That covers March, 1960.

By Mr. Sam Rice Baker: (Continuing)

Q. What does that show in the form of returns?

A. The same as the others.

Q. Well, how many papers and how many dollars?

A. Oh, I'm sorry. It shows twenty-nine daily copies, sixteen Sunday copies and a total of \$5.33.

[fol. 420] Q. And that shows the same as the others in reference to odd numbers and odd lots, does it not?

A. That is correct, sir.

Q. And again it indicates that some papers were sold and some were returned, does it not?

A. Yes, sir.

Q. Does the same apply to credit memorandum No. 437 which is for the month of May, 1960? Is that correct?

A. I don't see any 437. I see a 5—438.

Q. Well, 438 I meant to say. You may identify it properly.

A. It shows twenty-four daily copies, sixteen Sunday copies and the amount of money allowed as \$5.00.

Q. And it shows the same in reference to odd lots and odd amounts.

A. Correct.

Q. And it shows the same as to some newspapers being sold and some returned.

A. Correct.

Q. I will ask you if the same applies to No. 6-320? I am still referring to Exhibit 277.

A. This is a return for the month of April, 1960 and it shows that thirty-three were returned daily and credit allowed and forty Sundays and credit allowed.

Q. What is the total allowance?

A. The total allowance shows as \$10.75.

Q. Does the same apply to that credit voucher?

A. Credit voucher 6-1733 indicates returns taken for the month of May, 1960 and it shows that thirty dailies were returned and sixty-four Sundays and credit allowed for the full amount of \$15.71.

Q. And again it shows odd lots and odd amounts.

A. Yes.

Q. And shows that some papers were returned.

A. Yes, sir.

Q. Now, I will ask you to examine Plaintiff's Exhibit No. 279 which is the Jefferson News Company of Birmingham, [fol. 421] Alabama, and I will ask you to examine the credit memorandum attached to that exhibit and I will ask you if it doesn't show the same handling and the same course of dealing that you testified about in reference to Plaintiff's Exhibit No. 277?

A. That is correct, sir.

Q. Referring to the account, can you state from that account the total amount of these credit memoranda and the allowances for returned newspapers? I am referring to Exhibit No. 279 now.



Mr. Embry: For what period of time?

Mr. Baker: For the period covered by this statement for the year 1960.

The Witness: Credit has been allowed.

By Mr. Sam Rice Baker: (Continuing)

Q. I say, can you state the total amount of credit allowed? Is it broken down that way?

A. No, sir. It is not broken down that way.

Q. I will ask you if the credit allowances shown on this statement marked Exhibit No. 279 are not substantial?

Mr. Embry: We object to that, if the Court please. What is substantial to Mr. Baker may not be substantial to Mr. Waters or may not be substantial to The New York Times or to Your Honor—

The Court: Can you clarify it, Mr. Baker?

By Mr. Sam Rice Baker: (Continuing)

Q. Well, read into the Record then the various credit allowances shown by Exhibit No. 279.

Mr. Embry: We object to that because the Exhibit is in evidence and it speaks for itself and it is time consuming—

The Court: I don't think it necessary to read all that into the Record. It is already in evidence.

Mr. Baker: Well, he testified on Direct Examination that it was minimal, Your Honor—

Mr. Embry: He didn't testify to any such thing—

[fol. 422] The Court: Minimum?

Mr. Baker: Minimal.

Mr. Embry: Your Honor, there is no testimony—as I recall his testimony about anything being minimal. He compared figures on circulation. He did not testify about any money on Direct testimony—

The Court: Well, these papers have been introduced into evidence and I think they can speak for themselves.

Mr. Baker: Well, I was trying to save the Court the trouble of wading through all of them.

The Court: Go ahead.

By Mr. Sam Rice Baker: (Continuing)

Q. Well, Mr. Waters, I will take one more. I will take the one captioned Montgomery News Company of Montgomery and I will ask you to examine those credit memoranda and ask you the same questions I asked you with reference to Exhibits 277 and 279.

Mr. Loeb: What is the number of that exhibit?

The Witness: It is No. 280, sir.

Mr. Baker: Your answer, sir?

The Witness: Yes, sir.

Mr. Baker: Now, I believe you have identified all of these exhibits both for the years '59 and 1960 numbered from 276 to 309 as the original permanent records of The New York Times?

Mr. Loeb: We conceded that at the time you offered them into evidence.

The Witness: We did.

By Mr. Sam Rice Baker: (Continuing)

Q. Mr. Waters, did I understand your testimony to be that the Alabama daily circulation in 1960 was 390 newspapers a day?

A. That's correct, sir.

Q. And that the Sunday circulation was twenty-four to twenty-five hundred?

A. Yes, twenty-five hundred.

[fol. 423] Q. Mr. Waters, is there any department in The New York Times other than yours that has anything to do with the promotion of subscriptions?

A. The subscription department.

Q. Then, any efforts to increase the circulation would come from the subscription department and not your department, wouldn't it?

Mr. Embry: Don't answer that question. We object, if the Court please. It assumes that efforts were made and—

The Court: Lay a little more predicate on that. Do you know anything about the workings of the subscription department?

The Witness: Oh, yes, sir. As I stated earlier, these orders are filled by the subscriber who sends his money in advance and requests a subscription for a period of time.

By Mr. Sam Rice Baker: (Continuing)

Q. Is the subscription department under your jurisdiction and your division?

A. No, sir.

Q. Mr. Waters, generally, what are the duties and functions of the subscription department?

A. The duties and functions of the subscription department are to serve the public in the manner they wish a subscription entered for.

Q. Is it part of their function to promote the sale of subscriptions and the sale of newspapers?

Mr. Embry: We object to that, Your Honor. There is no predicate laid as to time and place and what in fact was done—

The Court: Well, I am assuming that all of these questions relate to the period of time we have under investigation.

Mr. Embry: Well, you would have to assume that, Your Honor—

Mr. Baker: In 1959 and in 1960.

Mr. Embry: It is not clear whether it relates to the State of Alabama—

The Court: Well, if he asks anything about New Jersey or Kamchatka, we will exclude it. You are asking about Alabama, as I understand it.

[fol. 424] Mr. Baker: I am asking about general functions now.

Mr. Embry: We object to it, Your Honor.

The Court: Well, you can be a little more specific, can't you?

By Mr. Sam Rice Baker: (Continuing)

Q. Do you have any particular knowledge of any activities of the subscription department in the State of Alabama?

A. No, sir.

Q. You don't know what they do in this State to promote subscriptions, if anything, do you?

Mr. Embry: We object to that, if the Court please.

The Court: I will let it in and give you an exception.

The Witness: Well, to my recollection, they don't do anything to promote subscriptions. The people come to us.

By Mr. Sam Rice Baker: (Continuing)

Q. Do they send any advertising matter through the mail in Alabama?

A. That would be hard to say.

Q. Mr. Waters, don't you know that either your department or the subscription department or some department of The New York Times sends circulars and literature into Alabama asking Alabama citizens to subscribe to The New York Times? Don't you know that?

Mr. Embry: We object, Your Honor, to anything sent by mail as not reflecting on activities within the State of Alabama and it is outside the scope of the definition of activity in a State by a corporation—a non-resident corporation—and can't shed any light on whether they are present here and maintain sufficient contacts which would subject to the jurisdiction of the Court—

Mr. Nachman: Your Honor, the United States Supreme Court twice within the past five or six years has decided that where a corporation's sole activity in contact with the State was through the mail that those corporations had sufficient contact within the State to subject them to the [fol. 425] jurisdiction of the Court. One is Traveler's Insurance Company case and the other is McGhee against the International Insurance Company and certainly we think it is relevant on the question of doing business whether or not they through the mails attempted to solicit Alabama subscribers to The New York Times. We certainly do not base our whole case on that but we think it is part of the evidence as to the manner in which they do business in this state.

Mr. Diana: Your Honor, may I make a statement?

The Court: Surely. Go ahead.

Mr. Diana: Your Honor, I have listened to many legal quotations by Mr. Nachman throughout this trial. On each occasion he mis-stated the holding of these cases and the import of these cases. Now, McGhee hasn't got a thing in the world to do with solicitation alone. He goes just far enough to create an impression as to what the law is. The McGhee case has to do with a contract which created a continuing obligation between the defendant corporation and the State which attempted to exercise jurisdiction over that corporation and we are not concerned with that here. So, I actually resent the half-stories about what these cases purport to hold.

Mr. Nachman: Your Honor, I—

Mr. Baker: I call on Mr. Diana to produce the cases.

The Court: You do what?

Mr. Baker: To produce his cases.

Mr. Diana: I will be very happy to produce the cases—

Mr. Baker: I don't like anybody to state that we mis-stated what—

The Court: Well, just sending a letter through the mail for an advertisement—I don't believe that's—

Mr. Baker: That's all there was in the Traveler's case—

The Court: Do you have that case?

Mr. Nachman: If Mr. Diana can show any other contact other than by mail contact, then I ask him to—

The Court: Well, let's get the cases—

Mr. Nachman: I ask him to produce now—

[fol. 426] The Court: Let's get the cases and that will save a lot of argument. We have a law library upstairs and anyone can get those cases.

Mr. Embry: Your Honor, may I make a suggestion?

The Court: Yes. Go ahead.

Mr. Embry: Perhaps I am acting in the capacity of referee but it would seem to me as a practical matter that if we pause now to make our legal arguments in this case we are going to cause a delay in the handling of the case in an expeditious manner.

Mr. Nachman: We happen to have the McGeehee case right here, Your Honor.

The Court: Let me see it.

Mr. Embry: We will have to give you the other cases if you go into that one, Your Honor.

Mr. Nachman: This is the case that Mr. Diana said that I mis-stated.

The Court: Is this the McGehee case?

Mr. Nachman: Yes, sir.

The Court: Where is the part in here about mail? What head note is that?

Mr. Embry: Perhaps I can expedite matters by simply withdrawing my objection and letting him testify about it. I believe he was asking him about what they sent out to Alabama—

The Court: I don't see anything in here about using the mails—

Mr. Embry: I think there is a statute involved there too, Your Honor.

The Court: Well, Mr. Embry said he withdrew his objection, so let's go ahead now.

Mr. Nachman: Well, Your Honor, we do resent the fact that Mr. Diana said we mis-stated—

Mr. Loeb: Well, you let Mr. Diana go to the library to find the case when you had it here all the time.

[fol. 427] The Court: Well, if the objection is withdrawn why not go ahead—

Mr. Loeb: Well, you asked him to produce the case—

Mr. Nachman: Well, he left the room. I don't know why he left the room.

Mr. Embry: He left the room to get that case—

The Court: Well, he said he withdrew the objection. Let's go ahead now. Now, this will have to relate to the promotion of subscriptions here in Alabama.

Mr. Baker: That was my question, Your Honor.

The Court: Go ahead. He said he withdrew his objection.

The Witness: The only thing the subscription department sends out is a notification of expiration indicating when a subscription will terminate.

Mr. Embry: If the witness had told me this before we could have saved all of this but I didn't know that, Your Honor. I am sorry, Mr. Baker.

By Mr. Sam Rice Baker: (Continuing)

Q. And they don't send out any literature or advertising matter of any sort to the citizens of Alabama?

A. Not to my knowledge.

Q. Mr. Waters, is the sale of the microfilm edition of The New York Times in Alabama under your jurisdiction?

A. No, sir.

Q. You have nothing to do with that?

A. No, sir.

Q. You don't know whether it is sold in Alabama or how many are sold or anything about that?

A. No, sir.

Q. How about the sale of The New York Times Index?

A. The same applies to that as applies to the microfilm.

Q. Is there anyone here from the subscription department to testify concerning their activities in Alabama?

[fol. 428] Mr. Embry: We object to that question, Your Honor. It assumes that there are activities in Alabama.

The Court: I will let it in and give you an exception.

Mr. Embry: We except. He could testify about whether they do or not.

The Court: Well, if he knows, he can—

Mr. Embry: We except.

The Witness: They don't have.

By Mr. Sam Rice Baker: (Continuing)

Q. There is no one from the subscription department here.

A. That is correct, sir.

Q. I will ask you a question this way. If there were activities in the State of Alabama in the promotion of sales and subscriptions and circulation, that would be under the subscription department and not under your department. Is that correct?

Mr. Embry: We object to that.

The Court: I will let it in. I don't see where it has got any value here if there was because there is no proof that there was but go ahead and answer it if you can.

The Witness: I can't answer that, sir.

By Mr. Sam Rice Baker: (Continuing)

Q. You can't answer whether that would be under your department—

A. Oh, I am sorry. I thought you specifically stated the subscription department.

Q. No, I say if there were activities in Alabama in connection with the promotion of sales and subscriptions, that would not be under your department, would it?

A. That is correct, sir.

Q. All right. That's all.

[fol. 429]            Redirect examination.

By Mr. T. Eric Embry:

Q. Mr. Waters, you were asked about a mail man or a baggage man. Now, with reference to a baggage man, I believe the substance of your testimony was that on the occasion The New York Times Company had sent claim forms to people or wholesale or retail dealers to whom they had sold newspapers or where the dealer wanted to make a claim because the papers had arrived incomplete, that is, the whole paper wasn't complete or because all of the paper wasn't in the issue, or that it had been damaged or that it had been—or that it had arrived late, and on those occasions the baggage man or the carrier who delivered those papers to the dealer had signed some sort of post card which verified to you the fact that there had been a late arrival or an incomplete delivery or a damaged delivery. Now, do you have any recollection with reference to whether or not there has ever been an occasion in Alabama where that happened?

A. No, sir.

Q. Do you mean by that answer that it has not happened in Alabama according to your recollection?

A. According to my recollection it has not happened in Alabama.

Q. What is an incomplete? We have been talking about it in reference to it—in reference to these exhibits. What is an incomplete?



A. An incomplete copy is a Sunday copy of the paper with a section or two missing. That could be lost from New York in route from New York to its destination.

Q. Now, what is a late arrival?

A. A late arrival—a dealer may be anticipating his copies coming in at a certain time on each specific day. There is a possibility that this late arrival—that this dealer rather will not get his papers as expected and they probably come in about six to twelve hours late and it thereby affects the sale of that particular issue.

Q. Now, we were talking about wholesale dealers. What is a galley?

A. A galley account is an account that is sent in to us [fol. 430] direct to New York by the wholesaler requesting us to put on our books a certain dealer for so many copies. That account is charged through the wholesaler.

Q. Well, assume as a hypothesis and we will take the Lurie News Agency of Dothan, Alabama whom I believe you testified is a wholesaler—

A. That's correct.

Q. If you have a galley account on your books for the Lurie News Agency for Enterprise, Hartford and Ozark, Alabama, what does that mean?

A. That means that we make up that bundle in New York and ship it out of New York and pay all of the transportation and then charge it through the wholesaler.

Q. You mean you look to the wholesaler to pay you?

A. Naturally, the wholesaler does pay us in New York and he collects from the dealer.

Q. Am I accurate and correct in summarizing what you have just said in stating that on those occasions or when that takes places that you are shipping to several different people and charging to one person or a firm—is that right?

A. That's correct.

Q. And that you are carrying that on such as Exhibit 277—if I can tell whose account that is—

A. The Carter News Agency in Mobile, Alabama.

Q. The Carter News Agency?

A. Yes, sir.

Q. I believe you have some galley accounts or you have a galley account with him and they are shipped directly

to the galley account and billed to Carter. Is that correct?

A. That's correct.

Q. At Fairhope, Foley, Thomasville—

A. That's right.

Q. We have established, I believe, that you would be shipping in that instance to five different locations and billing the Carter News Agency. Is that correct?

A. That's right.

[fol. 431] Q. Now, in the event of an incomplete paper or a damaged paper that went to one of the several galley accounts and that galley account returned one copy of a particular issue for that and other galley accounts we will assume returned a copy of another particular issue for some other reason, all of those would be credited, would they not—I will ask you to tell His Honor whether or not this is correct—they would be credited to the account of the Carter News Agency on the books, wouldn't they?

A. That's correct. That's the only account we would have on our books so far as the charges are concerned.

Q. So that when Mr. Baker asked you questions with reference to odd lots, the inference being from his question that he would sell some and return others, when all he was doing—I will ask you to state whether I am correct or not—all he was doing was describing what I have just asked you about, the return of galleys charged to the wholesaler.

Mr. Baker: We object to the leading and his conclusion.

The Court: I will let it in and you may examine him about it later.

The Witness: These returns indicate in coming from the Florence News—I'm sorry. From the Carter News in Mobile—there is no way of our telling where—what account they come from.

By Mr. T. Eric Embry: (Continuing)

Q. Well, let me clarify that. I will ask you to clarify it. You mean there is no way of your telling which of his galley accounts they may or may not have come from?

A. That's correct, sir.

Q. Of the Carter News Agency.

A. That's correct.

Q. All right, sir. That's all.

Recross examination.

By Mr. Sam Rice Baker:

Q. Mr. Waters, do you require your dealers such as the [fol. 432] Carter News Agency to physically return newspapers?

Mr. Embry: We object to what he may or may not require. There is no evidence as to his right to require anything.

The Court: Well, get it down to a particular time.

By Mr. Sam Rice Baker: (Continuing)

Q. In granting the refunds as shown in the statement of Carter's News Agency in Mobile and the two from Montgomery marked and identified as Exhibits 277, 279 and 280, did you require those dealers to return the newspapers on which you gave them a refund credit?

Mr. Embry: We object to the word require—

The Court: I will let it in and give you an exception.

Mr. Embry: We except.

The Witness: Well, we did not require.

By Mr. Sam Rice Baker: (Continuing)

Q. Then, I will ask you what procedure was used by you and by those dealers in establishing the validity of those claims for refund?

A. In many instances we know ourselves right in New York—

Q. I am talking about those claims for refund now that you have just testified about being Exhibits No. 277, 279 and 280. I want you to state what procedure was used by The New York Times and those dealers establishing the validity of those claims for refund.

A. None at all.

Q. Well, then, how did it come about that credit was given?

A. Credit was given because we in New York just know exactly what time our trucks would arrive at a certain depot and whether we missed the regular train for it or not and when we have places as far away as Alabama we automatically recognize their claim for credit without question because there are so many transfers involved in route.

Q. Well, then, how do you determine whether a refund is a late arrival or is an incomplete newspaper?

Mr. Embry: You are talking about these people in Alabama—

The Witness: An incomplete paper is much different [fol. 433] than a late arrival. On a late arrival in most cases the wholesaler will notify us and tell us that he is short certain sections of the Sunday issues and we duplicate those sections in anticipation of the reader still being interested and send that section with them even late in the week. That is an incomplete.

Q. That still doesn't answer my question.

A. They notify us of late arrivals.

Q. Who do you mean by they?

A. Whoever is the recipient of the paper, the dealer or the wholesaler.

Q. Do they notify you of any incomplete paper?

A. Yes, sir.

Q. All right. Now, do you in each case make a claim against the carrier where you have to pay a refund claim to your customers?

A. No, sir.

Q. You don't ever do that, do you?

A. No, sir.

Q. You absorb the loss yourselves.

A. Yes, sir.

Q. Mr. Waters, you testified that your national circulation was six hundred fifty thousand daily and one million three hundred thousand Sundays in 1960.

A. That's correct, sir.

Q. What percentage of those papers are sold in the State of New York?

A. What percentage?

Q. Yes, sir.

Mr. Embry: We object to that question, Your Honor. We are not concerned with New York as opposed to Alabama.

The Court: Well, I will overrule the objection and give you an exception. Just roughly.

Mr. Baker: You may answer.

The Witness: About five hundred thousand daily and about eight hundred thousand Sundays.

Mr. Baker: No further questions.

---

[fol. 434] JOHN McCABE, having been duly sworn, was called as a witness for the Defendant and testified as follows:

Direct examination.

By Mr. Roderick M. MacLeod, Jr.:

Q. State your name to the Court.

A. John McCabe.

Q. Where do you live, Mr. McCabe?

A. I live at Oak Ridge, New Jersey. That's two separate words.

Q. Are you employed by The New York Times Company?

A. Yes, sir.

Q. What is your position with The New York Times Company?

A. Administrative Assistant to the Comptroller.

Q. How long have you been employed by The New York Times Company?

A. Since 1949.

Q. Since 1949 have you been continuously employed in matters concerned with the fiscal management of The New York Times Company?

A. Except for my first seven months of employment. From 1950 to the present, I have.

Q. In the course of your duties are you concerned and

connected with the fiscal management and affairs of The New York Times Company?

A. Yes, sir.

Q. Are the records of the financial affairs of The New York Times Company generally under your supervision and control?

A. Yes, sir.

Q. Mr. McCabe, I will ask you first, please, sir, where the principal office of The New York Times Company is located?

A. It is located at 229 West 43rd Street in New York City, New York.

Q. What is the correct name of the company, please?

A. The New York Times Company, A Corporation.

[fol. 435] Q. Is its principal place of publishing activities at that address in New York?

A. Yes, sir.

Q. Principally, the activities of printing the newspaper are carried on there at that address?

A. Yes, sir.

Q. Are any of the activities of the printing of the newspaper published by the New York Times Company, a corporation, carried on in the State of Alabama?

A. No, sir.

Q. Does the New York Times Company have any facilities or office facilities in the State of Alabama for the purpose of printing a newspaper or any material—

A. No, sir.

Q. Does The New York Times Company have any office of any description located in the State of Alabama?

A. No, sir.

Q. Does The New York Times Company maintain any office space in the State of Alabama?

A. No, sir.

Q. Does it have any employees who are residents of the State of Alabama?

A. No, sir.

Mr. Nachman: Just a moment, please. We object to that. We object to the use of the word employees. It has legal connotations. Mr. Faber testified in detail about the relationship of the stringers for The New York Times and—

The Court: I will let it in and give you an exception. Just give it a common sense interpretation.

The Witness: No, sir.

By Mr. Roderick M. MacLeod, Jr.: (Continuing)

Q. I will ask you if there is anybody who is on the regular payroll of The New York Times Company who is a resident of the State of Alabama?

A. No, sir.

[fol. 436] Q. Is there anybody on the regular payroll of The New York Times Company who has an office in the State of Alabama?

A. No, sir.

Q. Mr. Nachman has asked various questions about the stringers. Are they carried on the regular payroll of The New York Times Company?

A. No, sir.

Q. Does The New York Times Company have a regular payroll for its regular employees?

A. Yes, sir.

Q. How often are they paid?

A. Most of our employees are paid weekly. Some of the people are paid monthly but most of the people are paid weekly.

Q. Are there any deductions made from the pay of the regular employees?

A. Yes, sir.

Q. What are those deductions?

A. The Federal Income Tax, New York State Income Tax, Social Security, New York State Disability, Associated Hospitals, Group Life Insurance and Union dues. I think that's about all.

The Court: Does the worker have very much left to carry home?

The Witness: Not very much, Your Honor. I missed one other payment also. The pension plan payment also.

By Mr. Roderick M. MacLeod, Jr.: (Continuing)

Q. Now, are any of those items deducted from the money or compensation that is sent to the stringers?

A. No, sir.

Q. Does The New York Times Company maintain compensation insurance for its employees?

A. Yes, sir. We do.

Q. Is that paid for by The New York Times Company?

A. Yes, sir.

Q. Are the stringers included in the compensation insurance?

A. No, sir.

[fol. 437] Q. I will ask you, Mr. McCabe, to tell the Judge how the stringers are actually paid if you will go through the procedure from the time a request for payment or a notice for payment is sent in to Mr. Faber? He testified that he had to authorize the payment. Would you tell us now how they are paid?

A. Well, first of all, the auditing department would check the number of lines of each stringer in a particular month and that would be sent down to Mr. Faber for his authorization and approval and returned to the auditing department for payment.

Q. Is that paid by check?

A. It is paid by check. Yes, sir.

Q. Is that a check that is prepared in the New York office of The New York Times?

A. Yes, sir.

Q. Is it mailed directly to the stringers?

A. Yes, sir. It is mailed directly to the stringer.

Q. How often is a payment made to a stringer?

A. Once a month if he has written any stories during the previous month.

Q. And if he has not written a story or The Times hasn't bought a story from him during the previous month, would any of the stringers in Alabama get any payment?

A. No, sir.

Q. Mr. McCabe, I will ask you if you are familiar with the payments made to the stringers in the State of Alabama during the year 1960?

A. Yes, sir.

Q. I believe you testified that those three stringers that The Times bought stories from in 1960 would be Don McKee located here in Montgomery, John Chadwick who is lo-



cated in Birmingham and Maurice Castel who is located in Mobile.

A. I don't believe we bought anything from Mr. Castle in 1960.

Q. Do you know if The New York Times bought anything from John Chadwick in 1960?

A. Yes, sir.

[fol. 438] Q. Do you know how much they paid him for that?

A. I think it was \$155 or in that neighborhood.

Q. That's your best recollection on that.

A. Yes, sir.

Q. Do you know if the New York Times bought anything from Don McKee in 1960?

A. Yes, sir.

Q. Do you know how much they paid to Don McKee in 1960? Do you know how much The New York Times paid Don McKee in 1960?

A. Again, I believe it was \$90.

Q. Ninety dollars?

A. Yes, sir.

Q. You say they did not buy anything from Maurice Castel in 1960.

A. Not to my recollection, no.

Q. All right. It is your testimony that they paid John Chadwick approximately \$155.

A. Yes, sir.

Q. And they paid Don McKee approximately \$90.

A. Yes, sir.

Q. That would be a total, would it not, of \$245?

A. Yes, sir.

Q. Do you know how that payment, that total of \$245 paid to the stringers in Alabama in 1960, compares with the total New York Times payment to stringers throughout the country?

Mr. Baker: We object to that, if the Court please. We don't see what the payment of stringers throughout the country has got to do with the payment of stringers in Alabama.

Mr. MacLeod: Your Honor, they contend that The New

York Times Company conducted a substantial part of its business in the State of Alabama. This would be relevant on the inquiry as to whether or not there is a substantial contact in this State or whether it is almost just negligible. The cases say, Your Honor, and I can show Your Honor a case right here—

The Court: I will let it in and give you an exception.

[fol. 439] Mr. Baker: We except, if the Court please.

By Mr. Roderick M. MacLeod, Jr.: (Continuing)

Q. Let me ask you this. Do you know the total that has been paid to stringers throughout the country in 1960?

A. From what period of time in 1960?

Q. From January 1st through May of 1960.

A. The payment throughout the whole country would be roughly two hundred forty-five to two hundred forty-six thousand dollars.

Q. Do you know what percentage of that total payment, the payment to the stringers in Alabama has been for the period of January 1st through May, 1960?

A. It would be less than one-tenth of one per cent.

Q. Less than one-tenth of one per cent?

A. Yes, sir.

Q. Mr. McCabe, does The New York Times have any bank account in the State of Alabama?

A. No, sir.

Q. Does it own any property in the State of Alabama?

A. No, sir.

Q. When I use the word property I am referring to either real estate or personal property.

A. No, sir.

Q. Does it rent any property in the State of Alabama?

A. No, sir.

Q. Does it rent any building of any type?

A. No, sir.

Q. Does it rent any personal property of any type in the State?

A. No, sir.

Q. Does it pay any taxes in the State of Alabama?

A. No, sir.

Q. Now, on occasions, Mr. McCade, when advertising matter is placed in The New York Times either by an advertising agency located in the State of Alabama or directly by an advertiser whose place of business is in the [fol. 440] State of Alabama, where is payment for that advertising made?

A. That would be made in New York City or by check from Alabama to New York City.

Q. And it is received by The New York Times Company in New York City?

A. Yes, sir.

Q. Are you familiar with the amount of advertising revenue that the New York Times has received from advertisements that were placed with The New York Times either through an advertising agency located in the State of Alabama or directly from the advertising place of business in the State of Alabama?

A. For what period of time?

Q. During the period of time from January 1st, 1960 through May, 1960.

A. Yes, sir. I am.

Q. What would that be, please, sir?

A. It would be in the neighborhood of seventeen to eighteen thousand dollars.

Q. Are you familiar with the total advertising revenue of The New York Times for the period of January 1st, 1960 through May, 1960?

Mr. Baker: If the Court please, we renew our objection.

The Court: I will let it in and give you an exception.

Mr. Baker: We except, Your Honor.

The Witness: Yes, sir. I am.

By Mr. Roderick M. MacLeod, Jr.: (Continuing)

Q. What would that figure be, please?

A. That figure would be thirty-seven million five hundred thousand dollars.

Q. What percentage of the total advertising revenue for the period of January 1st, 1960 through May, 1960 would be the advertising revenue received from advertisements placed either through an advertising agency located in the

State of Alabama or an advertiser's place of business in the State of Alabama for that same period of time, January 1st, 1960 through May, 1960?

A. Do you mean the total New York Times advertising income?

[fol. 441] Q. That's right.

A. That would be—

Mr. Baker: May we have a separate objection to each one of these questions, if the Court please?

The Court: Yes.

The Witness: It would be forty-six thousandths of one per cent.

The Court: How much?

The Witness: Forty-six thousandths of one per cent, sir.

The Court: Close to one-half of one per cent?

The Witness: No. Much less than that.

The Court: Forty-six thousandths—

The Witness: No, sir. Forty-six thousandths of one per cent.

The Court: I see. Go ahead.

Mr. MacLeod: Forty-six thousandths of one per cent, Your Honor.

The Court: All right. I carried my decimal too far. Go ahead.

By Mr. Roderick M. MacLeod, Jr.: (Continuing)

Q. Mr. McCade, when newspapers are sold by The New York Times to a subscriber in the State of Alabama, where is the subscription price paid to The New York Times?

A. It is paid to our New York City main office.

Q. Are those subscriptions pre-paid?

A. Yes, sir. They are pre-paid.

Q. And the payment is sent to The New York Times office before subscription is started?

A. Yes, sir.

Q. Now, when newspapers are sold to wholesalers or to news stands located in the State of Alabama, where is payment then sent—first, let me ask you this. How are those people billed by The New York Times?

A. Probably monthly in most cases to the address in Ala-

[fol. 442] bama—the payment would be made to New York City.

Q. Is it generally made by mail?

A. Yes, sir. It is sent by mail or check or money order.

Q. And received by The New York Times at its office in New York?

A. Yes, sir.

Q. Are you familiar with the amount of revenue received by The New York Times from its circulation in the State of Alabama for the period of January 1st, 1960 through May, 1960?

A. Yes, sir.

Q. What would that be, please, sir?

A. It would be in the neighborhood of twenty thousand dollars.

Q. Twenty thousand dollars?

A. Yes, sir.

Q. Are you familiar with the amount of revenue received by The New York Times for its total circulation for the period of time from January 1st, 1960 through May, 1960?

A. Yes, sir.

Q. What would that figure be, please, sir?

A. It would be in the neighborhood of eight and one-half million dollars.

Q. What percentage of the total revenue received from circulation by The New York Times for the period from January 1st, 1960 through May, 1960 would be the revenue received from circulation in the State of Alabama during that same period of time?

A. It would be about a quarter of one per cent. About twenty-three hundredths of one per cent.

Q. Twenty-three hundredths of one per cent?

A. Yes, sir.

Q. Mr. McCade, are you familiar with the total revenue received by The New York Times for the period of January 1st, 1960 through May, 1960 from Alabama sources either through circulation or through receipts from advertising placed by agencies located in the State of Alabama or directly by advertisers located in the State?

A. Yes, sir.

[fol. 443] Q. What would that be, please, sir?

A. It would be about \$37,200 or \$37,300.

Q. Are you familiar with the amount of revenue received by the New York Times from January 1st, 1960 through May of 1960 from its total advertising and circulation receipts?

A. Yes, sir.

Q. What would that figure be, please?

A. About forty-six million dollars.

Q. What percentage of the total revenue for that period of January 1st, 1960 to or through May 1960 would be the revenue received from Alabama sources that we have described during that period?

A. It would be about 81/1000 of one per cent.

Q. Eighty-one thousandths of one per cent?

A. Yes, sir.

Q. Now, Mr. McCade, are you familiar with the corporate structure of The New York Times Sales Incorporated?

A. Yes, sir. I am.

Q. Is it a separate corporation from The New York Times Company?

A. Yes, sir.

Q. Am I correct in stating that The New York Times Company is the organization that actually publishes the New York Times newspaper?

A. Yes, sir.

Q. Is the New York Times Sales Incorporated a corporation that does not publish The New York Times newspaper?

A. Yes, sir.

Q. Does The New York Times Sales Incorporated have an office located in Atlanta, Georgia?

A. The Sales Company does. Yes, sir,

Q. Do you know what the function of The New York Times Sales Incorporated office is located in Atlanta, Georgia? Do you know what that function is?

A. The solicitation of advertising in The New York Times.

Q. Are there three employees located there, Mr. Monger, Mr. Hurley and a young lady employed as secretary?

[fol. 444] A. Yes, sir.

Q. Are they each on the payroll of The New York Times Sales Incorporated?

A. Yes, sir.

Q. Do they receive any pay or compensation from The New York Times Company itself?

A. No, sir.

Q. Where are the offices of The New York Times Sales Incorporated located? By that I mean the place where the headquarters is.

A. We have the office you mentioned in Atlanta.

Q. Where are the financial records kept?

A. The financial records are kept by the office in New York City.

Q. Are they kept there in The New York Times building?

A. Yes, sir.

Q. Does The New York Times Sales Incorporated—is that the correct name? Is the correct name The New York Times Sales Incorporated?

A. So far as I know. Yes, sir.

Q. Does it have a separate bookkeeping system from The New York Times Company?

A. Separate records are kept on The New York Times Sales, yes.

Q. Does it have a separate bank account?

A. Yes, sir.

Q. You say that it is the function of the employees in the office at Atlanta to solicit advertising for The New York Times Company. Is that right?

A. Yes, sir.

Q. Does it receive any payment from The New York Times company for the solicitation of that advertising?

A. Yes, sir.

Q. Is that its source of revenue as payment for that advertising?

A. Yes, sir.

Q. Does it make any payment to The New York Times Company itself?

A. No, sir. It doesn't.

Q. Does The New York Times Sales Incorporated make [fol. 445] any payment to The New York Times Company for clerical work or administrative work?

A. There is a charge that The New York Times Company makes to the Times Sales for some of the book-keeping services that The New York Times Company renders them in our New York office.

Q. You say that Mr. Hurley and Mr. Monger are paid on the payroll of The New York Times Sales Incorporated?

A. Yes, sir.

Q. They are not on the payroll of The New York Times Company itself.

A. No, sir.

Q. Does The New York Times Sales Incorporated have any office other than the one located in Atlanta, Georgia?

A. Yes, sir. The New York Times Sales Incorporated has an office located in Los Angeles and an office located in San Francisco.

Q. Mr. McCade, does The New York Times Company publish what they call a microfilm edition of The New York Times?

A. Yes, sir.

Q. Is that an instance where the New York Times newspaper is put on microfilm and then sold in that form—in microfilm form?

A. Yes, sir.

Q. Are any of those sold in Alabama?

A. I would imagine there are a few down here, yes.

Q. Generally, what is the purpose of that microfilm edition?

A. This is mainly a service to different universities and possibly even to a Court in a particular State. They might want a copy of The New York Times in its microfilm form but it is mainly a public service.

Q. It is bought by schools or libraries mainly?

A. Yes, sir.

The Court: Is that used on a device that blows it up and you can read it?

The Witness: Yes, sir. You have to have a microfilm reader.

The Court: I see. You have to have a special machine in order to use it.

The Witness: Yes, sir.



[fol. 446]           By Mr. Roderick M. MacLeod, Jr.:  
                          (Continuing)

Q. Does The New York Times Company publish what they call an Index?

A. Yes, sir.

Q. Is that an Index of articles that have appeared in The New York Times?

A. Yes, sir.

Q. Is that also sold chiefly to schools and libraries?

A. Yes, sir. That would be a public service also.

Q. There would be no occasion for an individual to have either one of those, would there?

A. I can't imagine any. Possibly some lawyer might have a copy.

Q. Do you know approximately how many of the micro-film editions are sold by The New York Times?

A. Do you mean overall?

Q. Yes, overall.

A. I would just be guessing probably. It is probably in the neighborhood of several thousand. I don't know the precise number.

Q. What would be your best judgment as to the amount sold in Alabama?

A. I would say just a few. Possibly to the University of Alabama and possibly to the University of Auburn.

Q. Maybe five or six at the most?

A. I would say that.

Q. And about the same figure for the Index?

A. That would be my guess. Yes, sir.

Q. Has the New York Times Company for the period from January 1st, 1960 to the end of May, 1960 conducted any activity or sent any person into the State of Alabama for the purpose of promoting the sale of either one of those items?

Mr. Baker: We object to that, if the Court please. He is in the Comptroller's Department. He is testifying about—

Mr. Nachman: We object to that—

The Court: Well, let's have the Court Reporter read

the exact question so that I can get the question exactly.  
[fol. 447] The Reporter: Question: "Has the New York Times Company for the period from January 1st, 1960 to the end of May, 1960, conducted any activity or sent any person into the State of Alabama for the purpose of promoting the sale of either one of those items?"

The Court: Well, suppose he knows. Suppose he wasn't in the auditing department but suppose he knows. It looks like he could testify to it.

Mr. Baker: If he knows he can testify.

The Court: You may examine him and find out the sources of his knowledge. I will let him ask him and then you can find out if he really knows much about it. Go ahead.

Mr. MacLeod: You may answer.

Mr. Baker: We except.

The Court: You may answer if you can.

The Witness: No. We have not sent anyone into the State of Alabama.

By Mr. Roderick M. MacLeod, Jr.: (Continuing)

Q. If anyone had been here you would have had the records of the expense involved, wouldn't you?

A. Yes, sir. We get a monthly expense comparison on all of our operations and the Index happens to be one of them and I never saw any traveling expense involved in the microfilm or Index operations.

Q. As a matter of fact, does The Times lose money on those operations?

A. Yes, it does lose money. This is strictly a public service operation.

Q. During the period of time from January 1st, 1960 through May, 1960 has The New York Times sent any person into the State of Alabama to promote the circulation of its regular edition?

A. No, sir.

Mr. Baker: We make the same objection, if the Court please.

The Court: Same ruling.

Mr. Baker: We except.

[fol. 448] Mr. MacLeod: Did you answer?

The Witness: I did. No, sir.

By Mr. Roderick M. MacLeod: (Continuing)

Q. And under the same circumstances, you would have seen the expense accounts if there had been such a person sent—

A. Yes, sir.

Q. In connection with expense accounts, Mr. McCade, I would like to ask you about some of these accounts that have already been placed in evidence by the plaintiff in this case. First, I show you Plaintiff's Exhibit No. 102. I believe this previously has been identified as a copy of a New York Times expense statement. Is that correct, sir?

A. Yes, sir.

Q. Does that reflect on it the expenses that Mr. John Popham had during the period of time covered by that statement?

A. Yes, it does.

Q. Now, I will ask you this question generally in connection with these expense statements. Do these reflect expenses of people who have been on assignment for The New York Times?

A. Yes, sir.

Q. When a person is traveling for The New York Times, I take it that The New York Times pays his traveling expenses. Is that right?

A. Yes, sir.

Q. Is it the practice to put on these expense statements the points to which the person traveled?

A. Yes, sir. It is put on the left hand column there under the column for assignment and the man is asked to list each city that he may stop at during his travels.

Q. And if he is traveling on assignment for The New York Times, does The New York Times pay his expenses to and from the point he is going to on assignment?

A. We pay his expenses for his getting from his home location to the point of his assignment.

[fol. 449] Q. Would you pay the expenses for his stopping over night en route to the place he is assigned?

A. Yes, sir.

Q. And if an expense statement shows an over night stop in a certain town, it would not necessarily mean that that person conducted any activity in the way of news gathering if he were a reporter for The New York Times in that place, would it?

Mr. Nachman: We object to that, Your Honor. This man is from the Comptroller's office and these documents speak for themselves and there is no way in the world that this man—

The Court: I think that objection is good, Mr. MacLeod. I will sustain the objection and give you an exception.

Mr. MacLeod: Your Honor, I will say this to the Court—

The Court: I don't see how this gentleman could know what happened while they were in Atlanta or Huntsville or where ever they were—

Mr. MacLeod: Your Honor, Mr. Nachman used these documents to cross examine a witness with and the point he tried to put across and the inference he was trying to make from the use of these documents on cross examination was that at each place where it showed a man was in a city in the State of Alabama that it was evidence that that man had conducted some news gathering activities in that city. Now, he has opened it up and we are entitled to explain it—

Mr. Nachman: We are not arguing the case yet, Your Honor—

Mr. MacLeod: He used them and we are entitled to go into this phase—he has used them and we are entitled to explain what they are further.

Mr. Nachman: Your Honor, as I recall my cross examination, one account dealt, I think, with Peter Kihhs and it showed that he was in Alabama for nine days. I think I am right about that reporter or it may have been another one but it was for a period of time from January 22nd to January 31st and he never left Alabama during that time. Now, I think what this man in the Comptroller's office can say about the news gathering activities that these [fol. 450] expense statements show is extremely limited.

The Court: Let me ask this witness a question. All you

know about the question he asked you about is what comes to you through this expense account? Does this come to your desk in New York somewhere?

The Witness: I can tell from the expense statement in some cases—

The Court: Well, for instance, a fellow in Huntsville—you don't know what he was doing down there, do you? You don't know what kind of work he was doing, do you?

The Witness: Well, in the case of John Popham being on assignment from Chattanooga to some place probably in Mississippi—he might stop off in Birmingham over night just to rest en route if he was driving from Chattanooga to Mississippi.

By Mr. Roderick M. MacLeod, Jr.: (Continuing)

Q. And if he stopped over night, it would show on his expense account, would it not?

A. Yes, sir.

Q. That wouldn't mean that he conducted news gathering activities in Birmingham, would it?

A. No, sir.

Mr. Baker: Now, if the Court please, we renew our objection. The only person that can testify as to what they did in those places and explain those accounts are the people who did the traveling. Now, an auditor sitting up at a desk in New York is certainly not competent to say how a man travels when he wasn't there.

The Court: I am inclined to agree with that. Let me give you an exception.

Mr. MacLeod: Your Honor, may I make a further statement?

The Court: Yes.

Mr. MacLeod: We can show that Mr. McCade is familiar with these expense statements and he can testify what they reflect. Now, if Your Honor—

[fol. 451] The Court: Well, the exhibits themselves will show what they reflect.

Mr. MacLeod: Mr. Faber testified—take Claude Sitton for example. He testified that Claude Sitton was in Ala-

bama on assignment from The New York Times only on certain days in 1959 and 1960. Mr. Nachman took these statements and attempted to discredit Mr. Faber and in an attempt to cross examine him and trying to invoke the inference from these statements that each time the statement showed that Mr. Sitton was in Alabama that he was conducting some news gathering activities at that place. Now, I want to ask the witness about them individually. I am not going to go into the matter wholesale. I am going to ask him what each one of these expense statements reflect.

The Court: Well, doesn't the statement themselves show that so and so went to such and such a place and stayed for a so and so length of time and stayed all night and paid so much hotel bill or something like that?

Mr. MacLeod: Well, they show the places he visited on here and we can show—Mr. Nachman has opened it up, Your Honor. He went into that himself and so he is not in a position to object at this time. We would like to clarify it for the Court's benefit. I think that would help Your Honor if we could do that.

The Court: Well, the Court needs all the enlightenment it can get.

Mr. Baker: Well, you can clarify it in the right manner—

Mr. Nachman: Instead of clarifying it with the witness Harold Faber who sent the men on assignment, they are now trying to clarify it with somebody with the Comptroller's office—

The Court: Well, I don't see how he could be in New York—most of his knowledge is taken from those statements there.

Mr. Beddow: If the Court please, this gentleman knows that Mr. Popham was sent on certain occasions on certain missions and that he was given certain assignments—

The Court: Well, now, I didn't understand him to testify that he knew all that.

[fol. 452] Mr. Beddow: Well, he knows it from his records and if anybody knows it, the man who pays the money out and has to approve it—

The Court: Well, I thought that Mr. Faber was the man who did all of the assigning up there.

Mr. Beddow: He personally knows everywhere Mr. Popham goes or goes in an automobile. He will not fly in an airplane. He won't have anything to do with planes. That's the way he travels, Your Honor—

The Court: It's flirting with the undertaker.

Mr. Beddow: That may be, Your Honor. He also knows, if it please the Court, of his own personal knowledge that this man travels that way and that when he has these assignments then these records reflect that he has traveled that way and that he stopped in Birmingham. It might show that he stopped in Birmingham and—

The Court: Let me ask one question. Let me see one of those.

Mr. MacLeod: This is the particular exhibit, No. 102, Your Honor, that I was going to refer to.

The Court: Now, this is Exhibit No. 102 and here is a statement from John Popham and it says that he departed from Huntsville and arrived—do you know just what his business was in Huntsville or going through there?

Mr. MacLeod: I believe he can tell from that statement, Your Honor.

The Witness: He was on his way from Memphis back to Chattanooga. He arrived at Huntsville, Alabama at midnight. He was driving—

The Court: I know all that but what was he doing down there? Do you know whether he was gathering news or advertising the circulation or what? We are agreed on that—

The Witness: Mr. Popham's home office was in Chattanooga and he was on his way to Memphis back to Chattanooga and he just stayed in Huntsville over night. He arrived in Huntsville at midnight and he left at eight o'clock in the morning.

Mr. MacLeod: Wouldn't that show that his limited time

[fol. 453] The Witness: Well, apparently he was just resting in a hotel over night.

Mr. Whitesell: Apparently?

The Witness: Yes.

Mr. Whitesell: You don't know of your own personal

knowledge what he did, do you? That's the specific point, Your Honor.

Mr. Baker: Your Honor—

Mr. Nachman: Here is another one, Your Honor, Plaintiff's Exhibit No. 110 that shows that Wayne Phillips was in Montgomery from March 18th through March 24th—

Mr. Beddow: We are not asking him about that yet—

Mr. Nachman: I will ask Mr. McCade whether he can look at this and tell what he was doing in Montgomery all that time.

Mr. Embry: If the Court please—

Mr. MacLeod: If the Court please, that hasn't got a thing to do with what—

The Court: Well, there are too many lawyers talking at one time. One at a time.

Mr. MacLeod: Your Honor, that hasn't got a thing in the world to do with this particular exhibit that I am questioning this witness about. It doesn't enter into this objection that they have made here.

The Court: I just don't believe he can testify what this man was doing down there. I will give you an exception. Go ahead.

Mr. MacLeod: We except, Your Honor.

By Mr. Roderick M. MacLeod, Jr.: (Continuing)

Q. Would that expense account tell you whether or not he was gathering news in that place or is there an absence of a showing on there as to what he was doing?

Mr. Nachman: We object on the same grounds, if the Court please.

The Court: I think the paper itself would show that.

Mr. Beddow: Well, the only thing is, Your Honor, they [fol. 454] went into great detail in connection with an examination of the witness in connection with these particular exhibits and Mr. MacLeod is attempting to clarify it so that Your Honor will not have the laborious chore ahead of you of going through all that—

The Court: Well, a Judge's life is just full of laborious chores.

Mr. Beddow: Well, they went into it, Your Honor, and we feel we should give an explanation of—



The Court: Well, let me give you an exception on that. I don't believe his sources of knowledge are sufficient to allow him to answer that question.

By Mr. Roderick M. MacLeod, Jr.: (Continuing)

Q. Mr. McCade, in the course of your duties with The New York Times Company have you had occasion to be familiar with the practices in connection with expense statements for correspondents of The New York Times?

A. Yes, sir.

Q. Was there a period of time when it was your duty to approve or disapprove expense statements?

A. There was a period of time when it was my duty to audit these expense statements.

Q. You had to audit them?

A. Yes, sir.

Q. How long a period of time did that cover that you were connected with those duties?

A. For approximately two years.

Q. During the course of that time you became familiar with these expense statements, did you not?

A. Yes, sir.

Q. And you became familiar with the practices of The New York Times and of the correspondents in connection with what expenses were to be paid in connection with the activities of the correspondents while he was on an expense account.

[fol. 455] A. Yes, sir.

Mr. MacLeod: Your Honor, I believe we have shown from that that he is familiar with these things—

The Court: Well, it might be a general practice but as to having him testify as to what that man was doing and as to whether or not he was gathering news—let me stand pat on my ruling. You may have an exception.

Mr. MacLeod: All right, sir. We except.

The Court: Now, if you want to, Mr. MacLeod, you may make the same offer as to each one of these exhibits and let the Court overrule you and you may have an exception to each one.

Mr. MacLeod: They are already in evidence, Your Honor.

The Court: Well, if you want to you may ask a question about each one of them. I thought it might save some time.

Mr. MacLeod: Mr. McCade, I show you here a document identified as Plaintiff's Exhibit No. 102—

Mr. Nachman: Your Honor, if it will save time, we will stipulate that the same question was asked in regard to each one with the same objections and the same ruling of the Court—

The Court: Well, why couldn't we do that instead rather than go through all of them.

Mr. Nachman: We can have the same understanding we had on all the other documents earlier.

Mr. MacLeod: Well, Your Honor, I might want to ask him another question about this document instead of the one they have objected to and I believe I will at this time.

The Court: All right. Go ahead.

By Mr. Roderick M. McLeod, Jr.: (Continuing)

Q. Now, Mr. McCade, this document purports to be an expense statement for John N. Popham, Jr.?

A. Yes, sir.

Q. Now, will you read to the Court this item right here dated March 2nd?

Mr. Nachman: Your Honor, that is exactly the item [fol. 456] Your Honor has just ruled on. It is the trip from Memphis and we just can't see any reason for going over the exact question now. He has asked him to read from the statement and it is the same trip he just asked about that Your Honor just ruled on.

The Court: Well, let him ask the question and see if it is different from the other one.

Mr. MacLeod: Read that answer there, Mr. McCade.

The Witness: It says, "March 2nd, departed Memphis 5:00 P. M., arrived Huntsville, Alabama at midnight." Then it has a series of expenses listed there.

By Mr. Roderick M. MacLeod, Jr.: (Continuing)

Q. What is the next item there?

A. Do you want me to read the expenses?

Q. No, not the expenses. Begin at March 3rd.

A. It says, "March 3rd, departed Huntsville at 8:00 A. M., arrived at Chattanooga, Tennessee, March 3rd, at 1:00 P. M."

Q. From your experience and your connection with and your familiarity with expense statements of The New York Times and looking at this whole document taken together with that item you have just read, would that indicate to you that John Popham was conducting any news gathering activities in Huntsville, Alabama?

Mr. Baker: We object to that, if the Court please.

The Court: I sustain the objection. It is a question of what that indicates to the Court—let me sustain the objection to that and all that line of questioning.

Mr. MacLeod: We except, Your Honor. I would like to ask the same question—

The Court: Don't you think there is some way to save time? Don't you think you can ask the same question and have the same objection and have the same ruling—

Mr. MacLeod: I am going to do that right now, Your Honor. I would like to ask the same question and I would like the Record to show if we can, Your Honor, that the [fol. 457] question was actually asked in connection with each one and to show an exception to the Court's ruling in connection with each one. I ask the same question in connection with Plaintiff's Exhibit No. 98 which purports to be an expense statement of Claude Sitton. I ask the same question about Plaintiff's Exhibit No. 99 which purports to be an expense statement of John N. Popham. I would like to ask the same question in connection with Plaintiff's Exhibit No. 100 which purports to be an expense statement of John N. Popham. I ask the same question in connection with Plaintiff's Exhibit No. 101 which is an expense statement of John N. Popham. I ask the same question in connection with Plaintiff's Exhibit No. 93 which is an expense statement of Claude Sitton.

By Mr. Roderick M. McLeod, Jr.: (Continuing)

Q. Now, Mr. McCade, I am going to show you an expense statement of Claude Sitton which has been introduced into

evidence by the plaintiff in this case and is marked as Plaintiff's Exhibit No. 96 and ask you if there is any reference on there at all to the State of Alabama.

A. I don't see any Alabama City mentioned here.

Mr. Nachman: We will withdraw this exhibit, Your Honor.

Mr. MacLeod: Well, it is in evidence now.

Mr. Nachman: Do you want to leave it in?

Mr. Whitesell: Do you want to move to exclude it or do you want to leave it in?

Mr. Nachman: It doesn't make any difference to us. It was sent to us an expense statement by The Times as an expense statement pertaining to Alabama and apparently somebody there also mistook Huntsville, Arkansas for Huntsville, Alabama and we did too.

The Court: Where is that? In Texas?

Mr. Nachman: In Arkansas, Your Honor. It is completely immaterial to us but we will be happy to withdraw it in view of the error that both we and The New York Times made.

Mr. MacLeod: Go ahead and withdraw it.

Mr. Nachman: We will withdraw Exhibit No. 96.

Mr. MacLeod: We would like the Record to show, Your [fol. 458] Honor, that if they withdraw it that it was one of the records and documents that they used to cross examine Mr. Faber with.

Mr. Nachman: I don't know whether I used this particular document to cross examine Harold Faber with or not.

The Court: Well, the Record will show.

Mr. Baker: Leave it in.

Mr. Beddow: All right. Let's get contrary now. Leave it in. I thought you wanted to withdraw it because you made an honest mistake—

Mr. Nachman: We did make an honest mistake—

Mr. Beddow: I said that you did and I know that you didn't do it purposely and that it was an honest mistake by that—but why quibble over it. Now, you say to leave it in—

Mr. Nachman: I said that we would do whatever you gentlemen wanted us to do about it—

Mr. Beddow: Well, if he wants to withdraw it—I would want to withdraw it if I made an honest mistake—

The Court: Well, we all make mistakes. Why can't we adjourn at this time until three o'clock?

(At this point Court recessed and reconvened at 3 P.M.)

Direct examination. (Continued)

By Mr. Roderick M. MacLeod, Jr.:

Q. Mr. MacCade, does the New York Times Company buy news information and stories from the Associated Press?

A. Yes, sir. We belong to the Associated Press.

Q. Do you buy news information or news stories from the United Press?

A. Yes, sir.

Q. Do you also buy news information or news stories from other wire services?

A. Occasionally we do, yes.

Q. Do you buy news photographs from one of those wire services?

A. Yes, sir.

[fol. 459] Q. That would be the Associated Press or the United Press.

A. Yes, sir.

Q. Does the Associated Press bill the New York Times?

A. Yes, sir.

Q. Do you know on what basis they bill The New York Times? Is it a periodic billing?

A. I believe it is a weekly billing.

Q. Weekly?

A. Yes, sir.

Q. And The New York Times pays those bills.

A. Yes, sir. We do.

Q. They send the payment to the Associated Press office?

A. Yes, sir.

Q. Do you know where the Associated Press headquarters is located?

A. We send payments to the New York City office of the Associated Press office.

Q. Does the United Press also bill the New York Times?

A. Yes, sir.

Q. Is that on about the same basis?

A. Yes, sir. It would be a smaller payment, of course.

Q. A smaller payment. Do you buy less information news from that source?

A. They supply less.

Q. I see. They supply less. Your payments are made, as between those two, on the basis of how much news they supply. Is that correct?

A. Well, also the circulation of the New York Times would be taken into consideration and the volume of news with the circulation is taken into consideration as a basis.

Q. Does The New York Times exercise any supervision or control over the activities of the Associated Press?

A. No, sir.

Q. Does The New York Times exercise any supervision or control over the activities of the United Press?

A. No, sir.

[fol. 460]

#### NEW YORK TIMES COMPANY ASSIGNMENT OF ADDITIONAL GROUNDS OF OBJECTIONS

Mr. Embry: Under the stipulation and agreements had throughout the hearing on the Motion to Quash in the L. B. Sullivan case wherein it was agreed that counsel for The New York Times Company could assign any additional grounds of objections to questions propounded to the various witnesses and to the introduction of documentary evidence that they saw fit to do, such stipulation being for the purpose of saving the Court's time on the original hearing, the defendant, The New York Times Company, wishes to and does assign the following additional grounds of objection. To each objection made originally to questions propounded to the witnesses and the introduction of documentary evidence, that the questions called for a mental operation of the witness and not facts and that the questions called for an answer which does not tend to prove or disprove whether Don McKee and John Chadwick were agents of The New York Times Company so that purported

service upon McKee would constitute valid service upon this defendant. It does not tend to prove whether or not The Times did business in Alabama or whether the cause of action attempted to be stated in the complainant's cause accrued from or was incident to the doing of business or performance of work or service in Alabama by The New York Times Company or its agents, servants or employees and that these same grounds of objection apply to the introduction of the various exhibits offered by the Plaintiff. Further grounds of objection to questions propounded to the various witnesses as well as to the introduction of documentary evidence are that the question and the evidence sought to be adduced by an answer thereto and the documents would not be material or legal evidence such as would authorize a construction by the Court of Section 199 (1) of Title (7), Code of Alabama, 1940, that would permit the Court to assert jurisdiction over the person of The New York Times Company, a corporation, and to admit such evidence for such purpose would be such a misapplication of the law as would deprive this defendant of its property without due process of law in contravention or violation of the Fourteenth Amendment of the Constitution of the United States and in contravention or violation of Article 1, Section 6, of the Constitution of Alabama, 1901, [fol. 461] and would deny to this defendant equal protection of the law in contravention or violation of the Fourteenth Amendment of the Constitution of The United States and would constitute an abridgement of freedom of the press in contravention or violation of the First Amendment to the Constitution of the United States, taken together with the Fourteenth Amendment of the Constitution of the United States and would impose an unreasonable burden upon Inter-State Commerce in contravention or violation of Article I, Section 8 of the Constitution of the United States and such questions and the evidence sought to be adduced therefrom and such documents would be illegal and immaterial as a basis for the Court construing or holding that Don McKee was an agent of this defendant upon whom service of process might be had so as to support a holding by the Court that any purported service upon him would subject this defendant to the jurisdiction of this Court

and the admission of such evidence and the holding on the basis of such evidence that he was an agent so as to subject this defendant to the jurisdiction of this Court, would deprive this defendant of its property without due process of law in violation of the Fourteenth Amendment of the Constitution of the United States and in violation of Article 1, Section 6 of the Constitution of Alabama, 1901, and would deny to this defendant equal protection of the law in violation of the Fourteenth Amendment of the Constitution of the United States and would abridge freedom of the press in violation of the First Amendment to the Constitution of the United States, taken together with the Fourteenth Amendment of the Constitution of the United States and would impose an unreasonable burden upon Inter-State commerce in violation of Article I, Section 8 of the Constitution of the United States.

[fol. 462] Q. All right, sir. That's all.

Cross examination.

By Mr. M. R. Nachman, Jr.:

Q. I will sort of proceed in reverse order as we were talking about the Associated Press. The Associated Press is a corporation, is it not?

A. I don't know what the legal set-up is. It is made up of various newspapers—

Q. They are considered as members, aren't they?

A. That's right.

Q. The Associated Press is a non-profit organization, is it not?

A. I am not familiar with their fiscal operations.

Q. Does it pay any dividends to its members?

A. Not so far as I know.

Q. You would know, if they did, wouldn't you?

A. Well, The New York Times didn't receive any.

Q. The New York Times has been a member for a good long time, hasn't it?

A. Yes, sir.

Q. Is the same thing true with the United Press?

A. Yes, sir. So far as I know now.



Q. It is also a cooperative—

A. I didn't answer that they were a cooperative.

Q. Well, what is the status of the United Press, if you know?

A. Well, I really don't know.

Q. Well, let's get back to the Associated Press now. Am I correct in stating that a newspaper has to be a member of the Associated Press in order to get or to be able to get news from the Associated Press?

A. Yes, sir.

Q. Is the purpose of being a member the ability to avail yourself of the news gathering services of the Associated Press?

A. Yes, sir.

[fol. 463] Q. Now, earlier in your testimony, sir, you spoke of a regular payroll. Is there any other kind of a payroll that The New York Times maintains?

A. No, sir.

Q. Are the stringers on a payroll of The New York Times?

A. No, sir.

Q. How are they paid? What kind of a set-up is maintained for the stringers?

A. It would be a monthly payment based on any stories they had submitted to The New York Times for the preceding month.

Q. Well, they are paid for things other than stories, aren't they? I don't want to be repetitive but I believe you have been present throughout this hearing and heard the testimony, have you not?

A. Yes, sir.

Q. And do you recall the testimony of Mr. Faber that Mr. Chadwick and Mr. McKee were paid for services rendered to Harrison Salisbury while he was down here?

Mr. MacLeod: Your Honor, we object to him asking questions about what other witnesses testified to and—

Mr. Nachman: All right. I will withdraw that question. I was just trying to shorten things a little bit.

The Court: All right. Proceed. The question is withdrawn.

By Mr. M. R. Nachman, Jr.: (Continuing)

Q. Am I correct in stating that Mr. Chadwick and Mr. McKee were paid for services rendered to Harrison Salisbury in Alabama during the month of April of this year, 1960?

Mr. MacLeod: Your Honor, I object to that. The testimony—

Mr. Nachman: Your Honor, this is cross examination—

Mr. MacLeod: They paid for information—

Mr. Nachman: Your Honor, I tried not to interrupt Mr. MacLeod in his direct examination.

The Court: Well, if he knows. Go ahead.

[fol. 464] By Mr. M. R. Nachman, Jr.: (Continuing)

Q. I show you a piece of paper identified as Plaintiff's Exhibit No. 2 and I show you a slip of paper which reads, "Chadwick, Birmingham. Allowance, \$25 for help given Salisbury on his swing through south. For authorization, see memo 418." Now, does that indicate payment for a story?

A. It indicates payment.

Q. Yes, sir. I understand that but does it indicate payment for a story, and if so, tell us what story was submitted?

Mr. Embry: We object to that, Your Honor. The document speaks for itself. It is in evidence.

The Court: I will let it in and give you an exception.

Mr. Embry: We except.

The Witness: The piece of paper mentions that the allowance was for helping—it mentions an allowance of \$25 given for helping Harrison Salisbury.

By Mr. M. R. Nachman, Jr.: (Continuing)

Q. There is no mention of a story. Is there?

A. It mentions help given to Harrison Salisbury.

Q. There is no mention of a story. Is there?

Mr. Embry: We object to that, Your Honor. He is arguing with the witness.

The Court: If he knows, he can say so.

The Witness: I can only say what the slip of paper—

By Mr. M. R. Nachman, Jr.: (Continuing)

Q. That's right. The slip of paper doesn't mention a story. This was the authorization of which \$25 of a \$100 payment for John Chadwick in the April, 1960 envelope was made. Isn't that correct, sir?

A. Yes, sir.

Q. Isn't that why this slip of paper was in the envelope?

Mr. Loeb: He said, yes.

[fol. 465] The Witness: I said, yes.

By Mr. M. R. Nachman, Jr.: (Continuing)

Q. Now, I show you Plaintiff's Exhibit No. 1 which is an envelope on Don McKee for April, 1960. Now, I show you a piece of paper contained therein and I will read it along with you. "McKee. Montgomery. Allowance, \$25 for help given Salisbury on his swing through South. For authorization, see memo 4-18-60." That's what it shows, isn't it?

A. Yes, sir.

Q. This is the same situation throughout—there is nothing on here about payment for a story. Isn't that right?

A. No, sir. That's right.

Q. No, there is not. That's what your answer meant, wasn't it?

A. Yes, sir.

Q. Now, since you are familiar with all of the payments to the stringers, perhaps you can tell us what payment, if any, was sent to Don McKee for sending in this telegram which is in evidence as Plaintiff's Exhibit No. 78?

Mr. MacLeod: If the Court please, I object to that. That wouldn't tend to prove or disprove any of the issues in this case as to whether The New York Times was doing business in the State of Alabama. This is not a legitimate matter of inquiry. This has been shown to have been a matter that was done in the aid of the defense of this law suit after this plaintiff had made a demand on this defendant. It is

immaterial, irrelevant and incompetent and has no bearing whatsoever on the issues set out in this motion to quash or in the complaint and it is a confidential matter and as to what was done or what was paid in connection with it would be a privileged matter between this defendant and his attorney and the inquiry he has made is completely immaterial.

The Court: I will let it in. Go ahead.

Mr. MacLeod: We except, if the Court please.

The Witness: Would you repeat the question?

[fol. 466] By Mr. M. R. Nachman, Jr.: (Continuing)

Q. The question was, what payment, if any, was made to Don McKee for submitting this telegram, Plaintiff's Exhibit No. 78?

A. I don't know of any payment that was made. We submitted canceled checks on all payments made to Mr. McKee and Mr. Chadwick in 1960.

Q. Well, that would include up to what point?

A. I believe that would include up to April 26th, 1960.

Q. Well, for service performed on April 14th, 1960 would not be included in that, would it?

Mr. MacLeod: Your Honor, we object to that. He told what he produced—

Mr. Nachman: I didn't ask him what he produced—

Mr. MacLeod: He has already testified that he didn't know of any payment being made to McKee on this item.

The Court: Well, if he says he doesn't know, then that's all he can say.

Mr. Nachman: Your Honor, I believe he was talking about—

The Court: I believe the question is admissible. I will rule with you.

By Mr. M. R. Nachman, Jr.: (Continuing)

Q. You may answer. Was payment made to McKee for this?

A. I answered that I don't know.

Q. Well, is there anyone else connected with The New

York Times who is in charge of the stringers who does know? I thought from your Direct testimony that you were the man.

A. I can just repeat what I said before. Canceled checks for 1960 were submitted.

Q. Yes, sir. I understand that and I am not making any point that no canceled checks for this were submitted but I am simply asking you as Comptroller as you testified about the payment of stringers and I am asking you if any payment was made to McKee for his services in connection with this Exhibit No. 78?

[fol. 467] Mr. MacLeod: Your Honor, he has answered twice already that he doesn't know.

Mr. Nachman: I am now trying to find out—

The Court: Well, one more time and we may save time. Go ahead. If he doesn't know that's all he can say. If he doesn't know, he doesn't know.

Mr. Nachman: You don't know?

The Witness: I repeat again, I don't know.

By Mr. M. R. Nachman, Jr.: (Continuing)

Q. Now, as I recall your Direct testimony and correct me if I state it incorrectly, your testimony about the payment to stringers I thought covered January 1 through May, 1960.

A. That's right. I made a mistake before. I said April 26th and I think we sent canceled checks through May, 1960. If you will look through your canceled checks you will—

Q. Well, we don't have any envelopes beyond April, 1960. That is, these envelopes and by these envelopes I mean envelopes such as Plaintiff's Exhibits No. 1 and No. 2 and the like.

A. The payments made in May would cover stories submitted in April. The payment is always a month behind, you see.

Q. Well, we have no payment for May. Are there some that you have with you?

A. No.

Mr. Embry: Excuse me for interrupting, Your Honor. There seems to be some confusion here. He testified that the envelopes show a period for which the stories were sold and this witness is talking about when the check is written. In other words, if he got any check in May it would show on the envelope in April. I think that's what he is trying to say.

Mr. Nachman: Is that what you are trying to say?

The Witness: The check dated May, 1960 would cover the envelope dated in April.

[fol. 468] By Mr. M. R. Nachman, Jr.: (Continuing)

Q. I see. So that any May envelope would take us over into June. Is that right? Is that the way it works?

A. That's right. If any stories were submitted in May they would be paid for in June.

Q. Well, I understand that. Assuming that there were some they would be paid for then.

A. That's right.

Q. Now, you mentioned a lot of deductions that you take off the payroll. Are they taken off for all of the employees of The New York Times?

A. Well, I mentioned the pension payment but some of the people are not eligible because of their age.

Q. Well, all of those deductions you mentioned are not made for all of the employees of The New York Times, are they?

A. Some of them are.

Q. Some of them are but not all of them.

A. About half a dozen are made for all of the employees of The New York, The New York Times rather.

Q. But all of them aren't made for all of the employees of The New York Times. Isn't that correct?

A. Yes, sir. I agreed with that.

The Court: Am I to understand that an employee would be somebody who was on the payroll?

Mr. Nachman: I don't know, Your Honor. I am asking him about—

The Court: Well, how about a stringer? Do you take out anything for a stringer and I think the word stringer is

a horrible name. Do you take out any Social Security and things like that?

The Witness: No, Your Honor, we do not.

By Mr. M. R. Nachman, Jr.: (Continuing)

Q. Now, you mentioned the number of stringers. Does that include just stringers in the United States or does The New York Times have stringers outside of the United [fol. 469] States?

A. I don't believe I mentioned the number. I believe I mentioned the amount of payments.

Q. The amount of payments. You are correct. I stand corrected.

The Court: Don't you think we could stay within the borders of the continent of the United States?

Mr. Nachman: Well, I was just wondering, Your Honor, whether the payments included payments to stringers outside of the continental United States as well as within the United States. I don't know whether they have any—

Mr. Loeb: The question he answered this morning, as I recall it, was very clear. It was limited to the continental United States.

Mr. Nachman: Well, if so, he can limit it again.

The Witness: Yes, that's right. Domestic payments to stringers.

By Mr. M. R. Nachman, Jr.: (Continuing)

Q. Now, The New York Times does urge people and by people I include corporations or municipal or State organizations as well, to buy its Index, does it not?

A. No, we don't.

Q. You never send out any circulars regarding the Times Index?

A. We may occasionally advertise through an ad in the newspaper that we have this service available.

Q. I will ask you whether you have ever seen this document before or one like it?

A. It is a promotional piece for our Index.

Q. It is designed to promote the sale of the Index, isn't it?

A. Yes, I would assume so.

Q. Now, I notice on this brochure which has been identified as Plaintiff's Exhibit No. 310 for identification, the statement "Your Index is a Research and Reference Tool Almost Unsurpassed—"

Mr. MacLeod: We object to that. Let him answer the [fol. 470] question—

Mr. Nachman: I plan to read from it—

Mr. MacLeod: Are you going to introduce it into evidence?

The Court: Well, if he doesn't offer it, then you can offer it.

Mr. MacLeod: We except.

Mr. Nachman: Now, I will start again with the quotation, "Your Index is a research and reference tool—"

Mr. Embry: Your Honor, we object to his reading this into the Record without having offered it into evidence.

Mr. Nachman: Well, I will offer the document into evidence then.

The Court: Go ahead and offer it. It might save time.

Mr. Nachman: We offer it into evidence as Exhibit 310.

Mr. MacLeod: We object to its introduction on the grounds that it hasn't been shown to have any materiality or any pertinency to this case. It hasn't been shown to have any bearing on the question of whether or not The New York Times conducted any business in the State of Alabama or whether there has been any activity of The New York Times in the State of Alabama and all that is insofar as has already been shown is a piece of paper about The New York Times Index and hasn't been shown that it has any connection whatsoever with The State of Alabama.

Mr. Nachman: Your Honor, I was trying to connect it up when—

The Court: If you don't connect it up, it will go out. You can't get it in all at one time. Go ahead.

Mr. Nachman: The reason I was calling attention to this quotation was—the quotation I was about to read before they interrupted me has a line under it "William Stanley Hoole, Librarian, University of Alabama."

Mr. MacLeod: Your Honor, we move to exclude Mr.



Nachman's remark. He is attempting without being able to prove that is valid evidence to put it before the Court by stating himself what it is.

[fol. 471] The Court: Well, if it is proved that that is mailed and sent into the State or something, then it would be admissible—what did it say about Stanley Hoole? What did he do?

Mr. Nachman: Well, I was going to read it because I didn't want to characterize what he had done. This statement with quotes around it appears above his name. "Your Index—"

Mr. MacLeod: Just a minute! I am going to object to his reading it.

The Court: I will let it in and give you an exception to it word for word. Go ahead.

By Mr. M. R. Nachman, Jr.: (Continuing)

Q. It reads as follows: "Your Index is a research and reference tool almost unsurpassed in our organization. Not only do we use it as an Index to The Times but as an index to other contemporary newspapers, here and abroad." Now, isn't material like this or material similar to this sent into Alabama and other States and does a promotion for the Times Index?

A. I don't know.

Q. Do you know how this quotation was obtained from Mr. Hoole?

A. I assume that the Librarian of the University of Alabama agreed to—

Mr. MacLeod: Now, just a minute. We object to that, Your Honor. He tried to get it identified and he couldn't and he hasn't introduced it into evidence—

The Court: Well, he couldn't go on what the witness would assume. We have to get it stronger than that. It has to be stronger than that if it is to get in at all.

By Mr. M. R. Nachman, Jr.: (Continuing)

Q. Does The Times, before it publishes quotations such as this one, obtain authorization from them for the use of their names?

Mr. MacLeod: Your Honor, we object to that unless it is shown whether or not it was done in this particular case and whether or not it was done in Alabama—  
[fol. 472] The Court: Yes.

By Mr. M. R. Nachman, Jr.: (Continuing)

Q. Do you know whether or not such authorization is obtained by The Times?

A. I don't know.

Q. Do you know whether any payment is made? Do you know as Comptroller whether any payment is made to such persons for endorsement of The New York Times Index?

A. I have never seen any.

Q. But you do say that this is promotional material which you recognize as such.

A. Yes.

Q. And you do know that it is sent out by The New York Times.

Mr. MacLeod: I believe he testified, Your Honor, that he didn't know.

Mr. Nachman: Well, do you know whether it is sent out by The New York Times?

The Witness: It would be sent out upon request.

By Mr. M. R. Nachman, Jr.: (Continuing)

Q. It is sent out upon request. It is only sent out upon request. Is that your testimony?

A. Well, I don't know. There may be exceptions.

Mr. Nachman: Could we leave it with this identification, Your Honor—

The Court: Oh, yes. Leave it as offered in evidence and turned down.

By Mr. M. R. Nachman, Jr.: (Continuing)

Q. I show you now some documents which were sent in connection with the Motion to Produce and I show you some cards.

Mr. Nachman: Your Honor, may I inquire before getting an identifying witness whether the fact that they sent a [fol. 473] similar brochure in response to the Motion to Produce would make it admissible without further identification because we have one here, I think, which came along with the material sent by The Times out of this box previously identified. Your Honor will recall that we asked for such material in our motion.

Mr. MacLeod: Your Honor, it is not made admissible because it has been produced here by this defendant. It is up to him to show its admissibility.

Mr. Nachman: Well, I didn't know whether Your Honor's ruling was based on absence of identification—

The Court: No. I just don't think it is admissible unless you can show by somebody that they sent it in here.

Mr. Nachman: All right, Your Honor. I will not go into that then without such testimony.

By Mr. M. R. Nachman, Jr.: (Continuing)

Q. Now, do you recognize these cards, and if you do, I will have them identified before I ask you any more questions about them.

A. I don't recognize them.

Q. Do you know whether or not these are cards kept by The New York Times as a part of their records to indicate buyers or subscribers, or however you refer to them, of The New York Times Index?

Mr. MacLeod: Your Honor, he has already testified that he doesn't recognize them.

The Witness: I don't recognize them. There is no identification on them.

By Mr. M. R. Nachman, Jr.: (Continuing)

Q. Do you see the word "Index" here?

A. It doesn't mention The New York Times.

Q. The accounts for The New York Times Index doesn't come under your department at all. Is that correct?

A. Well, the account—

Mr. MacLeod: We object—

[fol. 474] Mr. Nachman: Your Honor, he testified about The New York Times Index on his Direct Examination and how it was handled and how many subscribers they thought there were in Alabama and now he says he doesn't know anything about these cards.

Mr. MacLeod: Your Honor, I don't think Mr. Nachman has made clear to the witness just what cards or just what accounts he is talking about.

Mr. Nachman: I am talking about the accounts in connection with The New York Times Index and specifically the sale of the New York Times Index to persons or organizations in Alabama. As I recall, there was some testimony on Direct Examination about the number of organizations in Alabama who took this New York Times Index and now I am showing him cards that were produced in response to the Motion to Produce.

By Mr. M. R. Nachman, Jr.: (Continuing)

Q. Now, as I understand it, you don't know what these are and you can tell nothing from looking at them. Is that your testimony?

A. I don't recognize these cards.

Q. By looking at them then, you have no idea whether they have anything to do with The New York Times Index or not. Is that correct? Do you mind taking a look at them?

A. Yes, sir. I will look at them again.

Mr. MacLeod: Your Honor, we object. The witness has testified he doesn't recognize them—

Mr. Nachman: Do you mind if he looks at them, Mr. MacLeod?

Mr. MacLeod: No—

The Court: Let him take one more look. Of course, if he doesn't recognize them, that's that.

Mr. MacLeod: It is not shown that they are fiscal records of The New York Times. Those may be some other mailing department records and they are not shown to be—

Mr. Baker: If it please the Court, we move that his testimony on Direct Examination with reference to The

[fol. 475] New York Times Index be stricken as based on lack of knowledge.

Mr. MacLeod: Your Honor, the only thing he said he didn't know about was these particular cards and it is not shown that they are connected with his department in any way—

The Court: Well, if we strike his testimony about the Index, then it doesn't look like this would be relevant at all, would it?

Mr. MacLeod: Sir?

The Court: If he moves to strike all of his testimony about the Index—if we do that, then this wouldn't be relevant, would it?

Mr. MacLeod: Let me ask him a question—

Mr. Nachman: No, sir. I am going to finish my cross examination. I let Mr. Embry interrupt me from time to time but I want to finish my cross examination without further interruption.

Mr. MacLeod: Well, I think I can clear up the difficulty.

The Court: Well, now, let's make all objections from the counsel table to the Court now.

Mr. MacLeod: Your Honor, I want to ask this witness a couple of questions on Voir Dire and see if I can find out—

The Court: Well, he doesn't seem to know much about these things but if you can find out it is all right.

By Mr. M. R. Nachman, Jr.: (Continuing)

Q. Now, these cards contain headings of dates, debit and credit, don't they?

A. Yes.

Q. They have the name of an institution, for example, "Alabama Polytechnic Institute, Main Library, Serials Section, Auburn, Alabama." Is that on one of them?

Mr. MacLeod: Your Honor, I object. Once more, Mr. Nachman is trying to read the evidence he wants in without having the document identified—

The Court: It is cross examination. I will let it in and [fol. 476] give you an exception.

Mr. MacLeod: We except, Your Honor.

By Mr. M. R. Nachman, Jr.: (Continuing)

Q. Now, Mr. McCade, am I correct in stating that you know nothing about these records regarding the New York Times Index? Is that correct? You have never seen them before; you don't know what they are; you don't know where they came from. Is that correct, sir?

A. I answered that I don't know.

Q. Have you ever seen cards like these before?

A. I have seen similar type cards. These are just alphabetical cards.

Q. Have you ever seen cards like these that were micro-filmed?

A. No, sir.

Q. You know nothing about these.

A. No.

The Court: He said he doesn't know.

Mr. Nachman: Well, Your Honor, we asked in our Motion to Produce that records be produced in this Court evidencing the sale of the microfilm edition of The Times in Alabama and evidencing the sale of The New York Times Index in Alabama. These cards were produced in response to that motion. Now, we have a witness on the Stand from the Comptroller's Department who testified on Direct Examination about the number of subscribers who were buyers in Alabama of these two items and when I cross examine him on the basis of the cards which the Times sent in here in response to such a Motion, he says he doesn't know anything about them and so we renew our Motion to have testimony stricken regarding the New York Times Index and the New York Times microfilm edition—

The Court: I will take that Motion under consideration.

By Mr. M. R. Nachman, Jr.: (Continuing)

Q. Now, let's talk about The New York Times Sales Incorporated. Who owns the stock in that organization?

A. The New York Times.

[fol. 477] Q. It owns all of it?

A. Yes, sir.

Q. Who are the officers of that company?

A. Do you want me to list them all?

Q. Well, tell me whether they are people who have any connection with The New York Times Company?

Mr. Embry: Officers of what company now?

Mr. Nachman: The Sales. I am using that shorthand rendition just to save a little time.

By Mr. M. R. Nachman, Jr.: (Continuing)

Q. Are the officers in Sales people who are connected with The Times publishing—the newspaper company?

A. Yes.

Q. What position do they hold in The New York Times Company, a newspaper company?

Mr. Embry: Your Honor, I object now. We object to that unless he specifies which officers he is talking about.

Mr. Nachman: The officers of the Sales Company. What position do they hold—

The Court: Well, President, Vice-President, Secretary and Treasurer and so on down the line.

Mr. Nachman: Yes, Your Honor. That's it. What position does the President of Sales hold in the newspaper company?

The Witness: The President of the Sales Company is the Vice-President of The New York Times Company.

By Mr. M. R. Nachman, Jr.: (Continuing)

Q. How about the Vice-President of the Sales Company?

A. It should be the Associate Business Manager of The New York Times.

Q. How about the Secretary of the Sales Company?

A. He is also the Secretary of The New York Times Company.

Q. How about the Treasurer of the Sales Company?

A. He is the Comptroller of The New York Times.

[fol. 478] Q. Are there any other officers of the Sales Company?

A. I believe there is an Assistant Treasurer.

Q. What position does he hold with the newspaper company?

A. He is an Executive in the Circulation Department.

Q. Now, who are the Directors of the Sales Company?

A. Do you want me to list their names?

Q. Again, are they officers or employees of the newspaper company?

A. Yes, sir.

Q. They are?

A. Yes, sir.

Q. All of them?

A. Yes, sir.

Q. Where are the books of the Sales Company kept?

A. In New York City.

Q. Are they kept in the offices of the newspaper company?

A. Yes, sir.

Q. Who does the accounting work on the books? Is it the employees of the newspaper company?

A. Yes, sir.

Q. Now, you mentioned some sort of payment from the newspaper company to the Sales Company. How is that payment computed? On what basis is it made?

A. On the number of hours. That is a constant figure and about a year or so ago when the Sales Company began in Atlanta we worked up the number of hours spent by The New York Times Company employees in working up the activities and in working up the accounts of The New York Times Sales and based on that computation we worked up a service charge.

Q. So, what The Times newspaper company is really doing is paying the employees of The Sales Company for their time. Isn't that correct, sir?

Mr. Embry: Objection! That's a question of law for the Court, if the Court please, and invades the province of the Court.

Mr. MacLeod: It is argumentative—

The Court: The question was, did The New York Times Company pay the officers of The New York Sales Company? [fol. 479] Mr. MacLeod: No, sir.

Mr. Nachman: Your Honor, they spoke of—if I understood Mr. McCade correctly he said that certain payments were made by the newspaper company to The Sales Com-



pany. Is that incorrect, Mr. McCade? If it is, please correct me, sir.

The Witness: I didn't say payment was made. I said a service charge.

By Mr. M. R. Nachman, Jr.: (Continuing)

Q. Well, by payment I mean the transfer of money.

A. Well, the transfer of money would be from The Times Sales to the New York Times and not to any employee.

Q. Do you mean that The Times Sales transfers money to The New York Times newspaper company?

A. Well, we are talking about the service charge.

Q. Well, then, maybe you had better explain what you mean by the service charge then. Perhaps I misunderstood you.

A. I will go over it again. About a year ago, we worked up the number of hours spent by New York Times' employees in working up the accounts and doing the bookkeeping for The Times Sales and we equated those hours into a monetary service charge.

Q. Well, that's what I was saying. My next question is that the service charge is based on the activity of the Sales Company's employees, isn't it? How much time they spend—

Mr. MacLeod: I think you are confused about that.

The Witness: The Times Sales has no employees in New York City.

By Mr. M. R. Nachman, Jr.: (Continuing)

Q. Well, then, the Sales Company pays the Times' employees. Is that what the service charge—

A. No, sir. I said The New York Times Sales Company pays The New York Times service charge based on the amount of time spent by The New York Times' employees in doing bookkeeping for The New York Times Sales.

[fol. 480] Q. All right. Now, what revenues does The New York Times Sales Incorporated have? What are their sources of revenue?

A. That source of revenue is based on the amount of advertising that they sell to The New York Times. Their

revenue is ten per cent of the revenue they obtain for soliciting advertising for The New York Times.

Q. Who pays them the ten per cent?

A. The New York Times.

Q. Well, that's what I said. Then, The New York Times does make payments to The New York Times Sales Incorporated, doesn't it?

A. I don't think that was the question you asked. You were talking about employees.

Q. Well, I asked you about payments but at any rate the New York Times newspaper pays The New York Times Sales ten per cent of the advertising that The New York Times Sales solicits for The New York Times newspaper. Is that correct?

A. For the advertising record. That's right.

Q. Is that correct?

A. Yes, sir.

Q. Does The New York Times Sales Incorporated ever pay any dividends?

A. No, sir. Not as yet.

Q. It is a new thing, isn't it?

A. July 1st, 1959 is when the Atlanta office was opened.

Q. July 1st, 1959. Was that when the company got under way or had it been under way for some time before that?

A. No, the company itself was incorporated in, I believe, April of 1956.

Q. And it has never paid a dividend.

A. No, sir.

Q. Does it have any surplus at all?

A. Yes, sir.

Q. Do you know how much that is?

Mr. Embry: We object to going into the surplus of—

The Court: I sustain the objection.

[fol. 481] By Mr. M. R. Nachman, Jr.: (Continuing)

Q. Now, I believe that when a solicitor such as Mr. Monger or Mr. Hurley submits an expense statement, it is submitted on The New York Times newspaper company forms, is it not?

A. Yes, sir.

Q. It is not submitted on the Sales Company forms.

A. No, sir.

Q. Those expense accounts are approved by an employee of The New York Times newspaper. Is that correct?

A. Yes, sir.

Q. And only by such employee. Is that correct?

A. Yes, sir.

Q. No employee of The New York Times Sales can approve an expense account of an employee of the Times Sales. Is that correct, sir?

A. An officer of The New York Times Sales would authorize the payment.

Q. I thought you said that the only people who could authorize it was an employee of The New York Times newspaper—

Mr. MacLeod: We object, Your Honor—

Mr. Embry: We object, if the Court please—

The Court: You are both objecting at the same time now and—

Mr. Nachman: Are you making a distinction between the word “authorized” and the word “Approved.” Is that it?

The Witness: I will, yes.

Mr. Nachman: Were you?

The Witness: Yes.

The Court: Well, let me get this straight. If an officer or executive of The New York Times Sales Company—if he approves such and such a payment—before the man finally gets it, it would come through the New York Times office, wouldn't it?

The Witness: Yes, sir.

Mr. Nachman: The newspaper office—

The Witness: Maybe I should have—could I explain this a bit?

[fol. 482] The Court: Go ahead.

The Witness: Mr. Wagner is Mr. Hurley's superior. He would approve Mr. Hurley's expense statement and the Treasurer of The New York Times Sales would authorize payment of that expense statement.

By Mr. M. R. Nachman, Jr. : (Continuing)

Q. And Mr. Wagner is the Advertising Manager of The New York Times newspaper, is he not?

A. Yes, sir.

Q. He is the Mr. Wagner you are talking about.

A. Yes, sir.

Q. And he is the man in charge of Mr. Hurley? Is that correct?

A. Yes, sir.

Q. And also in charge of Mr. Monger.

A. Yes, sir.

Q. Now, Mr. McCade, do you personally examine the expense statements of all of the expense payments for The New York Times' employees that come to your office?

A. No. It would be impossible.

Q. Am I correct, sir, in stating that you rely upon the approval of their department heads and you pay on the basis of such approval?

A. That would be after the auditing department had checked the figures thereon.

Q. Yes, sir.

A. Yes, sir.

Q. Assuming that's correct and assuming that they are approved as to their nature so to speak by the department head of the particular employee, then, you pay on the basis of those checks—

A. Yes, sir.

Q. Are you an officer of the New York Times Sales?

A. No, sir.

Q. Am I correct in stating that you testified that The New York Times had never sent any persons or employees of its company to Alabama for the purpose of promoting the sale and circulation of its newspaper?

[fol. 483] Mr. MacLeod: Your Honor, we object to that. Mr. Nachman's question goes beyond the scope of direct examination and Mr. Nachman has not specified any particular time. He said, never. That would be too far removed—whatever the word never means, to be pertinent or material as to the question of whether or not The New York Times was doing business in the State of Alabama

about April of 1960 when service was attempted to be had on it.

Mr. Nachman: I only asked him if he had testified to that.

The Court: I think the question is too broad and I sustain the objection to it and give you an exception.

By Mr. M. R. Nachman, Jr.: (Continuing)

Q. Is it your testimony, Mr. McCade, that The New York Times during the year 1960 has not sent any employee into the State of Alabama to promote the sale and circulation of its newspaper?

A. Yes, sir.

Q. That is correct. Is that your answer?

A. Yes, sir.

Q. That it has not. Now, on what basis—

A. You are talking about circulation now, aren't you?

Q. I am talking about circulation, I am talking about the Index and I am talking about the microfilm edition and I am talking about anything outside of the advertising business.

A. Are you including the news department?

Q. All departments except advertising.

A. Well, I believe—

Q. Not news gathering. Not the reporters. I exclude that as well.

Mr. MacLeod: Your Honor, we object to that. That embodies a request for five different answers—

The Court: Well, could you track them down one by one then?

[fol. 484] By Mr. M. R. Nachman, Jr.: (Continuing)

Q. Well, excluding news reporters, excluding advertising solicitors, has The New York Times sent any of its personnel into the State of Alabama in the year 1960 to promote any of its business activities?

A. To my knowledge, no.

Q. Are those statements based on your examination of

the records of The New York Times—the expense statements?

A. Yes, to the best of my recollection.

Q. Is there any other basis for your testimony?

A. What other basis would there be? I don't know whether I quite follow you or not.

Q. I don't know. You are the one that gave the answer.

A. Well, the only basis that I would have would be the records of The New York Times.

Q. What records of The New York Times would those be?

A. The expenses of the various departments concerned.

Q. You have just testified a few minutes ago that it would be impossible for one person to examine all of those expense statements, haven't you?

A. I wasn't talking about expense statements then. I was talking about expenses. When you say monthly expense you are talking about the expenses of all the departments of The New York Times and that would be a summary of any expenses involved.

Q. All right. That's all. No further questions.

#### DEFENDANT RESTS

Mr. Embry: We rest, if the Court please.