

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 Respondant**

Follow this and additional works at: https://digitalcommons.law.byu.edu/uofu_sc2

Original Brief submitted to the Utah Supreme Court; funding for digitization provided by the Institute of Museum and Library Services through the Library Services and Technology Act, administered by the Utah State Library, and sponsored by the S.J. Quinney Law Library; machine-generated OCR, may contain errors.C. Keith Rooker, Richard W. Giauque, and Ricardo B. Ferrari; Attorneys for Respondent

Recommended Citation

Brief of Respondent, *Hansen v. Brotherhood of Locomotive Fireman*, No. 11726 (1969).
https://digitalcommons.law.byu.edu/uofu_sc2/4843

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

THE SUPREME COURT OF THE STATE OF UTAH

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

Plaintiffs-Respondents,

vs.

BROTHERHOOD OF LOCOMOTIVE
FIREMEN AND ENGINEMEN and
No. 944 of BROTHERHOOD OF
LOCOMOTIVE FIREMEN AND
ENGINEMEN,

Defendants-Appellants.

BRIEF OF RESPONSE

Filed From Judgment of the Supreme Court
For Salt Lake County
Honorable Leonard W. [illegible]

VAN COTT
& McCAULEY
C. [illegible]
RICHARD [illegible]
RICARDO [illegible]

141 East [illegible]
Salt Lake City, Utah

Attorneys for Appellants

PRINCE & MANGUM

M. YEATES

R. MORRILL

2nd South Street
Salt Lake City, Utah 84111

Attorneys for Appellants

F I

TABLE OF CONTENTS

	Page
NATURE OF THE CASE	1
DISPOSITION IN THE LOWER COURT	2
POINT I	
THE FINDINGS OF FACT UPON WHICH THE JUDGMENT BELOW IS BASED ARE AMPLY SUP- PORTED BY THE EVIDENCE	4
POINT II	
THE COURT BELOW WAS CORRECT IN ITS FIND- ING THAT VALID CONTRACTS HAD BEEN EN- TERED INTO BY PLAINTIFFS AND DEFENDANT. THE TERMS OF THE AGREEMENT BETWEEN THE UNION AND PLAINTIFFS WAS NOT LIM- ITED TO THE PROVISIONS OF THE UNION CON- STITUTION. FURTHER, THE COURT WAS COR- RECT IN ITS FINDING THAT THE CONTRACTS ENTERED INTO BY THE UNION'S REPRESENTA- TIVES WERE BINDING UPON THE UNION	24
POINT III	
THE COURT BELOW WAS CORRECT IN ITS FIND- ING THAT PLAINTIFFS' CONTRACT CLAIMS COULD PROPERLY BE ADJUDICATED BY A COURT OF LAW	38
POINT IV	
APPELLEES WERE NOT REQUIRED TO UTILIZE INTERNAL UNION REMEDIES TO ANY GREAT- ER EXTENT THAN THEY HAD ALREADY DONE PRIOR TO THE FILING OF THIS ACTION	45
POINT V	
DEFENDANTS HAVE WAIVED THE RIGHT TO LIMIT STRIKE BENEFITS TO THOSE MONTHS IN WHICH THE STRIKER EARNED LESS THAN \$150.00 FROM OUTSIDE SOURCES, AND ARE ESTOPPED FROM ASSERTING SUCH A LIMITA- TION	47
POINT VI	
THE TRIAL COURT, IN ALLOWING COUNSEL FOR THE PLAINTIFFS TO CIRCULARIZE POTEN- TIAL PLAINTIFFS TO JOIN THE CLASS, DID NOT ABUSE ITS DISCRETION	53

TABLE OF CONTENTS (Continued)

	Page
POINT VII	
THE TRIAL COURT WAS CORRECT IN THE MEASURE OF DAMAGES USED TO COMPUTE THE JUDGMENT	55
POINT VIII	
THE JURISDICTION OF THE COURTS OF THE STATE OF UTAH OVER THE SUBJECT MATTER OF THIS ACTION IS NOT PRE-EMPTED BY THE NATIONAL LABOR RELATIONS ACT	56
POINT IX	
SECTION 501 OF THE LABOR MANAGEMENT REPORTING AND DISCLOSURE ACT OF 1959 IS NO DEFENSE TO THIS ACTION	62
CONCLUSION	65

AUTHORITIES

CASES

Amalgamated Clothing Workers v. Kiser, 174 Va. 229, 6 S.E.2d 562 (1969)	35
Armstrong v. Duffy, 28 LRRM 2379 (Ohio 1951)	41
Atkinson v. Sinclair Ref. Co., 370 U.S. 238, 82 S.Ct. 1318, 8 L.Ed.2d 501 (1962)	37
Barnhart v. Civil Service Employees Ins. Co., 16 U.2d 223, 398 P.2d (1965)	43
Barnhart v. UAW, 12 N.J. Super. 147, 79 A.2d 88 (1951)	39
Brotherhood of R.R. Trainmen v. Howard, 343 U.S. 768, 774, 96 L.Ed. 1283 (1952)	27
Cherico v. Brotherhood of R.R. Trainmen, 167 F. Supp. 635 (S.D.N.Y. 1958)	27
Cherner v. Transatron Electronics Corp., 201 F. Supp. 934 (D. Mass. 1962)	54
Cleaveland Orchestra Committee v. Cleaveland Fed. of Musicians, et al., 303 F.2d 229 (6th Cir. 1962)	39
Conley v. Gibson, 355 U.S. 41, 78 S.Ct. 99, 2 L.Ed.2d 80 (1957)	27
Conkling v. Standard Oil Co., 115 N.W. 822, 824, 138 Iowa 596 (1906)	32
Dalton v. Plumbers and Steam Fitters, Local No. 60, 122 So.2d 88, 89 (La. 1960)	47

TABLE OF CONTENTS (Continued)

	Page
Daniels v. Sanitarium Association Inc., 56 Cal.2d 602, 30 Cal. Rptr. 828, 381 P.2d (1961)	35, 36
Dyer v. Occidental Life Ins. Co., 182 F.2d 127 (9th Cir. 1950)	39
Eaton v. Wycoff, 4 Utah2d 386, 295 P.2d 332 (1956)	55
Employer's Liability Assurance Corp., Ltd. v. Madric, 54 Del. 146, 174 A.2d 809 (Del. Super. 1961) summary judgment rev'd, 54 Del. 593, 183 A.2d 182 (1962)	29
Escott v. BarChris Construction Co., 283 F. Supp. 643 (S.D.N.Y. 1968)	54
Fidelity & Casualty Co. of N.Y. v. Smith, 189 F.2d 315 (10th Cir. 1951)	30
In Fidelity-Phenix Fire Insurance Co. v. Farm Air Service, Inc. 255 F.2d 658 (5th Cir. 1958)	31
Fruit & Vegetable Packers and Warehousemen, Local 760 v. Morley, 378 F.2d 738 (9th Cir. 1967)	47
Gonzales v. International Assn. of Machinists, 142 Cal. App.2d 207, 298 P.2d 92 (1956), aff'd., 356 U.S. 617, 78 S.Ct. 95, 2 L.Ed.2d 1098 (1958)	34, 39, 59
Henningsen v. Bloomfield Motors, Inc., 32 N.J. 358, 161 A.2d 69 (1960)	31
Hormel v. United States, 17 F.R.D. 303, (S.D.N.Y. 1955)	54
Lachs v. Fidelity & Casualty Co. of N.Y., 306 N.Y. 357, 118 N.E.2d 555 (1954)	30, 33
Linn v. Plant Guard Wkrs. of America, Local No. 114, 363 U.S. 56, 63, 86 S.Ct. 657 (1966)	37, 61
Lockridge v. Amalgamated Assn. of Street' Electrical, Railway and Motor Coach Employees of America, 369 P.2d 1006 (Idaho 1962)	39
Louisville and N. Ry. Co. v. Miller, 219 Ind. 389, 38 N.E.2d 239 (1941), cert .denied, 317 U.S. 644 (1941)	39
Martin v. Favell, 344 Mich. 215, 73 N.W.2d 856 (1955)	39
Marshall v. International Longshoreman's and Warehousemen's Union, 57 Cal.2d 781, 22 Cal. Rptr. 211, 371 P.2d 978 (1966)....	36
Mooney v. Bartenders Union Local No. 238, 48 Cal.2d 841, 313 P.2d 857 (1957)	35
National Labor Relations Board v. Allis-Chalmers Mfg. Co., 388 U.S. 182, 87 S. Ct. 2001 (1967)	60
Nelson v. Johnson, 212 F. Supp. 233 (D. Minn. 1962), aff'd., 325 F.2d 646 (8th Cir. 1963)	38
Northern Imp. Co. v. Pembina Broadcasting Co., 157 N.W.2d 97, 103 (N.D. 1967)	32

TABLE OF CONTENTS (Continued)

	Pa.
O'Brien v. Mutual, 14 Ill. App. 2d, 173, 144 N.E.2d 446	4
Platt v. Amalgamated Assn. of Street and Electrical Railway Employees of America, 50 Utah 472, 167 Pac. 830 (1917)	4
Robinson v. Templar Lodge, I.O.O.F., 117 Cal. 370, 49 Pac. 170 (1897)	4
Ryan v. I.B.E.W., Locomotive Firemen and Enginemen, 361 F.2d 942 (7th Cir. 1966)	4
Seal v. Tayco, Inc., 16 Utah2d 323, 400 P.2d 503 (1965)	4
Steven v. Fidelity & Casualty Co. of N.Y., 27 Cal. Rptr. 127, 377 P.2d 284, 58 Cal.2d 362 (1962)	36
Union Carbide and Carbon Corp. v. Nisley, 300 F.2d 561 (10th Cir. 1961)	4
United Bhd. of Carpenters and Joinders v. Moore, 206 Va. 6, 141 S.E.2d 729 (1965)	4
United Glass Workers, Local No. 188 v. Seitz, 399 P.2d 74 (Wash. 1965)	4
United States v. White, 322 U.S. 694, 64 S.Ct. 1298, 88 L.Ed. 1592 (1944)	4
Vaca, et al., v. Sipes, 386 U.S. 180, 87 S. Ct. 903 (1967)	60
Williams v. Yellow Cab Co., 200 F.2d 302 (3d Cir. 1953); cert. denied, 346 U.S. 840 (1953)	2
York v. Guaranty Trust Co., 143 F.2d 503, (2nd Cir. 1944) (dictum)	4
Ziv Television v. Programs, Inc v. Associated Grocers of South Carolina, 114 S.E. 2d 783 (S.C. 1960)	4

STATUTES

Labor-Management Reporting and Disclosure Act of 1959 (29 U.S.C. § 401, et seq)	38, 45
UTAH CODE ANN. § 16-6-23	4

MISCELLANEOUS

6 Am. Jur. 2d, Associations	40, 4
RESTATEMENT, CONTRACTS (1932)	55, 2
Utah Constitution, Article I, Section 11	44
II WILLISTON, CONTRACTS	4

IN THE SUPREME COURT OF THE STATE OF UTAH

MARY S. HANSEN, et al., for himself
et al. 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 RESPONDENTS

NATURE OF THE CASE

This is an action by 192 Kennecott employees to recover damages from defendants for breach of contract and breach of fiduciary duties, arising out of written and oral promises to pay strike benefits to plaintiffs during the 1967-68 strike at Kennecott Copper Corporation's Utah properties, which promises defendants refused to fulfill.

DISPOSITION IN THE LOWER COURT

The case was tried to the court without a jury, and the court rendered a judgment in favor of plaintiffs in the aggregate sum of \$220,278, together with interest thereon and costs. The ruling of the lower court was based upon its findings of fact and conclusions of law filed and entered herein. (R. 579-595)

RELIEF SOUGHT ON APPEAL

The defendants-appellants seek a reversal of the lower court's judgment in favor of plaintiffs. Plaintiffs-respondents respectfully seek to have this court affirm the lower court's decision in all respects and to grant respondents their costs on appeal.

STATEMENT OF FACTS

In the fall of 1966, defendants commenced an organizational campaign among the employees of Kennecott Copper Corporation ("Kennecott") designed to attract plaintiffs and other Kennecott employees into membership in the defendant unions. (R. 396)

As part of this organizational campaign, the defendants through their various officers, including International officers, general organizers and other authorized representatives, repeatedly represented, promised, and guaranteed to plaintiffs, both orally and in writing, that they would receive strike benefits, varying from \$90.00 to \$150.00 per month per man, in the event they joined defendants and a strike occurred at Kennecott. (R. 396 and Exhibits P-1, page 195, and P-54)

During at least the final three months of this organizational campaign, authorized representatives of defendants represented to plaintiffs that they would be paid these strike benefits regardless of the outcome of the forthcoming representational election, held June 20, 21, 1967. (R. 397)

Plaintiffs, induced by and in reliance upon these and other representations and guarantees, and particularly those regarding strike benefits, joined as members of defendants and thereafter performed all obligations and duties required of members, including payment of dues, attendance at meetings and service of picket duty. (R. 397 and Exhibits 8, 11, 16, 18, 21 and 51)

From July 15, 1967, to March 29, 1968, plaintiffs, among other Kennecott employees, engaged in a strike at the Kennecott properties in Utah, which strike was authorized and engaged in by defendants and other unions at Kennecott. (R. 397 and Exhibit P-138)

Shortly after the commencement of this strike at Kennecott, the plaintiffs were included, among all members of Local 844, on a strike payroll submitted to defendant Brotherhood for the payment of promised strike benefits; but plaintiffs were stricken from this strike payroll by H. E. Gilbert, Brotherhood President, and were refused any promised strike benefits whatever from defendants. (R. 763-764 and Exhibits P-78 and P-79)

Defendants throughout the above-mentioned strike period paid full strike benefits to all members of Lodge

844 other than plaintiffs, which persons had joined that lodge prior to the 1966-67 organizational campaign. (R. 917-939 and Exhibits P-79 to 84)

At no time did defendants disqualify any member from receiving such strike benefits because of any outside earnings during the strike period; nor did defendants make any inquiry concerning the outside earnings of those members receiving strike benefits during this particular strike. (R. 158, 215, 879, 898, 929, and 934-935)

POINT I

THE FINDINGS OF FACT UPON WHICH THE JUDGMENT BELOW IS BASED ARE AMPLY SUPPORTED BY THE EVIDENCE.

1. The Evidence Supports the Finding that the Plaintiff Oliver was a Member of the B.L.F. & E.

The defendants contend that there is no evidence in the record to support the finding that the plaintiff Steven James Oliver was a member of the defendant unions at the time of the strike involved in this suit. Since he had been left off the initial B.L.F. & E. strike payroll, Exhibit P-78, Oliver was called as a witness to clarify his membership position, and to avoid the very contention now made by defendants.

Oliver testified that, at the urging of Warren D. Cole, chairman of the defendant local, he signed the necessary papers and joined the defendants in May, 1967. (R. 1073) At that time he executed an application for membership in the B.L.F. & E. (Exhibit P-139) and

a statement releasing him from membership in his previous union, the Mine, Mill and Smelter Workers. (R. 1074) Oliver testified that he was at that time shown a copy of the B.L.F. & E. Constitution and was told by Cole that, as a member of the B.L.F. & E, he would receive strike benefits whether the forthcoming union election was won or lost by the B.L.F. & E. (R. 1074) Oliver further testified that, upon commencement of the Kennecott strike, he performed picket duties for the B.L.F. & E. (R. 1076)

At no time prior to commencement of this action did the B.L.F. & E. raise any question as to whether Oliver was qualified as a member to receive B.L.F. & E. strike benefits. The union accepted his services on the picket line, and when he inquired of Cole why he had not been paid strike benefits, all Cole stated was "The Grand Lodge has renigged on their contract, and you won't get any." (R. 1076)

The defendants contend that the records in evidence show no payment of dues by Oliver to the B.L.F. & E. On the contrary, the lower court granted leave to the defendants to try to support this contention at the trial from dues payment records maintained by Kennecott, and the defendants failed to offer any such records. (R. 1072, 1079)

The record is clear that Oliver joined the B.L.F. & E. in the same manner as all of the other plaintiffs. The only way in which Oliver's situation differs from the other plaintiffs is that he was erroneously excluded from

the initial strike payroll, Exhibit P-78. At least ^{one} other plaintiff, B. L. Uliberri, was also erroneously excluded from P-78, and the defendants nevertheless stipulated that he was a member in good standing of the B.L.F. & E. (R. 1060)

2. The Evidence Supports the Finding That the Plaintiff Esquivel is a Proper Party Plaintiff.

Defendants assert that the plaintiff Herbierto Esquivel is not entitled to recover damages in this action because he did not timely intervene as a plaintiff. It is true that Esquivel was not included on plaintiffs' list of intervenors filed May 24, 1968. (R. 232) However, on that day plaintiffs sought by motion and were granted a one-week extension, to May 31, 1968, for the joinder of further plaintiffs in the action. (R. 229) On May 31, 1968, interrogatory answers of Esquivel were filed and served on the defendants. (R. 251-253) Plaintiffs' counsel, through simple oversight, failed to include Esquivel on a supplemental Notice of Joinder. However, at the time of filing of Esquivel's answers, it was expressly stated therein that each plaintiff filing said answers, including Esquivel, should be added to Exhibit A to the plaintiffs' original answers. (R. 242) That Exhibit A, in response to defendants' interrogatories, set forth those persons who had authorized this action and who intended to be plaintiffs in the action. Plaintiff Esquivel was included in that category just the same as all other plaintiffs, and defendants had knowledge of that fact.

Defendants made no objection to the extension sought by plaintiffs for further intervention, and they

made no objection to the filing or content of Esquivel's interrogatory answers. Esquivel, like all of the plaintiffs herein, had been promised strike benefits by defendants, was in all respects properly within the class of plaintiffs involved and fully answered the interrogatories propounded to him by defendants. (R. 251-253) Having been given practical notice of Esquivel's joinder as a plaintiff, and having made no objection thereto, defendants waived any objection they might have had to Esquivel's participation in the damage award in this action.

3. The Evidence Supports the Finding that the Defendants Placed No Condition Other Than Membership on the Payment of Strike Benefits.

The defendants state that the Constitution of the B.L.F. & E. itself "prohibits the granting of strike benefits to members not in the bargaining unit represented by the union." (Def. Brief, p. 6) For that proposition, the Court is referred to pages 195-199 of the B.L.F. & E. Constitution, Exhibit P-1. There is absolutely no reference whatever in pages 195-199 of Exhibit P-1 to a "bargaining unit represented by the union," let alone any provision which would limit the payment of strike benefits to persons within such a unit. On the contrary, the provisions cited even provide for the payment of such benefits to *non-members*, as well as members. (Art. 10, Sec. 3(a) and (b), p. 195, Exhibit P-1)

There is a clear record in this case that strike benefits were in no way conditioned upon a person's job classification or bargaining unit. L. L. Iman, who was

in charge of the B.L.F. & E. organizational campaign, testified that persons outside the B.L.F. & E. bargaining unit had been solicited for membership and told that they would, upon joining, qualify for B.L.F. & E. strike benefits. (R. 1206) Further, the record discloses that, in prior Kennecott strikes, the B.L.F. & E. paid strike benefits to persons who were not within the bargaining unit represented by the B.L.F. & E. (R. 926)

The record in this case is replete with documentary evidence and testimony to the effect that the B.L.F. & E. and its representatives at no time during the organizational campaign conditioned the payment of strike benefits upon B.L.F. & E. success in that campaign or the subsequent election or upon any factor other than membership in the defendant unions. (R. 689, Fairbanks; R. 869, 871, 877,, Oneida; R. 901-902, Lawson; R. 976-977, Hansen; R. 1043, Yates; R. 1048, Weichert; R. 1141, Trujillo; R. 1200, 1210, 1217, Iman; R. 1233, 1241, Cole, and Exhibits P-8, 16, 17, 18 21 54 62 and 65)

Even before all the evidence was in, the defendants stipulated that from March 24, 1967, and for a period of some three months thereafter, the B.L.F. & E. and its representatives represented to the plaintiff that they would be paid strike benefits if they were members in good standing and voted for the B.L.F. & E. at the NLRB election regardless of the outcome of the election. (R. 1061) Defendants further stipulated that certain written "flyers" were circulated to plaintiffs which stated that strike benefits would be paid to members regardless of the election results. (R. 670-671)

Thereafter, during the course of the trial, A. H. Gilbert, president of B.L.F. & E. admitted that he knew that the B.L.F. & E. representatives were promising strike benefits to the plaintiffs and that he did not instruct them to condition that promise upon anything other than joining the union. (R. 782-783) L. L. Iman corroborated the matter by his testimony that he recalled no one in the Grand Lodge ever telling him that there was any condition upon the payment of strike benefits other than joining the B.L.F. & E. (R. 1217)

4. The Evidence Supports the Finding that Representations and Promises of Strike Benefits were made by Authorized Representatives of Defendants.

Contrary to the assertion in defendants' brief that L. L. Iman "arrogated to himself" the authority for carrying on the Utah organizational campaign of the B.L.F. & E., the defendants at trial admitted that there were no less than thirty-eight B.L.F. & E. field representatives, general organizers and special organizers involved in that campaign. (R. 739-740 and Exhibit P-53) Those organizers, under Art. 2, Sec. 8 of the B.L.F. & E. Constitution, had the express duties of soliciting new members, taking application fees and making daily reports to the International President of the work performed by them. (Exhibit P-1, pp. 43-44)

The record in this case clearly supports the proposition that the entire Utah organizational campaign was conceived, commenced and carried out with the knowledge, and pursuant to authority of, the defendant Inter-

national. The details of the Utah organizational campaign were initially outlined at a Grand Lodge meeting at Lake Tahoe, Nevada, in September 1966. (R. 57-58 and Exhibit P-85) H. E. Gilbert, B.L.F. & E. President, engaged his brother-in-law, L. L. Iman, on a "special assignment" to run the Utah organizational campaign. (R. 58 and Exhibit P-89A) The various general and special organizers of the B.L.F. & E. were told to contact Iman on their arrival in Salt Lake City. (Exhibits P-111, 112, 123) Gilbert assigned B.L.F. & E. field representative Morelli to relieve Iman temporarily in February, 1967 as head of the Utah organizational campaign (Exhibits P-106, 107) and it was Morelli who informed Gilbert by letter that an unconditional promise of strike benefits to all members, regardless of job classification, had been made from the very beginning of the campaign. (Exhibit P-41)

E. F. Brehany, International Vice President, who attended the March 24, 1967 debate and took no exception to the representation made there that B.L.F. & E. strike benefits would be paid regardless of the election outcome, was sent to that debate on express orders of the International president. (R. 1198 and Exhibit P-110) There is abundant evidence that, throughout the organizational campaign, L. L. Iman reported in detail on the progress of that campaign to Gilbert, the International President. (R. 1191-1193 and Exhibits P-85 to P-135) Iman testified that he called to Gilbert's attention, either orally or in writing, every matter of significance in the campaign. (R. 1196) Even as early as November 21, 1966, Iman sent Gilbert copies of the handbills and flyers

being used in the campaign. (Exhibit P-93) Not only did Gilbert have knowledge that strike benefits were being promised to prospective new members in Utah, but he personally arranged for Iman to be provided with the details of all strike benefits paid to members of Lodge 844 in prior years, so that that information could be used as a recruiting tool. (Exhibit P-109)

The defendant International paid all expenses of the Utah organizational campaign, which expenses totalled \$63,569.80. (R. 737 and Exhibit P-47) Certain of the handbills and flyers which promised strike benefits were in fact prepared by the B.L.F. & E. in Cleveland, Ohio, and transmitted to Utah for circulation in the campaign. (R. 758-759, 1103, 1104, and Exhibits P-54, 60, and 70) E. F. Brehany, Vice President of the B.L.F. & E., actively involved himself in circulating to prospective new members flyers containing strike benefits (R. 1109-1110), and R. J. Whitlock, a member of the Board of Directors of the B.L.F. & E., also participated actively in organizational efforts, including the circulation of strike benefit materials. (R. 1136-1137)

Even assuming *arguendo* that L. L. Iman did not have actual authority to make the promises he admittedly made with respect to strike benefits, the record is clear that Iman had *apparent* authority to make those representations. Iman assured all Grand Lodge representatives, local lodge members and officers "on many occasions" that the payment of strike benefits to all who had joined the B.L.F. & E. had been "cleared and approved by President H. E. Gilbert by telephone." (Ex-

hibit P-8) The president of the defendant local said that he was told "time after time" that the International President had cleared or given approval to the procedures and statements employed in the organizational campaign. (Exhibit P-51) He further indicated that he had the impression "that the drive was being conducted with Grand Lodge approval of all facets involved and that I should not question the authority of those in charge." (Exhibit P-51) Iman expressly requested authority from the International President to promise all new members that they would receive strike benefits, and Gilbert gave him that assurance, which was then incorporated in a handbill circulated among plaintiffs. (R. 756-757 and Exhibits P-41 and D-162-163)

In one handbill circulated among and relied upon by plaintiffs, it was expressly represented by the Grievance Committee of Lodge 844 that its members had personally spoken to International President Gilbert about B.L.F. & E. benefits and had been advised that Gilbert was "giving the whole matter his personal guidance." (R. 1201-1202 and Exhibits P-159 and D-144) One of the most widely distributed flyers used by the B.L.F. & E. in its campaign was a bogus \$100 bill entitled "B.L.F. & E. Money" and containing the picture of its International President. That flyer pertained solely to strike benefits, and said such benefits were not merely promised but were "*guaranteed.*" (Exhibit P-60)

Even if one were to disregard the obvious apparent authority of L. L. Iman to bind the B.L.F. & E. at the time he acted, it is clear that those acts were impliedly

ratified by the Grand Lodge in all respects. (R. 1189, 1217, 1232, 1233)

5. The Evidence Supports the Finding That the Plaintiffs Beck, D. P. Bennett, Glen Bennett, Carter, James, Kendrick, Tsutsui, Gale and T. N. Turner are Entitled to Recover Strike Benefits.

After granting defendants' motion to dismiss the action as against a number of plaintiffs who had failed to retain counsel and intervene as parties in the action, the trial court made the following ruling with regard to the nine aforementioned plaintiffs, who defendants contended should be dismissed for failure to timely file interrogatory answers:

THE COURT: [T]he motion as to Beck, D. Bennett, G. Bennett, Carter, James, Kendrick, Tsutsui, Gale and Turner will be denied, however, if upon the termination of this trial, that is, both parties resting their case, defendant can show any prejudice, the Court will reconsider said motion of dismissal. (R. 804)

Plaintiff rested its case on June 25, 1968 and defendants rested their case on the next day. (R. 1148, 1266) At the time defendants rested, they made no attempt whatever to show any prejudice caused them by the failure of said nine plaintiffs to file interrogatory answers in the matter.

Defendants state, at page 8 of their brief, "As the record stands, it is completely devoid of any evidence whatsoever with regard to these plaintiffs." On the

contrary, these plaintiffs were not excluded from the defendants' stipulation, made at the commencement of trial, that strike benefits were promised to *all* persons solicited for B.L.F. & E. membership during its organizational campaign. (R. 671) These nine plaintiffs were included on the initial roster of members qualified for strike benefits, and each signed that roster. (Exhibit P-75) They were also included on a list specifying the number of dependents each member had, which was used in calculating the amount of strike benefits due. (Exhibit P-76) They were also included on the initial strike payroll duly approved by the officials of the B.L.F. & E. (Exhibit P-78)

The uncontroverted evidence in this case is that the promise of strike benefits was made to *all* plaintiffs, including these nine plaintiffs. (Exhibits P-8, 16, 17, 18, 21, 41 and 51) The defendants have interrogated all other plaintiffs, either at the trial or by written interrogatories, as to their reliance upon the promises of strike benefits made to them. (R. 148, 178, 220, 299, 321, 344, 353, 364, 372, 386, 456 and Interrogatories Nos. 50, 51, 54, 55, 62, 63, and 64, and the answers thereto, R. 128-129 and 245 et seq.) Defendants cannot cite a single instance where a plaintiff did not join the B.L.F. & E. in reliance, in part at least, upon such an offer of strike benefits. In light of that record, it would be completely unreasonable to assume that any of these nine plaintiffs, having obviously been made the same promises, failed to rely upon the same in joining the defendant Unions.

These plaintiffs, like all the others, were injured as a result of the defendants' breach of contract and of the fiduciary duties owed them, and there is no good reason to exclude them from participation in the damage award of the trial court.

6. The Evidence Supports the Findings that the Promises of Strike Benefits Were Made Throughout the Period of the Organizational Campaign.

Defendants have constructed an elaborate argument against a contract recovery here, based upon the faulty premise that since many of the plaintiffs joined the union prior to a certain date when defendants *admit* they were making "*guarantees*" of strike benefits, those plaintiffs cannot be said to have joined in response to those guarantees and promises. However, defendants' argument completely disregards the abundant documentary evidence and testimony at trial to the effect that such unconditional promises and guarantees were made not only after a certain date, but were made repeatedly by the defendants throughout the entire course of the organizational campaign, from October, 1966, to June, 1967. (See Exhibits P-1, 11, 21, 41, 51 72 and 140)

The record discloses that the organizational campaign commenced in early October 1966. (Exhibits P-85 to 91) Joseph Trujillo, one of the B.L.F. & E. special organizers, testified that he actively solicited new members during the latter months of 1966 as well as the first six months of 1967. (R. 1096-1097) The record is clear that various general organizers of the B.L.F. & E. par-

ticipated actively in the organizational campaign from December, 1966 on, and that each one of them repeatedly represented and promised to the plaintiffs that, if they joined the B.L.F. & E., they would be entitled to receive strike benefits in the event of a strike. (R. 1097, 1106, 1136; Exhibits P-8, 11, 16, 18, 21, 41, and 51)

L. L. Iman, the B.L.F. & E. representative in charge of the campaign, was questioned "from the very beginning" by one of the B.L.F. & E. general organizers about Iman's representation that all full dues paying members, regardless of job status, would be paid strike benefits. (Exhibit P-41)

That defendant's representatives informed plaintiffs *throughout the entire organizational period* that all members would receive strike benefits regardless of the results of the election is most profoundly established by the interrogatory answers of 57 of the plaintiffs that such a promise was made to them *before* the debate of March 24, 1967. (R. 245 *et seq.*)

Defendants contend that Exhibit P-54, attached as Exhibit B to the Court's finding number nine,, was not distributed until after February 1, 1967, and that, as a result, the promise contained therein could only be the basis of a contract between the defendants and those plaintiffs joining the union after that date. This assertion again disregards the uncontroverted testimony of Joseph Trujillo, who prepared most of the handbills and flyer material utilized in the organizational campaign, that Exhibit P-54 was "more widely distributed than any"

and was distributed "many, many times *throughout the campaign.*" (R. 1137-1138)

Finally, defendants' contention that it was not until after February 1, 1967, that promises of strike benefits were made to the plaintiffs even disregards the stipulations of record herein that the B.L.F. & E. representatives promised strike benefits to the plaintiffs "during the period of the campaign commencing in September of 1966 and through June 20th, 1967." (R. 671 and 1060-1061)

7. The Evidence Supports the Finding that the Plaintiffs were Engaged in a Strike Authorized by the B.L.F. & E.

The defendants contend that the plaintiffs were not engaged in a strike at Kennecott which was authorized by the B.L.F. & E. Certainly there can be no question that the plaintiffs were engaged in a strike. (R. 1061) Thus the only question is whether that strike was authorized by the B.L.F. & E. H. E. Gilbert, President of the International, issued the strike call of Kennecott. (R. 794) Contrary to his testimony that he called a strike of those men in the bargaining unit represented by the B.L.F. & E. (R. 794-795), Gilbert's actual strike authorization, in the form of a telegram to Mr. E. F. Brehany, was not so limited, and expressly granted authority for Lodge 844 and its members to go on strike effective July 15, 1967. (Exhibit P-138) Plaintiffs were, of course, members of Lodge 844 and were therefore included in that strike call.

All members of Lodge 844, including the plaintiffs, were notified by their lodge officers of the strike call, and all were told to report for B.L.F. & E. picket duty. (R. 141-142) Defendants stipulated that the plaintiffs reported to the B.L.F. & E. strike headquarters and signed for and served picket duty for the B.L.F. & E. (R. 1061) The plaintiffs, while serving such picket duty, carried a placard announcing they were on strike on behalf of the B.L.F. & E. (Exhibit P-73)

Defendants' statement in its brief that the plaintiffs were authorized to go on strike by the Mine-Mill Union is completely unsupported. On the contrary, the defendants by interrogatory asked the plaintiffs whether they were called out on strike by the Mine-Mill or any union other than the B.L.F. & E., and plaintiffs overwhelmingly answered in the negative. (Defendants' Interrogatories 12, 33 and 35, R. 124, 126 and answers thereto, R. 245 *et seq.*)

8. The Evidence Supports the Finding that the Plaintiffs Were Initially Included on a Duly Certified and Authorized B.L.F. & E. Strike Payroll.

The defendants contend that Exhibit P-78, the initial strike payroll, was not a valid and duly authorized payroll. To the contrary, nothing in this record is more clear than the validity of that payroll under the defendants' own rules pertaining thereto.

The defendant B.L.F. & E., in its Constitution (Art. 10, Sec. 3 (f), (g) and (h)) specifically sets forth the

mechanics for proper approval of a strike payroll. Those constitutional provisions state that bank payroll forms are to be filled out by the local lodge, certified by the president, local chairman and recording secretary, approved by the Chairman of the General Grievance Committee and the Grand Lodge representative assigned to take charge of the strike, and then forwarded to the General Secretary and Treasurer of the B.L.F. & E. for issuance of strike benefit checks. (Exhibit P-1, p. 197)

The record in this case shows that all requisites for proper certification and approval of the payroll were complied with in every respect. The Local Lodge 844 received blank payroll forms; the names of all striking employees, including all plaintiffs except Messrs. Oliver, C. Turner and Uliberri, were entered thereon, with the number of dependents for each employee and the amount of strike benefits due each set opposite his respective name. (Exhibit P-78) This was done by Martin Jensen, financial secretary of Lodge 844. (R. 918) The strike payroll, Exhibit P-78, with the names of the plaintiffs included with the three exceptions noted, was certified by the President (Voyle M. Fairbanks), Local Chairman (Warren D. Cole) and Recording Secretary of Local 844 (Glen R. Draper). P-78 was then forwarded to the Chairman of the General Grievance Committee (Warren D. Cole), who, along with the B.L.F. & E. representative in charge of the strike (E. F. Brehany), expressly *approved* the same by affixing their signatures thereto, and forwarded it to the B.L.F. & E. General Secretary and Treasurer (R. R. Bryant). (R. 918-919, 942-944, 946-948)

Glen R. Draper, Recording Secretary of Lodge 844, testified as follows with respect to the propriety of the certification and approval procedures followed:

Q. Now, do you know of any respect in which strike payroll Exhibit No. P-78 was handled and administered that was not in strict conformity with the provisions of Article 10 of the Constitution?

THE WITNESS: As far as I could determine, it was processed as nearly as possible according to the rules laid down for it in the Constitution. (R. 948)

Article 10 of the B.L.F. & E. Constitution requires that, when the steps specified for proper payroll certification and approval have been taken, as they were in this case, the General Secretary and Treasurer "*shall* issue checks from the General Fund for the amount due and persons whose names appear on the certified payrolls." Plaintiffs, with the three exceptions noted, appeared on that duly certified payroll, P-78. The defendants' president, H. E. Gilbert, improperly struck plaintiffs from P-78, as Article 10 Section 3(h) of the Constitution makes issuance of strike benefit checks to persons listed on a certified payroll *mandatory* and provides no authority to H. E. Gilbert or anyone else to interfere with the prescribed process for payment of strike benefits once a strike payroll has been constitutionally certified. (Exhibit P-1, page 197)

Defendants' assertion that the initial payroll was invalid because it contained the names of persons, including the plaintiffs, not in the bargaining unit represented

by the defendants, is contrary to the evidence as well as inconsistent with the B.L.F. & E. Constitution. As indicated above, the record discloses that persons outside the B.L.F. & E. bargaining unit were solicited for membership and told they would receive strike benefits (R. 1206) and B.L.F. & E., in prior Kennecott strikes, paid strike benefits to persons who were not within its bargaining unit (R. 926). Furthermore, Martin C. Jensen, financial secretary of the defendant local and the person who prepared the initial strike payroll, testified that he expressly informed officers of the B.L.F. & E. by letter that he had included all the new members on that payroll under an assumed, and perhaps improper, occupational designation. Despite such notice, which was appended to the payroll itself, the authorized officials of the B.L.F. & E. approved that payroll. (R. 920 and Exhibit P-78)

9. The Evidence Supports the Finding that Defendants Did Not Inquire Regarding, Nor Disqualify, Anyone from Strike Benefits as a Result of Outside Earnings During the Period of the Strike.

For a complete discussion of the record on these matters, see Point V below.

10. The Evidence Supports the Finding that the Defendants and Their Officers Had a Fiduciary Duty to Plaintiffs.

It is quite true as defendants contend, that the Constitution of the B.L.F. & E. creates a strict fiduciary

duty between the defendant Grand Lodge and its members with respect to the administration of all member-created funds from which benefits, including strike benefits, are paid (Exhibit P-1, pp. 195-199). Those provisions require strike benefits to be paid, without discrimination, "to each member and non-member engaging in a legal strike authorized by this organization." (Art. 10, Sec. 3(a), Exhibit P-1, p. 195) As indicated above, the plaintiffs did engage in a strike at Kennecott which was authorized by the B.L.F. & E. (See Section 7) They were thus entitled to receive said strike benefits, just the same as all other members of Lodge 844 who were engaged in the same strike, and defendants' refusal to pay plaintiffs such benefits, while paying them to the other members of Lodge 844, constitutes a clear breach of the strict fiduciary duty contained in the B.L.F. & E. Constitution.

11. The Evidence Supports the Finding that the Defendants Knowingly Made False Promises of Strike Benefits to the Plaintiffs.

Without any support whatever in the record, defendants assert that the Grand Lodge officers of the B.L.F. & E. had no knowledge that unconditional strike benefit promises were being made until "well after they had been made and the strike had begun." As indicated in Section 4 above, the record in this case clearly establishes that the B.L.F. & E. officers, and particularly the International President Gilbert, knew as early as November 21, 1966 that such unconditional promises of strike benefits were being made, and they continued to

be so informed throughout the entire course of the organizational campaign. (Exhibits P-41, 51, 54, 60, 70, 93, 109, D-144, 162, 163) Furthermore certain of those officials themselves actively participated in certain aspects of the organizational campaign in Utah including the circulation of written strike benefit offers. (R. 1109-1110, 1136-1137)

The defendants' assertion becomes preposterous in light of the uncontroverted evidence that E. F. Brehany, International Vice-President, participated in the very debate in March, 1967 at which defendants have stipulated unconditional promises of strike benefits were made. (R. 1061, 1198)

With respect to that portion of the trial court's Finding Number Twenty that defendants knowingly allowed unconditional strike benefit promises to be made to plaintiffs with no intention of fulfilling the same, it is significant that the defendants allowed the plaintiffs from at least March 24, 1967 to the commencement of the strike on July 15, 1967 to believe that they would receive such promised strike benefits. Having knowledge for that fifteen-week period that such unconditional promise of strike benefits had been made to plaintiffs, defendants at no time within that period informed plaintiffs that they would *not* be paid such benefits. (R. 1233-34) Yet, during that period defendants accepted dues from the plaintiffs and required them to perform all duties of membership. (R. 1057, 1060-61, and Exhibit P-77) The record is uncontroverted on this matter, and such unconscionable conduct clearly supports the lower

court's finding that the defendants, in that respect, acted in bad faith.

As shown above, each of the findings of fact upon which the judgment below is based is amply supported by the evidence, and therefore the judgment of the trial court should be affirmed in all respects.

POINT II

THE COURT BELOW WAS CORRECT IN ITS FINDING THAT VALID CONTRACTS HAD BEEN ENTERED INTO BY PLAINTIFFS AND DEFENDANTS. THE TERMS OF THE AGREEMENT BETWEEN THE UNION AND PLAINTIFFS WAS NOT LIMITED TO THE PROVISIONS OF THE UNION CONSTITUTION. FURTHER, THE COURT WAS CORRECT IN ITS FINDING THAT THE CONTRACTS ENTERED INTO BY THE UNION'S REPRESENTATIVES WERE BINDING UPON THE UNION.

1. The Agreement Entered into by Plaintiffs and the Defendants was not Prohibited by any Provision of the Union Constitution.

The trial court found, after consideration of exhaustive evidence presented by both parties, that:

[A]uthorized representatives of defendants represented to plaintiffs that they would be paid strike benefits regardless of the outcome of the then forthcoming election. . . , at no time during said campaign did defendants or any of their said authorized representatives condition the payment of said strike benefits upon BLF&E success in said representation campaign or election or upon any factor other than plaintiffs' membership. . . . (Findings of Fact, § 6.)

The court further found:

Plaintiffs, induced by and in reliance upon these and other offers, representations and guaranties, and particularly those regarding strike benefits, accepted said offers, joined as members of defendants and thereafter performed all obligations and duties required of members, including payment of dues, attendance at meetings, and service of picket duty. (Findings of Fact, § 7.)

The details of the representations made by defendants' representatives are set forth at pp. 7-13, *supra*. It is sufficient here to reiterate that defendants' representatives unequivocally promised plaintiffs that, in the event of a strike, they would be entitled to receive strike benefits *regardless of the election's outcome* and that, in reliance upon those representations, plaintiffs rendered to defendants all the duties of union membership, including payment of dues and performance of strike duty.

Defendants have argued at pp. 16-21 of their Opening Brief that because Article 10, Section 3(a) of the B.L.F. & E. constitution provided that strike benefits be paid to members and non-members engaged in a "legal strike authorized by [the union]," that plaintiffs were not entitled to receive strike benefits.

Defendants contend, without judicial support, that the term "legal strike authorized by this organization" is a term of art as used in the context of labor-management relations (Def. Br. p. 16), the effect of which is to exclude the plaintiffs from any class entitled to receive strike benefits. Any promise to pay benefits to a broader class, they contend, is contrary to the constitution.

Defendants' contention is fatally defective on several counts. First, it is clear from the terms of Article 10, Section 3, that subsection 3(a) is not sufficient to bar binding promises to pay strike benefits to members not within the bargaining unit. Article 10, Section 3(e) states:

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

Further, Section 3(b) of Article 10 states:

It shall be the policy of the organization to include as eligible to receive strike benefits under the provisions of this Section members and non-members on leave of absence or furloughed from service . . . who respond to the strike call in the manner of assisting in manning of picket lines. . . . ; [further,] the payment of strike benefits as prescribed in Paragraph (a) to especially deserving employees or members who aid the *Brotherhood in a strike*, may be authorized by the International President with the concurrence of the Finance Committee. [Emphasis added.]

It is clear from the foregoing that: (1) Section 3(a), and any limitations on payment of strike benefits which it may imply, is directory only and does not bar the union or an authorized representative thereof from promising or granting strike benefits to persons not enumerated in subsection (a); (2) Section 3(b) specifically authorizes and announces as a matter of union policy the granting of strike benefits to members or non-members who perform picket duty or who are "especially deserving" and aid the Brotherhood in a strike.

The intent of this subsection obviously is to authorize payment of strike benefits to persons who assist the union in a strike *who might not come within the coverage of Section 3(a)*.

Even if the promises — which the trial court found created a binding contract — could be limited by the terms of the union constitution, the terms of Article 10, Section 3 definitely did not preclude payment of strike benefits to plaintiffs. Any contrary interpretation of the constitution by the International President is clearly incorrect.

2. Plaintiffs, as Union Members, were Entitled to Strike Benefits Equal to Those of Other Members Similarly Situated.

Plaintiffs not only were eligible for strike benefits under the union constitution, they were, as union members and strike participants, *entitled* to benefits equal to those of other striking members of the Brotherhood similarly situated. The obligation of a union to represent and act on behalf of all members of the same bargaining unit in a fair and non-discriminatory manner is well-established. *Conley v. Gibson*, 355 U.S. 41, 78 S.Ct. 99, 2 L.Ed.2d 80 (1957); *Williams v. Yellow Cab Co.*, 200 F.2d 302 (3d Cir. 1953), *cert. denied*, 346 U.S. 840 (1953); *Cherico v. Brotherhood of R. R. Trainmen*, 167 F. Supp. 635 (S.D.N.Y. 1958). Further, it has been held that a union may not, in representation of workers in one bargaining union, so deport itself as to invade

the rights of other workers not in the bargaining unit. *Brotherhood of R. R. Trainmen v. Howard*, 343 U.S. 768, 774, 72 S.Ct. 1022, 96 L.Ed 1283 (1952).

3. Plaintiffs Would Be Entitled to the Strike Benefits Promised by the Union's Representatives Even if Those Representations Were at Variance with the Union Constitution.

It is not necessary, however, to establish that plaintiffs were entitled, by virtue of their union membership alone, to recovery of strike benefits or that such promises were consistent with the union constitution. The promises made to them by the union's field representatives constitute a contract between plaintiffs and defendants. (Conclusions of Law, § 4.) As has been pointed out at pp., 2-3, *supra*, defendants' field representatives stated to the plaintiffs in clear and unequivocal language that the promises made to them were consistent with the union constitution. In fact, the representatives stated that the benefits were *guaranteed* by the constitution. (R. 396-397)

It is a general rule that a party, who having prepared the contract in question, makes an explicit (or, in some cases, an implied) representation of the contract's contents under circumstances where it is reasonable to assume that the other party will rely upon those representations (especially when the other party is of limited education or when the contract provisions are vague or difficult for the ordinary layman to comprehend), he will be bound by those representations even

if they are at variance with the written instrument. A variance between the representations of defendants' representatives and the terms of the union constitution, if such a variance exists, must be resolved so as to preserve the promisees' expected benefits. If union membership creates a contractual relationship, as defendants contend it does (Br., p. 30), this general rule must apply. It would be ludicrous to expect men of plaintiffs' limited education and experience to have knowledge of the "terms of art," (Br. p. 16) intricacies of the Labor Management Relations Act (*Id.*, p. 17), and details of the proceedings of the 33rd through 39th International Conventions of the Brotherhood of Locomotive Firemen & Enginemen (*Id.*, pp. 19-21) upon which defendants base their interpretation of the constitution. Indeed, defendants, in this section, have failed to cite a single sentence of the constitution which would put an ordinary man on notice of even a potential variance between the organizers' promises and the terms of the constitution.

In *Employer's Liability Assurance Corp., Ltd. v. Madric*, 54 Del. 146, 174 A.2d 809 (Del. Super. 1961), *summary judgment rev'd*, 54 Del. 593, 183 A.2d 182 (1962), the court found that plaintiff was a "somewhat untutored and unsophisticated man" who had stated his insurance needs to an agent of the Liability Assurance Corporation and that the agent had represented the policy to Madric as providing the coverage he sought. Madric based his decision to purchase that and no other policy upon the agent's representation. 174 A.2d at 810-811. Therefore, the company was bound by its agent's false representations.

The California Supreme Court, in *Steven v. Fidelity & Casualty Co. of N.Y.*, 27 Cal. Rptr. 172, 377 P.2d 284, 58 Cal. 2d 362 N.Y. (1962) (accord, *Lachs v. Fidelity & Casualty Co. of N. Y.*, 306 N. Y. 357, 118 N.E.2d 555 (1954); *Fidelity & Casualty Co. of N. Y. v. Smith*, 189 F.2d 315 (10th Cir. 1951)), found defendant insurance company liable for coverage on a decedent who died in the crash of an unscheduled "air taxi" even though the policy set out across the top: NOT FOR TRAVEL ON OTHER THAN SCHEDULED AIR CARRIERS. Decedent has substituted the charter service for a regular carrier when his scheduled flight was cancelled. The court found that it was not certain that decedent could have made out the qualification before purchasing the policy from the vending machine. More important, it found that an ordinary traveler could not be expected to know the *technical difference* between scheduled and non-scheduled carriers and that the insurer should have foreseen the probability of an occasional passenger substituting non-scheduled transportation. It was held that the customer had "bargained for protection for the whole, not part of, the trip." 377 P.2d at 176.

The insurance contract had included a definition of "scheduled carrier" in the policy. However, the court observed that this definition was only one clause in a 2,000-word contract and held that this definition was no binding because the clause was "inconspicuous" and "unclear." 27 Cal. Rptr. at 181-82.

The court concluded:

If [defendant] deals with the public on a mass basis, the notice of non-coverage of the policy in

a situation in which the public may reasonably expect coverage must be conspicuous, plain and clear." 27 Cal. Rptr. at 182.

The New Jersey Supreme Court, in *Henningsen v. Bloomfield Motors, Inc.*, 32 N.J. 358, 161 A.2d 69 (1960) drew support from the principles of the airline insurance cases in voiding a manufacturer's disclaimer of warranty and holding that a buyer possesses an implied warranty of reasonable fitness if he makes known to the seller the particular purpose for which the article is required and it appears that he has relied upon the seller's skill and judgment. 161 A.2d at 76, 93-94.

In *Fidelity-Phenix Fire Insurance Co. v. Farm Air Service, Inc.*, 255 F.2d 658 (5th Cir. 1958), the court held that an ambiguous exclusion of fire coverage from an insurance contract was void against insured where it was clear from the parties' negotiations that plaintiff had desired and thought that he had purchased a contract which included fire coverage.

In the instant case, plaintiffs were told through defendant's handbills that strike benefits were guaranteed them. They were told later that the benefits were guaranteed by the union constitution. The constitution, to which most did not have access until a later date, is 305 pages long. The section regarding strike benefits is fairly complicated and well over 1,000 words in length. It is reasonable to expect that a man of limited education, even if he read the pertinent provisions, would have no inkling of a potential disparity between the union's representations and the constitution's contents.

Plaintiffs' comprehension of their bargain with the union undoubtedly was determined by what they read in union campaign leaflets and what they were told by union personnel. These plaintiffs are entitled to the same rights against the promisor union that other plaintiffs have been accorded against commercial promisors. Indeed, the reliance and expectations of both classes of plaintiffs is nearly identical.

4. Plaintiffs' Rights Arising from the Promises of Union Representatives Cannot be Negated by a Disclaimer of Legal Liability in the Union Constitution.

Defendants' representatives characterized their promises as "guarantees." In common speech, the word "guarantee" indicates a binding promise and when it is used in that sense, the courts will interpret it as expressing "an intention to warrant, insure, covenant, pledge or promise to be bound to perform." *Northern Imp. Co. v. Pembina Broadcasting Co.*, 157 N.W.2d 97, 103 (N.D. 1967). *Accord, Conkling v. Standard Oil Co.*, 116 N.W. 822, 824, 138 Iowa 596 (1906). Such terminology is completely inconsistent with any attempt to negate those promises through an exculpatory clause.

Exculpatory clauses are to be construed strictly against the party drafting the contract. This rule has special force in those cases in which the contract was one of adhesion rather than negotiation. This rule is well established in Utah. In *Seal v. Tayco, Inc.*, 16 Utah 2d 323, 400 P.2d 503 (1965), where seller had failed to deliver the quantity of goods required by agreement, seller's

contract contained a provision excusing him from liability for any delays or defaults by reason of fire, floods, acts of God, labor troubles, inability to secure raw materials, acts of government, or other causes beyond reasonable control. The second sentence thereafter added:

“In no event shall seller be liable for special or consequential damages.”

The Supreme Court found the disclaimer of liability for special or consequential damages susceptible to two interpretations: that it gave seller blanket protection against any claim of special or consequential damages or that it protected him only against damages resulting from delay caused by fire, flood, acts of God, etc. In adopting the more limited interpretation, the Court stated:

[I]t seems manifestly unfair to permit one who formulates a contract to so fashion it as to mislead the other party by setting forth a clearly apparent promise or representation in order to induce acceptance, and then designedly “burying” elsewhere in the document, in fine print, provisions which purport to limit or take away the promise, and/or preclude recovery for failure to fulfill it. 16 Utah 2d at 326.

The New York Court of Appeals held in the *Lachs* case, *supra*, 118 N.E. 2d at 559 that

the burden . . . is on the defendant [insurer] to establish that the words and expressions not only are susceptible of the construction sought . . . but that *it is the only construction which may fairly be placed on them.* (Emphasis added.)

The effect of the alleged exculpatory language in defendant's constitution is no different than that in the contracts in the above cases.

5. The Defense of Ultra Vires is Not Available to the Defendants.

The trial court, having found as a matter of fact that a particular representation constituted the basis of plaintiffs' reliance, that finding should be allowed to stand. The defense of *ultra vires* is not available to a non-profit corporation under Utah law. UTAH CODE ANN. § 16-6-23 states:

Defense of *ultra vires* — No act of a non-profit corporation and no conveyance or transfer of real or personal property to or by such corporation shall be invalid by reason of the fact that the corporation was without capacity or power to do such act or to make or receive such conveyance or transfer. . . . [The statute states several exceptions to the rule, none of which are applicable to the present case.]

Although Utah has no separate statute governing unincorporated associations, the *ultra vires* defense is a creature of corporation law. The Business and Non-Profit Corporation Acts set forth an unambiguous policy that corporations should not be permitted this defense against plaintiffs suing on contracts with them. There is no sound policy dictating a different rule in the case of unincorporated associations. Indeed, a trade union, even though unincorporated, "is for many purposes given the rights and subjected to the obligations of a legal entity." *International Ass'n of Machinists v. Gonzales*, 356 U.S. 617, 619, 78 S. Ct. 923 (1958).

The only cases cited by defendants which deal specifically with the availability of the *ultra vires* defense

to a trade union are *Amalgamated Clothing Workers v. Kiser*, 174 Va. 229, 6 S.E. 2d 562 (1939), and *United Bhd. of Carpenters and Joinders v. Moore*, 206 Va. 6, 141 S.E. 2d 729 (1965). Neither decision could have been reached consistently with UTAH CODE ANN. § 16-6-23. Further, the theory of union government which underlies both decisions is at variance with better-reasoned decisions.

The *Kiser* decision, which the *Moore* court considered dispositive of Virginia law on the subject, was rendered by divided court. The dissent regarded the majority opinion as gravely unrealistic and ignoring the "close analogy . . . between the constitution of a voluntary association, like the defendant, and the charter of an ordinary business corporation." 6 S.E. 2d at 567.

The more up-to-date rule governing trade unions was set forth in *Mooney v. Bartenders Union Local No. 238*, 48 Cal. 2d 841, 313 P.2d 857 (1957):

The court will . . . act in a proper case for the purpose of protecting the property rights of a member of unincorporated association and will, enforce, so far as practical, the rules apply to incorporated bodies of the same character. 313 P.2d 358.

Justice Tobriner, writing for a unanimous California Supreme Court in *Daniels v. Sanitarium Association, Inc.*, 56 Cal. 2d 602, 30 Cal. Rptr. 828, 381 P.2d (1961) dismissed the theory that trade unions should be treated as mere social groups as "obscurantism" "fraught with latent unfairness and patent difficulties." 30 Cal. Rptr. at 831. "The old approach," he wrote, regarded all members

of the union as principals and agents or partners. . . . After analyzing the emerging entity status of a labor union, we [have] concluded that the old rule could no longer be applied to unions. *Id* at 830-831. The opinion went on to reiterate, with obvious approval, the holding of Justice Dooling in *Marshall v. International Longshoremen's and Warehousemen's Union*. 57 Cal. 2d 781, 22 Cal. Rptr. 211 371 P.2d 978 (1966):

It is obvious that [labor unions] are no longer comparable to voluntary fraternal orders or partnerships; that they are *sui genesis*, and approximate corporations in their operations and powers . . . To consider such organizations under present day conditions as mere social or fraternal orders or partnerships is to close one's eyes to the realities now existing. 57 Cal. 2d at 786-787, 22 Cal. Rptr. at 215, 371 P.2d at 91.

Justice Dooling added that when partnership concepts are transferred to

labor unions, which normally act through elected officers and in which individual members have little or no authority in day-to-day operations of the association's affairs, reality is apt to be sacrificed for literary formalism. The courts, in recognition of this fact, have from case to case gradually evolved new theories approaching the problems of such associations, and there is now a respectable body of judicial decisions, especially in the labor union field. . . . which recognized the existence of unincorporated associations and labor unions as separate entities for a variety of purposes. 57 Cal. 2d at 783-784, 22 Cal. Rptr. at 213, 371 P.2d at 989. *Accord*, *Oil Workers International Union v. Superior Court*, 103 Cal. App. 2d 512, 230 P.2d 71 (1951), *Inglis v. Operating Engineers Local No. 12*, 58 Cal. 2d 269, 23 Cal. Rptr. 403, 373 P.2d 467 (1962).

In *United States v. White*, 322 U.S. 694, 64 S. Ct. 1248, 88 L. Ed. 1542 (1944), the United States Supreme Court observed:

Structurally and functionally, a labor union is an institution which involves more than the private and personal interests of its members. . . . The union's existence in fact, and for some purposes in law, is as perpetual as that of any corporation.

In a recent decision, dismissing the claims against the officers of a trade union, the Court, in *Aktinson v. Sinclair Ref. Co.*, 370 U.S. 238, 82 S. Ct. 1318, 8 L. Ed. 2d 501 (1962), specifically applied the corporate analogy to a labor union. The Court held that Section 301(b) of the Labor-Management Act of 1947, "evidences a Congressional intent that a union as an entirety, like a corporation, be the sole source of recovery for injury inflicted by it." Still more recently, the Court observed: "[T]he labor movement has grown up and must assume ordinary responsibilities." *Linn v. Plant Guard Wkrs. of America, Local No. 114*, 363 U.S. 56, 63, 86 S. Ct. 657 (1966).

Defendants' position that a trade union should be immune to liability for allegedly *ultra vires* acts of its agents is outdated and wholly unjustifiable. It has no support in present Utah law and defendants are unable to muster a single practical or equitable reason why the principle *should* be adopted in this jurisdiction. Neither the Supreme Court of the United States nor the Supreme Court of California have found that such claims the least meritorious, in view of modern conditions. In fact, the one court defendants cite as upholding their proposition did so by only a narrow margin.

POINT III

THE COURT BELOW WAS CORRECT IN ITS FINDING THAT PLAINTIFFS CONTRACT CLAIMS COULD PROPERLY BE ADJUDICATED BY A COURT OF LAW.

1. A Trade Union is Accorded No "Special Treatment" Insofar as its Contractual Obligations to its Members are Concerned.

29 U.S.C. § 411 states:

No labor organization shall limit the right of any member thereof to institute an action in any court . . . irrespective of whether or not the labor organization or its officers are named as defendants or respondents in such action or proceeding

The plain import of the above statute is to preclude "special treatment" of a labor union when its members seek adjudication of their legal rights.

Since the enactment of Section 411, the courts consistently have held that a union member may seek recovery in the courts for violation of those rights which devolve upon him by operation of law. Those rights included his rights under the Labor-Management Relations Act. *Nelson v. Johnson*, 212 F. Supp. 233 (D. Minn. 1962), *aff'd.*, 325 F.2d 646 (8th Cir. 1963). The United States Supreme Court has held, even prior to the enactment of Section 411, that a union member has recourse to the courts for a breach of contract between him and the union. It held that a union which wrongfully expelled a member was guilty of breach of contract and was subject to that member's recourse to the state courts of California. *Gon-*

ales v. International Assn. of Machinists, 142 Cal. App. 2d 207, 298 P.2d 92, 99 (1956), *aff'd.*, 356 U.S. 617, 78 S. Ct. 95, 2 L.Ed. 2d 1098 (1958). *Accord, Lockridge v. Amalgamated Assn. of Street, Electrical, Railway and Motor Coach Employees of America*, 369 P.2d 1006 (Idaho 1962).

The cases cited by appellants in support of their contention that unions are entitled to "special treatment" all involved questions of internal union policy, rather than contracts between the union and a member thereof. In *United Glass Workers, Local No. 188 v. Seitz*, 399 P.2d 74 (Wash. 1965), the court refused to enforce a fine levied by the union upon a defendant for violation of the union constitution. In that case, the court held that "where the parties to a contract foresee a condition which may develop and provided in their contract a remedy for the happening of that condition, the presumption is that the parties intended the prescribed remedy as the sole remedy . . . and this presumption is controlling where there is nothing in the contract itself or in the circumstances surrounding its execution that necessitates a different conclusion." The Washington Supreme Court regarded the disciplinary provisions of the union conditions as the equivalent of arbitration clauses. It is not necessary to dwell upon the differences between a penalty prescribed by a union constitution for a specific act and an obviously unforeseen cause of action arising out of a separate contract created between a union and a prospective member. The other cases cited by appellants in support of their proposition that the "right of a labor organization as a voluntary association to administer

its rules is . . . sacred" all pre-date the enactment of Section 411 of the LMRA and all involved questions of purely internal union policy. *Cleveland Orchestra Committee v. Cleveland Fed. of Musicians, et al.*, 303 F.2d 229 (6th Cir. 1962) and *Dyer v. Occidental Life Ins. Co.*, 182 F.2d 127 (9th Cir. 1950) both involve challenges to the validity of the amendments of union rules. *Platt v. Amalgamated Assn. of Street and Electrical Railway Employees of America*, 50 Utah 472, 167 Pac. 830 (1917), *Louisville and N. Ry. Co. v. Miller*, 219 Ind. 389, 38 N.E. 2d 239 (1941), *cert denied*, 317 U.S. 644 (1941), *Baruhart v. UAW*, 12 N.J. Super. 79 A.2d 88 (1951), and *Martin v. Favell*, 344 Mich. 215, 73 N.W. 2d 856 (1955) all involved appeals from imposition of union discipline.

The law recognizes a distinction between a union member's rights derived solely from his union membership and his rights arising by operation law. Although defendants contend that the plaintiffs in this case "allege that they have a contractual right to receive strike benefits pursuant to the constitution of the union," plaintiffs actually allege that their right to receive strike benefits is derived from the constitution and/or promises made to them by a union organizer. Insofar as a contract exists — by means of the constitution or otherwise — that contract may be interpreted by the courts.

2. The Trial Court Could Not Be Precluded by Any Provision in the BLF&E Constitution from Taking Jurisdiction over this Action and Granting the Recovery Sought by Plaintiffs.

This action does not merely involve the internal affairs of a union. It is, of course, an action for breach of contract involving a serious deprivation by defendant-

of plaintiffs' pecuniary rights. It is well established that a state court may and should intervene in union disputes involving property of pecuniary rights of members. In this respect, it repeatedly has been held that the deprivation of pecuniary benefits resulting from binding contractual obligations involves a question of due process of law for which judicial aid may properly be sought. See Am. Jur. 2d § 28 and the cases cited therein. More particularly, where, as in the instant case, the controversy concerns money and property rights, as distinguished from matters of association discipline, policy or doctrine, the members' right to resort to the court cannot be abridged by provisions of the organization's constitution. *O'Brien v. Mutual*, 14 Ill. App. 2d, 173. 144 N.E. 2d 446 (1957).

A declaration in the constitution of an unincorporated association, like that of Art. 10, Sec. 3(e) of the B.L.F.&E. Constitution, (Exhibit P-1), that its obligations to its members are not contractual but moral only, and that they do not constitute obligations enforceable by civil action, cannot change the real character of such obligations. *Robinson v. Templar Lodge, I.O.O.F.*, 117 Cal. 370, 49 Pac. 170 (1897).

Provisions of a union constitution must be strictly construed so as to preserve the rights of members to due process of law in the courts. In *Armstrong v. Duffy*, 28 LRRM 2379 (Ohio 1951), the court was confronted with union constitutional provisions similar to those invoked by defendants in the instant case. Rejecting the union's attempt to use its constitutional provisions to deprive the court of jurisdiction, the court in *Arm-*

strong held such provisions cannot be enforced when they impinge upon a union member's right to due process of law under federal or state constitutions. After citing the Fourteenth Amendment of the United States Constitution and a provision of the Ohio Constitution identical to that of Article I, Section 11 of the Constitution of Utah, the court held that the plaintiffs had the right, *unrestricted by any constitutional provision of the union*, to resort to the courts in the first instance for relief.

Two further decisions to the effect that a court may disregard union constitutional provisions that conflict with duties imposed upon the union by law, include *Ryan v. I.B.E.W.*, 361 F.2d 942 *cert. denied*, 385 U.S. 933 (1967) (7th Cir. 1966), and *Bates v. Brotherhood of Locomotive Firemen and Enginemen*, 56 LRRM 2271 (D.C. Fla. 1964). In *Ryan*, the court held that a union constitutional provision, as construed by the union, was inconsistent with the provision of the LMRDA, 29 U.S.C. § 411 and was thus of no force and effect. In so holding, the court stated:

This claim of the Union, it seems to us, makes a member's bringing of a suit against a union or its officers too chancy a gamble for the member and effectually blocks access to the courts by placing the member in the dilemma of swallowing the grievance about which he wishes to sue (and against which the court might grant immediate and necessary relief), or suing upon the speculation that he will be safe from expulsion by the court's discretion being exercised in his favor.

Congress cannot have intended to burden the protection it gave union members in their right to sue in the 'Bill of Rights' of the LMRDA with the hazard that is clear in defendants' claim.

The right of free access to our courts is too precious a right to be curbed by the risky prediction that the judge's discretion may, like a lucky roll of dice, turn up in favor of the suitor.

The *Bates* case was an action against the BLF&E, the defendant in the instant case. In *Bates*, the court held that neither the union's constitutional provision involved nor a decision of the International President interpreting the same was binding upon the court. Those matters, being in conflict with provisions of federal labor law, were held to be of no legal effect.

3. Provisions in the BLF&E Constitution that would Foreclose Plaintiffs from a Remedy Outside of the Union are Without Force Under Utah Law.

Even aside from the substantial problems of due process generated by the exculpatory provision of the BLF&E Constitution, plaintiffs, under Utah law, may not be bound to adjudicate their rights solely within the union structure. Although defendants contend that plaintiffs' acquiescence to such union constitutional provisions obligates them to so confine their dispute, such an agreement is without force in Utah. A contract of this nature, is identical to an agreement to arbitrate future disputes, a type of agreement consistently held illegal in this state as contrary to the state constitution and to public policy. *Barnhart v. Civil Service Employees Ins. Co.*, 16 U.2d 223, 398 P.2d (1965). The arbitration agreement challenged in the *Barnhart* case was somewhat less sweeping than the contractual obligation which defendants would have the court impose upon plaintiffs

in the case at bar. A unanimous Utah Supreme Court found that such a clause violated the terms of Utah Code Ann. 78-31-1 and was contrary to the governing case law of the state. The court went further, holding that such a clause was contrary to Article I, Section 11 of the Utah Constitution which provides:

All courts shall be open, and every person for an injury done to him in his person, property or reputation shall have remedy by due course of law . . . and no person shall be barred from prosecuting or defending before any tribunal in this state, by himself or counsel, any civil cause in which he is a party.

The majority held:

It is thus to be seen that covenants which prevent a party from having access to court runs counter to both the expressed purpose and the spirit of our system of justice. This is further accentuated because such a provision purports to confer final judicial authority on private arbitrators and tends to divest the official courts of jurisdiction. This precludes them from fulfilling their responsibility of remaining available to adjudicate all controversies to anyone seeking justice. . . .

The instant case provides a circumstance of just the sort of danger the Utah Supreme Court perceived in an arbitration proceeding immune to judicial review. The plaintiffs' grievance in this case could not have been satisfied except at a considerable financial cost to the international union. Yet the defendants here would have the court believe that the only review permitted by their constitution was review by a union officer with an obvious interest in protecting the organization's funds.

POINT IV

APPELLEES WERE NOT REQUIRED TO UTILIZE INTERNAL UNION REMEDIES TO ANY GREATER EXTENT THAN THEY HAD ALREADY DONE PRIOR TO THE FILING OF THIS ACTION.

29 U.S.C. § 411(4) states:

No labor organization shall limit the right of any member thereof to institute an action in any court. . . . Provided, that any such member may be required to exhaust reasonable hearing procedures (but *not to exceed a four-month lapse of time*) within such organization before instituting legal or administrative proceedings against such organizations. . . . (Emphasis added.)

The only “internal remedy” which defendants claim plaintiffs failed to “exhaust” was appeal to the general convention of the BLF&E. However, appeal to the union general convention could not have been taken for almost a year after the dispute arose. (p. 3, *supra*, R. 785) Therefore, plaintiffs were excused by Section 411 from pursuing such a remedy. Further, plaintiffs already have exhausted the Brotherhood’s internal *appellate* remedies.

Article 13, Section 9(a) of the Brotherhood constitution states:

No member of or subordinate lodge of the Brotherhood shall resort to the civil courts to correct or redress any alleged grievance or wrong, or to secure any alleged right from or against any member, subordinate lodge or the organization, until such member or lodge shall first have exhausted all remedy by appeal. . . .

Article 16, Section 1, states:

(b) Should any doubt arise as to the proper construction of any section or rule thereof, it shall be referred to the International President, whose decision shall be final, unless modified or reversed by the ensuing convention.

(c) All interpretations rendered by the International President on the Articles in the constitution, shall, unless rejected by the following convention, be incorporated into the constitution when codified.

Article 13, Section 6(c) designates the International President's decision on questions of union law (distinct from other questions) as "final."

It should further be noted that the sections of the constitution prescribing the activities and procedures of the international convention (Art. I, Sections 10-43) make no provision for presentation of appeals from presidential decisions. There is no indication that plaintiffs would be entitled to appear in person or through counsel before the convention or any committee thereof. The only period during which the convention could consider plaintiffs' case would be during the time allocated to resolutions and motions. Yet Art. I, Sec. 29 of the constitution restricts the period for such consideration to the first day of proceedings and "one (1) hour at each succeeding morning session thereafter." An extremely abbreviated debate before a convention of several hundred union members does not amount to a genuine vehicle for appellate review.

Finally, the convention is a legislative, not judicial body. Article 1, Section 15(a) of the constitution states:

The Grand Lodge, in convention assembled, shall have exclusive jurisdictional and supreme law-making power over all provisions of the constitution and matters that concern the Brotherhood. . . .

These words strongly suggest that the convention is a legislative body in which plaintiffs would have recourse only to political rather than judicial or appellate remedies.

Defendants have further contended that plaintiffs must plead exhaustion of remedies in their complaint. However, none of the cases cited by them contain such a proposition. *Dalton v. Plumbers and Steam Fitters, Local No. 60*, 122 So. 2d 88, 89 (La. 1960) states merely that plaintiffs must make such an allegation. There is no question that such an allegation was made in the course of this action. None of the other cases cited by appellants contain even that rule. Indeed, the federal courts generally have treated the exhaustion of remedies doctrine as an affirmative defense: E.g., *Fruit & Vegetable Packers and Warehousemen, Local 760 v Morley*, 378 F.2d 738 (9th Cir. 1967).

POINT V

DEFENDANTS HAVE WAIVED ANY RIGHT TO LIMIT STRIKE BENEFITS BY REASON OF EARNINGS OF THE PLAINTIFFS FROM OUTSIDE SOURCES, AND DEFENDANTS ARE ESTOPPED FROM ASSERTING SUCH A LIMITATION.

Defendants contend that, under Article 10, Section 3(i) of the B.L.F. & E. Constitution, strike benefits to the plaintiffs should be limited to those months in which

the striking plaintiffs earned less than \$150.00 from outside sources. This claimed set-off has never been an issue in this case. The defendants wholly failed to plead any such set-off and failed to reserve same as an issue to be tried, and, upon trial, offered no evidence whatever to support this contention.

Plaintiffs pleaded, tried and argued this case to the trial court on the theory that the contract between plaintiffs and defendants is evidenced by the oral and written offers for membership in defendants made by defendants during the organizing effort and accepted by plaintiffs upon joining defendants. The record is barren of any evidence that such oral and written offers included any limitation upon the earnings of plaintiffs in connection with the "guarantees" of strike benefits. Indeed, the overwhelming evidence is to the contrary. There is evidence that some of the plaintiffs were advised and assured by representatives of defendants, including Mr. L. L. Iman, who was in charge of the campaign, and Mr. Brehany, the International Vice-President, that the Union had never invoked the \$150.00 limitation on earnings and would not do so. (R. 878-880) Plaintiff Fred Oneida testified that the possibility of defendants' invoking the earnings limitation was an issue raised in the organizing contest by the United Steelworkers and caused defendants' officers to obtain from a large number a long-time members of defendants affidavits reciting that such members had earned in excess of \$150.00 during prior strikes, but that strike benefits had never been denied them. These affidavits were then used

as recruiting tools to induce plaintiffs to join defendants,
(R. 878-880)

The defendants in their brief, at page 41, referred the court to only a portion of Article 10, Section 3(i) of the B.L.F. & E. Constitution, and cited that portion out of context. Read in its entirety, that constitutional provision required that defendants pay to their striking members strike benefits for a period of at least thirty (30) days, and that thereafter "all officers and members of the organization" extend "every possible assistance to find employment for members on strike ." (Exhibit P-1, pp. 197-198)

It is, of course, uncontroverted that plaintiffs were not paid any strike benefit for the first thirty (30) days of the strike or for any other part of the strike. There is absolutely no evidence that thereafter any officers or members of defendants provided any assistance to plaintiffs in obtaining employment. Thus, defendants wholly failed to perform the conditions precedent to their right to invoke the \$150.00 outside earnings limitation as set forth in the B.L.F. & E. Constitution.

Even if defendants had performed those condtions precedent, so as to be entitled to the supposed benefits thereof, and even if there were evidence to support defendants' claim of set-off, defendants have waived and are estopped under the circumstances to assert such a claim. The evidence is uncontroverted that defendants made no attempt during the subject Kennecott strike to determine whether any of its members (old or new, plain-

tiffs or not) had any monthly earnings in excess of \$150.00 per month during the time strike benefits were paid or payable. (R. 878, 898, 929, and 934-935) Defendants admittedly did not disqualify a single member from strike benefits during the 1967-68 nation-wide copper strike by reason of outside earnings during the course of the strike.

That no striking B.L.F. & E. members at Kennecott were disqualified by reason of outside earnings is established plainly by the testimony of Martin Jensen, defendants' Financial Secretary (R. 934-935), and interrogatory answers of the defendants on this matter (R. 158 and 215). There is also evidence in the record that various persons who received strike benefits from defendants earned in excess of \$150.00 per month during the periods when they received such benefits. (R. 880) Defendants instructed their general organizers, who in turn advised plaintiffs, to disregard any constitutional provision regarding outside earnings during a strike because that provision had never been invoked and would not be invoked as a limitation upon the right of plaintiffs to receive strike benefits. (R. 878-880, 1002-1004) E. F. Brehany, International Vice-President, was himself present on one occasion during the organizational campaign when one of the plaintiffs expressly informed those assembled that he had another job which would provide him earnings exceeding \$150.00 per month during any strike, and was nevertheless assured by the defendant Local's president that he would be eligible for full strike benefits. (R. 1006) Brehany took no exception to that assurance.

The trial court, having heard the evidence regarding the defendants' assurances to plaintiffs that the claimed \$150.00 per month outside earning limitation had never been invoked and would not be invoked against plaintiffs, concluded as a matter of law that the defendants were estopped by such conduct from now invoking such a limitation. (R. 567-568) The court further concluded that by reason of that same conduct and the evidence that other persons earning in excess of \$150.00 per month during the strike were paid full strike benefits, the defendants had effectively waived and abandoned their right to invoke the claimed constitutional limitation. (R. 567-568) In an effort to counter these conclusions, defendants argue that, since many of the plaintiffs possessed a copy of the B.L.F. & E. Constitution, no material facts were concealed from them, i.e., they could have ascertained from reading the Constitution that outside earnings may disqualify them from strike benefits. On the contrary, the evidence is clear that the defendants falsely represented to plaintiffs that, despite the language of the constitutional provision on outside earnings, the same had not in the past and would not now be invoked against the plaintiffs. (R. 787-880, 1002-1004)

Even assuming that plaintiffs knew of the claimed constitutional limitation, the critical thing *unknown* to them was that, notwithstanding these B.L.F. & E assurances that the limitation had not and would not be invoked, the Union would disregard such assurances and attempt to invoke such a limitation against them. The plaintiffs did not and could not reasonably have foreseen the defendants' flagrant breach of promise on that subject.

Defendants have correctly interpreted the doctrine of waiver as involving the voluntary relinquishment of a known right. However, their argument disregards the clear record here that such voluntary relinquishment did take place. Defendants certainly knew of the claimed "right" to limit strike benefits based upon outside earnings, since the same is contained in their own Constitution. Furthermore, the record is clear that defendants knew (1) that B.L.F. & E. members had earned in excess of \$150.00 per month during prior strikes and had even signed affidavits of that effect, (2) that B.L.F. & E. representatives were assuring plaintiffs that no constitutional limitation would be invoked against them if they joined and thereafter during the period of a strike earned in excess of \$150.00 per month, and (3) that numerous members receiving strike benefits in the 1967-68 Kennecott strike had earnings exceeding \$150.00 per month. (Exhibit P-1, R. 158, 215, 878-880, 898, 929, 934-935, and 1002-1004)

Defendants, knowing of such matters and having taken no action to invoke the constitutional limitation in the past or to counter the present assurances that it would not be invoked in the future, clearly waived and relinquished any right they might have had to rely upon that constitutional provision.

It is highly significant in this case that the defendants having learned long before the July 15, 1967 commencement of the Kennecott strike that plaintiffs had been promised strike benefits regardless of their job classification, regardless of the election outcome, and

regardless of their earnings during the strike period, at no time after acquiring that information and prior to the strike, informed plaintiffs that they would *not* be eligible for strike benefits.

Plaintiffs were induced by defendants to join the B.L.F. & E. and thereby gave up their rights to strike benefits from their previous unions; plaintiffs were then required to pay dues to the B.L.F. & E. and to perform picket duty and other duties on its behalf. Having imposed these burdens upon plaintiffs, defendants then denied them strike benefits at a time of extreme hardship. Because of that hardship, which resulted from defendants' failure to pay the promised strike benefits, a large number of plaintiffs were compelled to seek outside employment and earnings. To allow defendants to now invoke any constitutional limitation grounded upon those outside earnings would permit defendants to profit from their own inexcusable misconduct and breach of promise.

POINT VI

THE TRIAL COURT, IN ALLOWING COUNSEL FOR THE PLAINTIFFS TO CIRCULARIZE POTENTIAL PLAINTIFFS TO JOIN THE CLASS, DID NOT ABUSE ITS DISCRETION.

Under Rule 23, Utah Rules Civil Procedure (and the former Rule 23, Federal Rules of Civil Procedure), the question of the manner in which notice of a spurious class action may be circularized is left to the sound discretion of the trial court.

The right of plaintiffs to circularize notice of a spurious class action has been upheld in numerous cases. E.g., *Union Carbide and Carbon Corp. v. Nisley*, 301 F.2d 561 (10th Cir. 1961), *cert. denied sub nom., Weinberg v. Union Carbide and Carbon Co.*, 371 F.2d 801 (1962); *York v. Guaranty Trust Co.*, 143 F.2d 503, 529 (2nd Cir. 1944) (dictum); *Hormel v. United States*, 17 F.R.D. 300, 304-305 (S.D.N.Y. 1955).

Neither of the cases cited by defendants provides authority for reversal of a decision to permit circularization prior to trial. Judge Wyzanski, in *Cherner v. Transatron Electronics Corp.*, 201 F. Supp. 934 (D. Mass. 1962), specifically recognized that a trial court was empowered to authorize circulation, but decided not to do so in that case. *Id.* at 935.

In *Escott v. BarChris Construction Co.*, 283 F. Supp. 643 (S.D.N.Y. 1968), the court declined to authorize circulation *after judgment had been entered* — a situation very different than that in the instant case. Incidentally, there is no support in the *Escott* decision for defendants' contention that allowing "such solicitation was not within the discretion of the trial judge" and that to allow such notice would have been prejudicial error.

POINT VII

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

- 1. Defendants' Argument is Irrelevant Because Plaintiffs Relied upon Representations made by the BLF&E and the Terms of that Organization's Constitution as well as any "Apparent Authority of Union Representatives."**

Defendants' Point VII assumes that plaintiff relied only upon defendants' representatives' apparent authority in entering into their contract with defendants. This is not correct (See pp. 4-24, *supra*). Inasmuch as defendants' estoppel argument is based upon the assumption that plaintiffs' reliance was upon union organizers' apparent authority only, the point is not well taken.

- 2. Estoppel Being a Substitute for Consideration, the Measure of Damages to a Plaintiff who has Relied upon Defendants' Representations to his Detriment as the Value of his Contract.**

Estoppel is a substitute for consideration. *Eaton v. Wycoff*, 4 Utah 2d 386, 395 P.2d 332 (1956); II WILLISTON, CONTRACTS § 553A; RESTATEMENT, CONTRACTS, §§20, 90 (1932). Therefore, the measure of recovery due a plaintiff establishing estoppel is the value of his contract. RESTATEMENT, CONTRACTS, § 90, *Examples*. There is no authority in plaintiffs' cited cases or elsewhere that a plaintiff's damages are limited to those proximately caused by his reliance.

3. Plaintiffs Relied Upon Defendants' Representations, at Least to the Extent of Paying Dues and Performing Strike Duty.

The trial court stated the above as a finding of fact (p. 25, *supra*). The acts plaintiff performed amount to adequate reliance to invoke the doctrine of estoppel. RESTATEMENT, CONTRACTS § 90, *Examples; Federal Finance Co. v. Humiston*, 404 P.2d 465 (Wash. 1965); *Ziv Television v. Programs, Inc. v. Association of Grocers of South Carolina*, 114 S.E. 2d 783 (S.C. 1960).

POINT VIII.

THE JURISDICTION OF THE COURTS OF THE STATE OF UTAH OVER THE SUBJECT MATTER OF THIS ACTION IS NOT PRE-EMPTED BY THE NATIONAL LABOR RELATIONS ACT.

The statement appearing at page 58 of defendants' brief that "one of the field representatives of the Brotherhood arrogated to himself control of the campaign" is contrary to the evidence and inconsistent with the proper findings of the trial court that find ample support in the record. (See Point I, Sec. 4 above). The evidence is that L. L. Iman, brother-in-law of H. E. Gilbert, President of defendant B.L.F. & E., conducted the campaign under the scrupulous personal supervision of Mr. Gilbert, and that Mr. Gilbert was at all times familiar with and in personal charge of the campaign. (R. 1191-93, 1196 and Exhibits P-85 to P-135). The claim contained later in the same paragraph of defendants' brief that the representation of payment of strike benefits regardless of election result was made "later in the

election campaign'' is equally inconsistent with the evidence and with the trial court's findings. (See Point I, Sec. 6 above.) The evidence is that this representation was made from the inception of the campaign and provided a material part of the offer of membership made by the defendants to each of the plaintiffs. (R. 671, 1060-61 and Exhibits P-1, 11, 21, 41, 51, 72 and 140).

Defendants' preemption argument is a "red herring." Defendants argue that because they can cite no cause which in their view involves the grant of relief similar to the relief granted in this case, therefore, it must follow that such relief is not permissible. But surely the converse of the statement is far more correct. Defendants have not cited and cannot cite a single case holding or implying that contractual promises made in the context of a union-organizing effort cannot be enforced because of some supposed conflict with national labor policy. During the trial plaintiffs' counsel challenged defendants' counsel to present such a case, and none was forthcoming.

All of the cases decided by the United States Supreme Court and lower federal courts in which the so-called "preemption" doctrine has been articulated have involved violations or claimed violations of Section 8 of the National Labor Relations Act. None have involved conduct in the context of organizing campaigns, which does not fall within the purview of Section 8, but which falls within the purview of Section 9 of that Act. Surely, if defendants' preemption argument were well founded, defendants could cite at least one case in which

the argument has no much as been raised before, particularly in light of what defendants characterize as the "great number of representation disputes" that have occurred since the amendment of the National Labor Relations Act.

The record in this case establishes that plaintiffs, in an effort to determine whether or not defendants' preemption argument had any merit, sought an official determination by filing a charge with the National Labor Relations Board. This is precisely what defendants claim plaintiffs should have done, and this is precisely what plaintiffs did. By letter dated April 2, 1968, the National Director for Region 27 of the National Labor Relations Board refused to issue a complaint on the facts alleged in this action (a copy of plaintiffs' Complaint herein having been appended to the charge as filed), stating:

The above captioned case charging a violation under Section 8 of the National Labor Relations Act, as amended, has been carefully investigated and considered.

As a result of the investigation, it has been concluded that in the absence of any evidence that the unions' withdrawal of strike benefits affected the employment status or job opportunities or collective bargaining contract benefits of employees, its conduct was not considered to come within the ambit of Section 8(b)(1)(A). I am, therefore, refusing to issue complaint in this matter.

This determination, absent an appeal to the general counsel of the National Labor Relations Board, which

appeal defendants did not undertake, constitutes a final and binding determination by the National Labor Relations Board that the matters complained of in plaintiffs' Complaint are not within the purview of the Board's administrative powers or the National Labor Relations Act.

That determination by the National Labor Relations Board is clearly correct. Although the National Labor Relations Board has authority under the National Labor Relations Act to conduct elections to determine the desires of employees with respect to their collective bargaining representatives, there is nothing in that act or the decision thereunder which in any manner supports the defendants' assertion that such election powers preclude state courts from enforcing contractual obligations of unions or remedying their tortious conduct. On the contrary, in the leading case of *International Association of Machinists v. Gonzales*, 356 U.S. 617, 620, 78 S. Ct. 823, 925 (1958), the United States Supreme Court expressly upheld the rights of union members to sue their union in a state court for breach of contract. In so doing, the Court stated:

. . . The protection of union members in their rights as members from arbitrary conduct by unions and union officers has not been undertaken by federal law, and indeed the assertion of any such power has been expressly denied . . .
Thus, to preclude a state court from exerting its traditional jurisdiction to determine and enforce the rights of union membership would in many cases leave an unjustly ousted member without remedy for the restoration of his important union

rights. Such a drastic result, on the remote possibility of some entanglement with the Board, enforcement of the national policy would require a more compelling indication of congressional will than can be found in the interstices of the Taft-Hartley Act. (Emphasis added)

The United States Supreme Court has cited the *Gonzales* case with approval in a number of recent cases, including *National Labor Relations Board v. Allis-Chalmers Mfg. Co.*, 388 U. S. 182, 87 S. Ct. 2001 (1967). In the *Allis-Chalmers* case it was held that nothing in the federal labor acts prevented a union from attempting to enforce in the state courts fines imposed upon its members, pursuant to the union's constitution, for crossing such union's picket lines during a strike. Certainly, if the defendant unions can utilize the state courts to enforce the provisions of their constitution against their members, plaintiffs, who are union members, should likewise be allowed access to the state courts to enforce their rights against those unions.

The *Gonzales* doctrine, which sustains state court jurisdiction over such "internal union matters," was also followed in *Vaca, et al. v. Sipes*, 386 U. S. 180, 87 S. Ct. 903 (1967). In the *Vaca* case, the Supreme Court held that the Missouri state court had jurisdiction of a damage action brought against a union by a discharged employee who alleged that he had been discharged in violation of the collective bargaining contract, and that his union had arbitrarily and without just cause refused to take his grievance to arbitration under the contract. The Court rejected the union's contention that the state court lacked jurisdiction because the gravamen of the

action was arguably and basically an unfair labor practice within the exclusive jurisdiction of the National Labor Relations Board.

In rejecting a similar contention that a state court action for damages arising from libelous conduct occurring during a union organization campaign was barred because subject to the Taft-Hartley Act, the Supreme Court held:

“While the Board might find that an employer or union violated Section 8 by deliberately making false statements or that the issuance of malicious statements during the organizing campaign had such a profound effect on the election as to require that it be set aside, it looks only to the coercive or misleading nature of the statements rather than their defamatory quality. The injury that the statement might cause to an individual’s reputation — whether he be an employer or union official — has no relevance to the Board’s function. *Linn v. Plant Guards Local 114*, 383 U.S. 60, 63, 86 S. Ct. 657, 663 (1966).

The Court went on to say:

“The Board can award no damages, impose no penalty, or give any other relief to the defamed individual.” *Linn v. Plant Guards, supra*.

Likewise, in the instant case, the National Labor Relations Board could grant no relief to plaintiffs. Thus, it was properly within the province of the lower Court to try this case and grant to plaintiffs the relief to which they were entitled.

This Court should not seriously entertain the artificial and fabricated preemption argument urged by de-

fendants. The facts of this case are simple and involve no national labor policy implications. Defendants promised that if plaintiffs joined defendants, they would receive certain benefits. Plaintiffs joined defendants and paid substantial dues and otherwise supported defendants. Defendants broke faith with plaintiffs by failing to fulfill the plan and indeed admitted promises made to plaintiffs. (See Stipulation, R. 1060-61) The trial court had no difficulty with this argument, recognizing easily a legal argument, fabricated out of whole cloth, irrelevant to the issues of the case, and made in desperation in the face of an indefensible factual situation.

POINT IX

SECTION 501 OF THE LABOR-MANAGEMENT REPORTING AND DISCLOSURE ACT OF 1959 IS NO DEFENSE TO THIS ACTION.

Defendants' Point IX, like Point VIII, is a desperate legal argument fabricated because no factual defense is or can be made. It is more than sufficient answer to the convoluted reasoning of defendants' brief, predicated upon out-of-context quotations of the statute, to refer this Court to two other "clear and unequivocal" sections of the same Act upon which defendants claim they rely. Section 411(a)(4) of the Labor-Management Reporting and Disclosure Act of 1959 provides as follows:

"No labor organization shall limit the right of any member thereof to institute an action in any court or in a proceeding before any administrative agency, irrespective of whether or not the labor organization or its officers are named as

the defendants or respondents in such action or proceedings.”

The same Act, in Section 523(a) provides as follows:

“Except as explicitly provided to the contrary, nothing in this act shall reduce or limit the responsibilities of any labor organization or any officer, agent, shop steward, or other representative of a labor organization, or of any trust in which a labor organization is interested, under any other federal law or under the laws of any state, and, except as explicitly provided to the contrary, *nothing in this act shall take away any right or bar any remedy to which members of a labor organization are entitled under such federal law or law of any state.*” (Emphasis added)

Defendants’ argument totally disregards these clear provisions of the statutes.

Even if the statute were not in itself inconsistent with defendants’ contentions, those contentions are irrelevant. They depend entirely upon the notion, which is wholly without support in this record or in law, that the payment of strike benefits to plaintiffs as admittedly promised by defendants would violate defendants’ Constitution. In support of that argument, defendants cite Article 10, Section 3, paragraph (a) of that Constitution (Def. Brief, page 72) and argue that plaintiffs did not engage in a legal strike authorized by defendants. The Court should consider that claim. It is, of course, not claimed that plaintiffs did not participate in a strike. They did. Indeed, the record not only shows that they participated, but establishes that they fulfilled assigned picket duty for defendants and otherwise satisfied each

and every obligation of union membership in conjunction with that strike. (R. 1061 and Exhibits P-8, 11, 16, 18, 21). There is no claim that the strike was illegal. Surely, the last to claim that this strike was illegal would be those who initiated it, namely, the defendant unions and other unions at Kennecott. Nor can it be seriously claimed that the strike was not authorized by defendants. (See Point I, Sec. 7 above for full discussion) The fact that defendants paid strike benefits to some of their members engaging in this same strike, as the record clearly establishes, should be sufficient to establish beyond doubt that no claim is or can be made that defendants did not authorize the strike. (R. 917-939 and Exhibits P 179 to 84)

Accordingly, and contrary to the spurious argument made in defendants' Point IX, plaintiffs as members of defendants did engage in a legal strike authorized by defendants, and like all of defendants' other members who engaged in said strike, are entitled to the strike benefits provided to them under defendants' constitution and promised to them but unjustly withheld from them. Clearly, the facts of this case require the conclusion that the very provisions of the Labor-Management Reporting and Disclosure Act of 1959 upon which defendants rely have been violated by defendants in their wrongful and arbitrary refusal to pay to plaintiffs the admittedly promised strike benefits. There neither is nor can be any merit whatever to the false contention that defendants' payment of these benefits would violate that Act.

CONCLUSION

The judgment below should be affirmed in all respects since the findings of fact upon which it is based are overwhelmingly supported by the evidence of record. Further, the trial court was correct in its finding that a valid contract existed for the payment of strike benefits to those plaintiffs who joined the defendant unions and performed the duties required of members.

The trial court correctly decided that it had jurisdiction to adjudicate this action to enforce the contract rights of union members. Appellants' defense of *ultra vires*, "special status" of trade unions, non-exhaustion of remedies, waiver, incorrect measure of damages, etc. generally assume factual data not supported by the court's findings of fact and are grounded upon an incorrect interpretation of the relevant law.

It is difficult to imagine an action which the fundamental elements of justice and equity are more decisively on the side of one party than they are here. The gravamen of the question before the court simply is this: Is a labor union situated as is the defendant Brotherhood free to have its officers and/or representatives misrepresent and deceive with impunity in recruiting and dealing with members, or may union members seek redress for violations of their contractual rights in courts of general jurisdiction on the same terms as any other citizen? To state the question is to answer it.

For the foregoing reasons, plaintiffs respectfully submit that the judgment entered by the trial court be affirmed in all respects.

Respectfully submitted,

VAN COTT, BAGLEY,
CORNWALL & McCARTHY

C. Keith Rooker
Richard W. Giaque
Ricardo B. Ferrari

*Attorneys for Plaintiffs-
Respondents*