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Troy A. Nance and Thomas B. Hanley v. Sheet Metal Workers International Association : Brief of Plaintiffs and Respondents and Cross-Appellants

Utah Supreme Court

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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.

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Clerk, Supreme Court, Utah

Case No. 9111

BRIEF OF PLAINTIFFS AND RESPONDENTS
AND CROSS-APPELLANTS

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BRIEF OF PLAINTIFFS AND RESPONDENTS
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STATEMENT OF FACTS
PROCEEDINGS IN TRIAL COURT

This is an action to set aside the expulsion of two members from membership in the defendant union. The proceeding was originally instituted by plaintiff Nance by filing a petition for a writ of mandamus to compel defendant to vacate and set aside his expulsion. Plaintiff Hanley was permitted to intervene in the action seeking the same relief

with respect to his own expulsion. In order to avoid confusion we shall hereafter refer to Nance and Hanley either by name or as plaintiffs, and shall refer to appellant Sheet Metal Workers International Association either as the union or as defendant.

The action was tried in two phases, the first before the court sitting without a jury and the second before a jury. The first related to the legality of the expulsion and the right to recover exemplary damages and attorneys fees. The second, that tried before a jury, related to the right of plaintiffs to recover compensatory damages and punitive damages after expulsion.

At the conclusion of the taking of evidence on the issues tried before the court without a jury, the court on December 30, 1958, rendered a Memorandum of Decision finding that plaintiffs had been wrongfully expelled. This Memorandum of Decision is printed on Pages 1 to 10 of the appendix to this brief. The court followed this decision by a Supplemental Memorandum of Decision on January 9, 1959, which is printed on Pages 11 to 12 of the appendix to this brief. Although finding that plaintiffs had been wrongfully expelled, the court postponed decision on the issues whether the defendant had acted wilfully and maliciously and whether as a consequence thereof plaintiffs were entitled to re-

cover punitive and exemplary damages and attorneys fees pending trial of the issues to be tried before the jury.

On January 13, 1959, a pre-trial conference was held regarding procedure in connection with presentation of issues to the jury. The court referred to the demand for jury filed by plaintiffs and the stipulation between the parties at the pre-trials prior to the commencement of the trial to the effect that the court should determine the legality of the expulsions without a jury, and raised the question as to whether the stipulation was intended to cover trial of the issue as to exemplary damages for wrongful expulsion by the court without a jury as it did not appear to be clearly covered by the prior stipulations of the parties (Pre-T. 1-13-59, p. 2). Counsel for defendant then raised the question as to whether the jury would be a common law jury or only an advisory jury (*ibid*, p. 4) Defendant contended that the jury would be advisory only (*ibid*, pp. 22-23, 33-34, 62-63), that the issue of the expulsion and reinstatement was properly tried by the court (*ibid*, p. 25) and that defendant had never made a demand for a jury in the case (*ibid*, p. 29). The court then suggested a stipulation by counsel to clarify the trial by the court of the issue as to exemplary damages for wrongful expulsion and to avoid repetition before

the jury of evidence theretofore presented to the court (ibid, pp. 9-12). After a recess, defendant refused to so stipulate unless the court first gave its decision as to malice and bad faith in the expulsion (ibid, pp. 36-37).

On January 14, 1959, the court submitted a form of stipulation to counsel with the request that they notify the court by January 19 whether it would be agreeable (R. 355-358). Plaintiffs agreed to the stipulation (R. 359), but defendant declined to do so and consented to trial by jury "as if trial by jury had been a matter of right upon all issues not heretofore decided by the court" (R. 360). On January 21, 1959, the court entered its Order as to Issues to be Submitted to Jury which is printed in full at pages 13 to 17 of the appendix to this brief. After a recital of the facts, the court stated in this order that the situation thus called for a ruling as to whether the defendant was entitled to have a jury trial of the issues (a) as to alleged malice or bad faith on the part of defendant's officers in bringing about the expulsion, and (b) as to whether exemplary damages should be awarded for such conduct and if so the amount of same. The court then ruled that defendant "is not now entitled to demand a jury trial" as to such issues and "that the court shall decide the aforesaid issues after evidence is completed in the case", and that only

the issues as to whether plaintiffs suffered actual damages as a result of the expulsion and whether they were entitled to exemplary damages for acts of defendant or its officers and agents subsequent to the expulsion should be submitted to the jury (appendix, pp. 16-17).

The issues reserved for the jury were then tried, and the jury returned a verdict in defendant's favor. Thereafter plaintiffs filed a motion for judgment notwithstanding the verdict and a motion for a new trial, and both motions were denied. Concurrently with the filing of its order denying these motions, however, the court rendered a second Supplemental Memorandum of Decision in which it found among other things that the verdict was against the weight of the evidence; that plaintiffs had in fact suffered actual compensatory damages; that in expelling plaintiffs, defendant acted wilfully and maliciously; and that plaintiffs were each entitled to recover nominal damages in the sum of \$1.00, exemplary damages in the sum of \$20,000.00 and attorney's fees in the sum of \$7,000.00. The Second Supplemental Memorandum of Decision is dated May 2, 1959 and is printed on Pages 18 to 34 of the appendix of this brief. Thereafter, Findings of Fact and Conclusions of Law and Judgment were entered by the court in accordance with the original Memorandum of Decision and

the Second Supplemental Memorandum of Decision. From that judgment, defendant has appealed. The plaintiffs have cross appealed, challenging the order denying their motions for judgment notwithstanding the verdict and for a new trial. The defendant has filed its opening brief. This brief is submitted in answer thereto and also in support of plaintiffs' cross appeal.

INTRODUCTION

We cannot and do not agree with the statement of facts contained in defendant's opening brief. Defendant states that probably most of the testimony and documentary evidence in this long and tedious case is surplusage. We believe, however, that a great deal of the testimony and evidence produced by defendant was cumulative as well as surplusage. This is indicated by the fact that on direct examination the defendant called 26 witnesses and the plaintiffs only 8 witnesses in the trial before the court, and that defendant called 18 witnesses and the plaintiff only 6 witnesses in the trial before the jury. The matter of needless accumulative evidence was referred to many times during the trial by the court. Likewise, a great deal of the record is consumed by incessant and repetitious objections and arguments by counsel for defendant which prolonged the trial and lengthened the record. No references to the transcript are necessary to support this statement,

inasmuch as it will be supported by turning at random to almost any volume of the transcript. The record is so voluminous that it is impossible to refer to all material parts and it would be an imposition on the justices of this court to ask them to read all such references.

The plaintiffs were expelled after trials held in their absence on charges that they had violated various provisions of defendant's constitution and ritual. They were given no opportunity to call witnesses or adduce evidence in their defense, or to cross examine witnesses called against them, although these rights were guaranteed to them by defendant's own constitution. (Exh. 53, Art. 18, Sec. 2(e)). The defendant seeks to justify this high-handed procedure by asserting that plaintiffs had refused to stand trial. But the court below found to the contrary after a consideration of all of the evidence, hundreds of pages of which concern the union trial hearings and explain and supplement the transcript of the proceedings printed in the appendix to defendant's brief. In this connection, the court found as follows in its findings No. 13 to 17 (R. 644-645) :

13. That neither the petitioner nor the intervenor at any time refused to stand trial upon the said charges preferred against them; that neither of them at any time either by words or conduct consented to trial of said charges in his absence, but on the contrary

each of them informed the trial board of his desire to be present and to present evidence in refutation of such charges.

14. That neither the petitioner nor the intervenor nor any person authorized to speak or act for them or either of them conducted himself in such a way as to justify the trial committee in trying them or either of them in absentia; that the evidence presented as to conduct of the petitioner and intervenor and other persons at open hearings conducted by the trial committee on June 3, 4, and 7, 1954, does not show any violence or threat of violence or any disturbance of the peace at said sessions of the trial committee; that police officers were present in the hearing room at each of said sessions and they were ready and able to prevent any violence or disturbance of the peace; that protests and objections made by the petitioner and intervenor at said open hearings were not so lacking in merit as to constitute or to be construed as a refusal to stand trial or as a waiver of trial or to justify the trial board in ordering them or either of them to be tried in absentia.

15. That the trial committee wrongfully and without reasonable justification or excuse and without giving either the petitioner or intervenor opportunity to be present or to hear the evidence against them or cross-examine witnesses or to present evidence in their own behalf, proceeded to hear witnesses and to receive evidence produced by the General President and his counsel and thereafter rendered decisions declaring that each and all of the charges preferred against the petitioner and intervenor, respectively, by the Gen-

eral President were true and that the petitioner and intervenor should each be expelled from membership in the respondent association.

16. That a purported trial of the charges against the petitioner Nance was held in Room 1003 of the Statler Hotel in Los Angeles on Thursday, June 10, 1954; that petitioner was not present and had no notice or knowledge of the room where said trial was held nor any notice or knowledge of the time of said trial except by the notice shown at page 4 of Defendant's Exhibit 6 which was read at the session of the trial committee on June 7, 1954; that at said session and subsequent to the reading of said notice the chairman of the trial committee announced that the petitioner and intervenor would be tried in absentia.

17. That a purported trial of the charges against the intervenor Hanley was had by the trial committee on Tuesday, June 8, 1954, as shown by Defendant's Exhibit 7 herein; that the intervenor had no notice of such trial but had been notified by the trial committee as shown at page 3 of said Exhibit 7 and at page 4 of said Exhibit 6 that his trial would be held Wednesday, June 9, 1954, or as soon thereafter as the trial of petitioner Nance was completed; that the purported trial of the charges against the intervenor was held on the day prior to the time specified in the notice read to him, and the intervenor had no notice or knowledge as to the time when or place where said trial was held except the notice above mentioned; that subsequent to the reading of said notice on June 7, 1954,

the chairman of the trial committee announced that the petitioner and intervenor would be tried in absentia.

These findings are supported by a preponderance of the evidence as the following statement of facts and summary of the evidence will show.

FACTS PRECEDING UNION CHARGES

Defendant is an international labor organization having local unions throughout the United States and Canada. It is governed by a General Executive Council composed of (1) a general president (who is the executive head of the organization), (2) a general secretary-treasurer and (3) eleven general vice presidents. (Exh. 53, Art. 6). Although the defendant's constitution provides that these general officers shall be elected at a convention held every four years, no general officer has been originally so elected, each convention having simply reelected the officers then in office who have been unopposed. (NJT 3202-3205, 3511). Vacancies occurring between conventions have been filled by the general executive council, which has thus constituted itself a self-perpetuating body. (ibid.).

During all times material to this litigation, defendant's general president was one Robert Byron (NJT 2860). He was a man of advanced years, being at the time of trial 78 years of age (ibid.). He had been connected with the defendant's organiza-

tion in one capacity or another for more than fifty years, and had held the office of general president since 1939 (NJT 35, 3202). Defendant's general secretary-treasurer was one Edward Car l o u g h (ibid.). Its eleven general vice presidents were A. H. Cronin, Rene Schroeder, Moe Rosen, Marion Macioce, J. R. Dietz, Jacob Baer, J. O. Renaud, G. Joseph Fitzgerald, James J. Ryan, James E. Brooks and C. D. Bruns (NJT 35-40). Of all of defendant's general officers, only Schroeder and Fitzgerald were residents of states West of the Mississippi River, the former being a resident of Houston, Texas and the latter a resident of San Francisco (ibid.).

Becoming dissatisfied with the policies and practices of the defendant, and with the disproportionately large representation of the Northeastern part of the United States on defendant's general executive council, a group of members started a movement early in 1953, first, to retire Byron as general president at full pay, and secondly, to change the method of electing general vice presidents so that they would be elected by a referendum vote of local unions on a regional basis (NJT 134-137, Exh. 12 to 15). The proponents of these changes proposed to endeavor to have them adopted at the defendant's next general convention scheduled to be held in August, 1954. If the changes were adopted, not only would Byron be removed as the active head of the

defendant, but most of defendant's general vice presidents would be ousted from office. (ibid.).

Late in January, 1954, Byron summoned plaintiff Hanley to meet him in Miami (NJT 41). At that time Hanley was an international representative of defendant in charge of California, Nevada and Arizona. Upon coming to Miami, Hanley met with Byron, Carlough and Cronin, first at a meeting at which all three were present together with other officers and representatives of defendant, and subsequently with each of them separately. At the meeting at which all were present, he was interrogated at length by Cronin about the movement above described. Hanley stated that he understood some local unions in his district were in favor of it. Cronin also told Hanley there were rumors that he (Hanley) intended to run against Byron for the office of general president and asked him if there was any truth in the rumors. Hanley denied that he had any intention of doing so. He was told that the administration (that is, the general officers then in office) would tolerate no opposition at the coming convention (NJT 44-48). Both Byron and Cronin were particularly bitter toward Carl Nichols (who was the business manager of Local Union 108, at Los Angeles, the largest of defendant's local unions in the United States) and toward John Fuller (who was the part time business agent of Local 371, an-

other large local union in Los Angeles, and the administrator of the Sheet Metal Workers Welfare Fund) whom they accused of having threatened to oppose the general officers at the convention by sponsoring the proposal to change the method of electing general vice presidents, opposing the reelection of Byron, and otherwise opposing the existing regime (ibid.).

After this meeting, Byron met with Hanley and requested him to prefer charges against Nichols and Fuller so as to prevent them from coming to the convention as delegates and even tried to induce Hanley to take \$2,000.00 for the purpose of having Nichols assaulted (NJT 49-52). Cronin also met with Hanley and told him that no opposition would be tolerated at the convention, such as opposition to the reelection of Byron and the vice presidential amendment, and that if necessary to forestall such opposition all potential opponents would be expelled (NJT 52-58). Carlough also met with Hanley, and made statements of the same import (NJT 58-60, 64-66).

During the week of March 21, 1954, Hanley along with all other international representatives of the defendant, was in Washington to attend a session of the general executive council (NJT 71-72). On the last day of the session, all of the international representatives were called before the council. At

the start of the meeting, Cronin called upon one Roy James, an international representative from Texas, to give a report as to rumors he had heard. Whereupon James, pointing at Hanley, said that he heard rumors that somebody in California was supporting a move to change the vice presidents and to bring about a lot of changes at the convention (NJT 73-79, 749-753). At the close of the meeting Hanley and Joseph Jarvis were asked to remain. Both were interrogated by Byron in reference to the plan to change the method of selecting vice presidents. Byron stated: "We intend to knock this thing out even if we have to expell everybody that's involved", and "so far as Nichols is concerned, you can look forward to his expulsion" (NJT 79-80). Cronin met with Hanley on two occassions after the close of the session. In the first of these meetings, Cronin offered to act as a conciliator to make peace between Byron and Hanley if Hanley would divorce himself from the insurgent movement (NJT 81, 114-116). In the second meeting, at which Nichols and several others were present, Cronin was shown a draft of a map indicating the regions from which the general vice presidents would be elected if the proposed amendment to the constitution were adopted (NJT 116-120, 484-488). He expressed in no uncertain terms the prophecy that any person actively participating in the movement would be

expelled (ibid.). Two days after the close of the meetings, Hanley was discharged as international representative. (NJT 122-123, 2944).

On April 3, 1954, a convention of the delegates to the Tri-State Council was held at Phoenix, Arizona (NJT 124). [The Tri-State Council is an organization composed of all local unions of the defendant in the states of Arizona, California and Nevada. Delegates to the Tri-State Council are elected by the various local unions in the three states and officers of the council are elected by the delegates so chosen (NJT 123).] At this convention a resolution was adopted urging the adoption at the next general convention of the resolution providing for the retirement of Byron as President Emeritus at full pay (NJT 131, Exh. 13). Hanley admittedly was the originator of this resolution (NJT 4056). The plan for the election of general vice presidents on a regional basis was discussed among the delegates and a map showing the districts from which the general vice presidents would be elected was shown to the delegates (NJT 132). Although no formal action was taken as to this, it was agreed among the delegates that, on condition that Local Union No. 108 (of which Nichols was the business manager) would defray the cost, the resolution providing for the change of the method of selecting vice presidents and maps showing the regions from

which they would be elected should be sent to all local unions (NJT 5597).

Hanley talked to the delegates at the meeting, discussed the maps and resolutions and reported on the discussion at the recent meeting of the general executive council in Washington. G. Joseph Fitzgerald, a general vice president who later served on the trial board, spoke in opposition to the resolutions and stated that anyone who supported them would only get in trouble (NJT 175-180, 5593-5596).

Within two weeks thereafter, between the 18th and 21st of April, 1954, Byron called a special session of the General Executive Council at Washington, D. C. (NJT 3466, 3856, 5147). At this session, at which all of the general vice presidents were in attendance Byron announced that charges looking to the expulsion of Hanley, Nance, Nichols, Say and Fuller would be prepared and asked which of the general vice presidents would be agreeable to serving on a trial board (*ibid.*). Cronin and one or two other general vice presidents declined to serve in that capacity (*ibid.*).

Following the meeting of the General Executive Council, Byron journeyed to Los Angeles, and there spoke to, among others, Charles Williams (a member of the Executive Board of Local Union No. 88 in Las Vegas, Nevada) and to William Hanson (a

former business agent of Local Union No. 371 in Los Angeles). He told both of them that Hanley and Nance were going to be expelled, and that their expulsion was inevitable because of their participation to retire him (Byron) and to change the system of selecting General Vice Presidents (NJT 1754, 1756, 1803). Thus, Hanson testified with respect to his conversation with Byron (NJT 1802-1803):

A. Well, President Byron asked me to come with him into another room, where he could talk to me. So we stepped directly across the hall and into another room, and he said: "Well," he said —

Q. Who was present now?

A. Just President Byron and myself.

Q. All right. State the conversation.

A. President Byron then said that — He said: "Well, I found out all about the maps and the resolutions, and all this other stuff," that Tom and Nick and them has been circulating. And he seemed very upset about it.

MR. SANDRACK: Move to strike: "He seemed very upset about it."

THE COURT: That will be stricken.

A. And he asked me, he said: "First of all I want to come to an understanding with you." He said: "I understand you want to go back to work? Is that right?" and I said: "Yes, I do. I have to work." He said: "Well, I can see that you go back to work under certain conditions." He said: "First of all, are

you going to be an administration man, or aren't you?" and I said: "What do you mean by that?" He said: "Well, are you going along with the International, or are you going to go along with Tom Hanley and those others, and help support them?" So I said: "Well, I have to work." I said: "I don't want to get into politics if I can keep out of it." "Well, then," he said: "in a few days I'll have an affidavit drawn up that I want you to sign," and he said: "in the meantime you can go on back to work." He said: "I have already fired Hanley," and he said: "it looks like I'm going to have to expell him." He said: "I hate to do this, because he was the best International Representative I have ever had." And he said: "It just was a real shock to me to find out these things. That he was circulating this petition to retire me and so forth, and put in these new resolutions that would put in a new system of electing vice presidents."

William's testimony was to the same effect. (NJT 1754 et. seq.).

That Byron was interested in and had his field lieutenants busy combating the movement to amend the constitution is shown by the following report of his investigator Stetter regarding a proposed meeting of Local Union No. 108 to be held on April 13, 1954 (NJT 5328, line 27 to 5329, line 13):

"Murphy also advised that there will be a move made by Tom Hanley and his crowd to take over the meeting to be held Tuesday evening and to try to force General President Byron to resign. Murphy also advised that

C. C. Artman, International Representative, is lining up substantial opposition to any action by Hanley; in view of the temper of both sides there is a good possibility of violence and even bloodshed. . . . O'Malley also advised that the members in Artman's camp are going to the meeting with the intention of fighting Hanley to the point that there will be bloodshed if need be. These men have informed O'Malley that they are going to object to Hanley talking, and that when the Hanley faction tries to oppose their wishes they intend to resort to whatever force is necessary to see to it that Hanley does not get to talk."

General Secretary-Treasurer Carlough was also interested in the plan to retire Byron and the maps designating the regions from which the vice presidents would be elected, as Stetter admitted on cross-examination that Carlough asked him if he had heard anything regarding the maps in Los Angeles immediately after he returned to Washington on May 2, 1954 (NJT 5350).

THE CHARGES AND PURPORTED UNION TRIALS

On May 15, 1954, Byron mailed to Hanley and Nance letters charging them with violations of various provisions of defendant's constitution and ordering them to stand trial before a trial board to be selected by him at the Statler Hotel in Los Angeles, California. Hanley was directed to appear for trial on June 3, 1954 and Nance, along with three

other members, on the following day (Ex. 30, pp. 21-28). Owing to his absence from Las Vegas (where he resided) Hanley never received the letter preferring the charges against him (NJT 181). He was, however, notified by Nichols by telephone that such charges had been preferred and saw a copy of them sometime around May 25, 1954 (NJT 181-182, Exh. 16). Nance received the letter preferring the charges against him on or about May 18, 1954 (NJT 1428, Ex. 49).

Defendant maintained below and repeats in its brief in this court that the charges preferred against the plaintiffs were the result of:

(a) Complaints made to Byron by Henry Ely and Ira Fulmor (the secretary of a contractors' association and a Los Angeles contractor, respectively) of "shake downs and strikes called for extortionate purposes"; and

(b) Reports made to Byron by an investigator, one Grant Stetter, whom defendant alleges was hired as a result of the aforesaid complaint, to the effect that "Hanley, Nichols, Fuller, and to a lesser extent Nance and Eugene Say" had engaged in "gross misconduct" including such matters as "intimidation of local union members, rigged union elections, extortions and even physical coercion and intimidation of contractors".

That defendant's contention in this behalf can-

not be sustained is demonstrated by the fact that neither Nance nor Hanley was charged with "shake downs and strikes called for extortionate purposes". Nor was either of them charged with "intimidation of local union members, rigged union elections, extortions, or physical coercion or intimidation of contractors." The principal charge against Nance was that he had circulated certain bulletins critical of defendant's general officers accusing them of misusing union funds for gambling and other improper purposes. He was also accused of refusing to turn over upon demand certain union books and records and an automobile (Exh. 47). But nowhere in the charges against Nance is any reference to shake downs, etc., as claimed by defendant. Nor is there any reference to any such matters in the charges against Hanley. Indeed, the charges against Hanley, which are set forth on pages 56 to 60 of the appendix to defendant's brief, are of such nature that, while they might justify his discharge from the position of international representative, would not justify his expulsion from membership in the defendant union. As for the reports of the investigator Stetter, there is good reason to believe that he was employed, not to conduct an impartial and unbiased investigation as defendant would have the court believe, but to obtain evidence to justify plaintiffs' expulsion which defendant had already deter-

mined to effect. This is shown not only by the fact that as early as April 1954, Byron had announced at a special executive council meeting that charges would be preferred against plaintiffs, whereas the investigator did not make his final report until May 8, 1954, but also by the following excerpts from the investigator's reports (NJT 5346) :

“Mr. John O'Malley, our associate in Los Angeles, California was also contacted by telephone and he advised that reasonable progress is being made to establish shake down activities by Nichols. He was instructed to handle these interviews which were already scheduled, but to concentrate on obtaining affidavits or signed statements concerning Hanley's illegal activities.”

Although prepared by defendant's general counsel, the charges were, especially in the case of Hanley, framed in the most general terms conceivable. As said before, Hanley never received the charges mailed to him by Byron, although he did see and obtain a copy of them indirectly sometime between May 25, and May 27, 1954. Upon learning of the charges, he wrote a letter to Byron on May 29, 1954 (Exh. 17) requesting a continuance. The letter read in part as follows:

“Not having received a copy of the charges, due to the fact that I have not been in Las Vegas for more than two weeks and my family has been on vacation, I would na-

turally be unable to defend such charges at the time and place designated by you. I would, therefore, request that you as General President, in accordance with Article 18, Section 3 of the International Constitution and Ritual, furnish me with a copy of said charges by forwarding the same to me at Post Office Box 786, Las Vegas, Nevada, or to the Mayfair Hotel, Los Angeles, California, and upon receipt of the same I will be governed by the provisions of our International Constitution relative to charges and trials by general officers."

A copy of this letter was sent to defendant's general secretary-treasurer and to each of its general vice-presidents.

In the meanwhile, Byron had appointed three of defendant's general vice presidents to serve as a trial board to try plaintiffs on the charges he had preferred against them. They were Moe Rosen, Rene Schroeder and G. Joseph Fitzgerald. Rosen was chosen as chairman of the board.

On June 2, 1954, Rosen replied to the letter quoted from above by a telegram reading as follows (Exh. 19) :

"Your trial will proceed at 10:00 A.M. June 3, 1954 at the Statler Hotel , Los Angeles, California, as stated in notice sent you by registered mail under date of May 15, 1954. Objections raised in your letter to Robert Byron dated May 29, 1954, may be submitted by you at your trial.

Moe Rosen,
Chairman Trial Board"

On June 3, 1954, Hanley and Nance appeared at the room where the trial was to be held. The room was approximately 16 by 20 feet in size, the larger part of which was consumed by tables (NJT 2326). When Nance and Hanley arrived the members of the trial board, as well as several newspaper reporters and a number of spectators variously estimated as numbering approximately 10 to 25, were present (NJT 2330). Three police officers in plain clothes, including one Captain Joseph E. Stephens, were also present (NJT 2334). As testified to by Stephens, "there was considerable discussion among the people in the back of the room. It was not loud but it was audible." (NJT 2336). At the start of the trial Hanley renewed his application for a continuance (Exh. 4, 20, 78). The motion was denied (Exh. 4, 76). He also presented several written applications for a clarification of the charges against him. This application was never acted upon (Exh. 18).

The chairman of the trial board refused to start the trial until the room was cleared of all persons except Hanley, his counsel Eugene Vaughn, the prosecutor Ernest Murphy, the members of the trial board, and two short-hand reporters. (Exh. 4). The spectators left during the morning session, and the trial got under way by the chairman reading charges and Hanley's objections and requests (Exh. 4, 67-83.). The trial then adjourned for lunch

(ibid.). At the afternoon session Fuller, Nance and Nichols, as well as Hanley, were present. The chairman refused to proceed until the first three individuals left the room (Exh. 4, 84), and finally he adjourned the trial (Exh. 4, 111).

Nance's trial, as well as the trials of three other union members, was scheduled for the following morning on June 4, 1954. Although Nance was present, his case was never called for trial (Exh. 5). Instead the trial board again recessed the trial because the spectators present failed to heed the chairman's request that the room be cleared of all but the accused, his counsel, etc. (ibid.).

The trial board reconvened on Monday, June 7, 1954. At this time the chairman read into the record notices to the effect that Fuller would stand trial on June 7, 1954, that Nichols' trial would follow that of Fuller, that Nance would be tried on June 8th and that Hanley would be tried on June 9th (Exh. 6). These notices were prepared over the weekend by Murphy, attorney Mulholland and the trial board after a conference with Byron under the following circumstances as testified to by Murphy (NJT 4742):

“Well, the trial had been going very badly, and, in conferring with Mr. Byron, I went to Mr. Fitzgerald and said that we would have to get Monday's proceedings off on a better foot. I pointed out some errors they had been

making in not reading some of these things into the record. They therefore agreed to prepare the notices which are under question. Mr. Schroeder and Mr. Rosen made sure in my presence that they had the proper documents to go to the proper people, and that I went in with them, or behind them, and saw them pass these documents out, and I knew they had the right documents in their hands, and that is the reason that I insisted at the opening of the procedure that these documents be read into the record."

After reading the notices into the record, the chairman recessed the trials when the spectators failed to leave the trial room (Exh. 6, 17). He reconvened the session to announce that the accused members would be tried in absentia. (Exh. 6, 19).

At no time did the number of spectators in the room exceed 25 (NJT 2330, 2332, 2340, 2345, 2352). At no time did the trial board ask the police present to clear the room, although police officers were present during all three days when the so called trials were in session. This is made clear by the following testimony of Captain Stephens (NJT 2440):

BY THE COURT: . . . referring to the trial hearings on the 3rd, 4th and 7th of January . . . of June. Was any request made of you by the chairman or any member of the trial board to quell any disturbance in the trial room?

ANSWER: My answer, your Honor, was that no one asked me to remove any one or quell any disturbance.

THE COURT: Was any request made of you to silence any boistrousness in the room?

ANSWER: No sir.

THE COURT: Was any request made of you to take any action? I mean any request made by any member of the trial board to take any action?

ANSWER: I testified, I think, your Honor, that the point, the question was raised by the chairman as to whether —

THE COURT: Well, but was any request made to you?

ANSWER: No sir.

THE COURT: To do anything?

ANSWER: No sir.

Stephens also testified that he was not requested by anyone to be present at any of the sessions (NJT 2351-2352).

Neither Nance nor Hanley was responsible for the presence of the spectators. (NJT 304, 1448). All of them were apparently members of defendant's Local Union No. 108 and hence interested in the trials, especially in view of the fact that their local had recently been taken over by Byron for the International (NJT 2348-2350, 5619, 5637-5638). Defendant refers to the testimony of John Fuller regarding a purported conspiracy to sabotage the trials, and states that his testimony was evidently not credited by the court. It is clear from the court's findings that it did not give any credence

to his testimony, and as a matter of fact, his testimony was so contradictory and he was so completely discredited in his cross-examination that his entire testimony could be completely ignored.

The evidence shows that the trial board was not impartial, as shown by the testimony of Murphy quoted herein and the appointment of Fitzgerald who had stated at the Tri-State Council that any one supporting the resolutions for amendment of the constitution would get in trouble. Also, throughout the trial the members of the trial board conferred constantly with Byron who had not only preferred the charges but also had appointed the trial board. Thus, Schroeder testified that the members of the trial board met with Byron, Attorney Mulholland and other officers when he first arrived in Los Angeles for the trials and that they would meet in Byron's room every evening after the trial hearings and go to dinner together (NJT 3965-3970).

On June 8, 1954, the members of the trial board met the accused members in the lobby of the Statler Hotel and offered to take Nichols to the trial room to stand trial, if he would go alone (NJT 3909). The offer was not extended to either Nance or Hanley (ibid). The trial board then proceeded to try Hanley and Nance in absentia (Exh. 7 and Exh. 10). Although Hanley had been notified to appear for trial on June 9, 1954, he was actually tried on

June 8, 1954. Nance had never been called for trial, and although he was notified that his trial would be on June 8th, he was tried in absentia on June 10, 1954 (Exh. 10).

THE UNION APPEALS AND EFFORTS FOR REDRESS IN COURT

Thereafter, on June 29, 1954, the trial board rendered decisions finding each of the plaintiffs guilty of all of the charges which Byron had preferred against them. (Exh. 30, pp. 37, 53). From these decisions plaintiffs appealed. Under the procedure prescribed by defendant's constitution, appeals from the decisions would ordinarily lie, first, to the general president, secondly, to the general executive council, and thirdly, to defendant's general convention (Exh. 53, Art. 19). Since Byron had preferred the charges against the plaintiffs he disqualified himself from hearing their appeals, which were referred to the general executive council (Exh. 26). In order that they might not lose their chance to appeal to the general convention which was scheduled to be held in August, and because several members of the general executive council had expressed themselves as being biased and prejudiced against the plaintiffs (NJT 386-388), plaintiffs waived the right to have their appeals heard by the general executive council (NJT 389). The appeals were accordingly referred to the grievance and ap-

peals committee. This committee, like all committees of the general convention, was appointed by Byron as general president. (Exh. 53, Art. 7, Sec. 7). Hanley appeared before the committee representing not only himself, but also Nance, who was unable to attend the convention (NJT 1456). He endeavored to introduce evidence refuting the charges preferred against plaintiffs and showing that the decision of the trial board was erroneous. The committee, however, refused to receive any new evidence and insisted that the appeals be heard on the record of the trials held in absentia (NJT 403 et seq). Thereafter, the committee recommended to the convention that the decisions of the trial board be affirmed and the appeals denied (Ex. 30, pp. 58-61). Although Hanley had been promised the opportunity of addressing the convention in support of the appeals, this privilege was finally denied (NJT 412-414). The recommendations of the committee were accepted and adopted by the convention by a standing vote, seven delegates dissenting in the case of Hanley's appeal (Exh. 30, pp. 63-66). It may be noted that under the defendant's constitution, the seven dissenting votes may have been sufficient to call for a reversal since the delegate or delegates of each local union were entitled to cast one vote for each fifty members in the union electing them (Exh. 53, Art. 7, Sec. 2a).

It was plain that the grievance and appeals committee was not an unbiased tribunal. In this connection Burk, the chairman of the committee, told Hanley in the presence of several persons that the "skids were greased", the committee having received orders to deny the appeals, and that there was nothing the committee could do about it (NJT 417-418, 1638, 1825). Moulder, another member of the committee, made statements to the same effect (NJT 442). There was much evidence to show that delegates were intimidated and pressure was exerted on them to affirm the expulsions, as shown by the testimony of delegate White (NJT 2073-2076). And this despite the fact that defendant's general counsel stated that "they had nothing on Hanley" (NJT 392-394, 1822).

Following their expulsion, plaintiffs brought mandamus proceedings in Nevada to compel defendant to reinstate them. Service of process upon defendant was attempted to be made by serving the officers of several of the local unions in Nevada, but on defendant's motion the service was quashed by the trial court on the ground that the persons served were not agents of the defendant. The action of the trial court was affirmed by the Supreme Court of Nevada. See *Hanley v. Sheet Metal Workers Int. Assn.*, 293 P. 2d 544. Thereafter defendant seduously kept all of its officers, international representatives

and other agents from entering the State of Nevada and plaintiffs were unable to effect service of process upon it. This proceeding was then brought in Utah during 1957 and valid service of process upon defendant was effected.

DAMAGES AFTER EXPULSION — THE JURY TRIAL

The foregoing is a greatly condensed summary of the evidence introduced on the issues tried by the court sitting without a jury. Following the court's decision that plaintiffs had been wrongfully expelled, the issues reserved by the court's order for trial by jury came on to be heard, and the following is a summary of the evidence adduced at this trial.

In the states of Arizona, California, Nevada and Utah, the several local unions of defendant operate what is known as a referral or clearance system for employment. Under this system, contractors and other employers desiring to hire sheet metal workers call the business agent of the local union who then orally or in writing refers or "clears" available men to them. Without such a referral or clearance it is as a practical matter impossible for an unemployed sheet metal worker to obtain or retain employment. (JT 28-30). Indeed, if a sheet metal worker obtained employment from a union contractor or an employer without such a referral or clearance the local business agent

would likely call a strike against the offending employer, or the other union employees would likely walk out en masse. This is shown, in addition to other evidence, by the recording of a conversation which took place between W. J. Fields, the business agent of defendant's Phoenix, Arizona local union, and the plaintiff Nance in December, 1956 (JT 2642) as transcribed in Exh. 188, as follows:

MR. NANCE: How's the work situation, Bill?

MR. FIELDS: It has not been very good down here now. It has been pretty fair. I've got all the local boys back to work at the present time, anyway — at least for the next few days, so far as I know.

MR. NANCE: Well, listen, I want to stay around here for a while and look for a job, and suppose I find my own job, will you give me a clearance?

MR. FIELDS: No.

MR. NANCE: Why not? If I find my own job, Bill?

MR. FIELDS: Find your own job in one of our shops — in one of my shops?

MR. NANCE: Anywhere I can go to work for you.

MR. FIELDS: Do you have a card?

MR. NANCE: No. You know I was expelled by the International.

MR. FIELDS: Now you know we have no business of clearing out anybody like that. If you find an employer who will take you,

why then he can go ahead and take you. That's up to him.

MR. NANCE: Well, I'm out of a job and I went out at one of the union shops, Bill, and he said I could go to work if I could get cleared with the union.

MR. FIELDS: Who told you a story like that?

MR. NANCE: A fellow who worked at the shop right behind the Southwest Manufacturing Company.

MR. FIELDS: Right behind the Southwest?

MR. NANCE: Southwest Manufacturing Company.

MR. FIELDS: You mean Frank Harmonson, do you?

MR. NANCE: Yes, Frank Harmonson's Shop.

MR. FIELDS: Oh. Who were you talking to?

MR. NANCE: I talked to the foreman, a fellow by the name of Platt. What's his name?

MR. FIELDS: Dick Platt?

MR. NANCE: Dick Platt.

MR. FIELDS: Oh! Well, those guys, of course, they — Well, now, Howard Wall, I talked to the foreman there this morning and I got some guys coming in from Glendale. That's how we get mixed up. Now, I talked to him just this morning and I got some fellows getting laid off from Glendale here — it

will be a couple or three days — and he is going to take them, now that's the way they get all mixed up. Dick Platt has done that before. These guys come in and he says, "Oh, yes, I'll take you." That's his way of saying, "Well, if you get straightened out with the union, why that's all right."

MR. NANCE: If I get a clearance out of the union, if I have to have a clearance out of your office, now if I find a job in a union shop, will you give me a clearance if they'll hire me?

MR. FIELDS: It depends here on how my men situation is. If I got men available here for 'em. Listen, these shops have no God damn business, so far as I'm concerned, I mean, I don't give a shit. I won't even furnish them any men if they are going to pick their men off the street. Why they can get them that way. I'll take my men out of the shop. They can get them off the street. Otherwise, why they call my office for the men because that's in the contract and we agreed to furnish them men. If we can't furnish them men, we've got a certain specified time, then they can get their men where they want to.

MR. NANCE: I don't see any reason why you wouldn't clear me out if a union shop will hire me. Personally, that's what I want to know, if you will kindly give me a job. I've got to know, Bill. I've got to have a job and I've got a family to support.

MR. FIELDS: Well, it depends here, Troy, on how my situation is. This is a slow time here for us, you see, than normally is. We are busier this winter than we have ever

been, but it is a slow time of year. If we were rushed and pushed for men and I had no men being out of work and none of my members out of work, we put our permit men out, you see, we would put men out on permit, put them out that way, but when I got my members out of work, I'm not putting any permit men out, putting guys out like that. It has been done before here. I mean, when the shop goes ahead, why that's their own liability. If they want to go ahead and do that, why they can go ahead, because I'm not going to answer for what the rest of the men in the shop are going to do if they pick up and walk out or what they do. If a man comes in without a clearance or anything from me, why they probably will. That's the way they do. But if I got men out of work and if I can furnish the men and if they are called up here from me and ask me to get men, from me, and I can furnish 'em, why then our own union members, why then they have no business of telling anybody. I've told them that before on account of this right to work law.

MR. NANCE: Have you told them they had to hire the men through the union hall?

MR. FIELDS: Why it's in the contract. It's in their contract, brother, its written right in there.

MR. NANCE: Okeh, Bill, I'll see you later then.

MR. FIELDS: Ya!

Prior to the decision of the trial board, Byron telephoned C. E. Vaughn, the business agent of Local Union No. 88 in Las Vegas, Nevada, and told

him that unless he kept Hanley and Nance from working he would be expelled. Vaughn asked him the grounds on which he would be expelled, and Byron replied: "Never mind. I have more power than Stalin or Hitler ever had. The lawyers will find the grounds" (JT 26-27). Byron also gave similar instructions to Chas. Williams, acting business agent of Local Union No. 88 (JT 302-304). Vaughn had previously been threatened by Leon Reliford, one of defendant's international representatives, with expulsion if he permitted plaintiffs to work. (JT 24). Vaughn attended defendant's convention in Montreal, Canada in August, 1954, and while there he was again told by Byron that he was not to permit Nance or Hanley to work (JT 28-29).

When Vaughn returned from the convention, Nance was employed by the Maslow Heating & Cooling Company in Las Vegas, Nevada (JT 34). Vaughn immediately dispatched a letter to Maslow calling attention to the fact that Nance had been expelled and insisting that he be not permitted to work (Exh. 147, JT 621-623). Copies of this letter were posted in the shops of all employers in the Las Vegas area (JT 37). Thereafter Vaughn refused to issue referrals or work clearances to either Nance or Hanley and they were unable to keep work (JT 30, 627, 632, 1029). In January, 1955, the members of Local Union No. 88 voted 82 to 2 to accept Hanley's

dues (Nance was last a member of Local Union No. 371) and to refer or clear both of the plaintiffs to jobs. (JT 32). Vaughn issued referrals or work clearances to both Nance and Hanley from that time until August 16, 1955, when he was removed as business agent for Byron for failure to carry out Byron's orders regarding the plaintiffs (JT 32, 55, 39). During this time plaintiffs were working, but upon Vaughn's removal both were discharged from their employment (JT 1070, 1076-1077).

Walter Vickers succeeded Vaughn as business agent of Local Union No. 88, and he was called to Chicago and received instructions from Byron. (JT 54, 2059-2060). Charles Biggert became business agent after Vickers, and he was succeeded by Ernest Newman (JT 54). None of these business agents would issue work clearances to plaintiffs, and from the time of Vaughn's removal to the time of trial plaintiffs were unable to obtain work as sheet metal workers in the Las Vegas area where they resided (JT 652, 656-657, 1151, 1210-1211). The record contains a great deal of testimony by both of the plaintiffs and other witnesses that the plaintiffs made numerous applications for work but were refused employment because they were expelled members of the union.

In an attempt to show that plaintiffs suffered

no damage as a result of their expulsion, defendant offered the testimony of several contractors that they refused to employ plaintiff because they were personally disliked by them. Defendant also attempted to show that the referral or work clearance was not in use, and apparently tried to prove that a union card had no monetary value. Fields, the business agent at Phoenix, testified that a work referral was not necessary in his area, but his testimony was completely discredited by the recording of his own words to Nance previously quoted (JT 2202-2203, 2222-2223). And it is very significant that defendant did not call either Vickers or Biggert, the two men best able to testify to the referral practices in Las Vegas during the long period when plaintiffs were unable to obtain work. Also, the testimony regarding Byron's instructions to Vaughn and Williams not to permit the plaintiffs to work was absolutely uncontradicted as Byron was also not called as a witness, although he was certainly "available".

Nance was compelled to accept employment as a service station attendant (JT 730-731), and Hanley was constrained to support himself and his family by selling his possessions and by borrowing funds (JT 1292-1294). The average earnings of sheet metal workers in the Las Vegas area during the years 1954 to 1958 were approximately \$9,000.00 a

year (JT 566, 1236-1239). In contrast, Nance's earnings after his expulsion were only as follows (JT 732-735):

July 1 to December 31, 1954	\$1,938.67
1955	3,778.11
1956	506.86
1957	3,351.00
1958	2,653.12

Hanley's earnings after his expulsion were only as follows (JT 1233-1234):

July 1 to December 31, 1954	\$ 100.00
1955	4,634.30
1956	500.00
1957	600.00
1958	1,626.50

The defendant resorted to a strategy of delay and confusion in the trial before the jury. What was said in the introduction regarding incessant and repetitious objections and arguments of counsel was doubly true during the jury trial. By reference to any volume of the transcript it will be seen that the constant objections, arguments and unnecessary proffers of testimony by defendant's counsel caused a veritable parade of the jury in and out of the court room, and the court commented on this situation (JT 1963). Despite the uncontradicted evidence and the natural and inevitable damage resulting from the loss of union membership, the jury returned a verdict that plaintiffs had suffered no actual damage whatsoever.

STATEMENT OF POINTS ON APPEAL

POINT I

THE COURT PROPERLY HELD THAT PLAINTIFFS WERE WRONGFULLY EXPELLED FROM MEMBERSHIP IN DEFENDANT UNION AND THAT THEIR EXPULSIONS WERE NULL AND VOID.

POINT IB

THE COURT DID NOT ERR IN CONCLUDING THAT PLAINTIFFS' REMEDIES ON APPEAL DID NOT CURE THE DEFECTS OF THE TRIAL BOARD PROCEEDINGS.

POINT II

THE COURT DID NOT ERR IN HOLDING THAT THE ACTIONS OF DEFENDANT AND ITS OFFICERS WERE MALICIOUS, ARBITRARY AND UNREASONABLE IN CONNECTION WITH THE PREFERRING OF CHARGES, TRIAL PROCEEDINGS, AND APPEAL THROUGH THE UNION PROCEEDING.

POINT III

THE COURT DID NOT ERR IN AWARDING NOMINAL AND PUNITIVE DAMAGES.

POINT IV

THE COURT HAD JURISDICTION TO ISSUE AND THE POWER TO ENFORCE THE WRIT OF HABEAS CORPUS, AND DEFENDANT'S MOTION TO QUASH SERVICE OF SUMMONS WAS PROPERLY DENIED.

POINT V

THE COURT DID NOT ERR IN ALLOWING PLAINTIFFS TO RECOVER THEIR ATTORNEY FEES.

POINT VI

THE COURT DID NOT ERR IN TAXING CERTAIN COSTS AGAINST DEFENDANT.

POINT VII

THE COURT ERRED IN OVERRULING PLAINTIFFS' MOTION FOR NEW TRIAL.

ARGUMENT

In presenting our argument in this brief, we shall first consider and answer the arguments advanced by defendant in support of its appeal, and then present our argument in support of plaintiffs' cross appeal.

POINT I

THE COURT PROPERLY HELD THAT PLAINTIFFS WERE WRONGFULLY EXPELLED FROM MEMBERSHIP IN DEFENDANT UNION AND THAT THEIR EXPULSIONS WERE NULL AND VOID.

The defendant argues that plaintiffs were rightfully expelled by defendant after trials held in their absence. It bases this argument on the contention that plaintiffs deliberately refused to stand trial, and to that end wilfully disrupted the proceedings before the trial board on June 3, 4 and 7, 1954, to such an extent that their trials could not get underway. The court below found against that contention. To overturn this finding, defendant points

only to the transcript of the proceedings before the trial board the days mentioned (Exhibits 4, 5 and 6, which it has printed as an appendix to its brief). In so doing, defendant has chosen to disregard the fact that the finding was based not only on that transcript, but also on volumes of oral and documentary evidence in which everything that took place before the trial board was fully canvassed and explored. The findings of the court below are amply supported by this evidence, and defendant has failed to show the contrary. Indeed, it cannot do so.

But even on the basis of the defendant's own brief, and the transcript of the proceedings before the trial board on which defendant relies, it is manifest that defendant's argument cannot be sustained. An analysis of the transcript shows that plaintiffs did no more than request (1) a continuance, (2) a bill of particulars clarifying the charges preferred against them, (3) the right to be confronted by their accuser and (4) that they be tried in what they considered to be the proper venue. All of these requests were reasonable, were properly made at the start of plaintiffs' trial, and under the provisions of defendant's own constitution should have been granted.

Certainly there was nothing improper in plaintiffs' request for a continuance. Section 2 (j) of Article 18 of defendant's constitution (which by

Section 3 (c) of the same Article is made applicable to trials held before general officers) provides:

Either party shall be granted a postponement of the trial for a reasonable period of time if valid reasons are presented to the trial committee or the trial committee may postpone the trial on its own motion for not more than thirty days.

Defendant by its own evidence claims that it had employed lawyers and investigators and had spent months in assembling evidence for use in the preparation of the charges preferred against plaintiffs. Yet Hanley saw a copy of the charges against him only 10 days before he was ordered to stand trial, while Nance received a copy of the charges against him only 16 days before he was scheduled to go on trial. In these circumstances, plaintiffs' requests for a continuance were plainly reasonable.

Nor were the requests for a bill of particulars clarifying the charges unreasonable or in any way improper. Section 1(b) of Article 18 of the constitution provides that all charges shall:

- (3) *contain a detailed statement of the facts out of which such charges originated;*
- (4) contain specific reference to Article, Section and Paragraph of the constitution, the policies, decisions, laws, rules or regulations which it is alleged have been or are being violated;

(5) state the nature of the violations claimed. The charges preferred against plaintiffs, particu-

larly those preferred against Hanley, most certainly do not comply with the foregoing requirements, for they do not contain a detailed statement of facts nor in fact any statement of facts out of which the charges originated. Typical of the charges preferred against Hanley are the following:

1. Bringing the labor movement and this association into disrepute in violation of Section 17 (a) of Article Ten (10) and Section 1(a) of Article Seventeen (17) of the International Constitution by:

.

(c) Having knowledge of extortion and attempted extortion on the part of certain members of Local Union 108 and Local Union 88 and not reporting the same to the general president and failing to take any steps to prevent its further occurrence.

.

2. Failing and refusing to cooperate with and defying the duly constituted officers of the Los Angeles Building Trades Council and representatives of other bona fide labor organizations while acting as International Representative having supervision over Local Union 371, to such extent that Sheet Metal Workers International Association and its affiliated local unions are completely discredited in the labor movement in the Los Angeles area, which conduct is in violation of Section 17 (a) of Article 10 and Section 1(a) of Article 17 of the International Constitution.

Clearly, the foregoing charges (and they are typical

of the others) fail to meet the requirements of the constitution. Hanley's written demand for bill of particulars (Exh. 18) was, therefore, clearly proper, and he did right in pressing for it before the trial board.

Likewise, there was nothing improper in Hanley's asking that the charges be prosecuted by the person who preferred them, Robert Byron. Section 1(c) of Article 17 of the constitution provides that it shall be an expellable offense for one to fail to appear as a prosecuting witness after filing charges against an officer or member, or to present all facts and evidence to support any charges so filed. Section 2 (h) of Article 18 provides, "Should those who preferred the charges fail to appear after due notice, the charges shall be dismissed without prejudice." This provision is made applicable to trials before general officers by Section 3 (c) of Article 18. The constitution provides in two places that when a member is tried before general officers, he shall be entitled to be represented by a good standing member as his counsel (Section 3 (b) and Section 4 of Article 18), but no such right is accorded to those preferring the charges.

Finally, Hanley cannot be criticized for asking that his trial be held in Las Vegas, Nevada, the city where his local union has its office. In this connection, Section 3 (a) of Article 18 provides,

“Unless otherwise agreed by the parties, the trial shall be held at the point where the office of such local union or council is located . . .” True, defendant contends that this provision is inapplicable because the charges were not filed with the local union. This contention is of doubtful validity. Section 3 (a) of Article 18 provides further that, “If charges were initially filed *with the general president* as provided in Section 4 of this Article, he shall notify the accused and those preferring the charges in writing, by registered mail, of the time and place of such trial.” The constitution makes provision for filing charges only with a local union or with the general president. Here the charges were not filed with the general president but by him. A literal reading of the constitution would seem to require that in such case the charges be filed with a local union. The plaintiffs’ construction of the constitution is therefore at least as tenable as that urged by defendant. In any case, we submit there was nothing censurable in Hanley’s asking to be tried in the place of his residence.

An examination of Exhibits 4, 5, and 6 discloses that Hanley at no time refused to stand trial. On the contrary, he expressed emphatically and repeatedly a desire to stand trial (Exh. 4, pp. 29-30, 48, 55-60, 100, 102-103, 112, Exh. 5, p. 117). At page 117 of Exh. 5, quoted at page 14 of defendant’s

brief, he said, "I desire to continue my trial *if the General President would comply with the Constitution and filing of the charges properly,*" and in the speech quoted at page 15 of defendant's brief he again stated his desire for a proper trial by saying, "I will submit my case, and I will defend Nichols and Fuller before anybody, *any impartial Board. I will submit it to this union.*" As for Nance, he took so little part in the proceedings before the trial board that there is nothing from which it can be even argued that he refused to stand trial.

On June 7 Hanley was notified that he was to stand trial on June 9, and Nance was notified that he would stand trial after the conclusion of the trial of Fuller probably on June 8. (Exh. 6, pp. 4 and 5). It is undisputed that neither Nance nor Hanley refused to stand trial on the dates they were thus summoned to appear, unless their failure to accept what defendant has termed the "last chance offer" can be considered to be a refusal to stand trial. We submit that it cannot, because for one reason the offer was not extended either to Nance or to Hanley. The so called "last chance offer" was made on the morning of June 8 when the trial board met the accused in the lobby of the hotel. The circumstances under which the alleged offer was made were explained by defendant's witness Schroeder as follows (NJT 3909) :

Q. All right. I want you to state what happened from the time you went down in the lobby. Describe to the court what you observed and what you heard and what you said.

A. I'll have to make an explanation. Mr. Nichols was unable to attend the Monday trial and he had not been notified that he would be tried in absentia, I'm reasonably sure.

Q. All right.

A. *And our purpose was then to invite Mr. Nichols to, or rather to ascertain as to whether he was agreeable to standing trial, or what his intentions were.*

Q. All right. Now state what happened.

A. (continuing) With respect to the trial, we'll say.

Q. All right, State what happened, then, when you went down in the elevator.

A. Mr. Rosen was there at that time. Asked Mr. Nichols if he was ready to stand trial in an orderly way.

Q. All right.

A. Under the rules of procedure. And he indicated that — he said, yes he would. And he wanted to know where the trial would be.

Q. Is this Mr. Nichols talking now, Mr. Schroeder?

A. Yes.

Q. All right.

A. And Mr. Rosen said, "Well, if you'll

— we'll not tell you that, we will take you to the trial room, then you will be privileged to call your witnesses and so forth."

Q. All right.

A. But he was not given the number of the room where the trial would be, where the trial board would convene, for the purpose of the trial.

Q. *All right. Now what, if anything was said to Mr. Hanley or any of the others and what if anything was said by Mr. Hanley or any of the others?*

A. *Well, now you are speaking of Mr. Hanley. I can't recall.* But Mr. Nichols at that point — changing it to Mr. Nichols — wanted to know the room number. And then Mr. Hanley, I'm sure chimed in and also wanted to know where the trial would be held. He wanted to know where the trial would be held.

That this so called "last chance offer" was extended only to Nichols and not to either of the plaintiffs is further shown by the following quotation which appears in the self-serving decision of the Trial Board finding both plaintiffs guilty of the charges preferred against them (Exh. 24 and 48):

The defendant C. A. Nichols had again been excused to attend court on June 7th and was not present when the Board ruled that the defendants would be tried in absentia, consequently the Board advised him to be present for trial on Tuesday June 8th. In order to forestall the overwhelming of the trial room

by the accused and their cohorts, the members of the Trial Board met Brother Nichols in the lobby of the Statler Hotel at 10:00 A.M. on the morning of June 8th. Brother Nichols arrived, accompanied by Brothers Hanley, Nance and Fuller and about fifteen other persons, the later group increasing in size until about thirty or forty persons were present. The chairman of the Trial Board told Brother Nichols that the Board was ready to proceed with his trial if he and his counsel would come to the trial room unaccompanied by the other defendants and the rest of the group which was demanding admission.

It is submitted that defendant cannot show any refusal to stand trial on the part of either of the plaintiffs on the basis of the so-called "last chance offer", which as shown above was made only to Nichols. And even if it were extended to plaintiffs, there is no showing that they refused a proper trial.

Defendant's attempts to justify plaintiffs' being tried in their absence on the ground that the spectators present on the days of the open hearings, i.e., on June 3, 4 and 7, failed to obey the repeated demands of the chairman of the Trial Board that the trial room be cleared of all "witnesses" and that the presence of such spectators and their conduct created such confusion and disorder that it was impossible for the trials to proceed. The short answer to this contention is that plaintiffs were not re-

sponsible for the presence of the spectators and were not responsible for their failure to comply with the requests to leave. Hanley repeatedly told the Trial Board this (Exh. 4, pp. 31, 61, 63-64; Exh. 5, pp. 115, 118).

Quite apart from the foregoing, the evidence is uncontradicted that defendant made all arrangements for holding the trials of the plaintiffs; that it rented the room in which the trials were to be held; that police officers were present at all times; and that there was no disturbance of the peace or disorderly conduct on the part of any persons present. If the presence or conduct of any persons present were such as to prevent an orderly trial, it would have been a simple matter for the Trial Board to request the police officers present to eject the offending parties. The responsibility for conducting orderly trials rested on the defendant and on the defendant alone. In these circumstances, the following finding of the court below, as set forth in its Memorandum of Decision filed December 30, 1959, (R. 349) cannot successfully be challenged:

7. That neither the petitioner nor the intervenor nor any person authorized to speak or act for them or either of them conducted himself in such a way as to justify the trial committee in trying them or either of them in absentia. That the evidence presented as to the conduct of the petitioner and intervenor and other persons at open hearings conducted

by the trial committee on June 3, 4 and 7, 1954, does not show any violence or threat of violence or any disturbance of the peace at said sessions of the trial committee. That police officers were present in the hearing room and the court believes that they were ready and able to prevent any violence or disturbance of the peace. That protests and objections made by petitioner and intervenor at said open hearings were not so lacking in merit as to constitute or be construed as a refusal to stand trial or as a waiver of trial, or to justify the Trial Board in ordering them or either of them to be tried in absentia.

It follows, therefore, that since neither of the plaintiffs refused either by words or by conduct, to stand trial, their expulsion was wrongful. For no principle of law is better established than that no member of a labor organization can be expelled except after a trial meeting the minimum requirements of due process, including notice of the time and place of trial, the opportunity to be confronted by and to cross examine the witnesses called against him, and to call witnesses and to adduce evidence in his defense. *Cason v. Glass Bottle Blowers Asso.*, 37 Cal. 2d 134, 231 P. 2d 6, 21 ALR 2d 1387; *Mahoney v. Sailors Union of the Pacific*, 43 Wash. 2d 874, 264 P. 2d 1095; *Ellis v. American Federation of Labor*, 48 Cal. App. 2d 440, 443-444, 120 P. 2d 79; *Annotation*, 21 ALR 2d 1397.

Indeed, the requirements of procedural due

process are now written into the Labor-Management Reporting and Disclosure Act of 1959, Section 101 (a) (5) of which provides as follows:

No member of any labor organization may be fined, suspended, expelled or otherwise disciplined, except for non-payment of dues, by such organization or any officer thereof unless such member has been (A) served with written specific charges; (B) given a reasonable time to prepare his defense; (C) afforded a full and fair hearing.

Since neither of the plaintiffs were accorded the benefits of the minimum requirements of due process, their expulsion was manifestly wrongful and null and void.

We have no quarrel with the cases cited and relied upon by defendant, but they are clearly not in point. In *Smith v. Kern County Medical Association*, 19 Cal. 2d 263, 120 P. 2d 874, in *Davis v. International Alliance of Theatrical Stage Employees*, 60 Cal. App. 2d 713, 141 P. 2d 486, in *Miller v. I. A. of Operating Engineers*, 118 Cal. App. 2d 66, 257 P. 2d 85, and in *Werner v. Int. Assn. of Machinists*, 11 Ill. App. 2d 258, 137 NE 2d 100, the expelled member failed to appear at the time set for his trial. No such situation confronts us here, for each of the plaintiffs appeared and insisted upon the right to make his defense. As for the case of *Allen v. Los Angeles County District Council of Carpenters*, 51 Cal. 2d 805, 337 P. 2d 457, which defendant cites

in support of its contention that plaintiffs should be barred from relief because they did not come into court with clean hands, it is clearly not in point. The clean hands doctrine or rule is a rule which permits a court in its discretion to withhold an equitable remedy where the party seeking the remedy does not come into court with clean hands. But the discretion to grant or withhold the remedy is vested in the trier of the fact, that is to say, in the trial court. In the *Allen* case, the trial court exercised its discretion in favor of the defendant, whereas in the present case the trial court exercised its discretion in favor of the plaintiffs. But in any case, there is no basis for saying that either Nance or Hanley did not come into court with clean hands. Defendant bases its contention to the contrary on plaintiff's alleged misconduct before the Trial Board, but as we have shown, their conduct was neither improper nor censurable in the circumstances.

POINT IB

THE COURT DID NOT ERR IN CONCLUDING THAT PLAINTIFFS' REMEDIES ON APPEAL DID NOT CURE THE DEFECTS OF THE TRIAL BOARD PROCEEDINGS.

The defendant next asserts that regardless of any defects in the proceedings before the Trial Board, plaintiffs are in no position to complain because they had the opportunity to incorporate with the appeals which they took documentary evidence

refuting the charges of which they were found guilty. In other words, defendant contends that even if plaintiffs were expelled without having charges preferred against them or given any opportunity whatsoever to defend themselves, they are now barred from challenging their expulsion because of their failure to attach to their appeal papers documentary evidence refuting the charges on the basis of which they were expelled. The mere statement of this contention is sufficient to show its fallacy.

Not only the constitution (Art. 18, Sec. 3(b) and Sec. 2(c)), but the general law guaranteed to plaintiffs the right to be confronted by and to cross examine the witnesses called against them, and to call witnesses in their defense. As said in *Cason v. Glass Bottle Blowers Association*, supra:

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. (Citations omitted). The authorities recognize that such a trial *includes the right to notice of charges, to confront and cross examine the accusers, and to examine and refute the evidence.*

See also *Werner v. Int. Ass'n. of Machinists*, supra, at page 112 of 137 NE 2d.

This right to cross examine the witnesses called against them and to call witnesses in their defense

was denied to plaintiffs. The deprivation of that right could not be cured by giving plaintiffs the chance to present documentary evidence. As a matter of fact, plaintiffs endeavored to call witnesses and to introduce documentary evidence before the grievance and appeals committee, but the committee refused to permit them to do so.

POINT II

THE COURT DID NOT ERR IN HOLDING THAT THE ACTIONS OF DEFENDANT AND ITS OFFICERS WERE MALICIOUS, ARBITRARY AND UNREASONABLE IN CONNECTION WITH THE PREFERRING OF CHARGES, TRIAL PROCEEDINGS, AND APPEAL THROUGH THE UNION PROCEEDING.

The second point urged by defendant on its appeal is that the court below erred in holding that in preferring charges against plaintiffs, in the conduct of the trial proceedings, as well as in the conduct of the appeal proceedings, the defendant and its officers acted maliciously toward the plaintiffs. Before proceeding to answer the argument urged by defendant in support of this point, we are constrained to correct some misconceptions upon which the argument is seemingly based.

In the first place, the question of malice went not only to plaintiffs' right to recover exemplary damages, as defendant seemingly contends, but also to the validity of plaintiff's expulsion. This is shown not only by Nance's original petition for a writ of

mandamus, his reply to defendant's counterclaim, and Hanley's complaint in intervention, but also by the trial judge's Memorandum of Decision (Appendix, pp. 1 to 10) and to its Second Supplemental Memorandum of Decision (Appendix, pp. 19 to 34). It is true that in rendering his original decision the trial judge postponed his decision as to malice pending trial before a jury of the issues whether plaintiffs had sustained any actual damages as a result of their expulsion and whether as a consequence of acts committed by defendant subsequent to their expulsion they were entitled to exemplary damages. He did so, however, only (1) because he did not wish to influence the jury in its consideration of the issue whether after plaintiffs' expulsion defendant had acted with malice toward the plaintiffs, and (2) he wished to have the benefit of evidence as to defendant's conduct after plaintiff's expulsion insofar as it might throw light on the issue whether in expelling plaintiffs defendant acted wilfully and maliciously toward them. The question of malice, therefore, went not only to the question whether plaintiffs were entitled to exemplary damages, but also to the legality of their expulsion. That plaintiffs' expulsion was invalid if the whole proceedings taken against them were so far permeated with, and the result of malice, as to amount to a sham or farce is too clear, we submit, to require argu-

ment. See for example, *Fittipaldi v. Legassie*, 7 App. Div. 2d 521, 184 NYS 2d 226, where the expulsion of “a dissident group whom the entrenched officers of the local union, working with or without the aid of the Brotherhood representative, were apparently seeking to suppress” was set aside. See also, *Grand Int’l. Bro. of Locomotive Engrs. v. Green*, 210 Ala. 496, 98 So. 596.

In the second place, the reports which Byron received from Fulmor and Ely, and upon which defendant maintains Byron acted in preferring charges against plaintiffs, did not implicate either Hanley or Nance “in a murder, in shake down activities against contractors, etc.” as claimed by defendant at page 47 of its brief. In this connection, defendant’s general vice president Cronin described the complaints made by Fulmor and Ely as follows (NJT 3360):

Well, Mr. Ely, of course, acted as the spokesman for the two and he stated that he came to Chicago to meet a representative of the International Union, who were meeting with the contractors at the time to complain of certain situations that existed with regard to 108 on the coast. He complained that the apprenticeship committee was not functioning properly, he complained with regard to the working of the Health and Welfare funds and he said they were not satisfied with the working of the vacation plan and that especially they were concerned with regard to

work stoppages and jurisdictional disputes in the Los Angeles area. That was the gist of their complaint and that's what they said.

As for the so called Stetter reports, they were never introduced in evidence. What they contained is therefore not before the court, except as shown by cross examination, the defendant having successfully prevented their introduction in evidence.

Having thus corrected some obvious inaccuracies in defendant's statement, we may proceed to answer defendant's argument. Defendant calls attention to the fact that the court found that Byron had received reports which if believed would have justified him in preferring charges against plaintiffs. It concedes, however, that the court also found, that in preferring charges against and in expelling plaintiffs, defendant and its officers acted wilfully and maliciously. Defendant then contends that since "at most, the evidence adduced in this issue of good faith in the preferring of the charges gave rise to two conflicting inferences . . . it was error for the court to draw the inference of bad faith". In support of this contention defendant cites the case of *N.L.R.B. v. Huber & Huber Motor Express*, 5 Cir., 223 F. 2d 748. This decision, however, does not correctly state the law and was expressly repudiated by the court which rendered it in *N.L.R.B. v. Fox Manufacturing Co.*, 5 Cir., 238 F. 2d 211, in which the court at pages 214-215 said:

Under the rule announced in *Coats & Clark* it is still our duty to ascertain whether there is substantial evidence in the record as a whole to make the inferences of legal and illegal discharge reasonably equal. *But now if the record warrants the conclusion that they are reasonably equal, we may not overturn the Board's findings of an illegal discharge.*

Nor does *Schofield v. Z.C.M.I.*, 85 Utah 281, 39 P. 2d 342, 345, support defendant's contention. In that case the court said merely:

A construction giving an instrument a legal effect to accomplish its purpose will be adopted when it can be reasonably be adopted, and between possible constructions, that will be adopted which establishes a valid contract.

Needless to say we are not here dealing with the construction of a contract, but with the question whether the defendant in expelling plaintiffs acted maliciously. The court below found on conflicting evidence that defendant so acted and its finding cannot be disturbed. If there were two conflicting inferences that might be drawn, it was for the trial court to select the one that should be drawn. It found that defendant acted wilfully and maliciously and its finding, we submit, cannot successfully be challenged.

POINT III

THE COURT DID NOT ERR IN AWARDING NOMINAL AND PUNITIVE DAMAGES.

In our argument under this point we will cover the questions raised by Points III, IV and V of defendant's brief.

Defendant's argument that the court below erred in awarding nominal and punitive damages disregards the stipulation and circumstances under which this case was tried. For a recital of this stipulation and circumstances we refer this court to the Order as to the Issues to be Submitted to the Jury printed at pages 13 to 17 of the appendix to this brief, and the facts leading up to the order recited in the statement of facts at pages 3 to 5.

The issue of malice in procuring plaintiff's expulsion was thus reserved for decision of the judge alone. As the trier of that issue of fact he was fully authorized to award punitive damages to the plaintiffs if he resolved the issues in their favor and if the other conditions necessary to sustain such an award were present, for an award of punitive damages may be made by the judge where the factual issues are tried by him. *Calvat v. Franklin*, 90 Colo. 444, 9 P. 2d 1061; *Pure Oil Co. v. Quarles*, 183 Okl. 418, 82 P. 2d 970; *Pickwick Stages v. Board of Trustees of the City of El Paso De Robles*, 54 Cal. App. 730, 215 P. 558.

Here the trial judge resolved the issue of malice

and bad faith in favor of plaintiffs and also found that plaintiffs had suffered actual damages (See paragraph 20 of the Second Supplemental Decision on page 28 of the appendix to this brief). He was therefore authorized to award nominal damages and on the basis thereof to award punitive damages, for by the great weight of authority an award of nominal damages, where actual damages have been suffered, will support an award of punitive damages. *Sterling Drug Inc. v. Benatar*, 99 Cal. App. 2d 393, 221 P. 2d 965; *Reynolds v. Pegler*, 2 Cir., 223 F. 2d 429; *Fauver v. Wilkoske*, 123 Mont. 228, 211 P. 2d 420, 17 ALR 2d 518.

It is true that the jury found that plaintiffs had not suffered actual damages, but the judge after consideration of all the evidence held that this finding was not supported by the evidence, saying:

After due consideration of the evidence presented before the jury and the answers of the jury to Special Interrogatories, the court believes that the answers of the jury to Special Interrogatories Nos. 1, 3, 7 and 9 (as to loss of earnings and humiliation and mental suffering) are in each case opposed to the weight of the evidence and that in each case the answer should have been "yes", also that the jury should have awarded actual damages to the petitioner and intervenor. The court believes from the evidence that both the petitioner and intervenor suffered substantial loss of income by reason of having been expelled

from the union and also suffered embarrassment and humiliation by reason of such expulsion and being deprived of privileges and benefits of union membership. (Appendix, p. 28).

In these circumstances, the judge was entitled to disregard the verdict of the jury and award nominal damages. Indeed, it would have been reversible error for the court to have failed to award nominal damages, not only for the reason that the evidence showed beyond question that plaintiffs had suffered actual damages but also for the reason that a right of the plaintiffs had been invaded which required vindication. *Nasner v. Burton*, 2 U. 2d 236, 272 P. 2d 163; *Harmony Ditch Co. v. Sweeny*, 31 Wyo. 1, 222 P. 577.

We turn then to arguments advanced by defendant in support of its contention that the award of punitive damages should not be allowed to stand.

SUB-SECTION A

Defendant first argues that since this is a suit to obtain relief formerly obtainable by a Writ of Mandamus as well as equitable relief, the award should be set aside because punitive damages are not generally allowed in suits in equity. This is a most technical argument. Plaintiffs could have brought a separate action at law in which they undoubtedly could have recovered punitive damages. See *Grand Int'l. Bro. of Locomotive Engineers vs. Green*,

supra. They could have brought an independent proceeding to have their expulsions set aside. The mere fact that they sought both types of relief in the same action should not deprive them of this substantial right.

In any case, this is not a suit in equity but one at law. Writs of Mandamus have been abolished in this state (*Rule 65B, U. R.C.P.*). But the relief formerly obtainable by a writ of mandamus can now be obtained by a civil action (*ibid.*). In determining, however, whether such an action is legal or equitable in nature the principles applicable before the abolition of the writ are still applicable. A writ of mandamus was never an equitable remedy. Historically, it never issued out of the court of chancery but only out of the Court of Kings' Bench. See 2 Jones' *Blackstone's Commentaries*, p. 1633. As early as 1860 the Supreme Court of the United States said that a proceeding to obtain the writ had become an ordinary action at law. *Kentucky v. Dennison*, 24 How. 100, 11 L. Ed. 513. So if we are to resort to technicalities it is clear that this is not a suit in equity but an action at law, and the principle on which defendant relies is technically inapplicable.

Furthermore, in a proceeding such as this damages resembling exemplary damages, such as damages for mental suffering, humiliation, etc., are clearly recoverable. See *Nissen v. International*

Brotherhood, 229 Iowa 1028, 295 NW 858, 141 ALR 598. In any case, the rule that exemplary damages are not recoverable in equity is not of universal application. There are many cases holding that such damages can be recovered in equity. See e.g., *Sterling Drug Inc. v. Benatar*, supra.; *Union Oil Co. v. Reconstruction Oil Co.*, 20 Cal. App. 2d 170, 66 P. 2d 1215; *Rivero v. Thomas*, 86 Cal. App. 2d 225, 194 P. 2d 553.

SUB-SECTION B

Defendant next contends that since the present proceeding sounds in contract and not in tort, and since exemplary damages are not generally allowed in actions for breach of contract, the award of punitive damages should be set aside. It is true that the basic right which plaintiffs seek to enforce is contractual in nature. See *I.A.M. v. Gonzales*, 356 U.S. 617, 618, 2 L. Ed. 2d 1018, 78 S. Ct. 923. But it is also true that the measure of damages in an action such as this is that applicable in actions sounding in tort. *Chafee, The Internal Affairs of Associations Not For Profit*, 43 Harv. L. Rev. 993, 1003. As said by Professor Chafee in the article last cited, "He (the expelled member) does not merely recover for the loss of expected benefits, but also recovers for injury to his reputation, just as in defamation, *and may receive punitive damages.*" He is also entitled to recover "such sums as will

compensate him for mental suffering and humiliation caused" by his expulsion. *Nissen v. International Brotherhood*, supra; *Gonzales v. I.A.M.*, 142 Cal. App. 2d 202, 298 P. 2d 92, affirmed 356 U.S. 617, 2 L. Ed. 2d 1018, 78 S. Ct. 923. In this respect, the present action is not like an action for breach of an ordinary commercial contract, but resembles more an action for breach of a contract to marry, or an action for a tortious breach of a contract of carriage resulting in injury to a passenger, in both of which types of actions exemplary damages are recoverable. 11 C.J.S. 813, *Breach of Marriage Promise*, Sec. 45; *Forrester v. Southern Pacific Co.*, 36 Nev. 247, 134 P. 753. It is clear, we submit, that plaintiffs were entitled to recover exemplary damages. *Grand International Bro. of Locomotives Engineers v. Green*, supra.

SUB-SECTION C

Defendant argues, thirdly, that the court should have left to the jury the question whether plaintiffs were entitled to recover exemplary damages because of the acts of defendants and its officers in procuring plaintiffs' expulsion. As shown by its Order as to the Issues to be Submitted to the Jury (Appendix, pp. 13-17) the court did submit to the jury the question whether plaintiffs were entitled to exemplary damages because of acts committed *after* plaintiffs' expulsion but reserved to

itself the question whether in procuring plaintiffs' expulsion defendant and its officers acted maliciously, and whether on account thereof plaintiffs were entitled to recover punitive damages. This was done pursuant to a stipulation of the parties that the issue whether plaintiffs were wrongfully expelled should be determined by the court. That included the issue, as we have shown, whether in effecting plaintiffs' expulsion defendant acted in good faith or with malice. Since the court was to determine this factual issue, it was for the court and not the jury to determine whether plaintiffs were entitled to punitive damages on account of defendant bringing about plaintiffs' expulsion. *Calvat v. Franklin*, supra, *Pure Oil Co. v. Quarles*, supra; *Pickwick Stages vs. Board of Trustees, etc.*, supra. If it were otherwise, all of the evidence introduced before the court in 10 weeks of trial would have had to be reintroduced before the jury — an unthinkable procedure.

SUB-SECTION D

The fourth argument advanced by defendant for disallowing punitive damages is that since defendant is not a legal entity, all of its funds are the joint property or assets of all of its members; that to award punitive damages is to assess them indirectly against the whole membership; and that accordingly the malice or bad faith of defendant's

officers should not be imputed to the defendant. In support of this argument defendant cites *Lawlor v. Loewe*, 2 Cir., 187 F. 522 (the famous Danbury Hatter's Case); *Sweetman v. Barrows*, 263 Mass. 349, 161 NE 272, 62 ALR 311; *Schneider v. Local 60*, 116 La. 270, 5 LRA (NS) 891; and *Martin v. Curran*, 303 NY 276, 101 NE 2d 683. None of these cases are in point. None of these cases involved the question whether a labor union could be held liable for exemplary damages. The first three involved attempts to impose personal liability on individual members. Obviously they are not in point because no such attempt is being made here. Any judgment rendered in this action will be recoverable only from the common funds of the union, and no part of it can be enforced against the property or assets of the individual members. *Rule 17(d)*, *U.R.C.P.* In *Martin v. Curran*, supra, the New York Court of Appeals held that a labor union could not be held liable for damages for libel unless the pleadings and proof showed that all of the members had authorized or ratified the publication of the libel. But in the later case of *Madden v. Atkins*, 4 NY 2d 283, 151 NE 2d 73, which defendant does not cite, the same court held that the principle or rule is inapplicable in the case of actions for wrongful expulsion from membership. In that case the court said:

The Appellate Division was of the view, how-

ever, that the precedents forbade an action against a union for damages unless proof established an authorization or ratification of the expulsion by all of the members and thereby rendered each and every one of them responsible for the wrong committed. While we have held that to be the law where damages are sought against an unincorporated association on account of libel (see *Martin v. Curran*, 303 NY 276, 101 NE 2d 683) the rule is otherwise in case of wrongful expulsion.

The cases relied upon by defendant do not, therefore, support its argument. That its argument cannot be sustained is further established by the fact that labor unions can be and have been held liable for punitive damages in cases such as this. Moreover, the acts of defendant's officers in expelling plaintiffs were ratified by defendant's grievance and appeals committee and general convention. This was enough to render defendant liable for their acts.

SUB-SECTION E

Defendant next argues that it was error for the court to award punitive damages after the jury had found that plaintiffs had suffered no actual damages. We have already answered this argument, but we deem it prudent again to call the courts attention to the decision of the Supreme Court of Montana in *Fauver v. Wilkoske*, supra. There the jury found that the plaintiffs had suffered no ac-

tual damage but awarded exemplary damages. The Supreme Court upheld the award since it appeared that the plaintiff must in fact have suffered actual damages. In so doing it reversed several of its prior decisions in favor of what it deemed to be the better rule. See also, *Sterling Drug Inc., v. Benatar*, *supra*, and *Calvat v. Franklin*, *supra*.

SUB-SECTION F

Defendant further argues that “the award of punitive damages in this case is erroneous as a matter of law because in Utah . . . punitive damages are not allowed unless compensatory damages based on the tortious or illegal conduct *are recovered*” (italics added). In support of this argument defendant cites and relies upon *Graham v. Street*, 2 Utah 2d 144, 270 P. 2d 456. But it is plain, however, that this case does not support the argument. There the trial court had made an award of compensatory damages in the sum of \$5,000 on the basis of “highly speculative matters — distress, anxiety and the effect on profits if Graham’s experience and contacts had been utilized — which according to defendant’s contention, not denied by plaintiffs, were unsupported by proof upon which the court could base an intelligent decree”. In other words, the plaintiff failed to show that he *had suffered* any actual damages, and having failed to show

actual damages, the award of punitive damages necessarily fell.

As we have shown above, if a plaintiff proves that he has in fact suffered actual damages, an award of punitive damages may be made even though no compensatory damages are recovered. This is confirmed by the recent decision of this court in *Ostertag v. LaMont*, 9 Utah 2d 130, 339 P. 2d 1022, wherein Chief Justice Crockett said:

It is undisputed that it was necessary for the (plaintiff) to expend \$140 for doctor and dental bills incident to his injuries. The jury awarded him only this sum but nothing for the pain and suffering, loss of earnings, or for humiliation and injury to his feelings, all of which may properly be considered in awarding damages for such an assault. It is obvious that an award of some further compensatory damages would have been justified. *The fact that the verdict gave him nothing but his actual expenditures, does not mean that that is all the damage he suffered, nor is it any reason for depriving him of the \$860 award of punitive damages. That award could be set aside if it were clearly excessive in view of the evidence as a whole and in comparison to the damages actually sustained.* We do not think the award as adjusted by the trial court can be properly so characterized.

SUB-SECTION G

Under this heading defendant advances two arguments. First, it reiterates its argument that

the award of punitive damages must be set aside because the amount thereof is disproportionate to actual or nominal damages recovered. As we have shown, this argument is untenable. The amount of punitive damages awarded must bear some reasonable relationship to the amount of actual damages *suffered or sustained*, but it need not bear any relationship to the actual damages *awarded*. The rule requiring a reasonable relationship between punitive damages and actual damages sustained, the reason for applying it, and the weight to be given to it were explained by this court in *Ostertag v. Lamont*, *supra*, as follows:

As with damages for injuries generally there is no method for exact calculation as to punitive damages, nor is there any precise formula for the relationship of punitive damages to actual damages. 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 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 punitive damages to actual damages awarded is only one of the facts to be considered in determining whether the amount awarded should be sustained. In appraising the punitive damages to see whether they are so excessive as*

to require a nullification of the verdict or correction as a matter of law, it is necessary to survey all of the circumstances as disclosed by the evidence.

Here it is impossible to say that in assessing punitive damages the trial judge was guilty of passion or prejudice or was laboring under a misconception or in disregard of the law or the evidence. The damages suffered by plaintiffs were great and extensive. Their loss of earnings alone exceeded the amount of punitive damages awarded. In addition, they suffered humiliation by being branded as expelled members. They were deprived of all of the benefits and privileges of union membership. It is idle for defendant to argue that these were without value. It is indeed something of a paradox for a labor organization of the magnitude of the defendant to urge such an argument while continuing to accept dues and assessments from its members and urging workmen to join it. Not only were the damages naturally flowing from plaintiffs' expulsion great, but not content with expelling plaintiffs, defendant as shown by the uncontradicted evidence took affirmative action to see that these damages were increased by instructing the business agents of its local unions to make certain that plaintiffs did not work. In view of all of the facts and circumstances disclosed by the evidence, it is plain that the punitive damages are not so excessive as to

require a nullification or correction of the award thereof. Compare *Reynolds v. Pegler*, supra, where an award of \$1.00 actual damages and \$100,000 punitive damages was upheld.

Secondly, the defendant argues that the trial court considered improper factors. There is plainly no merit in this contention. Certainly there is nothing improper in considering the fact “trial in absentia, where there has been no consent or waiver, is abhorrent to the principles of justice and fair play”. Even the Codes of Ethical Practices of the AFL-CIO recognize this to be a fact, in providing that in union disciplinary proceedings, “the essential requirements of due process — notice, hearing and judgment on the evidence — should be observed”. Nor was there anything improper in the court’s taking into consideration the fact that” the wealth and power of an international labor union was arrayed against individual union members with meager resources”. See *Wilson v. Oldroyd*, 1 Utah 2d 362, 267 P. 2d 759. Likewise, it was not improper for the court to consider the fact that the grievance and appeals committee of defendant’s general convention had full knowledge of the injustice inflicted upon plaintiffs and failed to take any action to correct it; or the fact that for four long years plaintiffs had been known and referred to as expelled members and deprived of the benefits and privileges

of union membership; or the fact that defendant deliberately prolonged the trial of this action by two intermediate appeals, constant and repeated frivolous objections and other dilatory tactics to the detriment of plaintiffs and to the great expense of the taxpayers. In this connection there is nothing in the record to substantiate defendant's charge that the punitive damages were awarded "in part on account of the fact that the union had the temerity to defend this case in the first place and because the trial below cost the county and its taxpayers some money". And the court below most certainly did not penalize appellant union for defending itself instead of confessing judgment. It did, however, and quite properly we think, take into account the manner in which it conducted its defense.

POINT IV

THE COURT HAD JURISDICTION TO ISSUE AND THE POWER TO ENFORCE THE WRIT OF MANDATE, AND DEFENDANT'S MOTION TO QUASH SERVICE OF SUMMONS WAS PROPERLY DENIED.

Defendant next urges two contentions. First, that the court was without jurisdiction to issue a writ of mandamus because if one were issued it would be powerless to enforce it, since none of defendant's officers reside in Utah so as to be amenable to process of the courts of this state; and secondly, that the court erred in overruling defendant's

motion to quash the service of process upon it. Both of these contentions were urged on defendant's first application for an intermediate appeal, and the application was denied. (Case No. 8673).

Neither contention can be sustained. The first, that the writ should be denied because the court would be without power to enforce it since defendant's officers are non-residents of this state, is plainly untenable. If it were sound there would not be a court in the United States that would have jurisdiction to compel defendant to reinstate plaintiffs. Defendant's principal officers do not reside in the same jurisdiction. Their residences are scattered throughout many states. There is not a court in the nation that could acquire jurisdiction of a sufficient number of them to compel them, by physical restraint, to obey a command to reinstate plaintiffs. In any case, defendant's argument is based on a false and untenable premise. The court below has both jurisdiction and power to compel defendant to obey its command. *Section 78-35-10, U.C.A. 1953*, provides:

When a peremptory writ of mandate or writ of prohibition has been issued and directed to an inferior tribunal, corporation, board, or person, if it appears to the court that any member of such tribunal, corporation, board, or person upon whom such writ has been personally served, has without just excuse, refused or neglected to obey the same, the court

may upon motion, impose a fine not exceeding \$500. In cases of persistence in refusal, the court may order the party imprisoned until the writ is obeyed, *and may make any orders necessary and proper for the complete enforcement of the writ.*

Section 78-32-1, U.C.A. 1953, provides:

The following acts or omissions in respect to a court or proceeding therein are contempts of the authority of the court . . .

5. Disobedience of any lawful judgment, order, or process of the court.

It is thus apparent that disobedience of the command to reinstate the plaintiffs could be enforced by process of contempt. It is today well settled that a labor union or other unincorporated association, as such and as distinguished from its officers and agents, may be adjudged guilty of contempt. *United States v. United Mine Workers*, 330 U.S. 258, 91 L. Ed. 884, 67 S. Ct. 677; *Oil Workers Int'l Union v. Superior Court*, 103 Cal. App. 2d 512, 230 P. 2d 71, 104-106. Upon being adjudged guilty of contempt, such an association can be compelled to obey the court's command by the levy of a coercive fine. For example, in the *United Mine Workers* case, *supra*, the court had issued an injunction restraining the defendant from continuing a strike. The strike was already in progress when the injunction was issued, so that the injunction was in effect a mandatory injunction. The union failed

to call off the strike and the defendant and its president, John L. Lewis, were cited for contempt. The court adjudged both in contempt, and imposed fixed fines on both the union and its president, and in addition thereto a coercive fine upon the union of \$100,000 a day for each day the strike continued in violation of the injunction. The Supreme Court of the United States, although reducing the fixed fine assessed against the union, affirmed the trial court's order insofar as it imposed the coercive fine. Needless to say, the strike was called off and the injunction promptly obeyed.

The court's command to reinstate the plaintiffs in this case can be enforced by similar process, particularly in view of the fact that the defendant has assets consisting of dues and per capita taxes which are constantly accruing to it from its local union and members in Utah, that can be reached by the process of the courts of this state. The argument that the court would be powerless to enforce a writ of mandate compelling defendant to reinstate the plaintiffs to membership is therefore without merit.

The defendant relies upon *Pratt v. Amalgamated Ass'n. of Street & Electric Rwy. Employees*, 50 Utah 472, 167 P. 830. In that case, the plaintiff sought a writ of mandate to compel the defendant to permit plaintiff to transfer from one local union

to another. This court approved a judgment denying him relief on the ground that he was not entitled thereto on the merits. As an alternative ground of decision, this court held that the writ should be denied because the court would be powerless to enforce it, since only one of the defendant's officers resided within this state, and he alone could not effect compliance with the writ. This latter holding is but an application of the principle that a writ of mandamus will not issue where the issuance thereof would be futile. 55 C.J.S. 36, *Mandamus Sec. 11*. But that principle is never applied unless it is "clear that no benefit can result from the issuance of the writ" (ibid.). See also, *Skeen v. Pratt*, 87 Utah 121, 48 P. 2d 457; *Horn v. Superior Court*, 94 Cal. App. 2d 283, 210 P. 2d 518. In any case, the *Pratt* case was decided in 1917, more than 43 years ago. At that time the concepts that an unincorporated association as such can be adjudged guilty of contempt and that obedience to a court's order can be compelled by means of coercive fines had not been developed. Insofar as the case holds that a writ of mandamus should be denied because of the absence of officers capable of affecting compliance therewith, it does not represent the law today. In this connection, it is significant that although it has been cited many times in numerous jurisdictions in support of other propositions, it has

never been cited in support of the proposition that a writ of mandamus should be denied because of the absence of natural persons competent to effect compliance therewith.

But quite apart from the foregoing, the plaintiffs sought, as permitted by the Utah Rules of Civil Procedure, not only a writ of mandamus, but also a judgment declaring plaintiffs' expulsion to be null and void, as well as damages. The judgment entered granted the relief prayed. Even if the writ of mandate were improvidently granted for want of power to enforce it, the balance of the judgment is unassailable on the ground and it is entitled to full faith and credit throughout the United States.

The second contention urged by defendant, namely that the court erred in refusing to quash the service of process on the ground that defendant is not subject to service of process in the State of Utah, is equally without merit. Defendant is an unincorporated association and is a resident of every state in which it has members and carries on the business and functions for which it was organized. Defendant not only has members in the State of Utah, but is also carrying on its business and functions in this State. Service of process was made on David Turner, then an International Organizer appointed and paid by defendant. At that time Turner was actively carrying on defendant's business

in the State of Utah. See the affidavit of Edward Carlough, defendant's General Secretary-Treasurer. (R. 11-12). In these circumstances the process was plainly properly served under *Rule 4(e) (4)*, and *Rule 17(d)*, *URCP*.

Defendant cites and relies upon *Wein v. Crockett*, 113 Utah 301, 195 P. 2d 222. It is difficult to see what conceivable bearing that case can have on the case at bar. It dealt with the amenability to suit in this state of a non-resident individual under *Rule 17(e)*, *URCP*. It has nothing to do with the amenability to suit of or with the service of process upon an unincorporated association having members in this state and carrying on its business and functions in this state.

POINT V

THE COURT DID NOT ERR IN ALLOWING PLAINTIFFS TO RECOVER THEIR ATTORNEY FEES.

Plaintiffs were clearly entitled to recover attorneys fees in this type of action, whether it be regarded as a proceeding in mandamus or a suit in equity. If it be regarded as a proceeding in mandamus the allowance of attorneys fees is expressly authorized by *Section 78-35-9, UCA 1953. Colorado Development Co. v. Creer*, 96 Utah 1, 80 P. 2d 914. If the proceeding be regarded as one in equity, attorneys fees would nevertheless be recoverable. For example, in *Malloy v. Carroll*, 287 Mass. 376,

191 N. E. 661, an expelled member brought a suit in equity against a trade union to have his expulsion set aside. Holding that he was entitled to recover attorneys fees, the Supreme Judicial Court of Massachusetts said:

In actions based on wrongful conduct, where the wrong is of such character that the proper protection of plaintiff's rights necessarily requires him to employ counsel to gain redress of the wrong, he may recover as an element of damage reasonable counsel fees.

The rule so laid down is in accord with the principles enunciated by this court in *Spoul v. Parks*, 116 Utah 365, 210 P. 2d 436.

Defendant argues, however, that attorneys fees are recoverable only as an element of "damages", and since the obligation of plaintiffs to pay attorneys fees was contingent upon their succeeding in the litigation, they will not be damaged by the disallowance of attorneys fees. Defendant states in its brief that the fee arrangement between plaintiffs and their attorneys was incomprehensible. Although verbal, the arrangement was not vague and uncertain as claimed by defendant. It is clear that the fee was contingent, to be a reasonable amount if judgment for reinstatement only was obtained and a percentage of the amount recovered if a judgment for damages was obtained (Post-T. 4-27-59, pp. 92, 103, 106, 115, 120-122, 130). It is probably

incomprehensible to defendant that "a man's word is as good as his bond". There is no merit to defendant's argument that plaintiffs will not be damaged by the payment of attorneys fees. Should plaintiffs fail in this action, they would not be entitled to recover anything. Should they succeed, the amount of their recovery will clearly be diminished by the amount they must pay their attorneys. To that extent they will be damaged. Should they succeed only in effecting their reinstatement, they would both by express agreement and as a matter of law be obligated to pay a reasonable attorneys fee. To that extent they would be damaged.

POINT VI

THE COURT DID NOT ERR IN TAXING CERTAIN COSTS AGAINST DEFENDANT.

The defendant finally complains that the court erred in taxing the fees and mileage of the witnesses called by the plaintiff s who testified before the jury. It maintains that since the jury returned a verdict for the defendant as to damages after expulsion, it was the prevailing party as to that phase of the case within the meaning of *Rule 54(d)(1) URCP*, and not the losing party within the meaning of *Section 21-51-8, UCA 1953*. Accordingly, it claims that it is not liable for the witness fees and mileage in question. The short and complete answer to this contention is that this is not two cases but a single

action. On the case as a whole, plaintiffs won and defendant lost and thus plaintiffs were the prevailing parties and are clearly entitled to recover the challenged costs. *Checketts v. Collins*, 78 Utah 93, 1 P. 2d 950.

POINT VII.

THE COURT ERRED IN OVERRULING PLAINTIFFS' MOTION FOR A NEW TRIAL.

As said before, the jury returned a verdict in favor of defendant on the issues whether plaintiffs had suffered actual damages as a result of their expulsion, and whether because of acts of defendant and its officers committed after the expulsion plaintiffs were entitled to punitive damages. A timely motion for new trial was filed on the ground, among others, of insufficiency of the evidence to support the verdict. The court overruled the motion, but in its order overruling the motion the court found as follows (R. 619-620) :

17. With reference to the contention of the petitioner and intervenor that the verdict of the jury is contrary to the evidence, the court believes that the answers of the jury to Special Interrogatories Nos. 1, 3, 7 and 9 are in each case contrary to the preponderance of the evidence and that the answer to each of said interrogatories should have been "yes". The court also believes that the jury should have awarded actual damages to both the petitioner and intervenor. The court believes that the preponderance of the evidence shows:

(a) That both the petitioner and intervenor suffered substantial loss of income between July 1, 1954, and the time of trial as a proximate result of their expulsion from the respondent association.

(b) That during the period mentioned employers of sheet metal workers in Nevada, Arizona, California and Utah generally requested union clearance in employing workers.

(c) That officers of respondent's locals customarily gave preference to union members in referring or giving clearance to men for work and generally refused to give clearance to expelled members of the union.

(d) That many employers of sheet metal workers were reluctant to employ expelled members of a union for fear of labor troubles.

(e) That, regardless of so-called right-to-work laws, officers of respondent's local unions generally gave preference to union members in work referrals or clearances.

(f) That the respondent association has locals throughout the United States and Canada and non-members of the union and men known to have been expelled from the union are seriously handicapped in obtaining or retaining employment in the sheet metal industry.

(g) That both the petitioner and intervenor suffered very substantial loss of income by reason of their expulsion and being known as expelled members of the union during the period of more than four and a half years elapsing between the expulsion and the time of trial.

(h) That both the petitioner and intervenor

suffered embarrassment and humiliation by reason of their expulsion and being deprived of privileges, associations and benefits of union membership.

(i) That although a number of employers of sheet metal workers in the Las Vegas area had had serious labor troubles during the time when the intervenor, Hanley, was International Representative for the respondent association and were consequently hostile to him and would not give have given him employment regardless of union membership, other employers of sheet metal workers there and elsewhere would have given Hanley or Nance employment if they could have obtained clearance from local union officers.

Notwithstanding the foregoing findings, which constitute a concise and accurate summary of the evidence presented before the jury, the court overruled the motion because it concluded that the jury's verdict was binding upon it. In so doing, the court was plainly in error.

The test to be applied by a trial judge in passing upon a motion for a new trial is different from that to be applied in passing upon a motion for a directed verdict or a motion for judgment notwithstanding the verdict. In the case of the latter two motions, if there is any evidence to support the verdict the motions must be denied; but in the case of a motion for a new trial, if the judge is convinced that the verdict is against the weight of the evidence, the motion should be granted notwithstanding

ing the fact that the evidence may be conflicting. *King v. Union Pacific R. R. Co.*, 117 Utah 40, 212 P. 2d 692; *Holmes v. Nelson*, 7 Utah 2d 435, 326 P. 2d 722 (concurring opinion of Crockett, J.). Accordingly such cases as *Cottrell v. Grand Union Tea Co.*, 5 Utah 2d 187, 299 P. 2d 622; *Sickle v. Union Pacific R. R. Co.*, 122 Utah 477, 251 P. 2d 867; *Heywood v. Denver & Rio Grande R. Co.*, 6 Utah 2d 155, 302 P. 2d 1045 are not applicable here.

In the present case, the trial judge having affirmatively found that the verdict was against the weight of the evidence, it was error for him not to have granted a new trial. Thus, in *Gulf Power Co. v. Bagby*, 113 Fla. 739, 152 So. 23, the trial judge in passing upon a motion for a new trial found that the verdict was against the weight of the evidence, but nevertheless denied the motion because another jury in a previous trial had returned the same verdict. The Supreme Court of Florida held that this was reversible error, saying:

Where, however, the trial judge in his order denying the motion for a new trial declares on the record that in his judicial opinion that the verdict is contrary to the probative force and weight of the evidence, it is his duty to give effect to that judicial determination and award a new trial. If he declines to do so and denies the motion, such action constitutes error, and unless the appellate court is convinced that a new trial should not be grant-

ed because of insufficiency of the evidence on behalf of the prevailing party, the judgment should be reversed.

See to the same effect: *People v. Robarge*, 41 Cal. 2d 628, 262 P. 2d 14; *People v. Hines*, 128 Cal. App. 2d 421, 275 P. 2d 585.

Clearly, we submit, the court here erred in not granting a new trial.

CONCLUSION

It is respectfully submitted that the judgment should in all respects be affirmed, except insofar as it denies plaintiffs' recovery of actual damages and punitive damages for acts of defendants and its officers committed after the expulsion, and that as to those matters, and as to those matters only, the case be remanded for a new trial.

Respectfully submitted,

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