BEFORE THE INDIAN CLAIMS COMMISSION

IRA SYLVESTER GODFROY, et al.,	)	Docket No. 131
	)	
THE MIAMI TRIBE OF OKLAHOMA, et al.,	)	Docket No. 253
	)	
Plaintiffs,	)	
	)	
v.	)	
	)	
THE UNITED STATES OF AMERICA,	)	
	)	
Defendant.	)	

Decided: October 18, 1973

Appearances:

Louis L. Rochmes, Attorney of Record for Sonnenschein, Levinson, Carlin, Nath and Rosenthal (Docket No. 253).

Robert C. Bell, Jr., Attorney of Record for Kiley, Osborn, Kiley and Harker; Walter H. Maloney, Jr., and the Estate of Walter H. Maloney, Sr. (Docket No. 131).

David M. Marshall, with whom was Mr. Assistant Attorney General Kent Frizzell, Attorneys for Defendant.

OPINION OF THE COMMISSION

Pierce, Commissioner, delivered the opinion of the Commission.

This matter is before the Commission for the purpose of awarding and apportioning attorneys' fees in consolidated Dockets 131 and 253.

Counsel in both dockets have filed separate petitions for the allowance of said fees. Both petitions are based on the amended final award entered by the Commission on January 8, 1970, in these dockets in the amount of $3,826,660.20 in favor of the plaintiffs herein "on behalf of the Miami and Eel River Tribes." 22 Ind. Cl. Comm. 92, 179.

In the prosecution of these claims, the Miami Tribe of Indiana (hereafter Docket 131) was originally represented by Walter H. Maloney, Sr. (now deceased) under Contract No. 950, approved June 7, 1951. Thereafter, the contract was assigned to Walter H. Maloney, Jr., and to the law firm of Kiley, Osborn, Kiley and Harker, which in turn associated with Robert C. Bell, Jr. Walter H. Maloney, Sr. had retained "of counsel" rights. The Miami Tribe of Oklahoma (hereinafter Docket 253) is represented, pursuant to Contract No. 42107, approved May 10, 1948, by the law firm of Sonnenschein, Levinson, Carlin, Nath and Rosenthal, associated with Louis L. Rochmes. The said contracts are set out more fully in our findings entered herein.

Neither group of attorneys, during the pendency of these claims before the Commission, and particularly since the order of consolidation of April 21, 1953, made provisions or agreements for the sharing of attorneys' fees allowable in the event of any awards which might be recovered as the result of their combined efforts in the successful prosecution of these claims. Upon issuance in 1970 of our final award order, supra, and with no such agreement forthcoming, the attorneys in

Docket 253 filed a motion on March 22, 1971, requesting proceedings on the allowance of attorneys' fees.

In our recent opinion of February 7, 1973, we disposed of the motion by ordering the parties to file proposed findings of fact, briefs, and appropriate replies on the issue of fees. We also set forth in some detail the respective contentions of the attorneys in each docket. 29 Ind. Cl. Comm. 424. Both parties have since responded to the Commission order. On August 20, 1973, oral argument was heard by the Commission on the fee question.

Briefly, the issue is the proper method of apportioning fees based on the final award to the Miami Tribe of Indians, when the award made by the Commission is to be shared by two identifiable tribes, each qualified under our act to retain separate attorneys. Counsel for Docket 131 urge upon us the proposition that, by virtue of their contracts, the attorneys' fees should be apportioned according to the number of present day descendants of the original Miami tribe which counsel represent. In their case, such allocation would amount to 71 percent of the attorneys' fees. Docket 253 counsel, on the other hand, contend that the attorneys' fees should be allocated and apportioned according to the relative contribution of each group of attorneys to the final results of the consolidated case. By these standards, Docket 253 counsel claim 85 percent of any fee allowable.

This Commission has jurisdiction to make an apportionment of attorneys' fees in the cases of this kind where two sets of attorney-

claimants render services under approved contracts and there is no agreement between them. Sisseton and Wahpeton Bands or Tribes v. United States, 191 Ct. Cl. 459, 423 F. 2d 1386 (1970). Under our act, the Commission must determine that each fee-claiming attorney has rendered services in prosecuting the claim in question, and make "an evaluation of the contribution" of the two independent sets of attorneys to the final result. Red Lake and Pembina Bands v. United States, 173 Ct. Cl. 928, 355 F. 2d 936 (1965).

In our 1973 opinion in this case, supra, we discussed at length the opinion in the Godfroy[1/] case which involved the same attorneys and the same issues as in these dockets. In Godfroy, the Court of Claims, reiterating the rationale of Sisseton, supra, and the standards of apportionment stated in Red Lake, supra, rejected the position of counsel therein, identical to the one urged upon us by counsel in Docket 131, that fees are to be determined by the terms of the attorneys' contracts with the tribe as applied to the total per capita distribution of the award. In a further refinement of Red Lake, the court in Godfroy applied the pertinent standards, i.e., performance of services and relative contribution, exclusively to the common cause of the original tribe.

1/ Godfroy v. United States, Miami Tribe of Oklahoma v. United States, 199 Ct. Cl. 487, 467 F. 2d 909 (1972), aff'g on rehearing, Dockets 124-D, et al., 24 Ind. Cl. Comm. 450 (1971), petition for cert. denied, U. S. Supreme Court No. 72-1555, October 9, 1973, ____ U.S. _____.

In accordance with Godfroy, we examined and evaluated the record of the proceedings in these dockets and the supplemental materials submitted by each set of counsel pursuant to our order of February 7, 1973, supra, in order to determine the services and relative contribution of both groups of attorneys to the final award in favor of plaintiffs.

The record clearly establishes that on the whole, and in every phase of the proceedings in these consolidated dockets, both groups of attorneys were diligent in representing the interests of their clients. Both counsel participated in the trials of the various phases of these claims, in the related briefings and arguments before the Commission, and in a number of procedural and substantive motions which required the attention and expertise of counsel. The services performed by both counsel resulted in the final award of January 8, 1970, supra, in the amount of $3,826,660.20 in favor of their clients. As compensation for these services, the Commission accordingly finds that both groups of attorneys are entitled to share in a fee of $382,666.02, which is ten percent of the total final award made to the two plaintiff tribes herein on behalf of the Miami Indians.

Counsel in Docket 253 contend, as to the relative contribution and services rendered by each group of attorneys to the final result, that they are entitled to most of the fee awarded herein on the alleged grounds that they carried the major burden in every phase of the proceedings, while counsel in Docket 131 accepted and relied upon the work done by counsel in Docket 253. We do not agree.

An examination of the record of the title phase, as set forth in our findings, indicates that counsel in Docket 131 were not negligent or derelict in their duties during the title phase of the proceedings. Counsel in Docket 131 participated actively in hearings in the title phase of the case, as in all proceedings that followed this phase. Counsel in Docket 253 did, however, submit the principal exhibits on title. It is noted, nevertheless, that the exhibits, as well as the briefs submitted by both counsel on title, were borrowed or paraphrased in large part from Docket 67 documents involving the Miami Tribe. In our Finding No. 14 we set forth in some detail the close relationship between consolidated Dockets 131 and 253 and Docket 67. As will appear from a reading of this finding, the use of material and argument developed in Docket 67 was an efficient and expeditious manner of trying consolidated Dockets 131 and 253. Counsel for Docket 131 complain that following the Commission's title decision in Docket 67, counsel for the Oklahoma Miami plaintiffs (the same as Docket 253 counsel herein) improperly consented to delete a finding which in effect interpreted the Greeneville Treaty of 1795 as recognizing in the signatory tribes title to all the land relinquished by the United States in that treaty including, of course, the land involved in Dockets 67, 253 and 131. This action was taken in response to a motion of defendant requesting the Commission for a rehearing of the title issue and for leave to introduce new evidence relative to the effect of the Treaty of Greeneville. Counsel for Docket 131 alleges that this action by Oklahoma Miami counsel in Docket 67 required the

relitigation of the recognized title issue in the instant consolidated dockets. Since the alternative to deletion of the finding was the possibility of reopening the whole case in Docket 67, and since the opinion of the Commission concluded as a matter of law, somewhat ambiguously it is true, that the Miami Indian Tribe had recognized title to Royce Area 99 in Indiana by virtue of the 1795 Treaty of Greeneville along with other subsequent treaties, and finally, since the deleted finding of fact was in reality the interpretation of a treaty and therefore not a true finding of fact, the objection of counsel for Docket 131 seems to be without particular merit under the circumstances. On the whole we conclude that the services rendered by counsel for Docket 253 in the title phase were more significant in terms of relative contribution to the final results achieved.

Following the Commission's decision on title in this case, 5 Ind. Cl. Comm. 180 (1957), the defendant filed several motions for rehearing and a new trial. As detailed in our findings herein, these were substantive motions and, had the defendant prevailed, they would have resulted in a substantial reduction in the ultimate award. While counsel in Docket 131 did not respond to one of these motions, that of May 2, 1958, and merely agreed with the answer of Docket 253 counsel in another motion, that of August 20, 1957, Docket 131 counsel did participate in the oral arguments on both motions. On the basis of the record, we conclude that counsel in Docket 253 carried the primary burden in responding to these motions. We note, however, that the record discloses

several instances where the defendant, as well as Docket 253 counsel, neglected to serve Docket 131 counsel with copies of certain motions and responses. Accordingly, failure of Docket 131 counsel to take action in such instances, examples of which we have mentioned in our findings, is excusable.

The situation is somewhat different in the value phase. Neither party submitted an appraisal report but counsel for Docket 253 employed and paid two expert witnesses, Dr. Gale Johnson and Dr. John Long, who testified on behalf of all plaintiffs. Dr. Long was the principal witness. Prior to the trial on value, counsel for Docket 131 met with counsel for Docket 253 and Dr. Long in Washington, reviewed the evidence he would give, and agreed upon the procedures to be followed at the trial. At the subsequent trial on value, counsel for Docket 131 stated that they had not participated in the actual employment of Dr. Johnson. Counsel for Docket 253 took the initiative in presenting the value phase of the case for all plaintiffs but counsel for Docket 131 did participate effectively in the cross-examination of defendant's leading witness. On the basis of the whole record, we conclude that the services rendered by counsel for Docket 253 were somewhat more valuable than those of Docket 131 in the value phase of the case.

As to all other aspects of the proceedings in these dockets (excluding title and value), i.e., certain motions, both procedural and substantive, and matters dealing with the title interest of plaintiffs in Docket 314-D, set out more fully in our findings, we are of the opinion that both groups of attorneys, throughout these consolidated proceedings, rendered valuable services to their clients and contributed equally to the results reached.

To summarize, we conclude that both counsel conscientiously rendered valuable services in all phases of the case. However, in considering applicable standards of performance of services and relative contribution to the common cause, we are persuaded that the performance and contribution of counsel in Docket 253 were greater than those of counsel in Docket 131, in the title phase, the preparation and examination of the witnesses in the value phase, and in connection with certain motions as mentioned above.

On the basis of the entire record herein and upon consideration of the responsibilities undertaken by counsel in both dockets, the difficulty of the problems of fact and law involved in these claims, the diligence of counsel in meeting defendant's opposition in the post-title phase, the substantial award obtained for the benefit of plaintiffs, the services rendered by each group of attorneys and their relative contribution to the final results, the appropriate factors pertinent to the determination of attorneys' fees under the standards established by the Indian Claims Commission Act, the foregoing findings of fact, and for the reasons set forth in our opinion, we conclude that the awarded gross fee of $382,666.02 should be apportioned on a basis of 60 percent to Docket 253 counsel and 40 percent to Docket 131 counsel.

For the services rendered in the prosecution of the claims in the matter of the subject cases, the Commission further concludes that the below named parties are entitled to the indicated sums as payment in full

of attorneys' fees, to be distributed by them to those entitled to participate in the sharing of the attorneys' fee in these cases in accordance with their respective interests therein:

(1) To Madeline F. Maloney and Walter H. Maloney, Jr., co-executors under the will of Walter H. Maloney, Sr., deceased; Walter H. Maloney, Jr., and the law firm of Kiley, Osborn, Kiley and Harker $153,066.41

(2) To the law firm of Sonnenschein, Levinson, Carlin, Nath and Rosenthal. $229,599.61

Margaret H. Pierce, Commissioner

Concurring:

Jerome K. Kuykendall, Chairman

John D. Vance, Commissioner

Richard W. Yarborough, Commissioner

Brantley Blue, Commissioner