

1960

# Troy A. Nance and Thomas B. Hanley v. Sheet Metal Workers International Association : Brief of Defendant and Appellant

Utah Supreme Court

Follow this and additional works at: [https://digitalcommons.law.byu.edu/uofu\\_sc1](https://digitalcommons.law.byu.edu/uofu_sc1)



Part of the [Law Commons](#)

Original Brief submitted to the Utah Supreme Court; funding for digitization provided by the Institute of Museum and Library Services through the Library Services and Technology Act, administered by the Utah State Library, and sponsored by the S.J. Quinney Law Library; machine-generated OCR, may contain errors.

A. Wally Sandack; Donald W. Fisher; Counsel for Sheet Metal Workers International Association;

---

## Recommended Citation

Brief of Appellant, *Nance v. Sheet Metal Workers*, No. 9111 (Utah Supreme Court, 1960).  
[https://digitalcommons.law.byu.edu/uofu\\_sc1/3436](https://digitalcommons.law.byu.edu/uofu_sc1/3436)

This Brief of Appellant is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Supreme Court Briefs (pre-1965) by an authorized administrator of BYU Law Digital Commons. For more information, please contact [hunterlawlibrary@byu.edu](mailto:hunterlawlibrary@byu.edu).

---

---

# IN THE SUPREME COURT OF THE STATE OF UTAH

TROY O. NANCE and  
THOMAS B. HANLEY,  
*Plaintiffs and Respondents  
and Cross-Appellants,*

vs.

SHEET METAL WORKERS  
INTERNATIONAL ASSOCIATION,  
an unincorporated association,  
*Defendant and Appellant.*

FILED

JUN 22 1960

Clerk, Supreme Court, Utah  
Case

No. 9111

---

## Brief for Defendant and Appellant

---

A. WALLY SANDACK  
405 Executive Building  
Salt Lake City 11, Utah

DONALD W. FISHER  
741 National Bank Building  
Toledo 4, Ohio

*Counsel for Sheet Metal Workers  
International Association*

### *Of Counsel:*

DRAPER, SANDACK & DRAPER  
405 Executive Building  
Salt Lake City 11, Utah

MULHOLLAND, ROBIE & HICKEY  
741 National Bank Building  
Toledo 4, Ohio

## NOTATION

We respectfully direct the Court's attention to the fact that Exhibits 3, 4 and 5 are the verbatim transcripts of proceedings of the hearings before the Defendant-Appellant Union's Trial Board at the Statler Hotel in Los Angeles, California, on June 3, 4 and 7, 1954. Those proceedings are reprinted in full in the Appendix tendered to the Court with this brief.

Accordingly, whenever reference is made to Exhibits 3, 4 or 5, the Court may, for the purpose of convenience, refer directly to the Appendix to our brief, rather than search through the official papers in the record for those exhibits.

## INDEX

|   | Page |
|---|------|
| THE FORM OF THE RECORD -----  | 1    |
| NATURE OF THE CASE -----  | 2    |
| INTRODUCTION -----  | 7    |
| STATEMENT OF FACTS -----  | 8    |
| The Grounds or Motives for Preferring Charges Against Hanley and Nance -----      | 9    |
| The Preparation of the Charges -----  | 12   |
| The Attempts to Hold Trials -----   | 13   |
| The Trials are Recessed to be Held in Absentia -----                              | 18   |
| The Trial Board's Last Chance Offer to Stand Trial on Tuesday, June 8, 1954 ----- | 19   |
| The Conspiracy of Hanley, Nance, Nichols and Fuller to Sabotage the Trials -----  | 20   |
| The Trials in Absentia -----  | 21   |
| The Appeals of Hanley and Nance -----   | 22   |
| Failure to Include New or Refuting Evidence in the Formal Appeals -----           | 23   |
| The Alleged Political Conspiracy to Expel Nance and Hanley--                      | 25   |
| STATEMENT OF POINTS ON APPEAL -----   | 26   |
| ARGUMENT -----  | 30   |

## POINT I

|  |    |
|--|----|
| THE COURT ERRED IN HOLDING THAT PLAINTIFFS-RESPONDENTS WERE WRONGFULLY EXPELLED FROM MEMBERSHIP IN DEFENDANT-APPELLANT UNION, AND THAT THEIR EXPULSIONS ARE NULL AND VOID -----  | 30 |
| A. The Court Erred as a Matter of Law in Finding and Concluding that the Plaintiffs-Respondents Did not Refuse to Stand Trial and That the Trials In Absentia Violated Their Rights Under the Constitution of Defendant-Appellant Union and the Law Forbidding the Taking of Property Without Due Process of Law ----- | 30 |
| The Elements of Due Process Required for Union Trials  | 33 |
| The Trial in Absentia Was Not Illegal Per Se -----   | 35 |

|   | Page |
|---|------|
| Trials May be Conducted in the Absence of a Party in Courts of Law .....  | 37   |
| The trials in Absentia Were Justified Under Defendant-Appellant Union's Constitution .....                        | 40   |
| Nance and Hanley Were Not Entitled to any Relief Because They Did Not Come Bfore the Court with Clean Hands ..... | 41   |

## POINT I

|   |    |
|---|----|
| B. The Court Erred As a Matter of Law In Concluding That Plaintiffs-Respondents' Remedies Upon Appeal Through Defendant-Appellant Union's Tribunals Was Inadequate and Did Not Cure the Alleged Defects of the Trial Board Proceedings Below..... | 43 |
|---|----|

## POINT II

|   |    |
|---|----|
| THE COURT ERRED IN HOLDING THAT THE ACTIONS OF DEFENDANT-APPELLANT UNION AND SOME OF ITS OFFICERS WERE MALICIOUS, ARBITRARY, AND UNREASONABLE IN CONNECTION WITH THE PREFERRING OF CHARGES, TRIAL PROCEEDINGS, AND APPEAL THROUGH THE UNION TRIBUNALS ..... | 45 |
| The Court Erred in Finding that the Charges were Not Preferred in Good Faith .....  | 46 |
| The Court Erred in Finding That the Members of the Trial Committee Were Unduly Influenced in the Conduct of the Trial Proceedings and in Their Decision by a Desire to Cooperate with President Byron in his Efforts to Expel Hanley and Nance .....        | 49 |
| The Remaining Findings of Bad Faith and Unreasonableness in Connection with the Trials in Absentia and Appeals Are Mere Additional Inferences Drawn from the Facts .....  | 50 |

## POINT III

|  |    |
|--|----|
| THE COURT ERRED IN HOLDING THAT PUNITIVE (EXEMPLARY) DAMAGES SHOULD BE AWARDED FOR PLAINTIFFS-RESPONDENTS' WRONGFUL EXPULSIONS FROM UNION MEMBERSHIP AND FURTHER ERRED IN AMERCING DEFENDANT-APPELLANT UNION WITH PUNITIVE DAMAGES FOR MISCONDUCT OF ITS OFFICERS IN THE ABSENCE OF A SHOWING OF RATIFICATION BY THE UNION OF SUCH ALLEGED WANTON OR MALICIOUS CONDUCT.... | 51 |
|--|----|

|  | Page |
|--|------|
| A. The Court Erred As a Matter of Law In Allowing Punitive Damages in Mandamus and Injunction Proceedings--  | 51   |
| B. The Court Erred As a Matter of Law In Allowing Punitive Damages For A Breach of Contract -----  | 53   |
| C. The Court Erred in Not Submitting the Issue of Punitive Damages to the Jury, If They Were Allowable-----  | 54   |
| D. Even If Punitive Damages Were Allowable the Court Erred in Assessing them Against Defendant-Appellant Union in Absence of a Finding that the Malice or Bad Faith of the Union Officers was Known to or Ratified by the Membership ----- | 55   |
| E. It was Error for the Court to Award Nominal Damages after the Jury Returned a Verdict that No Compensatory Damages Were Suffered by Either of the Plaintiffs-Respondents -----  | 59   |
| F. It Was Error for the Trial Court to Award Punitive Damages Without Having an Award of Compensatory Damages Upon Which to Base It -----  | 61   |
| G. The Award of Punitive Damages is Erroneous Because It is Wholly Disproportionate to the Nominal Award -----   | 62   |

## POINT VI

|  |    |
|--|----|
| THE COURT LACKED JURISDICTION TO ISSUE AND THE POWER TO ENFORCE A WRIT OF MANDATE OR A MANDATORY INJUNCTION AGAINST A NON-RESIDENT UNINCORPORATED LABOR ASSOCIATION COMPELLING SUCH ASSOCIATION TO REINSTATE PLAINTIFFS-RESPONDENTS ---- | 64 |
|--|----|

## POINT VII

|  |    |
|--|----|
| THE COURT ERRED AS A MATTER OF LAW IN REFUSING TO QUASH SERVICE OF PROCESS AND DISMISS ACTIONS BECAUSE DEFENDANT-APPELLANT UNION IS NOT SUBJECT TO PROCESS IN THE STATE OF UTAH -----  | 64 |
| A. Defendant-Appellant Union Was Not, And Is Not, Subject to Service of Process in the State of Utah Since None of the Acts Complained of by Plaintiffs-Respondents Arose Out of any Business Transacted by Defendant-Appellant Union in the State of Utah ----- | 64 |

## POINT VIII

|   |    |
|---|----|
| THE COURT ERRED AS A MATTER OF LAW IN ALLOWING EACH OF THE PLAINTIFFS-RESPONDENTS TO RECOVER THEIR ATTORNEYS FEES AGAINST DEFENDANT-APPELLANT UNION ----- | 67 |
|---|----|

## POINT IX

Page

|  |    |
|--|----|
| THE COURT ERRED AS A MATTER OF LAW IN TAXING<br>CERTAIN COSTS AGAINST DEFENDANT-APPELLANT UN-<br>ION ----- | 69 |
| CONCLUSION -----   | 71 |

## TEXTS

|  |    |
|--|----|
| 15 American Jurisprudence 442 -----  | 53 |
| 15 American Jurisprudence 550 -----  | 67 |
| 15 American Jurisprudence 709 -----  | 58 |
| 20 American Jurisprudence 224 -----  | 47 |
| 34 American Jurisprudence 829 -----  | 52 |
| 53 American Jurisprudence 167-168 -----  | 55 |
| 17 A.L.R. 2d 527 -----   | 61 |
| 17 A.L.R. 2d 542-545 -----   | 61 |
| 17 A.L.R. 2d 548-549 -----   | 62 |
| 48 A.L.R. 2d 948, 950 -----  | 52 |
| 32 California Jurisprudence 2d 119 -----   | 52 |
| 32 California Jurisprudence 2d 287 -----   | 51 |
| Dangel and Shriber, The Law of Labor Unions (1941) § 180, p. 205<br>and 206 -----      | 33 |
| Dangel and Shriber, The Law of Labor Unions (1941) § 186, p. 211-<br>215 -----         | 44 |
| Oakes, The Law of Organized Labor and Industrial Conflicts (1927)<br>§ 54, p. 60 ----- | 33 |

## STATUTES

|                                 |    |
|---------------------------------|----|
| 21-51-8, U.C.A. 1953 -----      | 70 |
| Rule 54 (d) (1), U.R.C.P. ----- | 70 |

## CASES CITED

|  |    |
|--|----|
| Allen v. Los Angeles County District Council of Carpenters, 337 P.<br>2d 457, 461 (1959) ----- | 41 |
| Brown v. Stroeter, 263 SW 2d 458, 462 (Kan. City, Mo., Ct. of App.<br>1953) -----              | 37 |

|  | Page   |
|--|--------|
| Cason v. Glass Bottle Blowers Assn., 37 Cal 2d 134, 231 P. 2d 6 (1951) -----                               | 33     |
| Checketts v. Collings, Utah, 1 P. 2d 950 (1931) -----  | 70     |
| Chelini v. Nieri, 32 Cal 2d 480, 196 P. 2d 915 (1948) -----  | 54     |
| Colorado Development Co. v. Creer, 96 Utah 1, 80 P. 2d 914 (1938)  | 68     |
| Davis v. IATSE, 141 P. 2d 486, 488 (Cal. App. 1943) -----  | 35     |
| Diaz v. United States, 223 U.S. 442, 457-460 (1912) -----  | 39     |
| Ex Parte Edelstein, 30 F2d 636, (C.A. 2d 1929) cert denied 279 U.S. 851 -----                              | 56     |
| Falk v. United States, 15 App. D.C. 446, error dismissed, 180 U.S. 636 (1899) [23 ALR 2d 484] -----        | 38     |
| Falkenberg v. Neff, 72 Utah 258, 269 Pac. 1008 (1928) -----  | 62     |
| Fordson Coal Co. v. Kentucky River Coal Corp., 69 F. 2d 131 (C.A. 6th 1934) -----                          | 54     |
| Graham v. Street, et al, Utah 270 P. 2d 456, 459 (1954) -----  | 61     |
| I.A.M. v. Gonzales, 356 U.S. 617, 2 L. ed. 1018 (1958) -----   | 53     |
| Lawlor v. Loewe, 187 Fed 522 (C.A. 2d 1911) cert. denied 223 U.S. 729 (1912) -----                         | 56     |
| Marchitto v. Central Railroad Company of New Jersey, 88 A2d 851 (1952) -----                               | 56     |
| Martin v. Curran, 303 N.Y. 276, 101 N.E. 2d 683, 685 (1951)-----   | 57     |
| Miller v. Grier S. Johnson, Inc., 62 SE 2d 870, 873, (Sup. Ct. of App. Va. 1951) -----                     | 37     |
| Miller v. I.U. of Opr. Engineers, 257 P. 2d 85, 87 (Cal. App. 1953)  | 35     |
| N.L.R.B. v. Huber & Huber Motor Exp. 223 F2d 748, 749 (C.A. 5th 1955) -----                                | 47     |
| Ostertag v. LaMont, Utah, 339 P2d 1022, 1024, (1959) -----   | 62     |
| Pratt v. Amalg. Assn. of Street & Electric Rwy. Emp. of Am., Utah, 167, Pac. 830 (1917) -----              | 34, 53 |
| Schneider v. Local 60, 116 La. 270, 5 L.R.A. (N.S.) 891 (1905)---  | 57     |
| Schofield v. ZCMI, Utah, 39 P. 2d 342, 345 (1934) -----  | 47     |
| Smith v. Kern County Medical Assn., 120 P. 2d 874, 877 (Cal. Sup. Ct. 1942) -----                          | 35     |
| State v. Aikers, Utah, 51 P. 2d 1052, 1056 (1935)-----   | 38     |
| Steiner v. Rowley, 35 Cal. 2d 713, 221 P. 2d 9 (1950) -----  | 54     |
| Sun Shipbuilding & Drydock Co. v. Marine & Shipbuilding Workers, etc., 95 F. Supp 50 (D.C. Pa. 1951) ----- | 55     |



|  | Page |
|--|------|
| Sweetman v. Barrows, 161 N.E. 272 (Mass. Sup. Ct. 1928) -----                                      | 57   |
| Thorpe v. Thorpe, 171 P. 2d 126, 129 (Cal. 1946) -----   | 37   |
| Van Lom v. Schneiderman, 210 P. 2d 461, 469, 11 A.L.R. 2d 1195,<br>1206 (Sup. Ct. Ore. 1949) ----- | 55   |
| Wein v. Crockett, Utah, 195 P. 2d 222 (1948) -----   | 66   |
| Werner v. Int. Assn. of Machinists, 11 Ill. App. 2d 258, 137 NE 2d<br>100 (1956) -----             | 35   |
| White v. Metropolitan Merchandise Mart 107 A. 2d 892 (De. 1954)                                    | 54   |
| Young v. Main, 72 F2d 640 (C.A. 8th 1934) -----  | 54   |

# IN THE SUPREME COURT OF THE STATE OF UTAH

---

TROY O. NANCE and  
THOMAS B. HANLEY,  
*Plaintiffs and Respondents  
and Cross-Appellants,*

vs.

SHEET METAL WORKERS  
INTERNATIONAL ASSOCIATION,  
an unincorporated association,  
*Defendant and Appellant.*

Case  
No. 9111

---

## Brief for Defendant and Appellant

---

### THE FORM OF THE RECORD

The case on appeal is based on an exceedingly voluminous record encompassing two trials, one to the court below sitting without a jury and the other before a common-law jury. During the two trials, 191 exhibits were introduced, most of which were admitted into evidence by the court.

In order to refer with facility to the massive accumulation of transcripts and documents in the record, many of which have independent, and thus parallel, pagination, the following code will be observed:

1. References to the record of all of the pleadings and other papers on file will be thus: (R. 1-729) etc.

2. References to testimony in the trial to the court sitting without a jury will be thus: (N.J.T. 1-6170) etc.
3. References to testimony in the jury trial will be thus: (J.T. 1-2952) etc.
4. References to pre-trial proceedings will be thus: (Pre-T., 2-2-59, 1-55) etc.<sup>1</sup>
5. References to post-trial proceedings will be thus: (Post-T., 4-6-59, 1-35) etc.

The parties to the litigation should also be explicitly designated at the outset of the brief, because the Appellant in this court was the Respondent in the court below, whereas the Petitioner in the trial court is now designated as one of the Respondents in connection with the appeal. Hereafter the parties will be referred to as follows:

1. Troy O. Nance will be referred to as "Plaintiff-Respondent Nance," or sometimes merely as "Nance."
2. Thomas B. Hanley will be referred to as "Plaintiff-Respondent Hanley," or sometimes merely as "Hanley."
3. Troy O. Nance and Thomas B. Hanley may sometimes be referred to collectively as "Plaintiffs-Respondents."
4. Sheet Metal Workers International Association will be referred to as "Defendant-Appellant Union," or sometimes merely as "Union."

## NATURE OF THE CASE

This is an action by two expelled ex-members of a labor union for reinstatement to membership and dam-

---

<sup>1</sup>Page references are to the typewritten page numbers rather than the numbering machine.

ages. Each of the expelled ex-members (Plaintiff-Respondent Nance and Plaintiff-Respondent Hanley) had a separate and independent cause of action, but the two suits were consolidated by consent of the trial court which permitted Hanley to intervene in Nance's Petition for Writ of Mandate (Civil No. 3783). Hanley's Complaint in Intervention (R. 131-141) was not in the form of a petition for writ of mandate, however, and this distinction has significance in connection with the issue of the allowance of attorneys fees, as will later be pointed out.

The two Plaintiffs-Respondents claimed, in their respective suits, that they were wrongfully and maliciously expelled from Defendant-Appellant Union, an unincorporated labor union (with headquarters or General Offices in Washington, D. C.) which, along with its affiliated local unions, has represented employees in the sheet metal trade for more than 75 years. They each sought approximately the same kind of relief, namely: a declaratory judgment that the expulsions were illegal, reinstatement to union membership, actual and exemplary damages, allowance of attorneys fees, and costs. Compare: amendment to Petition for Writ of Mandate, May 21, 1958 (R. 208-210) with Complaint in Intervention (R. 140).

The court below found for the Plaintiffs-Respondents on the first two items. It issued a declaratory judgment that their expulsions were illegal and void for lack of a valid hearing on the charges preferred against them, and an order directing their reinstatement to membership, subject to the right of Defendant-Appellant Union to conduct another hearing or trial on the charges preferred against them, in which they would be accorded their alleged due process rights. (R. 656-657).

Defendant-Appellant Union has appealed from this

4  
portion of the judgment, which was based on a ten week trial to the court below ~~sitting~~ without a jury. The non-jury trial (or phase of the case) commenced October 6, 1958, and lasted until December 19, 1958. See Memorandum of Decision of December 30, 1958 (R. 347-353) and Supplemental Memorandum of Decision of January 9, 1959 (R. 354).

At the conclusion of the first (or non-jury) phase of the case, the trial court expressly refused to announce its decision as to the issues of malice and bad faith on the part of the officers of Defendant-Appellant Union in connection with the expulsion of Plaintiffs-Respondents, for the avowed reason that an announcement of such decision would undoubtedly influence the assessment of damages for the wrongful expulsions to be made by the jury subsequently to be empaneled. (R. 353). Accordingly, the court, over the vigorous protest of Defendant-Appellant Union (Pre-T. 1-13-59, 36-43); proposed to withhold, until after the jury trial was over, disclosure of its decision whether the expulsion proceedings were malicious and brought in bad faith, as well as invalid.

Shortly thereafter, on January 21, 1959, the trial court further announced that he, and not the jury, would decide the question whether exemplary damages should lie against Defendant-Appellant Union on account of alleged malice or bad faith on the part of its officers in *procuring* the expulsions of Plaintiffs-Respondents. All other damage issues in the case (including other exemplary damage claims) were to be thrown to the jury. (R. 367-369).

The action above was taken by the court despite the fact that:

- (1) theretofore, the Plaintiffs-Respondents filed a formal demand for trial of damage issues by a jury (R. 288) ;

- (2) theretofore, on January 13, 1959, in the course of a pre-trial hearing, the court asserted that he would not (and could not unless the jury empaneled were merely advisory in nature) decide the question of exemplary damages for such alleged malice or bad faith unless counsel stipulated that such question should be decided by the court. "Otherwise it would be a jury question to decide." (Pre.-T. 1-13-59, 11-12); and
- (3) theretofore, on January 18, 1959, Defendant-Appellant Union formally declined to stipulate that such question should be decided by the court and, to the contrary, announced that pursuant to Rule 39(c) of the Utah Rules of Civil Procedure it "hereby consents to the trial of the aforesaid case by jury, whose verdict shall have the same effect as if trial by jury had been a matter of right upon all issues not heretofore decided by the court." (R. 360). See also (R. 371-372).

Interestingly, the trial court did not attempt to reserve for itself the determination of any compensatory damages (R. 367-369).

A jury was subsequently empaneled and a jury trial was had of all of the damage issues involved in, or flowing from, the expulsions of Plaintiffs-Respondents, except, of course, those withheld from the jury by the court. The jury trial phase lasted five weeks, from February 9, 1959, until March 13, 1959.

The jury returned a general verdict for Defendant-Appellant Union and, in answer to twelve special interrogatories prepared by the trial court, it specially found that (R. 550-551):

1. Neither Nance nor Hanley suffered a loss of income from and after July 1, 1954 (the approximate date of the expulsions) as a proximate result of being expelled from the Union,

2. Neither Nance nor Hanley (at any time) suffered humiliation or mental suffering as a proximate result thereof, and

3. None of the officers or authorized agents of Defendant-Appellant Union (at any time) wilfully and wrongfully (a) prevented Nance or Hanley from getting work as a sheet metal worker or (b) induced employers to fire or refuse to hire either of them.

[Note: this finding if it had been resolved otherwise was to serve as the predicate for an allowance of exemplary damages.]

Plaintiffs-Respondents Nance and Hanley filed motions for a new trial (R. 558-559 and 567-568) and for entry of a judgment notwithstanding the verdict (R. 556-557), both of which were denied by the trial court. (R. 615-622). The two Plaintiffs-Respondents have cross-appealed from the denial of those two motions and from the portion of the final judgment denying them damages on those alleged grounds or theories.

On the same day that the motions for a new trial and for a judgment n.o.v. were denied, to wit: May 2, 1959, the trial court issued a "Second Supplemental Memorandum of Decision" (R. 600-614). In this document (which was filed some six weeks after the jury verdict was returned) the trial court held, notwithstanding the findings of the jury that neither Nance nor Hanley had up to the time of the trial suffered any actual damage as a result of their respective expulsions, that they were nevertheless each entitled to judgment against Defendant-Appellant Union for nominal damages of \$1.00. He concluded further that the actions of Defendant-Appellant Union in expelling Nance and Hanley were unreasonable, arbitrary, and malicious, as well as illegal, whereupon he awarded Nance and Han-

ley exemplary damages of \$20,000.00 apiece. Finally he allowed each of them to recover an additional \$7,000.00 against Defendant-Appellant Union as an allowance of reasonable attorneys' fees for the 10-week (non-jury) phase of the case in which the issue of the legality of the expulsions was litigated.

Defendant-Appellant Union has appealed from the last described portions of the final judgment and the findings and conclusions upon which they are based.

It might be said that Defendant-Appellant Union is appealing from all of the issues (or matters) decided by the trial court, and that the Plaintiffs-Respondents are cross-appealing from all issues (or matters) submitted to and determined by the jury.

## INTRODUCTION

We believe that much, and probably most, of the testimony and documentary evidence in this long and tedious case is surplusage.

While the case involves some complicated issues, the basic issue that can undercut all of the others is simply whether the Plaintiffs-Respondents, Nance and Hanley, were afforded, and declined or refused to avail themselves of, an opportunity to stand trial before a union trial board on charges of misconduct. We believe this must be answered in the affirmative; and such a holding would largely dispose of the case.

The union trials that ultimately took place (if they can be called trials) were held in the absence of the Plaintiffs-Respondents (in absentia). This is not the normal, the preferable, or the recommended kind of union trial, and



we make no contention that trials in absentia can be equated with trials in the generally accepted sense of the term.

It is perfectly clear—and the constitution of Defendant-Appellant Union in Article Eighteen, Section 2(h) (Exh. 53, p. 75, 76) bears this out fully—that Defendant-Appellant Union does not favor trials in absentia. It only condones them as a last resort in the event that the accused should “refuse, fail or neglect to appear for the trial.” Then the trial is to proceed despite a refusal, failure, or neglect by the accused to appear and evidence is to be taken in absentia, somewhat analogous to the practice in courts of calling witnesses and taking evidence in the course of issuing a default judgment, rather than merely issuing judgment upon the bare allegations of the complaint.

As will be seen, Plaintiff-Respondent Hanley, on his own behalf and on behalf of the others (such as Plaintiff-Respondent Nance) whom he represented, refused to stand trial before the union trial board by both his words and, even more revealing, his atrocious conduct. For one thing, he flatly refused to abide by the rules for procedure promulgated by the chairman of the Defendant-Appellant Union’s trial board. This alone was enough to frustrate the intended trials, because the union trial board had no bailiff, no authority to cite or punish for contempt, and no way of compelling compliance with its orders.

In truth, the trials in absentia were forced upon the Union by Nance and Hanley, rather than vice versa.

## STATEMENT OF FACTS

In a 15 week trial, where the transcript of testimony and proceedings before the court runs to over 9,000 pages, it is virtually beyond human power to summarize the facts adduced within the confines of a score of pages.

Obviously, therefore, a number of facts are going to be ignored in our statement. We have, however, to the extent that it is feasible, tried to set out the facts which are most relevant, a great many of which are not controversial. By "not controversial" we mean that the facts are either conceded by the opposing party, or are corroborated independently through a letter, transcript, affidavit, or some other kind of documentary evidence, and thus should not be in dispute on appeal.

Plaintiff-Respondent Hanley was at one time an International Representative of Defendant-Appellant Union.<sup>2</sup> He was removed from that position on March 27, 1954, by Robert Byron, General President of Defendant-Appellant Union. (N.J.T. 122-123, 2944-2945). His dismissal as an International Representative did not, however, affect his status as a member in good standing of Defendant-Appellant Union. Hanley and Plaintiff-Respondent Nance were members in good standing of Defendant-Appellant Union until their expulsions from membership on June 29, 1954.

## THE GROUNDS OR MOTIVES FOR PREFERRING CHARGES AGAINST HANLEY AND NANCE

The trial court in the Findings of Fact and Conclusions of Law herein found that "at the time Byron filed the charges [against Hanley and Nance accusing them of serious misconduct] he had received reports and information which, if assumed to be true, would have given him probable cause to believe that the charges which he preferred,

---

<sup>2</sup>An International Representative acts on behalf of, and carries out the instructions of, the General President in the territory to which he is assigned. He is appointed to this position, and it is strictly an employment at will which may be terminated by the General President for any reason, "at his pleasure." (N.J.T. 867-880).

or at least some of them, were true.” (R. 648). There can be no doubt that the finding above is correct.

As early as December of 1953, President Byron got a verbal complaint about Plaintiff-Respondent Hanley from one Henry Ely, Secretary of an employers association known as Sheet Metal Contractors Association of Southern California. (N.J.T. 369). At this time, however, Byron had great confidence in his International Representative (Hanley) and he told Ely to stop meddling in union affairs, and to take up complaints of that nature with Hanley directly. (Exh. 77).

Ely refused to be deterred. In February of 1954, he sent Byron a letter complaining about Hanley, and with it he enclosed two affidavits. These affidavits accused Hanley and John Fuller and Carl Nichols of using Sheet Metal Workers Unions in the Los Angeles and Las Vegas areas as fronts for extortion and shake-down purposes. Ely followed up with a second letter enclosing a third affidavit. (Exh. 44 and 45). A meeting with Ely and one of the affiants, Ira Fulmor, was promptly arranged thereafter, and it was held in Chicago, Illinois, on February 25 and 26, 1954. (N.J.T. 1293-1296, 1316).

General President Byron, General Vice Presidents Cronin, Bruns, and Macioce, General Secretary-Treasurer Carlough, and General Counsel Mulholland met with Fulmor and Ely. Fulmor and Ely talked about a deteriorating labor situation in Los Angeles and Las Vegas generally, and went into detail about shake-downs and strikes called for extortionate purposes. (N.J.T. 1313-1325). They said that Hanley and Carl Nichols were largely responsible for the state of affairs, although Nance's name was also mentioned. (N.J.T. 1356).

They asked President Byron to investigate the matters they related, i.e.: the condition in the area under Hanley's "stewardship," and President Byron assured them that he would do so. (N.J.T. 2882-2885, 3360-3370, 4805-4809). After Ely and Fulmor left the meeting, the officials of Defendant-Appellant Union decided, at General Counsel Mulholland's suggestion, to try to employ Grant Stetter of Washington, D. C., a former special agent supervisor for the Federal Bureau of Investigation and an attorney, for this purpose. (N.J.T. 2918-2919, 3370-3371, 4864).

Stetter was hired on March 4, 1954. (N.J.T. 3038-3043, 3307-3310, 4870-4871). He immediately went to Los Angeles where he associated with him two experienced investigators, O'Malley and Murphey (N.J.T. 4872-4874). O'Malley and Murphey would report to Stetter, who, in turn, would report to President Byron or General Counsel Mulholland.

Stetter made personal reports to President Byron between March 16th and April 28th as to the results of the investigation. (N.J.T. 4875, 4880, 4891-4894, 4899, 4902-4906, 4912-4913). Except for one instance of an alleged shake down attempt at the Statler Hotel, of which charge Hanley was exonerated (N.J.T. 4901-4902), he reported evidence of gross misconduct on the part of Hanley, Carl Nichols, John Fuller, and, to a lesser extent, Troy Nance and Eugene Say, including such matters as intimidation of local union members, rigged local union elections, extortions, and even physical coercion and intimidation of contractors.

Stetter completed his investigation and prepared a summary of the results about May 9, 1954. (N.J.T. 4926).

## THE PREPARATION OF THE CHARGES

President Byron determined at least as early as the middle of April, 1954, that he would have to prefer charges against Plaintiff-Respondent Hanley, Carl Nichols, and their confederates. He called a special meeting of the General Executive Council between the 15th and 18th of April at which he explained that charges would be preferred; and he asked which of the members of the Council would be able and willing to sit as a trial board. (N.J.T. 3856-3857, 3467, 5147-5148). The trial board was not selected at this time, however. (N.J.T. 3857).

Following the special meeting of the General Executive Council, President Byron accompanied by General Counsel Mulholland went to Los Angeles, California. (N.J.T. 2945-2946). Byron had some personal conferences with sheet metal contractors and with union members concerning the activities of Hanley, Nichols, and the others accused of misconduct.

Charges were subsequently preferred against Plaintiffs-Respondents Nance and Hanley, and also against Carl Nichols, John Fuller, and Eugene Say. Nance received his charges on May 18, 1954. (Exh. 47).

Hanley claimed that he never did receive a set of charges through the mail, even though one set of charges was sent to him at his home address and a second set was mailed to the post office box of his local union, Local 88 of Las Vegas, Nevada (Exh. 36 and 37; N.J.T. 1663-1665, 1111-1113, 1664, 1668-1673). Even so, the court below found that Hanley learned that he had been charged with misconduct on May 18, 1954, and saw a copy of his charges at least by May 25, 1954, a full ten days prior to the commencement of his trial (R. 643, paragraph 9).

## THE ATTEMPTS TO HOLD TRIALS

Hanley was notified to appear for trial at the Statler Hotel in Los Angeles on Thursday, June 3, 1954, at 10:00 a. m. Nance was instructed to appear on the following day, June 4, 1954, for his trial. Hanley appeared at the appointed place and time, accompanied by Nance, Carl Nichols, John Fuller, and Clem Vaughn. In addition, in Hanley's own words, there were from 50 to 75 rank and file members of Local Union 108 (Carl Nichols' union and one of the local unions served by Hanley when he was an International Representative) who, at one time and another, crowded into the trial room as spectators. (Exh. 11, p. 51; N.J.T. 2345-2348, 2462-2468, 3726-3727, 3795-3797, 3869-3870).

Chaos and confusion of indescribable proportions resulted from the first day, June 3rd, through the second day, June 4th, until on the third day, June 7th, the Chairman of the trial board, General Vice President Rosen, declared that the accused members had refused to stand trial and the trials were recessed to be continued in absentia.

It is not possible to appreciate the extent of the confusion in the trial room without reading the transcripts of those hearings. For that reason, we are printing the verbatim transcripts of the hearings (Exh. 4, 5, and 6) and tendering them to the court with this brief, as an appendix thereto.

Hanley, who was acting on behalf of all of the accused, completely dominated the hearing. He constantly interrupted Chairman Rosen and the other two members of the trial board, Fitzgerald and Schroeder. His interruptions were so serious—and so lengthy—that the trial board on occasion actually had to leave the trial room for respite. See: Exh. 4, p. 111-112; Exh. 5, p. 137-157. He constantly har-

angued with the trial board, and he would shift to a demand for a new concession whenever the trial board attempted to yield a point to him.

Throughout the course of those three days Hanley frankly stated that he was not going to submit himself to trial under the terms and conditions that the trial board afforded. Thus, he first said he wasn't certain whether he would agree to stand trial. (Exh. 4, p. 6). A few minutes later he said he would not stand trial until he had been furnished with a copy of his charges [with which he was by then well acquainted] and the procedure for trial. (Exh. 4, p. 29). He next said that he would not stand trial unless Ernest Murphy [Byron's selected representative] left the trial room and Byron himself prosecuted the charges. (Exh. 4, p. 96). When Chairman Rosen asked him whether he would proceed if President Byron came into the trial room, he then said that Byron would have to be in the room and prosecute the charges and, furthermore, the trials would have to be held in Las Vegas rather than Los Angeles. (Exh. 4, p. 100). Still later, Hanley said he would not stand trial unless it were held in Las Vegas with President Byron prosecuting *and* unless he received an extension of time to prepare his case. (Exh. 4, p. 102). Still later, he said he would not stand trial until the charges were made more specific by President Byron. (Exh. 4, p. 109). Chairman Rosen at that point adjourned the proceedings (Exh. 4, p. 111).

Then, when the hearings resumed the following morning, on June 4th, Hanley took the position that the adjournment the previous day ended his trial. (Exh. 5, p. 115-117). Chairman Rosen specifically asked Hanley whether he wanted to resume his trial and he answered:

“I desire to continue my trial if the General President would comply with the Constitution and filing

the charges properly. I feel that yesterday when the Trial Board walked out on my trial, and abruptly adjourned the trial, they ended the charges. I feel that the next move is up to the General office." (Exh. 5, p. 117, 132).

He said he was there merely as counsel for Fuller, Nichols, or Nance whichever one was to be tried next. (Exh. 5, p. 115-116).

Hanley never changed his attitude, and on June 7, 1954, the last day of the hearing, when he was assigned a new trial date by Chairman Rosen, i.e.: June 9th, he once again told Rosen that his trial was adjourned. (Ex. 6, p. 4-7).

If this were not a sufficient declaration of his intention, he made it even plainer the next night. On the evening of June 8th, 1954, Hanley delivered a speech to the membership of Local Union 108. He referred to the opportunity he was offered on June 3, 4, and 7 at the Statler Hotel to stand trial before the Trial Board and remarked:

"... Rather than go down and be tried by Moe Rosen out of New York City and Rene Schroeder out of Houston, Texas, and Joe Fitzgerald who I helped defeat as a candidate of the Tri-State Council of the Sheet Metal Workers, I helped defeat him, I would rather be tried by William Randolph Hearst. I will submit my case, and I will defend Nichols and Fuller before anybody, any impartial Board. I will submit it to this union. There is nothing secretive, they say, but what did they want us to do today? They tried to tie me up in knots for four days and I have made a jack-ass out of them, every time, and the record will show it." (Exh. 11, p. 51).

Rosen stated again and again throughout the three day period (June 3, 4 and 7) that the hearing would not be in order until the trial room was cleared of spectators and



witnesses. (Ex. 4 p. 3, 6, 7, 8, 9, 19, 20, 22, 25, 26, 30, 32, 33-34, 41, 44, 54-55, 60, 61, 62, 64, 66, 84, 90; Exh. 5 p. 115, 117-118, 128, 131; Exh. 6, p. 4, 17-19). This simple request never was complied with except for a very short period of time before the noon recess on June 3rd. (Exh. 4, p. 66). The clearing of the room was in accordance with Hanley's direction to the spectators, (Exh. 4, p. 64), but, then, after the noon recess was over, the spectators came back and Hanley never again told them to leave. *This was despite Rosen's warning that the trials would not even be called to order unless they would leave.* He plainly stated that no evidence would be received, no objections to procedure entertained, and no rulings given unless and until this was done. (Exh. 4, p. 6, 22, 24, 26, 36, 41-42, 49). Hanley was unwilling to let go of his gallery of sympathizers, however, and as he, himself, put it in his affidavit of August 5, 1954, filed in the United States District Court for the District of Columbia:

“We [Hanley, Nance, Nichols and Fuller] *vigorously insisted* upon the right of the members of the Local to hear the trial. Rosen then announced that he would interpret *our insistence upon a trial that was public* — so far as the membership of the Local was concerned — as being a refusal to stand trial.” (Exh. 131, p. 7). (Emphasis ours.)

Still another example of Hanley's obstructionist tactics is where he demanded a ruling from Chairman Rosen as to how under the constitution he could be tried in Los Angeles. (Exh. 4, p. 103). Rosen thereupon gave Hanley the ruling in some detail. (Exh. 4, p. 104). Hanley then complained that the ruling was not given in writing. (Exh. 4, p. 105).

To add more to the disorder, Carl Nichols, whom Hanley designated as his counsel, along with Vaughn, brought

a tape recording machine into the trial room the afternoon of June 3rd, and again on June 4th and June 7th. Rosen insisted that it be taken out but it never was; and Hanley never once attempted to assist in having it removed. (Exh. 4, p. 91, 93; Exh. 5, p. 136; Exh. 6, p. 19; N.J.T. 2341, 1228-1229, 1691-1697). When Chairman Rosen insisted that it be taken out on the first day, June 3rd, Nichols contemptuously said to him: "Speak up at it. It won't bite a bit." (Exh. 4, p. 93). Rosen on several occasions covered the microphone to the recorder with a water glass, but, whenever he would do this, Nichols would take the glass off.

Chairman Rosen ordered some newspaper reporters who were present on the first day, June 3rd, to leave. Hanley encouraged them to stay on in disregard of Rosen's order. To one of the reporters, he said, immediately after Rosen told him to leave: "Stick around, Mr. Craig, I'd like to have my story published in the paper." (Exh. 4, p. 28 and also p. 6 and 35-36).

Plaintiff-Respondent Nance was as defiant and uncooperative as Hanley, Nichols, and Fuller, albeit somewhat less vociferous. He was present through the proceedings on June 3, 4 and 7, 1954, and refused to leave at Rosen's request on June 3rd so that Hanley's trial could commence. (Exh. 4, p. 84, 90). He refused to leave upon Rosen's request on June 4th (Exh. 5, p. 122-123), and he told Rosen, truculently, that he and the other people were going to stay "to see that the democratic processes are carried out and this is carried on in a democratic manner and everything above board."

Nance also, at Hanley's signal, started reading aloud, over Rosen's protest, his objections to standing trial. Rosen and the rest of the trial board left the room before Nance finished, but undoubtedly these objections were going to serve as Nance's excuse for refusing to stand trial. (Exh.

5, p. 155-156). Nance also tried unsuccessfully, to bait Chairman Rosen on the third and last day, Monday, June 7th. (Exh. 6, p. 16).

The presence of spectators and witnesses in the trial rooms on June 3, 4 and 7 was both ominous and annoying to the trial board. They made the trial room extremely crowded. (N.J.T. 2345-2348, 2462-2468, 3726-3727, 3730, 3795-3797, 3867-3868). Their talking and murmuring was audible in the room. (N.J.T. 2336, 3732-3737, 3802-3803, 3884, 3807-3808, 3869-3870). They were obviously partisan to Hanley, Nance and the other accused members. (N.J.T. 2337-2339, 2468-2473, 4709-4710).

Captain Joseph E. Stephens of the Los Angeles Police Department appeared at these hearings, accompanied by several associates, on a tip-off from ~~Judge~~ John Fuller that there might be disruptions at the trials. (N.J.T. 2320-2322). The police showed up at the first trial session, and after observing the demeanor of the people in the room, voluntarily returned for all of the remaining sessions, even though no one connected with the Defendant-Appellant Union ever requested police protection or policemen at the trial sessions. (N.J.T. 2334, 2344, 2351-2352). Although this answer was subsequently improperly stricken by the trial court, Captain Stephens said he returned to the trials on the second day (June 4) because he felt that there would have been a breach of the peace if he wasn't there. (N.J.T. 2344-2345).

## THE TRIALS ARE RECESSED TO BE HELD IN ABSENTIA

On the third day of the hearings, June 7th, after the spectators and witnesses still refused to leave the room, and after Hanley and Nichols still would not take out their

tape recorder, Chairman Rosen announced that the trials would be recessed to be continued later in absentia. (Exh. 6, p. 19). It is self-evident, as the transcripts of the hearings on June 3, 4 and 7 show, (Exh. 4, 5, and 6), that Rosen and the trial board never had effective control of the hearings, and they were never going to have it. Rosen warned Hanley and the others that this would happen if his rulings were flouted, but it made no difference to them. (Exh. 4, p. 49, 55, 56; Exh. 5, p. 131-132).

## THE TRIAL BOARD'S LAST CHANCE OFFER TO STAND TRIAL ON TUESDAY, JUNE 8, 1954

The next morning, Tuesday, June 8th, 1954, Hanley, Nance, and a large group of sheet metal workers again assembled at the Los Angeles Statler Hotel. Chairman Rosen appeared in the lobby and approached Hanley, Nance, Fuller, and Nichols who were standing by the escalator platform in the lobby. Other sheet metal workers were gathered around and could hear all or part of what was said.

Nichols, who had been absent at the close of the June 7th session, was specifically asked if he would stand trial in an orderly manner. When Nichols demanded to know the number of the trial room, Rosen told him that the number would not be divulged but that if he and his counsel followed the trial board to the room he would be allowed to call witnesses when they were needed. (N.J.T. 3909-3911). In substance the same offer was made to Hanley and Nance. (N.J.T. 3914, 3678-3682, 3648-3650, 2491-2492). This offer was declined. (N.J.T. 2941).

This "last chance" offer of an opportunity to stand trial is undisputable. Hanley alluded to it in the Electri-

cians Hall speech. (Ex. 11, p. 51-52). He also referred to it in his appeal to the General Executive Council from the decision of the trial board (Exh. 6, p. 4-5), and in the affidavit he filed on August 5, 1954, in the United States District Court for the District of Columbia where he was seeking to have that court enjoin Defendant-Appellant Union from holding its quadrennial convention in Montreal, Canada, in August of 1954. He there swore:

“He [Rosen] adjourned the trial board meeting. We did not participate in the trial after this because we did not know where the trial was being held and because the board would not tell us. *They did say that if we would follow them without anybody else, they would take us to the trial room.*” (Exh. 131, p. 7) (Emphasis ours.)

## THE CONSPIRACY OF HANLEY, NANCE, NICHOLS AND FULLER TO SABOTAGE THE TRIALS

We want to call the court's attention briefly to the testimony of witness John Fuller, who evidently was not credited by the trial court. Fuller was one of the four members to be tried at the Statler Hotel and a close associate of Hanley. It was Fuller who called Lieutenant (now Captain) Stephens of the Los Angeles Police Department on May 30, 1954, and told him there was going to be trouble at the trials at the Statler Hotel on June 3rd, and someone is liable to get hurt. (N.J.T. 2267-2268) [Proffer of Fuller]. Stephens corroborated this. (N.J.T. 2312, 2320-2322).

Fuller's testimony from N.J.T. 2217 to 2280 is a detailed account of the conspiracy *to which he was a party*, along with Hanley, Nance and Nichols, to thwart the trial board and sabotage the trials. At N.J.T. 2457-2458 he testified that Hanley instructed him and Nichols, just prior

to the time the trials were to start, to make out as if they were going to stand trial but never agree to. They were to talk loud and encourage the men that would be in the room to join in the conversation, and do everything except stand trial. If it got down to technical things, he (Hanley) would take over.

The transcripts of the trial proceedings on June 3, 4, and 7 at the Statler Hotel (Exh. 4, 5, and 6) demonstrate perfect execution of this plan. Fuller's admission of the conspiracy to block the trials is actually the only rational explanation for Hanley's and Nance's aberrant conduct in the trial room.

## THE TRIALS IN ABSENTIA

The Trial Board changed trial rooms after the last "open hearing" on June 7th and in the afternoon of the same day it commenced to hear in absentia evidence in the trial of John Fuller. (Exh. 8, p. 1). Hanley's trial commenced on June 8th at 2:50 p. m. (Exh. 7, p. 2) and Nance's trial on June 10th at 4:05 p. m. (Exh. 10, p. 2). Witnesses were called to give testimony and documentary matters were offered and received as exhibits before the trial board. (Exh. 7, 8, 9, 10).

After the hearings in absentia were concluded, the members of the trial board conferred privately on the cases and reached decisions in each of them. There was one conference on the evening that the last case (Nance's) was completed (N.J.T. 3972) and a further conference for more than an hour the following morning. (N.J.T. 3971). Chairman Rosen put the decision into rough draft form and then asked General Counsel Mulholland "to polish them off." (N.J.T. 3972).

The decisions were against the four members and the trial board recommended that they be expelled from membership. (Exh. 24 [Decision on Hanley's case] and Exh. 48 [Decision on Nance's case]). The decisions were mailed out June 29, 1954.

## THE APPEALS OF HANLEY AND NANCE

General President Byron disqualified himself from considering any appeals from the decisions of the trial board because he was the charging party, and he advised Hanley that he and the other members found guilty by the trial board could appeal directly to the General Executive Council. (Exh. 26). Hanley and Nance filed appeals from the decisions of the trial board on August 6th and 7th respectively. (Exh. 27 and 49). Fuller and Nichols appealed also.

They were notified that their appeals would be considered by the General Executive Council commencing on August 13, 1954, in Montreal, Canada. (Exh. 28). Hanley, Fuller and Nichols went to Montreal, Canada, to present their appeals. Nance did not go, but he authorized Hanley to act as his counsel and representative with respect to his appeal. (N.J.T. 1456).

Hanley waived all rights to appear before the General Executive Council (Exh. 29), as also did Nichols and Fuller, so that their cases could be presented to the Grievances and Appeals Committee of Defendant-Appellant Union's General Convention, and be reported out for appropriate action to the General Convention itself, which was to meet in Montreal, commencing on August 16, 1954.

Hearings before the Grievances and Appeals Commit-



tee took place in Montreal, Canada, on the Tuesday, Wednesday, and Thursday of the week preceding the General Convention (August 10th, 11th and 12th). (N.J.T. 3627-3628). The Grievance and Appeals Committee, through its chairman, Frank Burk, and its secretary, Mell Farell, ruled that no new evidence or testimony would be received and that the committee would limit itself to consideration of the transcripts of the trials in Los Angeles and any matters or documents which were contained in the formal written appeals of the parties. (N.J.T. 3555-3556, 3608-3609, 3612-3613, 4392-4394). Hanley presented all of the appeals. (N.J.T. 4389).

The Grievances and Appeals Committee exonerated Hanley on one charge on the ground that documentary evidence attached to his formal appeal refuted it. It affirmed the conviction on the other charges, however, and recommended to the General Convention that his expulsion be upheld. (Exh. 30, p. 62-63). The General Convention, by a rising vote, adopted the recommendation of the Grievances and Appeals Committee as to Hanley's expulsion, with 7 dissenting votes. (Exh. 30, p. 64).

In the case of Troy Nance, the Grievances and Appeals Committee affirmed his conviction on all counts and recommended that the General Convention uphold its recommendation; which it did, unanimously. (Exh. 30, p. 65-66).

## FAILURE TO INCLUDE NEW OR REFUTING EVIDENCE IN THE FORMAL APPEALS

If Hanley, Nance, and the others had the refuting evidence they claimed, their failure to incorporate it into their formal written appeals is totally incomprehensible. Han-



ley, as a former International Representative, was well-versed on the Defendant-Appellant Union's Constitution. (Exh. 53.)

Under Section 2(b) of Article Nineteen of Defendant-Appellant Union's constitution (Exh. 53, p. 78) it is provided that an appeal to the General President "shall be accompanied by such documentary evidence as the appealing party may deem necessary for the proper and complete consideration of his or their appeal."

Under Section 3(a) of Article Nineteen (Exh. 53, P. 78-79) it is stated that original appeals to the General Executive Council (which is what this was since President Byron disqualified himself from considering it) shall include "all documentary evidence and argument which the appealing party or parties may deem necessary for the proper consideration of the appeal." And in Section 3 (b) it is said that the decision of the General Executive Council shall be based "only upon the evidence and argument submitted in accordance with paragraph (a) of this section [except that oral argument may be permitted]."

Section 4 of Article Nineteen provides for referral of appeals from decisions of the General Executive Council to the Grievances and Appeals Committee "for consideration and report and the decision of the General Convention shall be recognized and accepted as final." (Exh. 53, P. 79, 80) Nothing in the constitution would indicate that new evidence could be received by the Grievances and Appeals Committee.

Hanley and Nance unquestionably could have incorporated all of their alleged refuting documentary evidence and affidavits of testimony of alleged refuting witnesses

into their formal written appeals. Had this been done, all of such purported evidence would have been considered by the Grievances and Appeals Committee, and thus, by the General Convention.

When asked why he did not include documentary evidence to rebut the findings of the trial board, Hanley responded with the unsatisfactory answer that it was too voluminous. He conceded, nevertheless, that there was no limit upon the size of their appeal or the number of documents that could have been annexed thereto. (N.J.T. 205-206).

## THE ALLEGED POLITICAL CONSPIRACY TO EXPEL NANCE AND HANLEY

Plaintiffs-Respondents Nance and Hanley tried to establish in the court below a political motivation to explain their being charged with misconduct and expelled. Their contention was that the charges filed were false, and known to be false by President Byron, but filed nonetheless because this was the only way that they could be kept away from the convention of Defendant-Appellant Union in Montreal, Canada. Their presence at the convention was supposed to have been feared because they would advocate passage of two resolutions, to wit:

- (1) a resolution to change the method of selecting General Vice Presidents which would have required them to be selected out of specific geographical areas. (Exh. 12), and
- (2) a resolution to retire President Byron and create for him the position of president emeritus. (Exh. 13).

The trial court did give credit to some of this political evidence, and he found that both President Byron and the

members of the trial board had knowledge of, and were opposed to, the Plaintiffs-Respondents' advocacy of those two resolutions. As nearly as we understand the ruling of the court below, it further found that Byron resented their political activities and that their participation therein was at least a partial explanation for the filing of charges against them (although the court also found that justifiable cause for filing the charges existed). In the court's opinion, moreover, the trial board was unduly influenced in their conduct of the trial proceedings and in their decision to hold the trials in absentia by a desire to cooperate with Byron in his efforts to expel Hanley and Nance. (R. 646-648, paragraphs 20, 21, 24, 25, 26).

These latter findings, among others, presumably served as the predicate for the Court's conclusion that having or permitting trials in absentia was unreasonable, arbitrary, and malicious as well as illegal, which, in turn, was the basis for the court's subsequent award of punitive damages.

## STATEMENT OF POINTS ON APPEAL

### POINT I

THE COURT ERRED IN HOLDING THAT PLAINTIFFS-RESPONDENTS WERE WRONGFULLY EXPELLED FROM MEMBERSHIP IN DEFENDANT-APPELLANT UNION, AND THAT THEIR EXPULSIONS ARE NULL AND VOID.

- A. The Court erred as a Matter of Law In Finding and Concluding that the Plaintiffs-Respondents Did Not Refuse to Stand Trial Before Defendant-Appellant Union's Trial Board.

- B. The Court Erred as a Matter of Law In Finding and Concluding that the Trials In Absentia of Plaintiffs-Respondents Violated their Rights Under the Constitution of Defendant-Appellant Union and Under the Law Forbidding the Taking of Property Without Due Process of Law.
- C. The Court Erred as a Matter of Law In Finding and Concluding that Plaintiffs-Respondents' Remedy Upon Appeal Through the Defendant-Appellant Union Tribunals was Inadequate and Did not Cure the Alleged Defects of the Trial Board Proceedings Below.

## POINT II

THE COURT ERRED IN HOLDING THAT THE ACTIONS OF DEFENDANT- APPELLANT UNION AND SOME OF ITS OFFICERS WERE MALICIOUS, ARBITRARY, AND UNREASONABLE IN CONNECTION WITH THE PREFERRING OF CHARGES, TRIAL PROCEEDINGS, AND APPEAL THROUGH THE UNION TRIBUNALS.

## POINT III

THE COURT ERRED IN HOLDING THAT PUNITIVE (EXEMPLARY) DAMAGES SHOULD BE AWARDED FOR PLANTIFFS-RESPONDENTS' WRONGFUL EXPULSIONS FROM UNION MEMBERSHIP.

- A. The Court Erred As a Matter of Law In Allowing Punitive Damages in Mandamus and Injunction Proceedings.
- B. The Court Erred as a Matter of Law In Allowing Punitive Damages in a Breach of Contract Action.

- C. If Punitive Damages Were Allowable, the Court Erred as a Matter of Law in Refusing to Submit All Such Damage Issues to the Jury.

#### POINT IV

THE COURT ERRED IN MAKING AWARDS OF NOMINAL AND PUNITIVE DAMAGES UNDER THE CIRCUMSTANCES OF THIS CASE.

- A. It Was Error for the Court to Award Nominal Damages after the Jury Returned a Verdict that No Compensatory Damages Were Suffered by Either of the Plaintiffs-Respondents.
- B. It Was Error for the Trial Court to Award Punitive Damages Without Having an Award of Compensatory Damages Upon Which to Base It.
- C. The Award of Punitive Damages Is Wholly Disproportionate to the Nominal Award.

#### POINT V

THE COURT ERRED AS A MATTER OF LAW IN HOLDING THE MEMBERSHIP OF DEFENDANT-APPELLANT UNION LIABLE IN PUNITIVE DAMAGES FOR ALLEGED MALICE OR BAD FAITH ON THE PART OF ITS OFFICERS IN CONNECTION WITH THE EXPULSIONS OF PLAINTIFFS-RESPONDENTS IN THE ABSENCE OF A FINDING OF RATIFICATION BY THAT BODY OF SUCH ALLEGED WANTON OR MALICIOUS CONDUCT.

## POINT VI

THE COURT LACKED JURISDICTION TO ISSUE AND THE POWER TO ENFORCE A WRIT OF MANDATE OR A MANDATORY INJUNCTION AGAINST A NON-RESIDENT UNINCORPORATED LABOR ASSOCIATION COMPELLING SUCH ASSOCIATION TO REINSTATE PLAINTIFFS-RESPONDENTS.

## POINT VII

THE COURT ERRED AS A MATTER OF LAW IN REFUSING TO QUASH SERVICE OF PROCESS AND DISMISS ACTIONS BECAUSE DEFENDANT-APPELLANT UNION IS NOT SUBJECT TO PROCESS IN THE STATE OF UTAH.

## POINT VIII

THE COURT ERRED AS A MATTER OF LAW IN ALLOWING EACH OF THE PLAINTIFFS-RESPONDENTS TO RECOVER THEIR ATTORNEYS FEES AGAINST DEFENDANT-APPELLANT UNION.

## POINT IX

THE COURT ERRED AS A MATTER OF LAW IN TAXING CERTAIN COSTS AGAINST DEFENDANT-APPELLANT UNION.

## ARGUMENT

### POINT I

THE COURT ERRED IN HOLDING THAT PLAINTIFFS-RESPONDENTS WERE WRONGFULLY EXPELLED FROM MEMBERSHIP IN DEFENDANT-APPELLANT UNION, AND THAT THEIR EXPULSIONS ARE NULL AND VOID

- A. The Court Erred as a Matter of Law In Finding and Concluding that the Plaintiffs-Respondents Did Not Refuse to Stand Trial and that the Trials In Absentia Violated Their Rights Under the Constitution of Defendant-Appellant Union and the Law Forbidding the Taking of Property Without Due Process of Law.*

We are combining under Sub-Section A the first two Sub-Sections under Point I.

The evidence of Plaintiffs-Respondents contemptuous and disruptive conduct before Defendant-Appellant Union's trial board has already been summarized in the Statement of Facts. Nothing can be added here that would enhance that description, but we do once again urge the court to read the verbatim transcripts of the hearings on June 3rd, 4th, and 7th, printed under separate cover, in the Appendix.

We will now show that the Plaintiffs-Respondents were accorded the full measure of their rights regarding a trial on the charges preferred against them, under both the constitution of Defendant-Appellant Union and the applicable principles of due process of law.

Before proceeding to an analysis of the legal principles involved, however, we want to point out some fundamental

errors or misconceptions of the court below, which perhaps tend to explain the ultimate error in the final judgment.

The court below erroneously believed that a trial in absentia was virtually illegal *per se*. This attitude was made apparent as early as October 23, 1957, when the court granted Plaintiff-Respondent Nance's motion to strike the entire Answer of Defendant-Appellant Union to his Petition for Writ of Mandate despite the fact that Defendant-Appellant Union had stated as a defense, *inter alia*, that Nance, Hanley, and others frustrated the attempts of the trial board to conduct their trials.

At the conclusion of the case, nearly two years later, the trial court held to the same view. Thus, in assigning reasons for amercing Defendant-Appellant Union in punitive damages twenty thousand times as great as the actual (nominal) damages suffered by the two Plaintiffs-Respondents, the court said:

“(a) That trial in absentia, where there has been no consent or waiver, is *abhorrent to the principles of justice and fair play*. (R. 652)

“(g) That the [Defendant-Appellant Union] in upholding the action of its officers and Trial Committee is *attempting to defend trial in absentia—a hateful thing in any civilized society*.” (R. 653) (Emphasis ours.)

We, of course, are not attempting to defend trial in absentia as a general proposition. But if a union member, through misconduct, frustrates the holding of his trial, his rights of a trial cease. He can thereafter be found guilty of the charges and expelled, either by default or upon the basis of a trial in absentia at which evidence is received.

Of the many paragraphs contained in the Findings of Fact and Conclusions of Law of the trial court below, not



a single one is critical of the deportment of Hanley and Nance or their close confederates Fuller, Nichols, and Vaughn. No criticism, either, was made of conduct of the crowd in the trial room. It would appear that so far as the court below was concerned, the Union's trial board committed grossly illegal acts by refusing to comply with the requests made by Hanley, Nance, and their compatriots, but that the latter for their part were under no legal duty to comply with any of the requests made, or conditions imposed, by the trial board. From what one can gather from reading the decision of the court below, the actions and general conduct of Hanley and Nance are very models of decorum for accused members of any unincorporated association. This, of course, simply cannot be correct.

The trial court never was able to comprehend that the question of the ultimate soundness of Hanley's and Nance's motions for bills of particulars and continuances, and their other demands made during the course of the "open hearings" was utterly immaterial as an issue in this case. They were guilty of misconduct notwithstanding that their objections to any of the trial board's rulings might have been well-taken because they would never comply with the trial board's liminal rules so that such requests, demands, and motions could be submitted properly for consideration. Had they been willing to do this, some, and perhaps most, of those matters might have been resolved by the trial board in their favor.

Their grievous mistake was in refusing to stand trial on conditions laid down by the trial board and refusing even to let the trials get started. Instead, they took the position that any trials that would take place would have to be conducted strictly on their terms. If the trial board had given in on this point, a state of anarchy would have resulted.

## THE ELEMENTS OF DUE PROCESS REQUIRED FOR UNION TRIALS

The authorities all substantially agree that the elements of fair play or due process of law applicable to trials of a member of an unincorporated association are (1) notice of the charges of misconduct and (2) *an opportunity* for the member to be heard in his own defense. As is stated in OAKES, THE LAW OF ORGANIZED LABOR AND INDUSTRIAL CONFLICTS (1927) §54 at page 60:

“ ‘The law insures to every member of a voluntary association a fair trial, not only in accordance with the constitution and by-laws of the association but also with the demands of fair play, which in the final analysis, is the spirit of the law of the land.’

“ ‘He is therefore entitled to *notice and opportunity to be heard in his own defense.*’ ” (Emphasis ours.)

See also: DANGEL AND SHRIBER, THE LAW OF LABOR UNIONS (1941) § 180 at pages 205 and 206.

A good statement of this proposition is also found in *Cason v. Glass Bottle Blowers Assn.*, 37 Cal. 2d 134, 231 P. 2d 6 (1951) at page 11:

“It is a fundamental principle of justice that no man may be condemned or prejudiced in his rights without an *opportunity* to make his defense, and this principle is applicable not only to courts but also to labor unions and similar organizations. *Taboada v. Sociedad Espanola De Beneficencia Mutua*, 191 Cal 187, 191, 215 P 673, 27 ALR 1508; *Ellis v. American Federation of Labor*, 48 Cal App2d 440, 443, 120 P2d 79. It is, of course, true that the refined and technical practices which have developed in the courts cannot be imposed upon the deliberations of workingmen, and the form of procedure is ordinarily immaterial if the accused is accorded a fair trial. See *McConville v. Milk Wagon Drivers' Union*, 106 Cal App 696, 701 289 P

852; 30 Columb L. Rev 847, 852; 4 Am Jur 471-472; 7 CJS, Associations §25, page 61. The union's procedure, however, must be such as will afford the accused member substantial justice, and the requirements of a fair trial will be imposed even though the rules of the union fail to provide therefor. *Taboada v. Sociedad Espanola De Beneficencia Mutua*, 191 Cal 187, 192, 215 P 673, 27 ALR 1508; *Von Arx v. San Francisco Gruetli Verein*, 113 Cal 377, 379, 45 P 685; *Ellis v. American Federation of Labor*, 48 Cal App 2d 440, 443-444, 120 P2d; see Dangel and Shriber, *Labor Unions* [1941] 204-206; Martin, *Law of Labor Unions* [1910] 384-386. The authorities recognize that such a trial includes the right to notice of the charges, to confront and cross-examine the accusers, and to examine and refute the evidence." (Emphasis ours.)

The proposition that trials before a labor union's tribunal do not have to be conducted with the same formalities and under the same rules as courts of law is also supported in *Pratt v. Amalg. Assn. of Street and Electric Rwy Emp. of Am.*, Utah, 167 Pac 830 (1917).

The notice issue which Hanley tried to urge before the trial board and later in the trial court is all but frivolous. We shall not even argue this insubstantial point, but shall merely state that he undoubtedly had adequate notice of his charges. Nance concedes that he had notice, well in advance of the hearings.

As to the second element of due process, the record in this case establishes that Hanley and Nance were accorded an opportunity to have a trial on their charges with full rights to examine and cross-examine all witnesses and to introduce testimony and exhibits. To put it more strongly (and accurately), the record shows that this is what the Defendant-Appellant Union desperately wanted to give them. The opportunity was quite convincingly refused, however.

## THE TRIAL IN ABSENTIA WAS NOT ILLEGAL PER SE

There are a number of cases which hold that a trial of a member of an unincorporated association in his absence may be valid under certain conditions.

In *Smith v. Kern County Medical Assn*, 120 P 2d 874, 877 (Cal. Sup. Ct. 1942), the member failed to show up at the appointed time and place for his trial. The court said:

“There is sufficient evidence in the record to support the findings of the trial court. The procedure provided by the rules of the society was followed and the petitioner was accorded every opportunity to defend himself. He may not be allowed to complain that hearings, of which he had due notice and opportunity to attend, were conducted in his absence. The requirements of the law are fulfilled when the accused is afforded notice and an opportunity to be heard. *Levy v. Magnolia Lodge, IOOF*, supra. If the society did not receive evidence from the accused himself, it was not a failure of the law or the rules adopted by the society, but a failure on the part of the accused when he voluntarily absented himself from hearings of which he had due notice.”

See also: *Davis v. IATSE*, 141 P. 2d 486, 488 (Cal. App. 1943) and *Werner v. Int. Assn. of Machinists*, 11 Ill. App 2d 258, 137 NE 2d 100 (1956).

*Miller v. I.U. of Opr. Engineers*, 257 P. 2d 85, 87 (Cal. App. 1953) presents a situation more closely analogous to the case at bar. There, the trial of two Los Angeles members of the union was scheduled in Chicago. The members demanded a trial in Los Angeles but were informed, instead, that their expenses to Chicago would be paid. The expenses of two representatives was to have been paid also.

A continuance was requested and granted. Then other continuance was sought, denied, and they were tried in absentia. The court ruled:

“The constitution did not give plaintiff the right to be tried in Los Angeles. It was within the discretion of the board under the constitution to hold the trial in Chicago. The accused were notified by letter of October 18, 1950, that a trial would be held November 14th. They demanded a trial in Los Angeles and they were informed by the general secretary-treasurer that if they attended the trial in Chicago their reasonable expense would be approved and paid. Through their spokesman they replied, demanding payment of their expenses of travel and while in attendance upon the hearing, and also their wages during the time they would be away from work. They were then requested to select two of their number to appear at the trial as their representatives and provision was made by the secretary for two airplane tickets for the representatives to be selected. This procedure was rejected by the members. The hearing was postponed from November 14th to November 16th for the appearance of some representatives, but no appearance was made and the hearing was had on the 16th. *The board found that the demands of the accused were unreasonable, that they had acted in bad faith and had no intention of attending the trial. Under these circumstances the contention that the accused were not given an opportunity to confront the witnesses and to be heard in their defense cannot be sustained.*” (Emphasis ours.)

Similarly, the trial board of Defendant-Appellant Union properly ruled in the case at bar that Hanley, Nance, and the others accused had not in good faith appeared for trial.

## TRIALS MAY BE CONDUCTED IN THE ABSENCE OF A PARTY IN COURTS OF LAW

Even in actions in courts of law there are situations where trials and portions of trials are validly conducted in the absence of a party. A default judgment in civil actions is the first example that comes to mind. But there are other ones too.

For instance, in *Brown v. Stroeter*, 263 SW 2d 458 (Kan. Cit., Mo., Ct. of App. 1953), a suit in equity to cancel a lease, one of the parties changed counsel just before the trial. She did not appear at the trial but her new lawyer sought a continuance which was denied. The trial court felt that the change in counsel was made for purposes of delay, and the court of appeals affirming held at page 462:

“Whether or not a court has abused its discretion in the matter of proceeding with the hearing of a case in the absence of a party or his attorney depends upon the particular facts and circumstances in the given case.”

In *Thorpe v. Thorpe*, 171 P 2d 126, 129 (Cal. 1946) a wife failed to appear in her husband's divorce action, although it was a contested case. The court felt her affidavit of illness was not made in good faith and proceeded with the trial. The court said:

“As has already been pointed out, the right of a litigant to be present to defend or prosecute an action is not absolute.”

In *Miller v. Grier S. Johnson, Inc.*, 62 S.E. 2d 870, 873, (Sup. Ct. of App. Va. 1951) the court proceeded to trial despite defendant's affidavit of illness. The reviewing court, in affirming, said:

“A litigant not only has a right to be present at the trial, but it is presumed that he will be present for

the purpose of aiding and assisting in the protection of his rights. However, a litigant forfeits this privilege or right when it appears that his absence is for the purpose of forcing a continuance which tends to hinder and delay the orderly and expeditious administration of justice."

Even in criminal cases, the right to be present at trial is not absolute. In *State v. Aikers*, Utah, 51 P. 2d 1052, 1056 (1935) this court said:

"[Defendant] usually will not be permitted to take advantage of his own misconduct when he has voluntarily absented himself from the trial. It is one thing for him to absent himself when he is at liberty and may voluntarily do so, and quite another thing for the court to deprive him of any substantial right against protest . . .

\* \* \*

"A defendant is entitled to be safeguarded in every constitutional right, but should not be permitted to so juggle with such rights as to embarrass and delay the courts or to defeat the ends of justice."

And the following quotation from *Falk v. United States*, 15 App D.C. 446, error dismissed, 180 U.S. 636 (1899) [23 ALR 2d 484] is very much in point. There, the prisoner escaped from jail and fled during the course of his trial. The Court of Appeals said:

"It is unfortunate, perhaps, that in several of the cases cited the fact of escape or absconding by an accused person under indictment, and whose trial has been commenced, has been held to be a waiver of the right of the person to be present at the whole trial and at every stage of the trial. In our opinion, there is no question of waiver here of any right. The question is one of broad public policy, whether an accused person, placed upon trial for crime and protected by all the safeguards with which the humanity of our present

criminal law sedulously surrounds him, can with impunity defy the processes of that law, paralyze the proceedings of courts and juries and turn them into a solemn farce, and ultimately compel society, for its own safety, to restrict the operation of the principle of personal liberty. *Neither in criminal nor in civil cases will the law allow a person to take advantage of his own wrong.* And yet this would be precisely what it would do if it permitted an escape from prison, or an absconding from the jurisdiction while at large on bail, during the pendency of a trial before a jury, to operate as a shield from further prosecution for the crime. An escape is itself a criminal offense, although now rarely punished independently of the principal offense for which the party is held. Can it be that an act, which is in itself a criminal offense, is to be allowed in law to operate as a release from criminal prosecution, and therefore ultimately from criminal liability? We can not think that the constitutional guarantee in its practical application will lead us to any conclusion so absurd. The Constitution was not intended to shield the guilty from the consequences of crime, but to protect the innocent.” (Emphasis ours.)

See also: *Diaz v. United States*, 223 U.S. 442, 457-460 (1912).

A trial in absentia, thus, is not necessarily abhorrent or illegal, and, as we have shown, courts of law have in appropriate circumstances proceeded with trials in the absence of a party or of the accused. The cases cited above indicate that there are far worse things than trials in absentia, one of which is to thwart or subvert one's right to trial by one's own misconduct and then to seek to reap advantage from that fact. This is precisely what Hanley and Nance did here.



## THE TRIALS IN ABSENTIA WERE JUSTIFIED UNDER DEFENDANT-APPELLANT UNION'S CONSTITUTION

The trials of Hanley and Nance were held before a trial board consisting of General Officers of Defendant-Appellant Union, as is permitted in Section 3 of Article Eighteen (18) of the Union constitution. (Exh. 53, page 76-77). Section 3(b) thereof provides:

“The General Officer or Officers designated by the General President shall constitute a trial board and all parties shall be given the same *opportunity* to present evidence and exhibits, to cross-examine witnesses, and for the accused to be represented by a good standing member of his local union as counsel, to which they would be entitled in a trial before a local union trial committee, as provided in Section 2 of this Article.” (Emphasis ours.)

Section 2(h) of Article Eighteen (18) (Exh. 53, page 75-76) provides:

“Except as provided in paragraph (i) of this Section, should the accused refuse, fail or neglect to appear for trial after due notice, the trial committee shall proceed with the trial, hear such evidence as may be presented by witnesses who respond to notice and render its findings, decision and recommendations.”

The trials in absentia given to Hanley and Nance and also to Carl Nichols and John Fuller were all in strict conformity with Sections 2 and 3 of Article Eighteen (18). The accused members (Hanley, Nance, Nichols and Fuller) did not appear for trial on June 3, 4 and 7, 1954, in the sense that “for trial” means for purposes of going to or submitting to trial. They physically appeared in the rooms

appointed as the trial rooms but only to insure that their trials would not take place.

Likewise, on Tuesday, June 8, 1954, they were afforded still another opportunity to appear before the trial board and go through trials on their charges, but again they refused to take advantage of it.

The opportunity to attend and participate in a trial which is required under the Union constitution and under principles of fair play or due process of law was, therefore, extended to each of them. Having declined to accept those opportunities, they have no right now to complain that they subsequently were found guilty of the charges preferred against them in trials at which they were not in attendance.

#### NANCE AND HANLEY WERE NOT ENTITLED TO ANY RELIEF BECAUSE THEY DID NOT COME BEFORE THE COURT WITH CLEAN HANDS

Recently, the California Supreme Court in *Allen v. Los Angeles County District Council of Carpenters*, 337 P. 2d 457 (1959), denied reinstatement to an expelled union member, despite the fact that there were irregularities in the proceeding before the union tribunals. In that case the expelled member refused to state whether he was a Communist. The court said at page 461:

“The proceeding before the trial court for a writ of mandate was an equitable proceeding, in which the trial court was vested with a wide discretion. *Parker v. Bowron*, 40 Cal. 2d 344; *Bartholomae Oil Corp. v. Superior Court*, 18 Cal 2d 726; *Rogers v. Board of Directors of Pasadena*, 218 Cal. 221; *El Camino L. Corp. v. Bd. of Supervisors*, 43 Cal. App. 2d 351; *Neto v. Con-*

selho Amor. etc., 18 Cal. App 234. The doctrine of 'clean hands' was therefore applicable. 32 Cal. Jur. 2d, Mandamus, §8, pp. 125-126. Thus, even assuming some showing of irregularity in the proceedings before the union committee, plaintiff may not successfully contend on this appeal that the trial court abused its discretion in denying the writ in the absence of a showing in the trial court that he came into court with 'clean hands,' and that he was entitled to the relief demanded, which was reinstatement to membership in the union. See Neto v. Conselho Amor etc., supra, 18 Cal. App 234; Note 36 A.L.R. 508. Plaintiff made no such showing but, on the contrary, refused to answer the question relating to his eligibility to attain or retain such membership."

We do not believe, frankly, that the clean hands rule is needed to dispose of this case. The ruling of the trial court below is patently erroneous, as a matter of law. The trial court's basic proposition that the trials in absentia were illegal under the Union constitution and principles of due process of law is erroneous in the circumstances of this case.

Nevertheless, it is entirely accurate to observe that, even if the Union trial board had committed some errors and had deprived Hanley and Nance of some rights, the utterly contemptuous misconduct on their part more than nullified these errors, and they would not have been able to come into the trial court below with clean hands, so as to be entitled to the extraordinary equitable relief of reinstatement to membership in Defendant-Appellant Union.

## POINT I

### *B. The Court Erred As a Matter of Law In Concluding That Plaintiffs-Respondents' Remedies Upon Appeal Through Defendant - Appellant Union's Tribunals were Inadequate and Did Not Cure the Alleged Defects of the Trial Board Proceedings Below*

Time does not permit a lengthy discussion of the rights of Hanley and Nance in the appellate tribunals of Defendant-Appellant Union. Suffice it to say that extensive and effective appeal procedures are provided for an aggrieved member of the Union in Article Nineteen (19) of the Constitution. (Exh. 53, page 78-80).

The appeals, which are to be filed in writing, are required to contain such documentary evidence and argument as the appealing parties may deem necessary for a proper consideration of their appeals, and decisions on appeals are to be based solely on the record of the case, the written statements of the appeals, and the documentary evidence and argument incorporated or annexed thereto. Article Nineteen (19), Sec. 3(a), 3(b). Oral argument may be permitted, but it is limited to evidence in the record of the trial or incorporated into the written appeal. Article Nineteen (19), Sec. 3(b).

Had Nance and Hanley wanted to refute any of the findings of the trial board or to expose any of the alleged political machinations on the part of President Byron or any other General Officers, they had ample opportunity to cite these matters in their appeals and submit affidavits or other documentary evidence to corroborate them. They would then have given the association an opportunity to rule on those issues in the first instance, and to remedy

forthwith any errors made by the trial board or any abuses of power on the part of their General Officers. But they declined to be specific with respect to such matters in their written appeals.

It cannot be said now that errors or mistakes committed by the trial board would not have been remedied upon appeal if proper supporting evidence had been submitted. In fact, the indications are all to the contrary, as is evidenced by the Grievances and Appeals Committee's exoneration of the charge against Hanley that he improperly directed John Fuller to act as a representative of Local Union 371 without authority to do so. *This is the only charge that Hanley attempted to refute by documentary evidence incorporated into his written appeal.*

To the extent that Hanley and Nance had refuting evidence which they neglected or failed to annex to their written appeals, they to such extent failed to exhaust their remedies within the association, and, thus, would not be entitled to any relief in the courts. See: THE LAW OF LABOR UNIONS, DANGEL AND SHRIBER, §186, p. 211-215, in support of this well-recognized rule requiring exhaustion of internal remedies within the organization.

The failure of Hanley and Nance to take advantage of their rights upon appeal within the union should not, therefore, become the basis for a finding that their remedies upon such appeal were inadequate. The trial court below erred in so ruling.

## POINT II

THE COURT ERRED IN HOLDING THAT THE ACTIONS OF DEFENDANT-APPELLANT UNION AND SOME OF ITS OFFICERS WERE MALICIOUS, ARBITRARY, AND UNREASONABLE IN CONNECTION WITH THE PREFERRING OF CHARGES, TRIAL PROCEEDINGS, AND APPEAL THROUGH THE UNION TRIBUNALS

On December 30, 1958, the trial court found that the trials afforded Hanley and Nance denied them rights under the Union constitution and under principles of due process of law. This was the sole basis for finding that the expulsions were void and ordering Defendant-Appellant Union to reinstate them to membership forthwith.

Approximately five months later the trial court in a supplemental memorandum of decision found that the expulsion proceedings were not only illegal but also malicious, arbitrary, and unreasonable. See: Second Supplemental Memorandum of Decision (R. 600-614). It was not contemplated that these findings as to malice or bad faith would be considered as a ground for holding the expulsions of Hanley and Nance illegal, since they had already been held illegal, but, rather, such findings were to bear on the question whether punitive damages would lie. See: Pre-T. 9-5-58, 2-5 and Order As To Issues To Be Submitted To Jury (R. 367-369). This is also clear from a reading of the trial court's Findings of Fact and Conclusions of Law and his Judgment and Decree. (R. 641-657). Had the previous ruling, rendered on December 30, 1958, in the Memorandum of Decision, been that the expulsions were not illegal under the Union constitution or applicable principles of due process of law, the case at bar would have ended, and Nance's

Petition for Writ of Mandate and Hanley's Complaint in Intervention would have been dismissed.

Therefore, if the court agrees with our argument under Point I above, the decision of the trial court should be reversed and dismissed, and none of the other points to be argued hereafter would need to be reached.

## THE COURT ERRED IN FINDING THAT THE CHARGES WERE NOT PREFERRED IN GOOD FAITH

The most important "bad faith" contention made by Hanley and Nance during the trial in the court below was to the effect that President Byron preferred false charges against them in bad faith, purely for the purpose of preventing them from sponsoring two resolutions at Defendant-Appellant Union's General Convention to be held in Montreal, Canada, in August of 1954.

It would be disingenuous to fail to acknowledge the fact that there was testimony, days and weeks of testimony, on the subject whether President Byron and other General Officers knew of Hanley's and Nance's political plans and, if so, whether they opposed them. The court found, erroneously we believe, that President Byron knew of these plans and opposed and resented them, and that he preferred charges against Nance and Hanley partly, at least, to prevent them from supporting the two resolutions at the General Convention. Regardless of such conclusion, however, the filing of the charges was warranted and justified.

The trial court at the same time found that President Byron had received reports which, if believed, would have justified his preferring charges against them. (R. 647-648). These were the Stetter reports and the communications from Ira Fulmor and Henry Ely. The reports from those

sources which implicated Hanley and (to a somewhat lesser extent) Nance in a murder, in shakedown activities against contractors, etc., were so shocking that President Byron would virtually have been impelled to charge them with misconduct, and force them to defend themselves against those despicable accusations. President Byron, or any other Union leader, would himself have been guilty of gross misconduct had he refused to take action after receiving such serious documented evidence of misconduct on the part of members of his organization.

Thus, at most, the evidence adduced on this issue of good faith in the preferring of the charges gave rise to two conflicting inferences. In these circumstances it was error for the court to draw the inference of bad faith. As pointed out in 20 AMERICAN JURISPRUDENCE 224 on the subject of inferences and presumptions of good faith, honesty and fair dealing:

“.... It is further presumed that men intend to do what they have the right and power to do, rather than what is beyond their right and power. In those cases where different inferences may be drawn from the same state of circumstances it is the duty of the court to presume in favor of innocent conduct, rather than intentional and guilty misconduct.”

See also: *N.L.R.B. v. Huber & Huber Motor Exp.*, 223 F2d 748, 749 (C.A. 5th 1955) where the court said:

“.... As stated above, the record discloses that there existed several reasons for the unpopularity of Barnett, both with the management and with the Union Officers, and where the Board could as reasonably infer a proper collateral motive as an unlawful one, the act of the management cannot be set aside by the Board as being improperly motivated.”

Accord: *Schofield v. ZCMI*, Utah, 39 P. 2d 342, 345 (1934).



Actually, here the inference of good faith in preferring the charges is much stronger than the contrary one, because it is based upon facts which if reported to any reasonable man would have induced him to take the same action as President Byron, i.e.: prefer charges.

The trial court found that President Byron delayed too long before preferring charges and did not do so until he learned of Hanley's and Nance's political activities. (R. 647-648). This is wholly unfounded.

To reach this erroneous conclusion the trial court had to find that President Byron should have preferred charges against Hanley and Nance solely on the basis of some unverified reports of misconduct given to him by representatives of certain Los Angeles contractors. These reports were made first in December of 1953 and then again in February of 1954. The trial court evidently felt that President Byron either should not have bothered to make his own investigation using Grant Stetter, Murphey and O'Malley, or that he should not have waited until such investigation had been completed, which was around the 9th of May, 1954, before preferring the very serious charges against Hanley and Nance. (N.J.T. 4926-4927). Neither premise is tenable, of course, and the record establishes that Byron acted prudently and with reasonable dispatch in preferring the charges.

THE COURT ERRED IN FINDING THAT THE MEMBERS OF THE TRIAL COMMITTEE WERE UNDULY INFLUENCED IN THE CONDUCT OF THE TRIAL PROCEEDINGS AND IN THEIR DECISION BY A DESIRE TO COOPERATE WITH PRESIDENT BYRON IN HIS EFFORTS TO EXPEL HANLEY AND NANCE

The finding that the members of the Trial Committee were "unduly influenced" in the conduct of the trial proceedings and in their decision by a desire to cooperate with President Byron in his efforts to expel Hanley and Nance is wholly unsupported by evidence and also confusing.

The trial court did not hold that the Union trial board, or any member of it, was biased against Hanley and Nance, nor did the court hold that they would not have had fair trials if they had stood trial before it. Quite to the contrary, the trial court below held the expulsions of Hanley and Nance were void specifically because they were not present at their trials before that very trial board. (R. 651-652).

The transcript of the three days of "open hearings," best proves the fact that the trial board of Defendant-Appellant Union gave Hanley and Nance "every break in the books." They did not recess the trials prematurely, but only after three aggravating sessions that would have broken the patience of Job. From such a record, it cannot be inferred that their decision to recess the hearings and resume them in absentia was "unduly influenced" by some ulterior desire to cooperate with President Byron.

With respect to the reasonableness or correctness of the trial board's decision finding Hanley and Nance guilty

of the charges preferred against them, this is a matter that the court never inquired into, and which is not an issue in the case. See: Pre-T., 9-5-58, 2-5. To the extent that there is any misapprehension on this point, however, we submit that there was substantial evidence received during their trials in absentia which more than supports the findings of the trial board. See: Exh. 7 and 10.

### THE REMAINING FINDINGS OF BAD FAITH AND UNREASONABLENESS IN CONNECTION WITH THE TRIALS IN ABSENTIA AND APPEALS ARE MERE ADDITIONAL INFERENCES DRAWN FROM THE FACTS

The other findings of the trial court respecting arbitrariness, malice, and bad faith are mainly based upon a reevaluation of the conduct of the trial board, the General President, and the General Convention with respect to matters such as denying requests for continuances and bills of particulars and even of the act of permitting Hanley and Nance to be tried in absentia. The trial court merely belatedly characterized them as arbitrary, unreasonable, and malicious in nature, as well as illegal.

We have already argued that the denials of those requests and motions was brought about because Hanley and Nance never consented to the trial board's rules of procedure and, thus, the trials were never in session so that such matters were up for rulings. Such conduct was therefore not illegal; *a fortiori*, it was not arbitrary, unreasonable or malicious. The findings and conclusions of the trial court as to these matters of malice and bad faith should be reversed.

### POINT III

THE COURT ERRED IN HOLDING THAT PUNITIVE (EXEMPLARY) DAMAGES SHOULD BE AWARDED FOR PLAINTIFFS-RESPONDENTS' WRONGFUL EXPULSIONS FROM UNION MEMBERSHIP AND FURTHER ERRED IN AMERCING DEFENDANT-APPELLANT UNION WITH PUNITIVE DAMAGES FOR MISCONDUCT OF ITS OFFICERS IN THE ABSENCE OF A SHOWING OF RATIFICATION BY THE UNION OF SUCH ALLEGED WANTON OR MALICIOUS CONDUCT

Points III, IV, and V will be considered under this heading and argued as one.

*A. The Court Erred As a Matter of Law in Allowing Punitive Damages in Mandamus and Injunction Proceedings.*

Plaintiff-Respondent Nance filed his action herein in the form of a Petition for Writ of Mandate. Our research of authorities has failed to bring to light a single instance in which a court has awarded punitive (exemplary) damages in a mandamus proceeding. There is no statement in any standard reference work, such as AMERICAN JURISPRUDENCE or CORPUS JURIS SECUNDUM, that supports the recovery of punitive damages in a mandamus suit. On the other hand, in 32 CALIFORNIA JURISPRUDENCE 2d 287 it is stated:

“It is extremely doubtful whether the court in a mandamus proceeding could or should award exemplary damages.”

The conclusion that punitive damages are not obtainable in a mandamus suit is fortified by the fact that mandamus is a special form of action which is essentially

equitable in nature; that is to say, it is a proceeding in which equitable principles are applicable. See: 34 AMERICAN JURISPRUDENCE 829; 32 CALIFORNIA JURISPRUDENCE 2d 119.

These equitable rules, then, would apply to Nance's Petition for Writ of Mandate as well as to Hanley's Complaint in Intervention, which is purely a proceeding in equity for injunctive relief and damages. In a comprehensive annotation in 48 A.L.R. 2d 948, the authors state that the majority rule, adopted in all but a few states, is that punitive or exemplary damages may not be recovered in a proceeding in equity. At page 950 of the annotation, it says:

"The several theories advanced by the courts as the basis for the rule that punitive damages may not be recovered in courts of equity are: (1) A court of equity does not have the power to award punitive damages; (2) the awarding of punitive damages is incompatible with the principles and practice of equity; and (3) by seeking equitable relief, a litigant waives all claim to punitive damages. It should be noted that in refusing to award punitive damages the courts have frequently based their holdings upon several or all of these theories.

"There are, however, a number of cases in which the courts have denied punitive damages in equity or have recognized that such damages may not be recovered in equity without stating upon what theory they based their decision."

According to the annotation, at least 18 states plainly hold that punitive damages may not be recovered in equitable proceedings, and only two jurisdictions, to wit: California and Tennessee, definitely allow them.

It is not clear where Utah stands in respect to this proposition, but we submit that the majority rule is based

upon sound principles and ought to be followed. To allow punitive damages to lie in equitable proceedings would go far towards destroying all remaining distinctions between legal and equitable actions,

*B. The Court Erred As a Matter of Law in Allowing Punitive Damages For A Breach of Contract.*

The general rule of contract law with respect to damages is that the plaintiff is limited to a recovery of the actual loss he has sustained by reason of the breach. 15 AMERICAN JURISPRUDENCE 442. With respect to punitive damages it is said in 15 AMERICAN JURISPRUDENCE 709:

“ . . . According to the overwhelming weight of authority, exemplary damages are not recoverable in actions for breach of contract, although there are dicta and intimations in some of the cases to the contrary.”

While Hanley and Nance are proceeding in equitable actions, the wrong that they seek to remedy is in the nature of a breach of contract. A wrongful expulsion from a labor union is a breach of the contract of membership between the member and the union. Recently, in *I.A.M. v. Gonzales*, 356 U.S. 617, 2 L.ed. 1018 (1958) the Supreme Court held:

P. 618 “ . . . under California law membership in a labor union constitutes a contract between the member and the union, the terms of which are governed by the constitution and by-laws of the union, and that state law provides, through mandatory reinstatement and damages, a remedy for breach of such contract through wrongful expulsion. This contractual conception of the relation between a member and his union widely prevails in this country . . . ”

In accord is *Pratt v. Amal. Ass. of Street & Elec. Rwy. Emp. of Am.*, Utah, 167 Pac. 830 (1917).

Punitive damages were sought but not recovered in *Gonzales*, supra, which was also a *mandamus* suit. Chief Justice Warren, speaking in dissent, said at page 628:

“... The right of action for emotional disturbance, like the punitive recovery the plaintiff sought unsuccessfully in this case, is a particularly unwelcome addition to the scheme of federal remedies because of the random nature of any assessment of damages.” (Emphasis ours.)

Other cases denying punitive damages for breaches of contract are *Fordson Coal Co. v. Kentucky River Coal Corp.* 69 F. 2d 131 (C.A. 6th 1934); *Young v. Main*, 72 F2d 640 (C.A. 8th 1934); *Steiner v. Rowley*, 35 Cal 2d 713, 221 P. 2d 9 (1950); *Chelini v. Nieri*, 32 Cal 2d 480, 196 P. 2d 915 (1948); and *White v. Metropolitan Merchandise Mart*, 107 A. 2d 892 (Del. 1954).

Punitive damages should accordingly have been denied in the case at bar on the ground that they do not lie for breach of a contract of union membership.

C. *The Court Erred in Not Submitting the Issue of Punitive Damages to the Jury, If They Were Allowable.*

If we assume that the issue of punitive damages was properly allowed in this case, the court still erred in not submitting such issues to the jury. Some punitive damage issues were submitted to the jury at the trial below but not all of them. The jury found that the Defendant-Appellant Union was not guilty of any malice or bad faith and that Hanley and Nance were entitled to no punitive damages, and, in fact, no damages at all. The only punitive damages allowed in the case were those assessed by the court itself.

The general rule as to the allowance of punitive dam-

ages and the rule which we believe applies in Utah, is that they are strictly and peculiarly within the province and discretion of the jury. A good statement of this rule is found in *Van Lom v. Schneiderman*, 210 P. 2d 461, 469, 11 A.L.R. 2d 1195, 1206 (Sup. Ct. Ore. 1949) :

“In the trial of a case where exemplary damages are sought the judge determines as a matter of law whether there is evidence of malice, and, if he decides that there is, the assessment of such damages is committed to the discretion of the jury. *Cholia v. Kelty*, 155 Or 287, 291, 63 P2d 895; *Martin v. Cambas*, 134 Or 257, 262, 293 P 601; *Gill v. Selling*, 125 Or 587, 591, 267 P 812, 58 ALR 1556. The Supreme Court of the United States says: ‘*This has always been left to the discretion of the jury*, as the degree of punishment to be thus inflicted must depend on the peculiar circumstances of each case.’ *Day v. Woodworth*, 13 How 363, 371, 14 L Ed 181. And the jury has entire discretion to refrain from giving any punitive damages at all even though all the elements of malicious and damaging misconduct may have been established. *McCormick on Damages* 296, §84; 4 *Sedgwick on Damages* 2660, §1318.” (Emphasis ours.)

See also: 53 AMERICAN JURISPRUDENCE 167-168.

*D. Even if Punitive Damages Were Allowable, the Court Erred in Assessing them Against Defendant-Appellant Union in the Absence of a Finding that the Malice or Bad Faith of the Union Officers Was Known to or Ratified by the Membership.*

Defendant-Appellant Union as a voluntary, unincorporated association consists of, and has no identity separate from, its entire membership. A union's citizenship, for instance, is coextensive with the citizenship of all its members. *Sun Shipbuilding & Drydock Co. v. Marine & Shipbuilding Workers, etc.*, 95 F. Supp 50 (D.C. Pa. 1951) ;



*Ex Parte Edelstein*, 30 F2d 636 (C.A. 2d 1929), cert. denied 279 U.S. 851.

As the Supreme Court of New Jersey held in *Marchitto v. Central Railroad Company of New Jersey*, 88 A2d 851 (1952), a union is a common enterprise or joint venture in which each of the members is a co-principal with all of the others. There the court said:

P. 856 “. . . It [the union] is not a separate legal entity in the eyes of the law, having no existence apart from that of its individual members. At common-law it could neither sue nor be sued . . . In legal effect plaintiff and every other member of the Brotherhood are co-principals joined together in a joint enterprise to accomplish a common purpose with their relationships to each other and to the group being governed by the association’s constitution and the by-laws or rules adopted pursuant thereto, and by the common law.”

A judgment against Defendant-Appellant Union is enforced against its treasury, which is the joint property or asset of the entire membership. It is thus necessarily true that to mulct the Union with punitive damages is indirectly to assess them against the whole membership. We submit that, regardless of the rule as to the liability of the union for actual damages proximately caused by acts of their officers or agents, the bad faith or malice of such officers or agents ought not to be imputed to the membership in the absence of a showing that the membership knew of the malicious nature of the acts and approved or ratified the same.

This point was decided in *Lawlor v. Loewe*, 187 Fed. 522 (C.A. 2d 1911), cert. denied 223 U.S. 729 (1912) where the court said at page 526:

“. . . Surely the fact that an individual joins an association having such a clause in its constitution cannot be taken as expressing assent by him to the per-

petration of arson or murder. Something more must be shown, as, for instance, that with the knowledge of the members unlawful means had been so frequently used with the express or tacit approval of the association, that its agents were warranted in assuming that they might use such unlawful means in the future, that the association and its individual members would approve or tolerate such use whenever the end sought to be obtained might be best obtained thereby."

To the same effect is *Sweetman v. Barrows*, 161 N.E. 272 (Mass. Sup. Ct. 1928); *Schneider v. Local 60*, 116 La. 270, 5 L.R.A. (N.S.) 891 (1905); and in *Martin v. Curran*, 303 N.Y. 276, 101 N.E. 2d 683, 685, 686 (1951) the New York Court of Appeals held that in a libel action against officers of a union sued in their representative capacities there had to be allegations and proof that such libels in the union's newspapers were ratified by the membership. There, the court said:

"A voluntary, unincorporated membership association is neither a partnership nor a corporation. It is not an artificial person, and has no existence independent of its members. *Ostrom v. Greene*, 161 N.Y. 353, 361; see *Niven v. Spickerman & Stever*, 12 Johns. 401. No agency of one member for another is implied. *McCabe v. Goodfellow*, 133 N.Y. 89, 95, *supra*. 'A part of the members of a voluntary organization cannot bind the others without their consent before the act which it is claimed binds them is done, or they, with full knowledge of the facts, ratify and adopt it.' *Sizer v. Daniels*, 66 Barb. 426, 432-433. So, until the passage of the statutes which were the precursors of article 3 of the present. General Association Law, all the members of such a group were necessary parties defendant in any suit on an alleged association liability, and could not be sued through their officers. *Van Aernam v. Bleistein*, 102 N.Y. 355, 358.

\* \* \*

"So, for better or worse, wisely or otherwise, the

Legislature has limited such suits against association officers, whether for breaches of agreements or for tortious wrongs, to cases where the individual liability of every single member can be alleged and proven. *Despite procedural changes, substantive liability in such cases is still, as it was at common law, 'that of the members severally'.* Sperry Products, Inc. v. Association of Amer. R.R., 132 F. 2d 408, 410, certiorari denied 319 U.S. 744. 'In the kind of association now under consideration, only those members are liable who expressly or impliedly with full knowledge authorize or ratify the specific acts in question'. Wrightington on Unincorporated Associations and Business Trusts, §64." (Emphasis ours.)

The court below never found that the membership of the Union, or their representatives, the delegates to the General Convention, ever learned that President Byron acted in bad faith or maliciously in preferring charges against Hanley or Nance. Similarly, the court never found that any alleged malice or ill will or undue influence on the part of the trial board or the Grievances and Appeals Committee was brought to the attention of the membership. Moreover, Hanley and Nance, by failing to incorporate any evidentiary matter into their written appeals, did not do anything to apprise the membership of the Union of malice or bad faith on the part of any officer or agent of the Union.

The membership of Defendant-Appellant Union did not have any opportunity to ratify any alleged malice or bad faith in connection with Plaintiffs-Respondents' expulsions because they never learned of it, and, therefore, even assuming that in a case such as this punitive damages could be awarded, they would lie only against those members and officers who had evil motive and intent in connection with the expulsion proceedings. None of those persons was named as a defendant in the case at bar, however.

*E. It Was Error for the Court to Award Nominal Damages after the Jury Returned a Verdict that No Compensatory Damages Were Suffered by Either of the Plaintiffs-Respondents*

So far as the record of this case reveals, every damage issue involved was to be submitted to the jury, except for those limited issues which the trial judge kept from the jury pursuant to his Order As to Issue to Be Submitted to the Jury. (R. 367-369). The trial court never reserved for himself the right to rule upon any elements of actual or compensatory damages. See Pre-T., 1-13-59, 11-12. Note also the following colloquy between the court below and counsel at page 50 of the January 13, 1959, pre-trial conference:

“THE COURT: Under the suggestion of the court, the question of bad faith or malice up to the time of the expulsion would be left to the court, including any punitive damages for that if the question were found in favor of the [Plaintiffs-Respondents].

“MR. FISHER: Yes, but how about the compensatory damages?”

“THE COURT: Beg pardon? All the compensatory damages would be left to the jury.”

and further at page 51 thereof:

“MR. SANDACK: In other words, if we were to so stipulate, you would still allow this jury to hear elements of compensatory damages, including pain, suffering, humiliation for the pre-expulsion period which would in effect allow Nance and Hanley to reopen their testimony as to humiliation, pain and suffering in that pre-expulsion period which might go back of May 15th?

“MR. DREYER: May I be heard on that, your Honor? All that we can recover by way of compensatory damages is damages that naturally and proximately

flowed from the expulsion. I don't see how pain and suffering prior to the expulsion or pain and mental distress can have anything to do with it.

“MR. SANDACK: Or Humiliation.

“MR. DREYER: It is the damages flowing from the expulsion that is included in the compensatory damages.

“MR. FISHER: I am not too convinced of that Mr. Dreyer, unless you want to stipulate that. If the court would make a finding that there was malice in the original preferment of charges, I would have some question as to whether humiliation and mental anguish suffered from the date the charges were first issued might not possibly be an element of the case.

“MR. DREYER: I think it would be part of the punitive damages.”

The court below, therefore, had no justification for belatedly reevaluating the same evidence that the jury scrutinized and giving Nance and Hanley nominal damages where the jury previously ruled that neither of them was entitled to even one cent. Counsel for the Plaintiffs-Respondents state at page 5 of their Memorandum of Points and Authorities in Support of Motion for Reconsideration of Order on Motion to Settle Record (filed in the Supreme Court of January 22, 1960):

“Among other things [Defendant-Appellant Union], as shown by its statement of points, is attacking the trial court's award of nominal damages. *That award is based entirely on the evidence adduced at the trial which began on February 9, 1959.* (Emphasis ours.)

This was an attempt indirectly to give them a judgment n.o.v. when, as a matter of law, as the trial court properly ruled, they were not entitled to it.

*F. It Was Error for the Trial Court to Award Punitive Damages Without Having an Award of Compensatory Damages Upon which to Base It*

In any event, however, the award of punitive damages in this case is erroneous as a matter of law because in Utah, as in the vast majority of states, punitive damages are not allowed unless compensatory damages based on the tortious or illegal conduct are recovered. Such as the ruling of this court in *Graham v. Street*, et al, Utah, 270 P. 2d 456, 459 (1954). There the court held:

“Defendants next contend that the court erred in allowing \$5,000.00 punitive damages. We agree. As was the case with compensatory damages, there are no specific pleadings, only a general allegation of fraud in the amended complaint. Standing alone, the failure to set forth a specific pleading may not be fatal since the damage may follow as a conclusion of law from the allegation of fraud, 15 Am. Jur., Damages, Sec. 304: *however, the general rule is that there can be no punitive damages without compensatory damages based on the tort.* *Gilham v. Devereaux*, 67 Mon. 75, 214 P. 606, 33 A.L.R. 381. And see *Falkenburg v. Neff*, 72 Utah 258, 269 P. 1008; *Evans v. Garsford*, Utah, 247 P. 2d 431; and cases cited in annotation in 33 A.L.R. 384. Hence, the failure to allege *and prove* a tort giving rise to compensatory damages vitiates the claim for punitive damage. (Emphasis ours.)

See also the comprehensive new annotation on punitive damages in 17 A.L.R. 2d 527 et seq.

Only a minority of jurisdictions permit an award of punitive damages to be based upon nominal damages and Utah is not among them. 17 A.L.R. 2d. 542-545.

The *Graham* case would seem conclusively to establish the error of the court below in awarding punitive damages in this case.

*G. The Award of Punitive Damages is Erroneous Because It Is Wholly Disproportionate to the Nominal Award*

Even if Utah allowed the recovery of punitive damages based on an award merely of nominal damages, the grossness of the verdict for punitive damages in the present case would nevertheless be erroneous. In Utah there is the additional requirement that the punitive award must bear some reasonable relationship to the amount of actual damages recovered. *Falkenberg v. Neff*, 72 Utah 258, 269 Pac. 1008 (1928) (where a verdict of \$5,000.00 punitive to \$362.50 compensatory was held excessive, and the court ordered a remitter of \$3,500.00). This rule is still in effect in Utah, as it is in a number of other jurisdictions; and in *Ostertag v. LaMont*, Utah, 339 P2d 1022, 1024 (1959) this honorable court recently said:

“ . . . The jury from its advantaged position must necessarily be allowed a broad discretion in such matters. It is true that this court has stated a number of times that the punitive damages must bear some reasonable relationship to actual damages. This is so because they must not be so disproportionate as to manifest that they were awarded as a result of passion or prejudice, or under misconception of, or in disregard of the law or the evidence. But the relationship of the punitive damages to actual damages awarded is only one of the facts to be considered in determining whether the amount awarded should be sustained.”

See also: annotation in 17 A.L.R. 2d at 548-549.

The two punitive verdicts in the case at bar of \$20,000.00 each based upon nominal recoveries of \$1.00 each, are so wildly disproportionate as to be virtually prejudicial per se. These verdicts, moreover, were imposed, in part, on account of the fact that the Union had the temerity to defend this case in the first place (although the Union

was the defendant) and, because the trial below cost the county and its taxpayers some money. (R. 652-653). Evidently, the court below saw fit to penalize Defendant-Appellant Union for defending itself instead of confessing judgment in a case in which its actions were proper in the circumstances and the plaintiffs themselves were guilty of serious misconduct. The court, thus, in its Findings of Fact and Conclusions of Law held that "In determining the amount of exemplary damages the following matters are entitled to consideration:

(a) That trial in absentia, where there has been no consent or waiver, is abhorrent to the principles of justice and fairplay.

(b) That in this case the wealth and power of an international union was arrayed against individual union members with meager resources.

(c) That appeals were timely taken, and respondent's officers and its Grievances and Appeals Committee refused to reverse the action of the Trial Committee despite the fact that the transcript of the trial proceedings unmistakably showed that the trials had been had in the absence of the accused and without their consent and obviously over their objections.

(d) That continuously since on or about July 1, 1954, the petitioner and intervenor have been known and referred to as expelled members and have been deprived of the benefits and privileges of union membership.

(e) That petitioner and intervenor have been put to the expense of a costly and very prolonged trial, over constant objections of respondent and two intermediate appeals, in order to obtain redress in the court.

(f) That taxpayers have been burdened with the expense of a greatly prolonged trial despite the fact that respondent's officers and its Trial Committee and appellate tribunal had full knowledge that trials of petitioner and intervenor upon the charges herein involv-



ed had been held in their absence, without their consent and over their obvious objections.

(g) That the respondent in upholding the action of its officers and Trial Committee is attempting to defend trial in absentia — a hateful thing in any civilized society.’’

The reasons assigned by the court as warranting the imposition of punitive damages are not only improper but highly prejudicial.

These reasons would also support the reversal of the punitive damage award herein, even if the other grounds were not sufficient.

## POINT VI

THE COURT LACKED JURISDICTION TO ISSUE AND THE POWER TO ENFORCE A WRIT OF MANDATE OR A MANDATORY INJUNCTION AGAINST A NON-RESIDENT UNICORPORATED LABOR ASSOCIATION COMPELLING SUCH ASSOCIATION TO REINSTATE PLAINTIFFS-RESPONDENTS

## POINT VII

THE COURT ERRED AS A MATTER OF LAW IN REFUSING TO QUASH SERVICE OF PROCESS AND DISMISS ACTIONS BECAUSE DEFENDANT-APPELLANT UNION IS NOT SUBJECT TO PROCESS IN THE STATE OF UTAH

*A. Defendant-Appellant Union Was Not, And Is Not, Subject to Service of Process in the State of Utah Since None of the Acts Complained of by Plaintiffs-Respondents Arose Out of any Business Transacted By Defendant-Appellant Union in the State of Utah*

Points VI and VII will be argued as one.

Two settled doctrines of Utah law were specially pleaded in Defendant-Appellant Union’s Motion to Quash the

Alternative Writ of Mandate. (R. 8, 9). The motion was overruled (R. 25) by the court below.

(1) The court lacked jurisdiction to enforce extra-territorially the mandatory injunction order against non-resident labor association; and

(2) No jurisdiction was acquired over the person of this out of state association.

These pleas were raised by special appearance prior to answer and stand to date unwaived on the record.

In *Pratt v. Amalgamated Association of Street & Electrical Railway Employees of America*, Utah, 167 Pac 830 at page 835, this court early held:

“No one, we think, will be bold enough to assert that we could enforce our judgment outside the state. If, therefore, we enter a judgment, and the defendants refuse to convene, and take the action required of them, by what means could we coerce them to comply with the judgment.”

In *Pratt*, plaintiff commenced a proceeding to compel the defendants to reinstate him as a member of defendant's association, a labor union, claiming an illegal expulsion. The defendants lived in different states of the union, one having his home in Salt Lake City. The principal office of the association was Detroit, Michigan. It had under its control subsidiary associations called local divisions in various states of the United States and Canada. The holding in *Pratt* squarely supports Defendant-Appellant Union's theory that the lower court had neither the power nor jurisdiction to grant and especially to enforce a writ of mandate directed against a non-resident, unincorporated labor association compelling reinstatement of respondents.

The court further erred in refusing to quash service

of process for the reason that Defendant-Appellant Union was not subject to service of process in the State of Utah.

In *Wein v. Crockett*, Utah, 195 P. 2d 222 (1948), the making of a single contract within this state was sufficient for the court to establish jurisdiction under 78-27-20, U.C.A. 1953, "... in any action arising out of the conduct of *such* business." Critical to this decision was the court's recognition that the cause of action arose in Utah, the availability of Utah witnesses, and the laws of Utah controlled and governed the cause.

In *Wein*, the court did not feel it an unreasonable imposition to require a non-resident to defend at the place in which he committed the alleged wrong and where the witnesses would be available for trial.

Hanley is a non-resident of Utah (N.J.T. 28). Nance claimed a residence at Nephi, Utah (N.J.T. 1520) through his wife's interest in a home. All of Nance's employment was outside the state, at his "temporary residence" in Las Vegas, Nevada (N.J.T. 1425). The activities of which they vigorously complain took place, by their own story, in Las Vegas, Nevada; Miami, Florida; Los Angeles, California; Chicago, Illinois; Washington, D. C.; Montreal, Canada; Tucson and Phoenix, Arizona.

It is undisputed that Defendant-Appellant Union is a voluntary, unincorporated labor association with its principal office in Washington, D. C. (R.6). Article One, Section 1, Constitution. No representative or agent authorized to act for or on behalf of Defendant-Appellant Union resided in Utah (R. 12).

If *Wein* extends 4(e) (4), U.R.C.P. against non-resident individuals or associations, even for a *single* business transaction or a *single* tort, it must be predicated on actions

which arise out of business done by the non-resident in the State of Utah. This critical point is entirely absent from all claims of the Plaintiffs-Respondents.

Therefore, no jurisdiction ever legally attached against the Defendant-Appellant Union which Plaintiffs-Respondents were entitled to ground either of their lawsuits.

## POINT VIII

THE COURT ERRED AS A MATTER OF LAW IN ALLOWING EACH OF THE PLAINTIFFS - RESPONDENTS TO RECOVER THEIR ATTORNEYS FEES AGAINST DEFENDANT-APPELLANT UNION

The attorneys fees issue in this case was also decided erroneously.

We do not dispute the fact that in proper circumstances Nance would be entitled to an allowance of a reasonable attorney's fee as an element of damages, provided, of course, he should prevail in his mandamus suit. He is not entitled to prevail in his madamus suit, however, but, regardless of that, his contract for services of counsel is such that he suffered no damages or loss on account of employing them, and, thus, in those circumstances, he can not properly claim attorneys fees as an element of his damages.

Hanley, on the other hand, did not proceed on a mandamus theory, so that he is not entitled to an allowance of attorney fees in any circumstances under the law of Utah.

The general theory or rule is that attorneys fees may not be recovered by the prevailing party as an element of damages or as part of the allowance of court costs. In 15 AMERICAN JURISPRUDENCE 550, it is said:

“As a general rule, in the absence of any contractual or statutory liability therefor, attorneys' fees and expenses incurred by the plaintiff or which the

plaintiff is obligated to pay, in the litigation of his claim against the defendant, aside from usual court costs, are not recoverable as an item of damages, either in an action ex contractu or an action ex delicto."

In Utah the legislature has engrafted certain exceptions to the general rule quoted above, and one of the few kinds of civil actions in which attorneys fees are recoverable by a prevailing party as part of his damages is mandamus. This exception is expressly recognized in *Colorado Development Co. v. Creer*, 96 Utah 1, 80 P. 2d 914 (1938).

But the *Colorado Development Co.* case, supra, made it clear that attorneys fees are not properly a part of damages unless the prevailing party has in fact suffered loss of income by incurring attorneys fees and thus truly is "damaged." He must have, in other words, paid, or contracted to pay, an ascertainable sum to his counsel as attorneys fees. As this court said in syllabus 19 to the *Colorado Development Co.* case, supra:

"In mandamus proceeding, knowledge of court as to value of services of attorney revealed by words and records on file and appearances of counsel would be *insufficient* to justify an award of attorneys fees as damages within statute *without other evidence as to contract to pay or actual payment for services.*" (Emphasis ours.)

The fee arrangements between Hanley and Nance and their attorneys, McCune and Dreyer, is absolutely incredible. Nance himself knew nothing of his fee arrangement except that vaguely it was contingent. (Post-T. 4/27/59, 98-99). Dreyer felt that the arrangement was for a 50% contingent fee, with which McCune agreed. (Post-T. 4/27/59, 115, 120). In addition, there was some even vaguer agreement *among the attorneys only* that, if they recovered no money for their clients but succeeded nevertheless

in having them reinstated, their clients would ~~nevertheless~~, then, pay them a "reasonable fee." The clients, Hanley and Nance, were not shown to have ever expressly agreed to this.

The trial court wrongfully allowed the two Plaintiffs-Respondents punitive damages of \$40,000.00, out of which, if it is allowed to stand, the two attorneys, McCune and Dreyer, were entitled to \$20,000.00.<sup>3</sup> We see no basis upon which the court could remake this so-called agreement for either the attorneys or their clients. The court, in effect, gave attorneys fees to Dreyer and McCune when it awarded their clients punitive damages. It was error to give more than this.

## POINT IX

### THE COURT ERRED AS A MATTER OF LAW IN TAXING CERTAIN COSTS AGAINST DEFENDANT-APPELLANT UNION

Over Defendant-Appellant Union's objection, the lower court taxed certain costs in favor of Plaintiffs-Respondents. (R. 721). The disputed items related to allowance of witness fees and mileage for C. E. Vaughn, Charles C. Williams, Jack Berry, George Mitchell, Aubrey Long, Alfred Long, W. J. Horne, Joseph Hanley, Joe Long and Robert L. McElvany. Each of these witnesses attended the jury phase of the trial coming from Las Vegas, Nevada. (R. 662, 663). The amount allowed Plaintiffs-Respondents for these witnesses and their mileage amounts to \$598.00 which constitutes an improper allowance.

All these witnesses appeared voluntarily and without subpoena for the Plaintiffs-Respondents. They testified

---

<sup>3</sup>If the judgment below is reversed, as it should be, then Hanley and Nance would not, as losing parties, be entitled to an allowance by the court of attorneys fees as damages or costs under any concept or theory.

entirely in connection with the jury trial damage phase of Plaintiffs-Respondents' claims. Since the jury rejected Plaintiffs-Respondents' claim for damages, it can hardly be argued that Plaintiffs-Respondents "prevailed," yet the trial judge included the fees for these witnesses in his final costs bill allowed. (R. 721).

Rule 54(d)(1), U.R.C.P. provides:

"To Whom Awarded. Except when express provision therefore is made either within a statute of this state or in this rule, costs shall be awarded as of course to the prevailing party unless the court otherwise directs ..."

21-51-8, U.C.A. 1953 provides:

"The fees of witnesses paid in civil causes may be taxed as costs against the losing party."

While the rule gives the court a wide discretion, allowance of costs to a party whose case has been rejected by the jury would constitute an abuse of the court's discretion. There can be little argument that Plaintiffs-Respondents did not prevail and in fact lost the jury trial phase of the case.

Under prior law, in *Checketts v. Collings*, Utah, 1 P. 2d 950 (1931) it was held that defendant was the prevailing party since he defeated plaintiff's cause, inasmuch as the jury found that neither the complaint nor the counterclaim established a cause of action. Hence, on the entire case, the plaintiff lost and the defendant won and thus, the defendant was the prevailing party entitled to judgment and to costs.

Under the present rules of civil procedure, the court probably has a wider discretion to divide or apportion costs, but certainly not to allow them to a defeated party.

The Defendant-Appellant Union may not complain that the court failed to award its costs in successfully defend-

ing the jury phase of this case, but it has grounds to object when \$598.00 is allowed Plaintiffs-Respondents for a case which they lost.

## CONCLUSION

For the reasons stated in the brief hereinabove, we ask the court to reverse the decision of the court below, and enter judgment for the Defendant-Appellant Union. A denial of such relief will, in truth, place labor unions, and associations generally, at the mercy of unscrupulous members who commit offenses against the law of the society but who also refuse to go through the procedures necessary to stand trial before duly constituted tribunals of the society.

Respectfully submitted,

A. WALLY SANDACK  
405 Executive Building  
Salt Lake City 11, Utah

DONALD W. FISHER  
741 National Bank Building  
Toledo 4, Ohio

*Counsel for Sheet Metal Workers  
International Association,  
(Defendant-Appellant Union)*

*Of Counsel:*

DRAPER, SANDACK & DRAPER  
405 Executive Building  
Salt Lake City 11, Utah

MULHOLLAND, ROBIE & HICKEY  
741 National Bank Building  
Toledo 4, Ohio

Dated: July 22, 1960