

1969

**Gary S. Hansen, Et Al., for Himself and for and on Behalf of 191
Other Persons Similarly Situated v. Brotherhood Of Locomotive
Firemen and Enginemen and 844 Of Brotherhood Of Locomotive
Firemen and Enginemen : Brief of Defendants-Appellants**

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THE SUPREME COURT THE STATE OF UTAH

E. HANSEN, et al., for himself
and on behalf of 191 other
similarly situated,

Plaintiffs-Respondents

vs.

UNION OF LOCOMOTIVE
MEN AND ENGINEERS
No. 14 of BROTHERHOOD
OF RAILROAD
FIREMEN,
LOCAL NO. 14,

Defendants-Appellants

OF DEFENSE
AND OF INTEREST
IN THE
CASE

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IN THE SUPREME COURT OF THE STATE OF UTAH

GARY S. HANSEN, et al., for himself
and for and on behalf of 191 other
persons similarly situated,

Plaintiffs-Respondents,

vs.

BROTHERHOOD OF LOCOMOTIVE
FIREMEN AND ENGINEMEN and
LODGE 844 of BROTHERHOOD OF
LOCOMOTIVE FIREMEN AND
ENGINEMEN,

Defendants-Appellants.

Case No.
11726

BRIEF OF DEFENDANTS-APPELLANTS
BROTHERHOOD OF LOCOMOTIVE FIREMEN AND
ENGINEMEN and LODGE 844 of BROTHERHOOD
OF LOCOMOTIVE FIREMEN AND ENGINEMEN

NATURE OF THE CASE

This is an action commenced by Gary S. Hansen and others for themselves and “for and on behalf of 191 other persons similarly situated” seeking damages against defendants based upon alleged contracts and breaches of fiduciary duty.

DISPOSITION IN THE LOWER COURT

The case was tried to the court without a jury and the court found for plaintiffs. The ruling of the lower court was based upon its findings of fact and conclusions of law filed and entered herein in the record at pages 579 through 595.

RELIEF SOUGHT ON APPEAL

Defendants seek a reversal of the judgment in the lower court.

STATEMENT OF FACTS

This action arose out of a National Labor Relations Board (herein referred to as "NLRB") election campaign wherein the Brotherhood of Locomotive Firemen and Enginemen (herein called "BLF&E" or "Brotherhood") was seeking collective-bargaining rights of a group of employees at the Kennecott Copper Mine. The contract of these employees was held at that time by Local 485 of the Mine, Mill and Smelter Workers Union (herein referred to as "Mine-Mill"). The campaign began in the middle part of September, 1966, and ran through the 21st of June, 1967.

From the beginning, in September 1966, through February or March, 1967, organizers working for the Brotherhood solicited membership from the group then represented by Mine-Mill. Among the numerous benefits of the Brotherhood which were advertised in the solicitation were the constitutional provisions regarding strike

benefit payments. Employees who joined during this time were promised strike benefits according to the Constitution of the Brotherhood if they would join and vote for the Brotherhood in this campaign.

From and after February 1, and possibly as late as March 24, 1967, some of the organizers involved locally represented that strike benefits would be paid to those who joined the union, regardless of the outcome of the NLRB election.

The NLRB election was held on June 22, 1967, and the BLF&E lost. Subsequently, Mine-Mill was again certified as the bargaining representative of a unit including plaintiffs herein. The BLF&E has never at any time been bargaining agent for said unit.

On July 14 and 15, 1967, a strike was instituted at Kennecott Copper Corporation properties by all of the unions involved. The BLF&E called the members in *its* bargaining unit on strike per an authorization by President Gilbert at 12:01 p.m., July 15, 1967. (Exhibit P-138, R. 798.) Prior to that time, some of the other unions had instituted their strike. (R. 797; R. 963.)

On or about July 31 or August 1, 1967, the first BLF&E strike benefit payroll was prepared and submitted to the Grand Lodge. This payroll contained the names of the plaintiffs in this action, under erroneous job classifications expressly contra to a letter of instruction received by Martin Jensen from R. R. Bryant,

Exhibit D-191, and expressly contra the instructions on the blank payroll forms sent out by the Brotherhood, Exhibit P-78. This payroll was rejected by President Gilbert and returned to the Local Lodge with the instructions that only those members of the Brotherhood in the bargaining unit *represented* by the BLF&E and covered by the contract at Kennecott should be included on it.

Subsequently, a revised payroll was sent to the Brotherhood which did not contain the names of the plaintiffs in this action. That payroll was paid. Plaintiffs in this action did not receive strike benefits at any time during the strike.

President Gilbert of the Grand Lodge, BLF&E, informed Lodge 844 and the plaintiffs of his interpretation of the Constitution which forbade payment of strike benefits to these plaintiffs. He also informed them at this time that their only remedies were: (1) An appeal to the Convention; (2) A plea to the Finance Committee for special assistance. (R. 1243-45.)

Subsequently, a plea was instituted to the Finance Committee of the Grand Lodge of the BLF&E. The Finance Committee voted 5 against and 3 for payment of special strike assistance. (Exhibit P-29.) Therefore, no strike assistance was authorized for these persons. However, the Finance Committee did authorize an amount of \$10,000 to be paid into a special fund for hardship cases among these people. (Exhibit P-29.)

Plaintiffs did not make an appeal to the Convention of the Brotherhood on the interpretation placed upon the Constitution by President Gilbert. (R. 765; R. 783-84.)

During the membership campaign, each member solicited was given a copy of the Constitution or a copy was made readily available to him. (R. 1060-61.)

POINT I

THE FINDINGS OF FACT UPON WHICH THE JUDGMENT BELOW IS BASED ARE NOT SUPPORTED BY THE EVIDENCE.

The trial court erred in its first finding of fact that plaintiff Stephen James Oliver was a member of defendant union at the time of the strike involved in this suit. There is uncontradicted evidence from the records of defendants to the contrary. (R. 998; R. 924; R. 938; Exhibit D-190.) Exhibit D-190, which was admitted as evidence, indicates that Mr. Oliver was never a member of defendant unions. This exhibit was prepared from the records of the BLF&E by Martin Jensen, Financial Secretary of the Local. (R. 1253-54.) Further, Oliver's name does not appear on the initial strike payroll, Exhibit P-78, or on the defendant's lists, Exhibit P-75 and P-76. The only evidence presented by Oliver was his testimony that he signed some papers. He gave no proof of making any dues payments and the records show he made none.

The court's first finding of fact that Heriberto Esquivel is a proper plaintiff is not supported by the

pleadings. The record in this case indicates clearly that this man never intervened as a plaintiff. The final notice of joinder and representation of plaintiffs filed by counsel for plaintiffs was filed on the 24th of May, 1968. This notice contained a list of all the parties who were plaintiffs in Exhibit I, Part A, attached thereto, and it also contained a list of all those possible plaintiffs who had not intervened as Exhibit I, Part B. The name of Heriberto Esquivel is found on Exhibit I, Part B, indicating that he had not intervened as of that time. (R. 232-41.) There were no interventions after that time.

Part of the court's sixth finding of fact is not supported by the evidence. The evidence is clear that the Constitution of the BLF&E itself conditions payment of strike benefits and prohibits the granting of strike benefits to members not in the bargaining unit represented by the union. (Exhibit P-1, pages 195 through 199; R. 781-82.) Further, there is evidence in the record in this case that organizers of defendants did condition strike benefits offered to plaintiffs as provided in the Constitution of the BLF&E. (Exhibits D-152; D-160; D-162.)

In addition, as shown by Exhibit D-190, most of the plaintiffs had already become members of the BLF&E prior to the time any representations were made by anyone regarding strike benefits regardless of the outcome of the election. The evidence indicates that said representations were not made until some time between February 1 and March 24, 1967. (R. 697-98; R. 857; R. 891.) Thus, these representations are wholly irrelevant and

immaterial as to all plaintiffs who had joined previous to that time and cannot be the basis of any recovery here.

Finding number six is not supported by evidence where it states that representations were made by *authorized* representatives of defendants. These representations were devised solely by L. L. Iman. There is not a scintilla of evidence in this record to indicate any actual authority of Iman to make any promises inconsistent with the Constitution of the BLF&E. The testimony of President Gilbert is clear on the fact that Iman was a field representative and was empowered only to sell insurance and solicit members. (R. 724.) He was not empowered to interpret the Constitution of the Brotherhood, nor was he empowered to make promises *ultra vires* the Constitution of the Brotherhood. (R. 761.) Constitution of the BLF&E, Article 16. (Exhibit P-1.) Any so-called authority which he possessed was, by his own admission, based upon his own notions and ideas of what should be done (R. 1159-61; 1176.) Even the evidence of plaintiffs in this action proves this. Mr. Trujillo, one of the plaintiffs and formerly a special general organizer for the Brotherhood, indicated in his testimony that he suggested to Mr. Iman the use of the word "guarantee" since "these people" had received so many promises they "are sick and tired of promises." Mr. Iman then proceeded without authority from the Grand Lodge to use the word "guarantee" in his fliers and instructed the special general organizers to use this term in their solicitation. (R. 1100.) This evidence clearly shows that Iman was taking instructions from no one in the Grand Lodge, but had simply taken unto

himself the authority to make these promises and guarantees. (R. 1160-62.) There is no evidence to the contrary to be found in the record.

The seventh finding of fact entered by the court below is in error in holding that plaintiffs Gene A. Beck, D. P. Bennett, Glen Bennett, Carter, James, Kendrick, Tsutsui, Gale and T. N. Turner were induced by or relied upon any offers or representations or guarantees of defendants. These plaintiffs did not appear at trial, they did not testify, they did not answer interrogatories of defendants, and further, they were specifically excluded from a stipulation entered into by counsel for both plaintiffs and defendants regarding evidence of a contract and evidence of reliance. In this stipulation, found in the record at pages 1060 through 1062, the parties stipulated to certain evidence in order to shorten the time of the trial. At that time Mr. Rooker, counsel for plaintiffs, made the following statement:

The foregoing stipulation does not apply to testimony that would be adduced from the following-named plaintiffs if they were called: Gene A. Beck, D. P. Bennett, Glen Bennett, Carter, James, Kendrick, Tsutsui, Gale and T. N. Turner.

As the record stands, it is completely devoid of any evidence whatsoever with regard to these plaintiffs. Thus, there is absolutely no basis in evidence for finding of fact number seven made by the trial court as it applies to these plaintiffs.

There is no evidence whatever in the record to support finding number eight as it relates to a contract

with plaintiffs Gene A. Beck, D. P. Bennett, Glen Bennett, Carter, James, Kendrick, Tsutsui, Gale and T. N. Turner for the same reasons set forth in the immediately preceding paragraph.

Further, with regard to all plaintiffs, the court's finding of a contract in this case must have been on either one of two theories. First, the facts indicate that between September, 1966, and February 1, 1967 (at the earliest, and possibly as late as March 24, 1967), organizers of the BLF&E solicited members making promises, including promises of strike benefits based upon the Constitution of the BLF&E. There is no evidence of any other representations as to strike benefits during this time. If any offer was made to constitute a contract based upon the BLF&E Constitution, these promises must be considered the offer and joining the BLF&E must be considered the acceptance.

The second possible theory of contract must be that a contract was entered into which is not based upon the BLF&E Constitution. According to the evidence, such an offer could be construed from the statements made from and after February 1, 1967, and possibly as late March 24, 1967. (R. 1181; R. 1060-62; R. 889-92.) At that time, some of those people solicited were promised strike benefits regardless of the outcome of the NLRB election. Authority for such an offer cannot be found within the Constitution of the BLF&E. Acceptance of this offer by joining the BLF&E (if it could be a basis for a contract action against the Brotherhood) would apply only to those members who joined as a

result of the offer. Members who joined prior to the above dates can in no way be said to have accepted this offer made after they joined. Hence, under this contract theory, only those members who joined after the offer was made can rely upon it as a basis for contractual recovery. The dates of membership of each of the plaintiffs in this action are set forth on the exhibit introduced through Martin Jensen and accepted in evidence as Exhibit D-190.

From the above, it can be seen that finding number eight entered by the court cannot possibly be based upon the evidence. If the contract is based upon the Constitution of the BLF&E, then the plaintiffs are also subject to the rest of the provisions of the Constitution which do not allow recovery. BLF&E Constitution Article 10, Section 3(a); Article 10, Section 3(e), (Exhibit P-1, pp. 195-97). If the contract is based upon the unconditional guarantee allegedly made by agents of defendants, then only those who joined the union after this promise was made can recover. All of the plaintiffs could not possibly recover since most of them joined the union prior to the time of this latter promise.

The schedule attached as Exhibit B (plaintiffs' Exhibit P-54 herein) to the court's finding number nine can have no relevance unless the court adopts a contract theory based upon that document and similar promises. The evidence clearly shows that the document was not distributed and the promises were not made until after February 1, 1967. (R. 889-92; R. 1060-62; R. 1181.) Any such promises, including the promise made in Exhibit B

attached to finding number nine can only apply to those members of the BLF&E who joined from and after approximately February 1, 1967. They have no relevance whatsoever with respect to those members who were already in the union at that time. Thus, such promises cannot be the basis for recovery herein as to those plaintiffs.

The finding made by the lower court in its finding number ten is contrary to the uncontradicted evidence in this record. The only person in the organization of the BLF&E authorized to approve a strike is its president. Constitution of the BLF&E, Article 9, Section 16; Article 9, Section 20(j); (Exhibits P-1.) He testified that he called a strike of those men in the bargaining unit represented by the BLF&E (R. 794-95). He further testified that under the union law he had no authority to call a strike of people who were not represented by the BLF&E. The evidence clearly shows that plaintiffs in this action were not and never have been represented by the Brotherhood. (R. 1123-24.) The evidence shows that any authority to strike granted plaintiffs in this action was granted by the Mine-Mill union which represented them at the time. (R. 1223-24.)

The court's finding number twelve is contrary to the evidence in that it states that the strike benefit payroll of July, 1967, which included the plaintiffs, was a valid and duly-authorized payroll. The uncontradicted evidence demonstrates that this payroll was invalid because it contained names of people not in the bargaining unit represented by the defendants contrary to express

instructions given to Martin Jensen by letter of July 25, 1967, and also contrary to express instructions found on the bank payroll forms upon which the payroll was submitted. Both this letter and the instructions on the forms indicate that only names of men in the bargaining units represented by the BLF&E should be included on the payroll. (Exhibits P-78 and D-191.)

Uncontradicted testimony of Martin Jensen, Secretary of the Local BLF&E, indicates that he placed plaintiffs' names on this payroll knowing they were not members of the bargaining unit represented by the BLF&E and further that he placed these plaintiffs in erroneous job classifications so as to include them on the payroll. (R. 1145-46.) This payroll was held to be invalid by the president of the BLF&E for these reasons. This was his duty under the Constitution of the BLF&E.

The court's finding number fourteen is in error because it is contrary to the evidence in exhibit form which indicates that plaintiffs were not compelled to seek outside employment by any act of defendants, but were compelled to seek outside employment by the Constitution of the BLF&E in Article 10, Section 3(i). (Exhibit P-1, pp. 197-98.)

Finding number fifteen entered by the court below is contrary to the evidence since undisputed evidence from the records of the BLF&E shows that plaintiff Oliver was never a member of the BLF&E. (Exhibit D-190; R. 924; R. 932; R. 938.) Further, the undisputed evidence in the case shows that members of the BLF&E

not in a bargaining unit represented by the BLF&E do not enjoy the same benefits of membership as do members who are in a bargaining unit represented by the BLF&E. (R. 783-84; Exhibit P-1.) Thus, these plaintiffs were not entitled to all of the benefits available to members of the BLF&E in a bargaining unit represented by the BLF&E.

Finding number sixteen by the court below is entirely without supporting evidence with regard to whether strike benefits were knowingly paid by defendants to men outside of the bargaining unit represented by the BLF&E. The evidence indicates that some of the men on the strike payroll may have been listed in erroneous job classifications and in this respect may have received benefits when they should not have received them. (R. 920; 926-27.) There is no evidence, however, to indicate that the BLF&E knowingly paid strike benefits to anyone outside of a bargaining unit which it represented.

There is no evidence in the record to support the court's finding number seventeen. Plaintiffs at no time introduced any competent evidence with respect to outside earnings of other people who had been paid strike benefits. Further, plaintiffs introduced no competent evidence respect inquiry made by the Grand Lodge as to outside earnings of those members receiving strike benefits during the strike. In addition, there is clear evidence found in Exhibit P-1 that the defendants had no duty to make any inquiry with regard to strike benefits and that the duty to disclose earnings rested upon each individual member of the BLF&E. Constitution BLF&E Article 10, Section 3(i), (Exhibit P-1, pp. 197-98).

This court should be aware that finding number eighteen originally entered by the trial court was modified and practically vitiated by that court's additional finding of fact. The additional finding of fact indicates that defendants introduced into evidence the interrogatories answered by most of the plaintiffs, which interrogatories indicate the amount of earnings of each plaintiff during the period of the strike. With respect to those plaintiffs who did not answer the interrogatories, it is the position of defendants that they cannot recover even if the court upholds the judgment below since it is impossible to compute the correct amount of said recovery.

Parts of finding number nineteen are conclusory and clearly not supported by the evidence. There is no evidence in this record whatsoever which would indicate that defendants had any fiduciary duty to pay strike benefits to *these* plaintiffs. Plaintiffs' whole theory of this action has been contract. Any fiduciary duty would have to come from the Constitution of the BLF&E (Exhibit P-1) which also contains provisions which prohibit the payment of strike benefits to these plaintiffs. That Constitution clearly creates a form of discrimination in the administration of strike funds, since it requires payment of strike funds to people participating in a "*legal strike authorized by*" the union and it forbids payment of strike benefits to all others, whether members or not. Constitution of the BLF&E Article 10, Section 3(a), (Exhibit P-1, p. 195.) See also Exhibit D-136 discussed at pp. 19-20 *infra*.

In its finding number twenty the court finds a breach of fiduciary duty based upon its finding that promises were made to plaintiffs by defendants when defendants well knew that these promises were false and that they would not pay benefits. This finding is clearly contra to the evidence in this case. There is no evidence whatever in the record that defendants or their employees ever knew at the time these alleged unconditional promises were made that they would not be kept. The evidence clearly shows that the organizer who initiated the promises, L. L. Iman, thought his interpretation of the BLF&E Constitution was correct. (R. 1175-76.) The evidence is uncontradicted in its showing that the Grand Lodge officers of the BLF&E did not know these alleged unconditional promises were being made until well after they had been made and the strike had begun and the plaintiffs had shown by plaintiffs' own evidence when one of their witnesses, Mr. Trujillo, stated that he was asked to gather up fliers after the strike had begun to send to President Gilbert to show him what went on out here. (R. 1142-43.)

Finding number twenty-one entered by the court below is unsupported by the evidence since the evidence is insufficient to support a judgment on behalf of alleged plaintiff Esquivel (he is not a plaintiff) or on behalf of alleged plaintiff Oliver (he was not a member of the BLF&E at the time of the strike). Alleged plaintiffs Gene A. Beck, D. P. Bennett, Glen Bennett, Carter, James, Kendrick, Tsutsui, Gale and T. N. Turner have produced

no evidence whatsoever indicating any contract of any kind between them and the BLF&E and further they have produced no evidence showing any reliance upon promises made by the defendant BLF&E or any damage incurred because of breach of contract or because of said reliance. Since these items are not "common questions" which can be proved for all by some members of the class, failure of these plaintiffs to adduce proof is fatal to their case.

Since the crucial findings of fact upon which the judgment below is based are not supported by evidence, the judgment below should be reversed and the case should be remanded for findings consistent with the evidence.

POINT II

THE COURT BELOW ERRED IN CONCLUDING THAT A VALID CONTRACT WAS ENTERED INTO BY PLAINTIFFS AND DEFENDANTS BECAUSE, AS A MATTER OF LAW, ANY "CONTRACT" FOR STRIKE BENEFITS TO THESE PLAINTIFFS WAS *ULTRA VIRES* THE UNION CONSTITUTION AND CANNOT BE BASED UPON ANY AGENCY, IMPLIED AUTHORITY, APPARENT AUTHORITY OR RATIFICATION THEORY.

Article 10, Section 3, sub-section (a) of the Constitution of the BLF&E provides:

The rate of pay to each member and non-member engaging in a *legal strike authorized by this organization* shall be

The terms "legal strike authorized by this organization" are words of art as used in the context of labor-

management relations. Section 8(b)-4(ii)(c), 29 U.S.C. §158(b)(4)(ii)(c), of the National Labor Relations Act as amended provides that it is an unfair labor practice to force or require

. . . any employer to recognize *or bargain with* a particular labor organization as the representative of his employees if another labor organization has been certified as the representative of such employees under the provisions of Section 159 of this title(Emphasis added.)

Section 9(a) of the Act, 29 U.S.C. §159(a), provides:

Representatives designated or selected for the purpose of collective bargaining by the majority of the employees in the unit appropriate for such purposes, shall be the *exclusive representatives* of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment (Emphasis added.)

After the certification election in June of 1967, the Mine, Mill and Smelter Workers Union, not the BLF&E, was the exclusive representative of plaintiffs for the purposes of collective bargaining concerning the terms and conditions of employment. (R. 1224.) The economic strike authorization and call issued by the BLF&E on July 15, 1967, was for the purpose of achieving better terms and conditions of employment for only those persons under the jurisdiction of the BLF&E. (Exhibit D-186; R. 1222-1224.)

As set forth in Section 8(b)(4)(ii)(c) above, any concerted action on the part of a labor organization attempt-

ing to force or require an employer to bargain with that organization when another labor organization has been certified as representative of that unit is an unfair labor practice. *NLRB v. Teamsters*, 314 F.2d 792 (1st Cir. 1963); *Parks v. Atlanta Printing Pressmen*, 243 F.2d 284 (5th Cir. 1957). Consequently, if the BLF&E were to authorize or call members not within its bargaining unit, but within a unit held by Mine-Mill, out on strike, it would be in express violation of this section and an illegal strike. *NLRB v. Teamsters, supra*; *Park v. Atlanta Printing Pressmen, supra*; *Local 48, Sheet Metal Workers v. Hardy Corp.*, 332 F.2d 682 (5th Cir. 1964).

The BLF&E cannot use strike coercion to effect terms and conditions of employment of employees it does not represent. Plaintiffs were never represented by the BLF&E. (R. 1223-24.) Hence, the BLF&E Constitution, when it speaks of a "legal strike" authorized by the BLF&E cannot be said to encompass plaintiffs in the instant case. If plaintiffs were called out or authorized to strike by the BLF&E, it would not be a legal strike, but would be an unfair labor practice under the National Labor Relations Act as amended. This is the sense in which the International President, therefore, properly defined those constitutionally entitled to strike benefits. This is entirely within his power and authority.

Plaintiffs argue that this provision entitled them to strike benefits even though they were not within the bargaining unit represented by the BLF&E. They claim that the fact that they are members of the BLF&E entitled them to the benefits. Plainly, this cannot be

the correct interpretation of this section of the Constitution. The Constitution authorizes pay to *members and non-members* engaging in a "*legal strike authorized*" by the organization. There were thousands of non-members outside the bargaining unit represented by the BLF&E engaging in the same strike plaintiffs engaged in. If the interpretation placed upon this section by plaintiffs were correct, the BLF&E would also be liable to every one of them. Such an interpretation would place the BLF&E under contractual obligation to pay strike benefits to every employee of Kennecott. Analysis reveals the absurdity of plaintiffs' proposition. The intent of the BLF&E Constitution was clearly to limit strike benefits to those in a unit represented by the union and over which the union had control. (R. 783-790.)

This is the interpretation which has been placed upon this article of the Constitution by those entitled to interpret it, the officials of the International Union and the Constitutional Convention of the Brotherhood. The proceedings of the 33rd through the 39th International Conventions of the BLF&E show the clear intent of the BLF&E constitutional provision on strike benefits. As an example, during the 37th Convention (1959) an amendment was proposed by Lodge 247 which would have provided the following:

The rate of pay to each member and non-member engaging in a *legal strike authorized by this organization* shall be SAME TO INCLUDE ANY TIME LOST BY A MEMBER ON ACCOUNT [Sic] HONORING A PICKET LINE

WHERE A STRIKE IS IN PROGRESS. *Proc.*
ceedings of the 37th Convention (1959) at 399.
(Exhibit D-136.) (Emphasis added.) (Amendatory
language capitalized.)

Obviously, this proposed amendment would have applied to the plaintiffs in the instant case, since they were, in fact, members honoring a picket line where a strike is in progress as far as the BLF&E was concerned. However, since this provision, in classifying those eligible for strike benefits, speaks of a "legal strike authorized by this organization" and the amendment would provide benefits for members honoring a picket line where a strike is in progress, it is clear that such a dual classification was not previously recognized. This proposed amendment was rejected (Exhibit D-136 at p. 392) and it is therefore certain that the Convention did not wish to pay strike benefits to people not authorized to strike by the BLF&E. (The position of plaintiffs in this case).

In the same Convention, another amendment was proposed by Lodge 810:

WHEN A MEMBER IS DISMISSED FROM
THE SERVICE OF ANY RAILROAD . . . BE
CAUSE OF *HIS DECISION TO HONOR THE
PICKET LINES OF ANY UNION WHOSE
MEMBERS ARE ON A LEGAL STRIKE*, HE
SHALL BE ENTITLED TO RECEIVE COM-
PENSATION UPON THE SAME BASIS AS
IS PROVIDED IN PARAGRAPH (a) THIS
SECTION, GOVERNING PAYMENT OF
STRIKE BENEFITS DURING AN *AUTHOR-
IZED STRIKE*. *Proceedings of the 37th Con-
vention (1959) at 395-96. Exhibit D-136. (Em-
phasis added.)*

Once more this proposed amendment would have granted benefits to those honoring picket lines where the picket lines were set up by a union engaged in a legal strike. Once again the drafters of this amendment made a distinction between members on a legal strike (in the bargaining unit represented by the striking union) and members honoring a picket line. This distinction was clearly intended to provide strike benefits in a situation apart from the normal "authorized" strike-benefits situation. Since the amendment was rejected, (Exhibit D-136, at p. 396) it necessarily follows that the Convention did not wish to pay strike benefits for the honoring of picket lines and intended such benefits to be limited to those in a bargaining unit represented by the union and engaging in a strike authorized by the Brotherhood. Based upon this history, President Gilbert was constrained to interpret Section 3 of Article 10 so as to exclude payment to plaintiffs.

Under the indisputably correct *interpretation* which the Conventions and the International President placed upon the BLF&E Constitution, it would be *ultra vires* the power of the union under its Constitution for its officers to pay strike benefits to those not within a bargaining unit it represents. If such strike benefits could not be paid by the union without a Constitutional amendment, the union certainly cannot be said to have ratified any activity of its purported agents in making this offer. Neither could there be an implied authority of these agents to make the alleged offers nor an apparent authority, since agents of the union could never be said to have more authority than the union itself has.

This particular issue has been presented in several cases, the first of which is *Brotherhood of Railroad Trainmen v. Barnhill*, 214 Ala. 565, 108 So. 456 (1926). In the *Barnhill* case, after a prolonged strike, the president, the general secretary and the treasurer of the union decided to terminate the strike benefits on the ground that such benefits were bankrupting the union. Plaintiff thereupon sued the union to recover his strike benefits. The constitution there involved provided for payment of strike benefits under sworn statements showing the names, occupations and length of service with the company to all men "under the jurisdiction" of the lodge engaged in the strike. A further section of the constitution provided that the president, the general secretary and the treasurer, in conjunction with the vice-president in charge of the strike and the board of trustees, had the power to suspend payment of any strike benefits. The court, after much discussion on the subject, concluded that:

[T]he power through the provisions of the brotherhood law to make the decision of their own officials and tribunals conclusive in respect to the extraordinary protective fund and all its strike benefits under its law . . . is conclusive on the members, no fraud being charged.

Thus, the constitutional provision making the decision of the authorities of the union conclusive as to strike benefits was held valid. See *Annotations* 47 A.L.R. 282, 125 A.L.R. 1260.

In the case of *United Brotherhood of Carpenters & Joiners of America v. Moore*, 141 S.E.2d 729 (Va. S. Ct. App. 1965), a member of a local union brought an action

against the brotherhood and the local union alleging that he was promised that if he would engage in a strike against his employer the organizations would pay all his necessary bills during the strike. In the lower court, the plaintiff was granted a verdict and the union appealed. There was testimony in the case that a certain Mr. McKinney had made promises to the employees that all of their bills would be paid if they would engage in a strike against the employer. McKinney was a representative of the brotherhood sent to aid the local in the strike. The plaintiff claimed that McKinney was merely the alter-ego of the president of the brotherhood. His credentials card was signed by the president of the brotherhood and the card stated that McKinney was a representative of the president. The duties of McKinney included organizing, negotiating contracts, settling grievances and arbitrations. During one of the local meetings, McKinney was asked about benefits in case of a strike. It was here that he allegedly made the promise that the union would take care of any bills the members had. There was further testimony by the plaintiff that McKinney made it plain that "he was the boss of the thing."

After commencement of the strike, McKinney, along with people from the local union filled out and mailed, in accord with the constitution, the strike payroll. The international sent a certain amount of money to the local for distribution. This money was distributed and plaintiff received strike benefits in the amount of approximately \$300.00. However, he alleged that this was not sufficient to cover his bills and expenses incurred. As the strike continued, the local asked for more money and it was denied these funds by the international. The court

concluded that there was sufficient evidence introduced as to the question of the promise made by McKinney to uphold a jury verdict. *However, the controlling question was a question of law: Whether McKinney had the authority to bind the brotherhood in this manner.* The court held that the brotherhood, being a voluntary unincorporated association, the rights and privileges and obligations and duties of the association and its members must be found in its constitution and laws. Plaintiff alleged that the reference in various provisions of the constitution to strike pay and strike benefits indicated an implied power to promise such benefits. However, the provision of the constitution relied upon stated:

“In the case of a strike or lock-out, where immediate aid is required, the General President, General Secretary and General Treasurer shall be vested with power to appropriate such sums as, in *their judgment*, they deem advisable to meet the particular demands, and until such time as the *General Secretary* can act upon the same through correspondence with the *General Executive Board.*” (Italics by the Court.)

Under this provision, the court concluded that the officers, jointly, could act and grant and promise strike benefits. However, the court concluded the officers could not act alone. Therefore, since the president alone could not have granted or validly promised strike benefits, his representative could not be said to have any authority, either direct, implied or apparent, to make such promises. Hence, the appellate court reversed the lower court for refusing to strike plaintiff's evidence on the ground that

the plaintiff had not proved that McKinney had authority to make the promises claimed by plaintiff.

The *Moore* case is very analogous to the instant case. If, in fact, Iman made the promises which plaintiffs' evidence indicates he made, the controlling question is a question of law: Whether Iman had authority to bind the Brotherhood in that manner. As set forth above at pages 14-15, the BLF&E Constitutional Convention and President Gilbert had interpreted the Constitution so as to deny benefits to persons in the position of these plaintiffs. (Exhibit P-78; Exhibit D-191.) Since even the International President could not bind the union by promising benefits to plaintiffs when they were not represented by the BLF&E, it is clear that Iman, an agent the President appointed, could have no such authority, express, apparent, or implied; and it is equally clear that such a promise could not be ratified by the Grand Lodge.

In the case of *Amalgamated Clothing Workers of America v. Kiser*, 174 Va. 229, 6 S.E.2d 562 (1939), the Virginia Supreme Court held that where the union constitution did not expressly authorize the union to make a contract to pay wages to a member who should lose employment because of the union, any alleged contract made by the union's agents in order to induce a member to join was invalid. In the *Kiser* case, an organizer for the union allegedly promised plaintiff that if she lost her employment due to the fact that she joined the union, the union would pay her certain benefits. Plaintiff joined the union and lost her employment. For a certain time the union did pay her some benefits. How-

ever, at a later date she was notified she would not receive any further payments. Thereupon, she instituted a proceeding by filing a petition of attachment on union funds. The controlling issue was whether or not the union had the power to make these promises and, hence, could grant authority for such promises to its agents. The court stated that it had searched the constitution of the union and had found no authority for the promises made in this case. It further stated that:

All rights, privileges and duties of both the association and its members must be found in the constitution. We are not permitted to look elsewhere for them.

The Court went on to state that the principal-agent rule that an agent in discharge of his duties within the scope of his authority, whether that authority is express or implied, are obligatory upon the principal without ratification or assent on the latter's part *does not apply in the case of unincorporated associations*. The court stated:

That rule has no application here because we are considering an association, not formed or existing for profit and one which has very limited powers prescribed in a definite clear, unambiguous constitution. It is a democratic instrument and affords to all who subscribe, equal rights, privileges and duties. No one is entitled to a greater right or privilege than his brother member. From such an instrument inferred or implied powers seldom arise as is attested by this apt language in *International Brotherhood of Boiler Makers v. B. L. Wood*, 162 Va. 517, 175 S.E. 45, 58:

“* * * The doctrine of authority implied from ostensible authority has a very limited applica-

tion as between such an order and a person who is seeking membership in or claims to be a member of it."

The court further stated that the plaintiff was bound by the constitution of the association and became so bound when she signed the application card. The court held that plaintiff was charged with a knowledge of the limited authority of the officers and agents of defendant based upon the contractual nature of the constitution. In addition, the court held that:

A person applying for membership in a fraternal-benefit association is charged with the duty of acquainting himself with its constitution and by-laws; and, in the absence of fraud, is conclusively presumed to know the qualifications for membership therein prescribed *and the limitations thereby imposed upon the power and authority of its officers*, and upon subordinate lodges and their officers as its agents. (Emphasis added.)

The court concluded that there being no power in the constitution of defendant authorizing it to enter a contract with plaintiff for payment to her of benefits, such a contract could not be validly made. The court held that plaintiff:

is bound to have known of the absence of authority in the constitution. *The defendant itself not having the power to make the contract, its agents would have no implied authority to do what the principal itself is not empowered to do.* (Emphasis added.)

This rule also applies to the doctrine of ratification. A contract can only be ratified by the person who had the power to authorize it.

Further expounding upon the constitution of the union in that case, the court held that in addition to being a contract between plaintiff and the union, the constitution was a contract between plaintiff and the other members of the union. The fund which was derived from the other members of the association by dues and assessments was paid to the union as a trust fund. It could not be paid out except by virtue of the constitution. The court held that looking behind the association as an entity, the fund really belonged to all of the members. Therefore, to permit plaintiff to collect wages as she alleged, would be taking money from the fund belonging to all members of the union without consent of said members.

As stated in the *Kiser* case, *supra*, every member of the union is bound by the constitution as a contractual obligation and is chargeable with knowledge and understanding of its provisions. *E.g. Allen v. Southern Pacific Co.*, 166 Or. 290, 110 P.2d 933, 935 (1941); *Amalgamated Clothing Workers v. Kiser*, *supra*. Article 10, Section 3(e) of the BLF&E Constitution provides that the provisions concerning strike benefits are *directory only and cannot be the basis for a legal liability on the part of the Brotherhood*. Under this provision, the members who joined supposedly in reliance upon the promises of strike benefits were not reasonable in their reliance. They were charged with knowledge that such provisions could not create legal liability. Since union members are bound to know and have accepted the provisions of the Constitution, they cannot now repudiate this specific provision while trying to rely on another provision purportedly

granting them benefits. They must accept the whole Constitution.

Under the cases cited above, it is clear that the constitutional and contractual obligation involved in the case at bar prevents, by operation of law, any recovery by plaintiffs in the instant case. Since, under the Constitution, the president himself could not authorize payment of benefits to plaintiffs, no one could be said to have actual, implied or apparent authority to do so. Further, there could be no ratification of such conduct.

POINT III

NON-PROFIT ASSOCIATIONS SUCH AS LABOR ORGANIZATIONS ARE ACCORDED SPECIAL TREATMENT UNDER THE LAW AND THEREFORE CONSTITUTIONAL PROVISIONS GOVERNING INTERNAL AFFAIRS ARE CONSIDERED BINDING ON ALL MEMBERS OF THE ORGANIZATION AND THE COURT SHOULD NOT INTERPRET A UNION CONSTITUTION WHERE VALID PROVISIONS FOR ITS INTERPRETATION ARE PROVIDED THEREIN.

Expenditures of union funds may only be made pursuant to the union constitution. Absent authorization under the constitution, any payment of moneys by an officer of the union would constitute a breach of his fiduciary duty under the federal Labor-Management Reporting and Disclosure Act §501. *See* Point IX, *infra*. Article 10, Section 3, of the BLF&E Constitution provides for strike benefits. It further provides that the final authority to interpret the Constitution resides in the president, unless he is overruled by the National

Convention. Const. BLF&E, Article 16, Section 1(b), (Exhibit P-1).

Union constitutions, when properly adopted, create a contractual relationship between the union and its members. *E.g. Allen v. Southern Pacific Ry. Co., supra*; *Gonzales v. International Ass'n of Machinists*, 298 P.2d 92 (Cal. 1956); *Lockridge v. Amalgamated Ass'n of Street Electrical Railway and Motor Coach Employees of America*, 369 P.2d 1006 (Idaho 1962); *United Glass Workers Local No. 188 v. Seitz*, 399 P.2d 74 (Wash. 1965). Members are held to have consented to be bound by the rules and regulations of the union when they join the union. *E.g. Cleveland Orchestra Committee v. Cleveland Federation of Musicians, et al.*, 303 F.2d 229 (6th Cir. 1962); *United Glass Workers Local No. 188 v. Seitz, supra*.

Plaintiffs in the instant case allege that they have a contractual right to receive strike benefits pursuant to the Constitution of the union. It should be noted, however, that they are also contractually bound by *all* provisions of the Constitution. Article 10, Section 3 of the BLF&E Constitution authorizes the payment of strike benefits to members and non-members engaged in a "legal strike authorized by this organization." (Emphasis added.) Article 16 of the Constitution also gives the International President authority to interpret the Constitution.

Furthermore, since the Constitution of the BLF&E creates a contract, plaintiffs are bound by Section 3(e) of Article 10 which provides that the article on payment

of strike benefits is "*directory only, and shall not be the basis of any liability on the part of the Brotherhood.*" (Emphasis added.) Members cannot now create a legal liability where they have agreed none could exist.

In a good-faith interpretation of the Constitution, the president determined strike benefits could not be paid to plaintiffs under the Constitution. (R. 784-788.) See discussion *supra*, at The good faith of this interpretation is shown by actions of prior Constitutional Conventions, discussed, *supra*, at pp. 12-14.

Additional support for the reasonableness and good faith of the interpretation of President Gilbert that strike benefits can only be paid to employees working under the jurisdiction of the BLF&E is found in the record. Exhibit P-78, admitted into evidence at the request of plaintiffs, is the initial strike payroll submitted to the Grand Lodge in this case. This payroll contains the names of most of the plaintiffs in this action. First, attention is directed to the page containing the signatures of the local lodge officers and that of Mr. E. Brehany of the Grand Lodge. On this page is a paragraph stating:

TAKE NOTICE!

Where chairmen approve pay-rolls for several lodges, they will be responsible for duplication of names. They must not approve two pay-rolls of two different Lodges whereon the same striker is listed twice. Regardless of what Lodge a striker may be a member, his name should appear on the pay-roll of the *Lodge under whose jurisdic-*

tion he was employed when the strike began
(Emphasis added.)

Further, attention is directed to each sheet of the payroll whereon names of members have been placed by the local lodge. Just above these names, in bold-face print, appears the following:

To the General Secretary and Treasurer, Brotherhood of Locomotive Firemen and Enginemen: The following list of names is a correct list of the names of striking *employees who were employed under the jurisdiction of this Lodge* in the service of above-named railway company at the beginning of this strike on said railway: (Emphasis added.) (Then follows list of names.)

Both of these references make it unassailable that the interpretation given the plaintiffs in this case is in good faith. That same interpretation appears from this printed document put out by the Brotherhood prior to any denial of benefits to plaintiffs. (Exhibit P-78.)

In addition, Exhibit D-191, admitted in evidence at the request of defendants, supports this construction. This exhibit is a letter written by R. R. Bryant of the Grand Lodge to Mr. Martin Jensen, Local Lodge 844 Secretary-Treasurer, on July 25, 1967. This letter was also written prior to any denial of benefits to plaintiffs, even prior to the submission of the strike payroll. The pertinent part of that letter giving instructions as to the strike payroll states:

The names of all those *represented by our Brotherhood* should be listed [on the strike pay-

roll], provided they responded to the strike call. (Emphasis added.)

It is obvious from the above-cited exhibits that the position taken by the Brotherhood in this case is not novel. Plaintiffs were not in the bargaining unit represented by defendants and they should not have been listed on the strike payroll. They were mistakenly listed by the secretary of the local lodge under erroneous job classifications. For these reasons, the president refused to allow payment of benefits to them. This was his constitutional duty and has always been the understanding of the Brotherhood. Since the constitutional interpretation rendered to plaintiffs in the instant case was in good faith and entirely reasonable, the courts should not interfere with it.

The right of a labor organization as a voluntary association to interpret and administer its rules and regulations is just as sacred as the right to make such regulations, and no presumption against just and correct action should be indulged. *E.g. Louisville & Nashville Railway Co. v. Miller*, 219 Ind. 389, 38 N.E.2d 239, 142 A.L.R. 1050 *cert. denied*, 317 U.S. 644 (1941); *Barnhart v. United Auto Aircraft & Agricultural Implementation Workers*, 12 N.J. Super. 147, 79 A.2d 88 (1951). The courts cannot decide the wisdom or propriety of legitimate by-laws of a trade union. *Dyer v. Occidental Life Ins. Co.*, 182 F.2d 127 (9th Cir. 1950). The courts have felt that they had no right to interfere with a ruling of a labor organization which was made within the limits of its constitution even though the court might

not be of the same opinion as the labor organization regarding the merits of a controversy. *E.g. Louisville & Nashville Railway Co. v. Miller, supra; Mayo v. Great Lakes Greyhound Lines*, 333 Mich. 205, 52 N.W.2d 665 (1952).

It has also been held that union members are bound by the union constitution and that the courts cannot resolve ambiguities in the constitution or set aside its provisions. *E.g. Martin v. Favell*, 344 Mich. 215, 73 N.W.2d 856 (1955); *Pratt v. Amalgamated Ass'n of Street & Electric Ry. Employees*, 50 Utah 472, 167 Pac. 830 (1917). The mere fact that several officers of the organization have had differing opinions as to a ruling on a constitutional issue does not authorize a court to review the rulings of the regularly-constituted officers relating to internal affairs. Such a difference of opinion in interpretation was said to be natural. *Allen v. Southern Pacific Co.*, 166 Or. 290, 110 P.2d 933 (1941); *Pratt v. Amalgamated Ass'n of Street & Electrical Ry. Employees supra*. The courts have, however, required that constitutional provisions and by-laws be reasonable and that they provide a valid mode for determining when relief should be given or denied. When such reasonableness and validity is found, redress may not be sought in the courts. *E.g. Allen v. Southern Pacific Co., supra; Lang v. International Photo Engravers Union*, 343 S.W.2d 385 (Ky. 1960); *Sewell v. Detroit Electrical Contractors' Ass'n*, 75 N.W.2d 845 (Mich. 1956); *Saint v. Pope*, 211 N.Y.2d 9 (App. Div. 1961).

This issue has been presented and decided in the state of Utah. In the case of *Pratt v. Amalgamated Ass'n*

of *Street & Electrical Ry. Employees*, 50 Utah 472, 167 Pac. 830 (1917), the Utah Supreme Court held that it was not authorized to review the rulings of the regularly-constituted officers of an association relating to the internal affairs of that association. This case involved a suit by an ex-union member alleging that he had been arbitrarily and illegally deprived of the right to receive certain benefits from the union because he had been arbitrarily and illegally expelled from the union. Plaintiff had been expelled from a Philadelphia local for failure to comply with the transfer requirements of the union. Whether or not he had been lawfully denied renewal of membership depended upon the construction given the constitution. The opinion of the lower court, adopted by the Supreme Court, held that:

“[T]he international board did have power, expressly given it in conjunction with the international president, to rule upon all questions of law [and] the manner of construction of the laws of the association, and did have power to suspend locals expressly given it by this constitution and these by-laws.” *Pratt v. Amalgamated*, *supra*, at 832.

In *Pratt*, the local which had accepted plaintiff's membership was suspended for this act. The next question asked by the trial court was whether or not this power of the union had been exercised arbitrarily. Upon the evidence presented, the court held that the officers had acted in good faith and further stated:

“The power given these international [union] officers is quite arbitrary. I have no doubt it is necessary, to the successful maintenance of an

organization of this sort, that the international officers should have very great power and certainly, very great power is conferred upon the international officers by the constitution of this association; but there is nothing in the evidence in this case that indicates the power was exercised not in good faith." *Pratt v. Amalgamated, supra*, at 832.

In sustaining the verdict of the trial court that plaintiff was not entitled to recover, the Supreme Court stated:

Courts may not interfere with the acts and proceedings of the officers of beneficial societies or associations to that extent. What the courts are authorized to do and what they will do, in that regard, is to compel the officers of the such associations, and the associations themselves, to condemn no member and not to forfeit his property or his property rights without a hearing or an opportunity to be heard in his defense according to the laws and rules of the association, and if there are no such rules the court will imply or create them. When such an opportunity is given, however, and the complaining member has been tried and condemned or *has been declared ineligible* in accordance with the laws and rules of the order or association, and the acts of the officers of the association in that behalf are free from fraud or duress, courts may not interfere. *Pratt v. Amalgamated, supra*. at 834. (Emphasis added.)

With regard to the construction of the constitution by the officers of the union, the court held:

In any event the officers not only possessed the right but it was their duty to construe and apply the provisions of the constitution to the best of their understanding and ability. The fact that

different officers have arrived at different conclusions regarding certain provisions of the constitution is but natural. *Pratt v. Amalgamated*, *supra*, at 834.

Hence, it is clear under the Utah law that the court may not interfere in the legitimate operation of a trade union, even to the extent of interpreting its constitution where those interpreting the constitution have done so in good faith. There is no evidence of lack of good faith in the instant case. The court should not interfere.

The Supreme Court of Oregon, in the case of *Allen v. Southern Pacific Ry. Co.*, 110 P.2d 933 (1941), refused to interfere in the interpretation of a union constitution with respect to settling grievances and disputes between members. The court stated that:

This case, therefore, comes within the well established rule that, when the constitution and by-laws of an unincorporated, voluntary association, such as the Brotherhood, are reasonable and valid and provide a mode for determining when relief shall be given or denied to its own members by tribunals provided for therein, redress therefor may not be sought in the courts. *Allen v. Southern Pacific Ry. Co.*, *supra*, at 939.

This interpretation is correct under the policy of labor law.

The officers entitled to interpret the BLF&E Constitution made a good-faith interpretation that plaintiffs were not entitled to strike benefits. The trial court erred in finding contrary to their interpretation and its judgment should be reversed.

POINT IV

THE TRIAL COURT HAD NO JURISDICTION BECAUSE PLAINTIFFS DID NOT EXHAUST THEIR INTRA-UNION REMEDIES PROVIDED IN THE CONSTITUTION AND PLAINTIFFS DID NOT PLEAD EXHAUSTION OF REMEDY OR AN EXCEPTION TO THE EXHAUSTION REQUIREMENT.

Before union members can resort to the courts for relief on intra-union questions, all internal remedies must be exhausted. *E.g. Putnam v. Gordon Jensen, Inc.*, 139 N.W.2d 266 (Minn. 1965); *Duffy v. Kelly*, 91 N.W.2d 916 (Mich. 1958). This rule has been a development of the common law of trade associations much the same as the exhaustion development in federal and state administrative law. However, in the instant case, reliance need not be placed entirely upon the common law, Article 13, Section 9 of the BLF&E Constitution (Exhibit P-1, p. 251) requires members to exhaust their intra-union remedies before going to court.

Article 13, Section 6(c)-(e) of the Constitution of the BLF&E (Exhibit P-1) provides for appeals from decisions of the International President. Generally, such appeals can be made to the Board of Directors on any matter properly submitted. However, a decision of the International President interpreting the law of the organization is final unless it is reversed on appeal by a Convention of the Brotherhood. In the instant case, the International President decided that the Constitution prohibited payment of strike benefits to plaintiffs. (R. 789.) Plaintiffs' remedy lay in an appeal to the Convention — a remedy which they did not pursue. (R. 785.) Therefore, the instant action is not proper. *See, e.g.*

Bryan v. International Alliance, 306 S.W.2d 64 (Ky. 1957); *Fray v. Amalgamated Meat Cutters & Butchers*, 101 N.W.2d 782 (Wis. 1960).

Cases construing the exhaustion doctrine are legion. The great majority of these cases hold that a union member must indeed exhaust his intra-union remedies before resorting to the courts. *E.g. Lear Sieglar, Inc. v. International Union of A.A.&I. Workers*, 287 F. Supp. 692 (W.D. Mich. 1968); *Samuelson v. Brotherhood of Railroad Trainmen, Rocky Mtn. Lodge No. 852*, 60 Wyo. 316, 151 P.2d 347 (1944); *Greenwood v. Building Trades Council*, 71 Cal. App. 159, 233 Pac. 823 (1925); *Minch v. Local Union No. 370, Internat'l Union of Operating Engineers*, 44 Wash. 2d 15, 265 P.2d 286 (1953).

It has further been held that a mere claim of futility of pursuing internal union remedies will not suffice. *Long Island City Lodge 2147 of Brotherhood of Railway & S.S. Clerks v. Railway Express Agency, Inc.*, 217 F. Supp. 907 (1963). Furthermore, the provisions in labor union constitutions which require the exhaustion of internal remedies have generally been recognized by the courts as contractually binding upon the members. *E.g. Mooney v. Bartenders' Union Local No. 284*, 313 P.2d 857 (Cal. S. Ct. 1957); *Minch v. Local No. 370, Internat'l Union of Operating Engineers, supra*; *Gallagher v. Harrison*, 69 Ohio App. 73, 88 N.E.2d 589 (1949); *Way v. Paton*, 195 Or. 36, 241 P.2d 895 (1952).

There are, however, some exceptions to the exhaustion requirement. It has been held that union members

need not exhaust their internal remedies if such remedies are, *in fact*, futile or illusory. *Eg. Naylor v. Harkins*, 11 N.J. 435, 94 A.2d 825 (1953); *Walsche v. Sherlock*, 110 N.J. Eq. 223, 159 A. 661 (1932); *Cunningham v. Milk Drivers & Dairy Employees Local No. 584*, 148 N.W.2d 114 (1955).

In the instant case, plaintiffs had the right to appeal to the Convention of the International Union. The Convention was held in July, 1968 (R. 789) and it was clearly not unreasonable to require plaintiffs to abide by their contractual agreement and present their views to this Convention. Such a right of appeal was not illusory or futile in view of the fact that the plea to the Finance Committee (R. 781-82) resulted in a 5 to 3 decision. (Exhibit P-28.) There is no showing on the record that such an appeal, if made, would not have received a fair and impartial hearing by the Convention. It was, therefore, not an undue burden upon plaintiffs to require them to first exhaust their intra-union remedy.

Procedurally, the courts are in general agreement that a member of a voluntary association intending to sue that association must allege in his complaint for relief that he has exhausted his internal remedies and that the results of that course of action are final. *Eg. Dalton v. Plumbers & Steam Fitters Local No. 60*, 122 So. 2d 88 (La 1960); *Putnam v. Gordon Jensen, Inc.*, 139 N.W.2d 266 (Minn. 1965); *Taxicab Drivers' Local Union No. 889 v. Pittman*, 322 P.2d 159 (Okla. 1958); *Hickman v. Kline*, 279 P.2d 662 (Nev. 1955). Such an allegation is not found in the instant complaint. (R. 1-19.)

The courts which have required exhaustion have also required that the plaintiff plead with specificity so as to clearly indicate that the matter is ripe for adjudication. In other words, the mere allegation of exhaustion of intra-union remedies is not even sufficient to give jurisdiction to a court. *E.g. Falsetti v. Local Union No. 2026, United Mine Workers*, 400 Pa. 145, 161 A.2d 882, 87 A.L.R.2d 1082 (1960); *Wax v. Internat'l Mailers' Union*, 400 Pa. 173, 161 A.2d 603 (1960). In the instant case there is no indication in the complaint whether plaintiffs have exhausted their intra-union remedies. Since these intra-union remedies were available and have not been exhausted, this litigation was not ripe for decision by the lower court and defendants' motion to dismiss should have been granted.

POINT V

DEFENDANTS HAVE NOT WAIVED THE RIGHT TO LIMIT STRIKE BENEFITS TO THOSE MONTHS IN WHICH THE STRIKER EARNED LESS THAN \$150.00 FROM OUTSIDE SOURCES, NOR ARE THEY ESTOPPED FROM ASSERTING THE LIMITATION. THE TRIAL COURT ERRED IN FAILING TO SO LIMIT BENEFITS GRANTED.

Article 10, Section 3(i) of the Constitution of the BLF&E provides, in part:

When a striking member or nonmember receiving strike benefits, is able to earn One Hundred Fifty Dollars (\$150.00) or more per month, *it shall be his duty* to notify the International President, who shall thereupon request the General Secretary and Treasurer to remove the individual's name from the strike benefit payroll. At any time during the continuance of a strike, the

International President *may require* members or nonmembers who are receiving strike benefits to furnish affidavits and other evidence indicating the exact amount of their earnings from other employment during any given period, and the International President shall have authority to order the withholding of further strike benefits until the individual has filed the information thus required of him. On sufficient proof to justify such action, *the International President may authorize the discontinuance of payments entirely to any member or non-member receiving strike benefits whose earnings from other employment equal or exceed One Hundred Fifty Dollars (\$150.00) per month.* (Emphasis added.)

This constitutional provision places an explicit duty on each union member to notify the International President if he is making over \$150.00 per month. It also grants the International President the right to require an appropriate affidavit from members receiving benefits. This constitutional safeguard provides a means of conserving the union funds for the payment of strike benefits to those primarily in need. It also affords protection to the membership inasmuch as a protracted strike can result in assessment of the overall membership for the benefit of the striking members. This is a constitutional provision and, as stated in the foregoing points, the members of the union are bound contractually by this document.

By interrogatories to plaintiffs admitted in evidence (see Additional Finding of Fact by court) the International President has been made aware that many of plaintiffs earned in excess of \$150.00 in some of the

strike months. Any recovery granted plaintiffs by the lower court should have respected this constitutional limitation which is there for the benefit of all of the members. Plaintiffs herein wish to rely upon the Constitution of the BLF&E for benefits, and they must therefore accept also its burdens. They cannot pick and choose which constitutional provisions they will abide by.

There is no evidence in this record indicating whether defendants requested earnings information from those members receiving strike benefits. Even if this information was not requested, such action cannot prevent inquiry into plaintiffs' earnings. A custom or practice, even if it were to be so considered, does not bind the future action of a labor organization in matters governed by its Constitution.

In the case of *Carey v. International Brotherhood of Papermakers*, 123 Misc. 680, 206 N.Y.S. 73 (Sup. Ct. 1924), the plaintiff had run as an incumbent president of the Papermaker's Union but had lost the election. He brought an action to get a recount and a judicial declaration that he had been elected president. One of the questions at that trial was whether the Board of Canvassers had properly disallowed the votes from one particular local union. The union constitution provided that the voting of each local be done at a single meeting. This provision had been violated by the local in question in that the voting had been done at more than one meeting. Plaintiff, nevertheless, contended that the votes should be counted since a custom had been established for voting in more than one meeting. The court rejected

plaintiff's contention and upheld the Board of Canner's decision to reject the vote of this particular local, noting that:

No custom can be established in violation of specific provisions of the Constitution.

Other courts have also held that custom or practice does not supersede the union constitution and by-laws. *E.g.* *International Brotherhood of Electrical Workers v. Commission on Civil Rights*, 140 Conn. 537, 102 A.2d 366 (1953); *Fritsch v. Rarback*, 99 Misc. 356, 98 N.Y.S.2d 748 (Sup. Ct. 1950).

The courts have indicated that activities contra the union constitution are absolutely void and cannot be validated even by the application of estoppel doctrine. *Amalgamated Clothing Workers v. Kiser*, 174 Va. 229, 6 S.E.2d 562 (1939). In *Kiser*, agents of defendant labor union had promised plaintiff that if she joined the union and consequently lost her job defendant would pay her an amount equal to her regular salary. Plaintiff joined the union, lost her job, and the union did, in fact, make payments to plaintiff for nearly a year. The union then notified plaintiff that it could not continue with these payments. Plaintiff sued the union based upon this promise as a contract. In approaching this question, the court first noted that:

All rights, privileges and duties of both the association and its members must be found in the constitution. We are not permitted to look elsewhere for them.

The court then held that the officers of the union lacked authority to make such a contract; and, consequently, any

agents of the officers similarly lacked authority. The contract, therefore, was void. A significant fact in *Kiser* was that the practice of making payments to plaintiff for nearly a year in no way validated the payments. See *Doria v. Internat'l Union, Allied Industrial Workers*, 16 Cal. Rep. 29, 196 Cal. App. 2d 22 (D.C. App. 1961); *United Brotherhood of Carpenters and Joiners v. Moore*, 206 Va. 6, 141 S.E.2d 729 (1965).

Assuming *arguendo* that labor organizations and their constitutions should not be treated differently from any other contract, it will be found that even under general principles of estoppel and waiver the court could not disregard the "outside earnings" constitutional provision applicable in this case. The requirements of estoppel are set forth very well in the case of *Lillywhite v. Coleman*, 46 Ariz. 523, 52 P.2d 1157 1160 (1935):

The essential elements of an equitable estoppel may be stated as follows: (1) there must be a false representation or concealment of material facts; (2) it must have been made with knowledge, actual or constructive, of the facts; (3) the party to whom it was made must have been without knowledge of or the duty of inquiring further as to the real facts; (4) it must have been made with the intention it should be acted upon; and (5) the party to whom it was made must have relied on or acted upon it to his prejudice. There can be no estoppel if any of these essentials are absent. (Italics by the court.)

See *Hampton v. Paramount Pictures Corp.*, 279 F.2d 100, 104 (9th Cir.) cert. denied, 364 U.S. 882 (1960).

It should be noted at this point that the doctrine of estoppel is not favored by the courts. *See Beard v. Melvin*, 60 Cal. App.2d 421, 140 P.2d 720, 726 (1943); *Sturkie v. Bottoms*, 203 Tenn. 237, 310 S.W.2d 451 (1958). The judicial disfavor of the doctrine is reflected in the procedural practice of requiring one relying upon estoppel to bear the burden of proving *all* the essential elements. *Baton Rouge Lumber Company v. Gurney*, 173 So. 2d 251 (La. Ct. App. 1965); *Levy v. Bonfouca Hunting Club*, 136 So. 2d 567 (La. Ct. App. 1961). There is no evidence of fraud or concealment of material facts in the record of the instant case. Further, there is no evidence that the Grand Lodge of the BLF&E had knowledge of facts which would justify an estoppel with regard to the "outside earnings" provision of the Constitution or any other element of plaintiffs' case. In addition, under the cases previously cited, each member who joined the BLF&E is charged with a knowledge of what is contained in the BLF&E Constitution. *Amalgamated Clothing Workers v Kiser, supra*, at 564. At the very least, each member of the BLF&E had the duty of inquiring into the laws of the Brotherhood. As set forth in the preceding quote from the BLF&E Constitution, the law of the Brotherhood is abundantly clear with regard to this \$150.00 per month outside earnings provision. The members who are now plaintiffs in this suit had knowledge of the facts and therefore cannot make out an estoppel. As the Utah Supreme Court noted:

One of the essential elements which must enter into and form a part of an equitable estoppel is that the truth concerning the facts relied upon by the person claiming the benefits of the estop-

pel was unknown. *Tripp v. Bagley*, 74 Utah 57, 276 Pac. 912, 918 (1928).

The burden of proving a lack of knowledge of the actual facts or lack of constructive knowledge of the actual facts fell upon plaintiffs in this lawsuit. Each of plaintiffs either possessed or had access to a copy of the Constitution of the BLF&E (R. 1060) and should have been aware of its provisions. Even if these members were not actually aware of the constitutional provisions, they were all chargeable with knowledge of the laws and general rules of the organization which they had joined. *Allen v. Southern Pacific Co.*, 166 Or. 290, 110 P.2d 923, 935 (1941); *Amalgamated Clothing Workers v. Kiser*, *supra*.

Not only must the party seeking to claim estoppel prove the absence of knowledge of the actual facts, but, as noted in *Lillywhite*, *supra*, he must also prove his personal good faith reliance. Such reliance is negated when the party claiming estoppel has actual knowledge of the facts, *Bradford v. Western Oldsmobile, Inc.*, 222 Or. 440, 353 P.2d 232, 238 (1960), or where such party is in possession of such facts as would put an ordinarily prudent person upon notice to make further inquiries. *O'Malley v. United Producers and Consumers Co-operative, Inc.*, 95 Ariz. 134, 387 P.2d 1016, 1018 (1963); *Marshall v. Benedict* 161 Cal. App.2d 284, 326 P.2d 516, 519-20 (D.C. App. 1958). Since plaintiffs had access to facts which would have put a reasonable person on notice (the BLF&E Constitution) they were chargeable with knowledge of the provisions of the Constitution regarding out-

side earnings and they could not possibly have had the good-faith reliance necessary to establish estoppel. The evidence of plaintiffs themselves indicates that they had actual knowledge of the earnings provision. (R. 1002). Each of the plaintiffs had within his own hands and his own power the facts which would have clearly prevented any reliance on strike benefits where outside earnings exceeded \$150.00 in any strike month. The evidence adduced from some of the plaintiffs in the case that they were told by old members of the BLF&E that this provision was never enforced cannot purport to bind the Brotherhood or serve as the basis for an estoppel. See discussion, *supra*.

Even if constitutional provisions could be waived, there is no evidence in this record to show a waiver by defendants. The doctrine of waiver is generally defined as the voluntary relinquishment of a known right. In *Birkeland v. Corbett*, 51 Wash. 2d 554, 320 P.2d 635, 642 (1958), the Supreme Court of Washington stated that:

A "waiver" is the intentional and voluntary relinquishment of a known right, or such conduct as warrants an inference of the relinquishment of such right. The person against whom a waiver is claimed must have *intended* to relinquish the right, advantage, or benefit, and his actions must be inconsistent with any other intention than to waive them. (Emphasis added.)

See *Constantino v. Moreschi*, 9 Wash. 2d 638, 115 P.2d 955, 961 (1941). These cases indicate that waiver can only arise when there is a *knowing* relinquishment. There is absolutely no evidence in the instant case indicating that

the Grand Lodge of the BLF&E or President Gilbert knew that any of the members of the local who were receiving strike benefits were earning in excess of \$150.00 per month. Absent such knowledge, there could be no waiver of the constitutional provision limiting benefits upon receipt of knowledge as to outside earnings. There is no evidence in this record regarding whether defendants sought information as to earnings from those members receiving benefits. Even if defendants did not seek such information from those members, they are not precluded from limiting plaintiffs here since information regarding plaintiffs' outside earnings came to the attention of defendants. Custom or practice cannot change a union constitution. See discussion, *supra*, at 43-44.

Since the Constitution of the BLF&E requires those earning in excess of \$150.00 per month to be removed from the strike rolls by the President, the trial court erred in refusing to limit benefits as requested by defendants. For this reason, the trial court should be reversed and the case should be remanded.

POINT VI

THE TRIAL COURT ERRED IN ALLOWING COUNSEL FOR PLAINTIFFS TO CIRCULARIZE POTENTIAL PLAINTIFFS TO JOIN THE CLASS.

On May 9, 1968, over objection of defendants (R. 221-223), counsel for plaintiffs in this action sent notice under their firm name and signature to a large number of potential plaintiffs who had not intervened. This notice recited approval through an order of the court purportedly dated May 6, 1968, (R. 224-28) and was

sent to thirty-six persons (R. 227-28). As a result of this notice, at least ten plaintiffs intervened. *Compare*, "Notice of Joinder and Representation" filed April 30, 1968, (R. 197-206) *with* the final "Notice of Joinder and Representation" filed May 24, 1968, (R. 232-41). The suit had been pending for approximately six months at the time the notice was given and at that time only 18 plaintiffs had joined. It is apparent that the remaining ten would not have joined but for the invitation sent out by counsel for plaintiffs.

Rule 23 of the Utah Code of Civil Procedure makes no provision for notice to be given to potential plaintiffs. This rule follows in substance the old Federal rule which also provided for no such notice. In the 1968 amendments to the Federal Rules, Rule 23 was changed to allow notice to be given in certain specified instances. Note, however, that an explicit change was made in the Federal Rules of Civil Procedure according to the legislature authority given to the Supreme Court in the Enabling Act, (28 U.S.C.A. 2072, 2073). No such change has been made in the Utah Rules. Consequently, any such notice was contrary to the Rules, and thus was error on the part of the trial court.

There are strong reasons of policy dictating that any change in the Rules of Civil Procedure should be made according to the normal legislative and judicial channels. Absent such authority, the giving of notice of plaintiffs' counsel is not free from suspicion. In *Cherner v. Transition Electronics Corp.*, 201 F. Supp. 934 (D. Mass. 1962) Judge Wyzanski had the following very pertinent remarks to make about giving notice:

Ordinarily the primary duty of counsel is to his own client. His obligation, like that of his client, may in some situations require him to give notice to other interests which may be adversely affected by his prosecution of his own client's cause of action. But the bringing of the present suit, and any preliminary proceedings in connection with the taking of evidence prior to judgment, cannot legally prejudice other shareholders who might be in like case with his own client. *No precedent supports the suggestion that plaintiffs or their counsel have a moral duty to act as unsolicited champions of others.* Without going so far as to agree with defendant's arguments that the proposed conduct of the plaintiffs or their counsel would be champertous or would violate either Canon 27 or Canon 28 of the American Bar Association Canons of Professional Ethics, this Court concludes that at the present stage of the controversy (when there is no more reason to accept as true plaintiff's declaration than defendant's answers) *Rule 23 should not be used "as a device to enable client solicitation."*

* * * If this Court were to grant plaintiff's motion, the normal consequence would be that many persons would incorrectly infer that this Court regarded the plaintiff's complaint as *prima facie* well founded and had required a prompt notice to all who had been victimized so that they might not by delay or inaction lose valuable rights.

* * * *Nor is it any part of this Court's duty to awaken anyone who is sleeping through the period of limitation set by Congress.* Moreover, it would not be appropriate for this Court to sound the alarm. (Emphasis added.)

See *Escott v. BarChris Const. Corp.*, 283 F. Supp. 642 (S.D.N.Y. 1968). Allowance of such solicitation was not within the discretion of the trial judge, and it was prejudicial error for the trial judge to allow attorneys for plaintiffs to solicit additional members of the class to join as plaintiffs. As stated in *Escott v. BarChris Const. Corp.*, *supra*, at 706:

The only participants in the present action who would benefit by such a course would be plaintiffs' attorneys, who might expect a larger fee.

There is no Utah precedent allowing solicitation of class members by plaintiffs in a class action. The Rules of Civil Procedure allow no such action. As stated in the cases cited, *supra*, sound judicial policy forbids such action.

For the foregoing reasons, the case should be reversed or at least those plaintiffs who intervened as a result of the solicitation should not be allowed to recover in this action.

POINT VII

THE TRIAL COURT ERRED IN THE MEASURE OF DAMAGES USED TO COMPUTE THE JUDGMENT.

The proper measure should have been the damages proximately attributable to the plaintiffs' reliance upon the actions of defendants' agents.

As the record conclusively shows, the defendants' employees had no actual authority to bind the union in contract to pay strike benefits to these plaintiffs. Any

theory of recovery must be based upon the apparent authority of defendants' employees to bind the union by their statements. The doctrine of apparent or ostensible authority is dependent upon the establishment of an estoppel. *Monte Carlo Motors, Inc. v. Volkswagenwerke, G.M.B.H.*, 1 Cal. Rptr. 920 (Cal. App. 1960); *Murray v. Hills Cab Company*, 198 N.E.2d 466 (Ohio App. 1963); *Zie Television Programs, Inc. v. Associated Grocers, Inc. of South Carolina*, 114 S.E.2d 826 (S.C. 1960); *Pioneer Casualty Co. v. Blackwell*, 383 S.W.2d 216 (Texas C. App. 1964); *Morris v. J. I. Case Credit Corporation*, 411 S.W.2d 783 (Texas C. App. 1967). There is logic behind this approach. The doctrine of apparent authority is justified upon the ground that it is more equitable to place the loss upon the party employing the person who made the unauthorized promises than upon an innocent party who could genuinely believe that the employee did have the authority to make the pertinent representations.

It is axiomatic, however, that in cases of estoppel there should be some change of position on the part of the plaintiff which leads to his damage. To establish an equitable estoppel, the plaintiff must have injuriously changed his position. This change of position must result directly from the actions of the defendant or the defendant's representative. See cases cited at pp. 43-48, *supra*. In *Easton v. Wycoff*, 4 Utah 2d 386, 295 P.2d 332 (1956), the defendant had promised to rent certain premises to the plaintiff on the representation that he owned the premises. The defendant did not own the premises and was unable to secure them. As a result, plaintiff could not move in on the agreed date. Later, plaintiff was able

to negotiate another, but far less favorable, lease with the true owner. Plaintiff sued defendant based on a theory of contract by estoppel. The supreme court held that the doctrine of estoppel could not apply. Plaintiff had not spent any money in reliance upon defendant's promise to rent the premises to him; he had not changed his position in any way in reliance upon defendant's promises. All he had lost was the bargain that he thought he had made with the defendant. The court held that this was not enough to justify the application of the estoppel doctrine. Another instructive case is *Federal Finance Co. v. Humiston*, 404 P.2d 465 (Wash. 1965). This case involved an assignee's action on a conditional sales contract. There was a total failure of consideration in the execution of the original contract. The court said that there could be no estoppel against the buyer unless the assignee could show that the assignor could have or would have been able to assert a defense against the original seller. Since the assignee could make no such showing, he could not recover against the buyer even though the assignor had sold him a worthless conditional sales contract. The court quite correctly pointed out that in this situation there was no way that the assignee's reliance on the actions of the assignor had damaged him, as he would have been in no different position against the original seller.

There are virtually an endless number of authorities for the proposition that the plaintiff, in order to take advantage of the doctrine of estoppel, must have some detrimental reliance upon the actions of the defendant.

In *Weiner v. Romley*, 94 Ariz. 40, 381 P.2d 581 (1963) the court quoted with approval the following:

The essential elements of estoppel are that plaintiff, with knowledge of the facts, must have asserted a particular right inconsistent with that asserted in the instant action, *to the prejudice of another who has relied upon this first conduct...* If any of these essential elements are lacking, there is no estoppel. *Weiner v. Romley, supra*, at 583. (Emphasis by the Court.)

In *Garcia v. Frey*, 442 P.2d 159, 162 (N.M. 1968) the court said: "Absent reliance and injury, equitable estoppel is inapplicable." In *Rheem Manufacturing Co. v. United States*, 371 P.2d 578, 581 (Cal. 1962) the court stated: "There can be no estoppel unless the party asserting it relied to his detriment on the conduct of the person to be estopped."

Applying these general and valid principles of law to the present case, it is clear that the trial court wrongfully measured the damages of the plaintiffs. To recover under a theory of apparent authority, plaintiffs would have to show estoppel. To prove estoppel they must prove that because of the representations of defendants' agents, plaintiffs acted to their detriment. The only possible detrimental reliance of plaintiffs was that they joined the union. In order to recover strike benefits, the plaintiffs would have to show that because of defendants' employees' representations they went out on strike. They were damaged by the strike, not by joining the union. They were called on strike not by the defendants but by the International Mine, Mill & Smelter Workers

Union. (R. 1223-24.) Plaintiffs would have been on strike even if no representation as to strike benefits had been given by defendants. Plaintiffs' argument that because of the representations made by defendants' agents they were injured and as a result of such injury should be able to recover strike benefits completely fails in law and in logic. The most that plaintiffs should be able to recover are those damages directly attributable to their reliance upon representations by defendants' employees. The record is devoid of any evidence of damages which are proximately attributable to plaintiffs' reliance upon the representations of defendants' agents. Since plaintiffs were only entitled to recover their reliance damage, the judgment of the trial court is grossly excessive and must be reversed. The case should be remanded to allow plaintiffs to prove reliance damage, if they have any.

Strong arguments of policy support the above result. As was mentioned earlier, the doctrine of apparent authority is a means of protecting relying plaintiffs from injury and loss. The underlying theory is that where people suffer injury due to their reliance on another's representations, that loss should fall upon those parties who made the representations or who were in control of those making the representations. It must be remembered, however, that the parties being held liable are themselves not especially culpable. The courts use the doctrine of apparent authority only as a means of spreading losses. In cases where there has been no detrimental reliance, it would be very unfair to bind principals for the unauthorized representations of their agent. The only justification for holding the principal liable is the

damage suffered by plaintiff due to his reliance on what he believed to be authorized statements of the agent. Where there is no reliance damage there should be no recovery unless actual authority can be proved. There was no proof of actual authority in the instant case. To hold that plaintiffs should recover strike benefits is to say that the defendants are bound on a contract of insurance by the unauthorized actions of their agents and that such a contract protects plaintiffs forever against whatever damage they may suffer no matter the source of the damage. The statement of plaintiffs' position carries its own refutation.

POINT VIII

THE EVENTS UPON WHICH THE COMPLAINT IS PREDICATED OCCURRED IN THE COURSE OF A LABOR REPRESENTATION CONTROVERSY THAT WAS SUBJECT TO THE NATIONAL LABOR RELATIONS ACT, AND THE LEGAL SIGNIFICANCE OF THOSE EVENTS MUST BE MEASURED BY THE FEDERAL ACT AND THE POLICIES THAT UNDERLIE THAT ACT.

The events forming the basis for plaintiffs' complaint occurred in the following setting: The defendant Brotherhood is an unincorporated association which has functioned as a national railway labor organization for the greater part of a century. In such capacity, prior to June 30, 1967, the Brotherhood had been the certified bargaining representative of persons employed as locomotive engineers, trainmen and hostlers by Kennecott.

Kennecott is, of course, engaged in a business that affects interstate commerce, and therefore its labor re-

lations are subject to the National Labor Relations Act of 1935 (29 U.S.C. §141, et. seq.) as re-enacted by the Labor-Management Relations Act (Taft-Hartley Act) of 1947 and as last amended by the Labor-Management Reporting and Disclosures Act (Landrum-Griffin Act) of 1959 (29 U.S.C. §401).

The plaintiffs, and other employees totalling some 900 persons, were included in a collective-bargaining unit for which the International Union of Mine, Mill and Smelter Workers had been, since 1943, certified by the National Labor Relations Board (herein called NLRB) as bargaining representative.

In September, 1966, this unit (herein called "truck haulage unit") included a number of persons who had previously been employed at Kennecott as locomotive firemen and engineers. Because of dissatisfaction by such individuals and others within the truck haulage unit with the representation provided by Mine-Mill, a campaign was instituted in which the Brotherhood sought the truck haulage unit bargaining rights.

During this election campaign, one of the field representatives of the Brotherhood arrogated to himself control of the campaign. He then proceeded to instruct the other representatives that according to his interpretation of Article 10, Section 3 of the Brotherhood Constitution, those employees within the truck haulage unit who joined the Brotherhood would be entitled to receive strike benefits whenever they participated in a strike against Kennecott. Late in the election campaign, he

made the erroneous representation that such Brotherhood benefits would be due them regardless of the outcome of the forthcoming NLRB election.

The NLRB election was conducted on June 21 and 22, 1967. Out of the 926 employees eligible to vote, 250 voted in favor of the Brotherhood and 510 voted for the competing union which consisted of Mine-Mill as merged with the United Steelworkers of America.

We respectfully suggest that the lower court should have declined jurisdiction over the plaintiffs' complaint because the subject matter of the complaint is a phase of labor relations that has been preempted by the National Labor Relations Act (herein called "NLRA") (29 U.S.C. §141, et. seq.). *To the extent that legal consequences attach to campaign promises by representatives of labor unions, preliminary to the holding of representation elections, control over that subject has been vested by Congress in the NLRB with judicial review being lodged in the United States Court of Appeals and the Supreme Court* (29 U.S.C. §§ 159 and 160). Clearly, the activities upon which the plaintiffs' action rests in this case occurred in the course of, and were a direct consequence of, campaign tactics in the context of a representation election.

When Congress resolved in 1935 to establish a system of rules and policies to regulate labor relations between employers and employees engaged in interstate commerce, the plan of regulation as it emerged in the form of the NLRA basically divided the field of em-

ployer-employee relations into the following principal areas: (1) The Section 7 rights of employees to engage or not to engage in concerted activity and to freely determine their collective-bargaining representative, if any, (29 U.S.C. §157); (2) Prohibiting employers and labor unions from engaging in unfair labor practices as provided in Section 8 of the Act (29 U.S.C. §158; (3) The enforcement of employer and employee rights and duties as established by collective-bargaining agreements pursuant to Section 301 (29 U.S.C. §185(a)).

The results of this statute, beginning with the interpretation by the Supreme Court of the United States in the case of *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448 (1957) has been the development of a new body of Federal substantive law fashioned from the rules and policies enunciated by the national labor acts.

The justification for developing a new body of Federal substantive law governing the enforcement of collective-bargaining agreements is the tendency of a system of Federal law to promote uniform rights and obligations. This need has been declared many times by the Supreme Court. We cite as an illustration the case of *Local 174, Teamsters, Chauffeurs, Warehousemen & Helpers v. Lucas Flour Co.*, 369 U.S. 95, 102-04 (1962). In that case, the Supreme Court stated:

* * * We hold that in a case such as this, incompatible doctrines of local law must give way to principles of federal labor law

The importance of the area which would be affected by separate systems of substantive law

makes the need for a single body of federal law particularly compelling. The ordering and adjusting of competing interests through a process of free and voluntary collective bargaining is the keystone of the federal scheme to promote industrial peace. State law which frustrates the efforts of Congress to stimulate the smooth functioning of that process thus strikes at the very core of federal labor policy. . . . With due regard to the many factors which bear upon competing state and federal interests in this area, *California v. Zook*, 336 U.S. 725, 730-31, 69 S.Ct. 841, 843-44, 93 L.Ed. 1005; *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230-31, 67 S.Ct. 1146, 1152, 91 L.Ed. 1447, we cannot but conclude that in enacting §301 Congress intended doctrines of federal labor law uniformly to prevail over inconsistent local rules.

The further fruition of the Congressional intention for a new body of industrial law to develop and mature is illustrated in the case of *San Diego Building Trades Council v. Garmon*, 359 U.S. 236 (1959). In that case the California Supreme Court had sustained the judgment of the court below which had enjoined the union from picketing and had awarded resulting damages to the employer.

The Supreme Court of the United States granted certiorari and reversed, holding that the mere fact that the NLRB had declined to assert jurisdiction over the dispute (because of insufficient impact on interstate commerce) did not leave the state free to regulate activities that had been preempted by Federal law. We quote a part of the court's explanation as follows:

To the National Labor Relations Board and Congress must be left those precise and closely limited demarcations that can be adequately fashioned only by legislation and administration. We have necessarily been concerned with the potential conflict of two law-enforcing authorities, with the disharmonies inherent in two systems, or, federal the other state, or inconsistent standards of substantive law and differing remedial schemes. *But the unifying consideration of our decisions has been regard to the fact that Congress has entrusted administration of the labor policy for the Nation to a centralized administrative agency, armed with its own procedures, and equipped with its specialized knowledge and cumulative experience:*

*"... Congress evidently considered that centralized administration of specially-designed procedures was necessary to obtain uniform application of its substantive rules and to avoid these diversities and conflicts likely to result from a variety of local procedures and attitudes towards labor controversies. * * **

A multiplicity of tribunals and a diversity of procedures are quite as apt to produce incompatible or conflicting adjudications as to different rules of substantive law. * * * *Garner v. Teamsters, etc. Union*, 346 U.S. 485, 490-91, 75 S.Ct. 161, 165, 98 L.Ed. 228.

San Diego Building Trades Council v. Garmon, *supra*, at 242-43. (Emphasis added.)

Such preemption is further demonstrated in a case in which the Supreme Court held that a dispute must be considered to be beyond the state's jurisdiction to entertain if the conduct involved in the litigation is conduct

that is "arguably" subject to the jurisdiction of the NLRB, *Local 100 of United Ass'n of Journeymen and Apprentices v. Borden*, 373 U.S. 690 (1963). In that decision, the Court stated:

We need not and should not now consider whether the petitioner's activity in this case was federally protected or prohibited, on any of the theories suggested above or on some different basis. It is sufficient for present purposes to find, as we do, that it is reasonably "arguable" that the matter comes within the Board's jurisdiction.

* * *

Nor do we regard it as significant that Borden's complaint against the union sounded in contract as well as in tort. It is not the label affixed to the cause of action under state law that controls the determination of the relationship between state and federal jurisdiction. Rather, as stated in *Garmon, supra*, 359 U.S., at 246, 79 S.Ct. at 780,

"[O]ur concern is with delimiting *areas of conduct* which must be free from state regulation if national policy is to be left unhampered."

Local 100 of the United Ass'n of Journeymen and Apprentices v. Borden, supra, at 696, 698. (Emphasis added.)

We believe the above discussion with reference to the gradual preemption during the past twenty-five years is essential to an understanding of the reasons why, and the methods by which, the Federal government has assumed virtually total regulatory control, to the

exclusion of the state governments, over relations between employers and employees.

Being realistically aware of such transformation, one can hardly fail to sense the conflict between a state assuming jurisdiction over an action of the kind in the instant case and the administrative plan promulgated by Congress in §§9 and 10 of the NLRA.

The authority of the NLRB to ascertain with legal finality whether a union has the right to bargain on behalf of a group of employees is spelled out in §9(e) of the Act. Such authority is premised upon a filing of a petition by a group of employees, a union or an employer. Upon its receipt the Act provides that the NLRB shall "investigate" and make a determination so as to assure that the employees have a truly free choice in selecting what, if any, collective-bargaining representative they desire for an appropriate collective-bargaining unit.

After the NLRB has issued a certification as to the results of an election, the opportunity for judicial review of the organizing tactics used by the unions and the certification does arise if the NLRB has occasion to subsequently issue an order directing the employer to meet and bargain with the certified union in accordance with §10(c) of the Act (29 U.S.C. §160(c)).

In this judicial review, the whole NLRB record developed during the investigation becomes a part of the record upon which an order to cease or desist from

an unfair labor practice is predicated by the NLRB. This is accomplished by §9(d) of the Act (29 U.S.C. §159(d)). Once the Board issues such an unfair labor practice order, the gate is open for aggrieved parties to obtain judicial review by the United States Court of Appeals and a second review by the Supreme Court pursuant to §10(f) of the Act (29 U.S.C. §160(f)).

On the basis of the authority granted and the procedure prescribed by §§9 and 10 of the NLRA, it is clear that Congress intended there should be a minimum of governmental regulation of the election tactics used and that such regulation be vested exclusively, in the first instance, in the NLRB with the limited judicial review by the Federal Court of Appeals under §10(f) of the Act. This conclusion was affirmed by the Supreme Court in *Boire v. Greyhound Corporation*, 376 U.S. 490 (1964).

Counsel for defendants, in preparing this brief, have made an exhaustive search of the court decisions in an effort to find a precedent for the plaintiffs' case. We have found no such precedent. If the theory upon which the plaintiffs predicate their action is sound, one should discover precedents by the score for plaintiffs' action. That would be true simply because it is a fact of common knowledge in the field of labor relations that great numbers of representation disputes have been developed during the years since the enactment of the NLRA and that representatives of the union, whether they are engaged in an election contest with an employer or in

a competitive effort with another union are notoriously lavish (or loose) in the promises that they make.

The reason for no such precedents is that such action, if proper, would have the effect of nullifying or overriding the Congressional intention that the administrative regulation of such contests shall be preempted by the Federal law.

If the courts of fifty states were permitted to entertain suits sounding in contract or in tort, based upon the promises or activities during election campaigns, the inevitable result would be a state of chaos and confusion in the field of labor relations.

In 1966, the Supreme Court of the United States decided *Linn v. United Plant Guard Workers, Local 114*, 383 U.S. 53 (1966). The principal question therein presented might be thought to parallel that raised by the complaint in the instant case. Careful examination, however, shows that such case is no precedent for the relief now sought by the plaintiffs. In the *Linn* case, damages were sought in a civil action for libel instituted under state law by an employer subject to the NLRA for libelous union statements published during a union organization campaign. The complaint was dismissed by the United States District Court and such finding was affirmed by the Court of Appeals. The Supreme Court, in reversing the Court of Appeals, explained its action as follows:

In the light of these considerations it appears that the exercise of state jurisdiction here would

be a "merely peripheral concern of the Labor Management Relations Act," provided it is limited to redressing libel issued with knowledge of its falsity, or with reckless disregard of whether it was true or false. Moreover, we believe that "an overriding state interest" in protecting its residents from malicious libels should be recognized in these circumstances. This conclusion is buttressed by our holding in *United Construction Workers v. Laburnum Construction Corp.*, 347 U.S. 656, 74 S.Ct. 833, 98 L.Ed. 1025 (1954) . . . *Linn v. United Plant Guard Workers*, *supra*, at 61.

The Court, however, after noting the basis for state court relief, stated:

In order that the recognition of legitimate state interests does not interfere with effective administration of national labor policy the possibility of such consequences must be minimized. We, therefore, limit the availability for state remedies for libel to those instances in which the complainant can show that the defamatory statements were circulated with *malice* and caused him *damage*. (Emphasis added.) *Linn v. United Plant Guard Workers*, *supra*, at 64-65.

The Court went on to further emphasize these considerations as stated in *Garrison v. Louisiana*, 379 U.S. 64, 75:

"[T]he use of the known lie as a tool is at once at odds with the premises of democratic government and with the orderly manner in which economic, social or political change is to be effected." We believe that under the rules laid down here it can be appropriately redressed without curtailment of state libel remedies beyond the actual needs of national labor policy. *However, if experience shows that a greater curtailment, even*

a total one, should be necessary to prevent impairment of that policy, the Court will be free to reconsider today's holding. We deal here not with a constitutional issue but solely with the degree to which state remedies have been pre-empted by the Act. Linn v. United Plant Guard Workers, supra, at 67. (Emphasis added.)

In *Linn*, the court made it clear that it was not intending to open the door for all sorts of state actions. There is nothing in such decision to imply a right to enforce contractual remedies arising out of an alleged electioneering offer by the representative of a union and an alleged acceptance by the employees. If each of the states is to be free to apply its own contractual doctrines to the vital area of union organizational efforts, the results could be catastrophic. Just as in the instant case, any erroneous, albeit honest, representation by a union organizer could expose the union and its membership funds to a state claim for damages. Every time a labor organization successfully gained the representation rights for a bargaining unit of employees, its success or failure thereafter in achieving its campaign predictions of employment gains could be subject to a suit for failure to perform.

There is little question that had the BLF&E been successful in winning the Kennecott NLRB election, any misrepresentation of its organizers could have resulted in having the election set aside. By the NLRB procedures the BLF&E would thus have been denied the fruits of its election victory because of such conduct. This is the type and the form of regulation designed and deemed

salutary by Congress. If this type of action relied upon by the plaintiffs is sustained, then freedom of discussion, persuasion and argument during a NLRB representation election as contemplated by the NLRA would be destroyed. To test such conduct by the ordinary concepts of contract law is as much out of step in this instance as in the case of a successor corporation's obligation to arbitrate. *John Wiley & Sons, Inc. v. Livingston*, 376 U.S. 543 (1964). In addition to its effect upon election conduct, it would seriously impede the union's ability to later compromise and accommodate its bargaining position. Rather than reach a settlement at a level less than it had earlier envisioned, the union would be compelled to resort to strikes.

The activities of defendants in the instant case did not occur in a vacuum. The employees of a major industrial enterprise such as Kennecott have long been members of or associated with labor unions. There are approximately nineteen separate labor organizations or bargaining representatives of various units of Kennecott employees. These employees have long been exposed to and are familiar with union organizational and representative functions. They must be deemed sophisticated and fully aware of the nature of electioneering promises made by unions during a representational campaign. It is completely unrealistic for them now to attempt to take out of context one particular campaign promise and to elevate it to an enforceable contractual right.

We respectfully submit that the plaintiffs' complaint should not be entertained by either state or Federal

courts, because the authority vested in the NLRB by §§9 and 10 of the Act clearly indicates that Congress did not intend that the campaign tactics indulged in by unions during organization drives preceding representation elections should be "regulated" by the states by permitting such tactics to be made the subject of actions in state courts based upon the common law of contracts and agency.

POINT IX

THE PLAINTIFFS' COMPLAINT FAILS TO STATE A CLAIM AGAINST THE DEFENDANTS UPON WHICH RELIEF CAN BE GRANTED UNDER SEC- TION 501 OF THE L.M.R.D.A.

The above contention is based principally upon §501(a) of the Labor-Management Reporting and Disclosure Act of 1959 (29 U.S.C. §501).

The plaintiffs are subject to §501 because they come within the definition of "employee" as set forth in §3(f) of the Act (29 U.S.C. §402(f)). Section 501(a) reads as follows:

The officers, agents, shop stewards, and other representatives of a labor organization occupy positions of trust in relation to such organization and its members as a group. *It is, therefore, the duty of each such person, taking into account the special problems and functions of a labor organization, to hold its money and property solely for the benefit of the organization and its members and to manage, invest, and expend the same in accordance with its constitution and bylaws and any resolutions of the governing bodies adopted thereunder* (Emphasis added.)

The primary evil at which that statute is directed is manifestly the embezzlement and other unlawful use of union funds by union officials. But the literal language of the statute forbids union officials from using or expending union funds in any manner that is "*not in accordance with its constitution and bylaws.*"

Thus, Federal law precludes state courts and juries from compelling union officers to use union funds for purposes or in any manner that is not consistent with the union's constitution. This view is supported by observations made by the United States District Court in the case of *Highway Truck Drivers and Helpers, Local 107 v. Cohen*, 182 F. Supp. 608 (E.D. Pa. 1960).

The complaint in the *Cohen* case sought a preliminary injunction to prohibit the officers of Local 107 from using union funds to defray the legal costs of defending the officers in the criminal and civil actions brought against them in the courts of Pennsylvania. The principal question presented was whether the expenditure of union funds to pay legal fees to defend the officers of Local 107 was improper in light of the prohibitions contained in §501(a) of the Act, notwithstanding the expenditure was authorized by resolution of the union membership passed at a regular union meeting.

The ultimate decision reached was that the expenditure authorized by the resolution was beyond the power of Local 107 to make. Accordingly, the expenditure was deemed an improper use of union funds and, hence, was a violation of §501(a) of the Act. The district court's

decision was affirmed by the Court of Appeals for the Third Circuit (284 F.2d 162) and the Supreme Court denied certiorari (365 U.S. 833).

The pertinent provisions of the Brotherhood's Constitution pertaining to strike benefits are contained in the paragraphs that comprise Article 10, Section 3, of the Constitution. Paragraph (a) of Section 3 is a controlling provision and reads as follows:

The rate of pay to each member and non-member *engaging in a legal strike authorized by this organization* shall be three dollars (\$3.00) per calendar day (Emphasis added.)

Paragraph (c) of Article 10, Section 3, is also a vital provision in the Brotherhood's law. It reads as follows:

The provisions of this Section concerning the payment of strike benefits are directory only, and shall not be the basis of any legal liability on the part of the Brotherhood

The Brotherhood's field representative during the election campaign announced that his interpretation of Article 10, Section 3, would entitle those employees within the truck haulage unit who became members of the Brotherhood during the organization campaign to receive strike benefits regardless of whether the Brotherhood lost the election. That interpretation manifestly meant that the Brotherhood would pay strike benefits to the plaintiffs notwithstanding the Brotherhood did not authorize the strike and had no control over it, and regardless of the cause of the strike or the nature of the dispute that led to the strike.

Patently, the interpretation placed on Article 10, Section 3, of the Constitution by such field representative calls for the payment of strike benefits to members under circumstances *not authorized by the language of the Constitution*.

Therefore, if the President and the Finance Committee of the Brotherhood were to formally authorize the payment of strike benefits to persons, either members or non-members, who are engaged in a strike which the Brotherhood did *not* call, and over which it has *no* control, such use of Brotherhood funds, although authorized by the top financial officers of the Brotherhood, would be a violation of §501(a) of the Reporting and Disclosure Act, and hence, would be an unlawful use of Brotherhood funds. (Exhibit D-136.)

Defendants do not believe the prohibition in §501 against the use of union funds for a purpose forbidden by Article 10, Section 3, of the Brotherhood's Constitution can be disregarded by any person, or by a Brotherhood officer, nor may it be disregarded by any court or jury. The Federal law in §501(a) must be deemed controlling over all persons and all state authorities. For that reason, we respectfully submit that the plaintiffs' complaint fails to state a claim upon which relief can be granted.

CONCLUSION

The judgment below should be reversed because the findings of fact upon which that judgment is based are

not supported by the evidence. Even if those findings were supported by the evidence, the judgment should be reversed because, as a matter of law, any contract for strike benefits to these plaintiffs was *ultra vires* of the union constitution and could not be based upon an agency, implied authority, apparent authority or ratification theory, and because the courts should not interpret a union constitution where valid provisions for its interpretation are provided therein.

Further, defendants have not waived their right to limit strike benefits to those months in which the strike earned less than \$150.00 from outside sources, nor are they estopped from asserting the limitation. The trial court erred in failing to so limit the benefits. Even assuming that damages were recoverable by the plaintiffs, the trial court erred in allowing counsel for plaintiffs to circularize potential plaintiffs to join the class and further erred in the measure of damages used to compute the judgment.

In addition, the judgment below should be reversed because the court had no jurisdiction over the subject matter, plaintiffs having failed to exhaust their internal union remedies. The trial court also lacked jurisdiction over the subject matter of this action since the events upon which the suit is based occurred in the context of a National Labor Relations Board supervised union election and the regulation of such union activity is preempted by Federal law. Moreover, the expenditure of union funds is governed by §501 of the Labor-Management

ment Reporting and Disclosure Act which forbids payment of strike benefits contra the constitutional provisions of the union. Interpretation of §501 is a question clearly preempted by Federal law and the state court is without jurisdiction in the matter.

For the foregoing reasons, defendants respectfully submit that the judgment entered by the trial court should be reversed.

Respectfully submitted,

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