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 : Reply Brief

THE SUPREME COURT
F THE STATE OF UTAH

BY S. HANSEN, et al., for himself
for and on behalf of 191 other per-
similarly situated,

Plaintiffs-Respondents,

- vs. -

OTHERHOOD OF LOCOMOTIVE
EMEN AND ENGINEMEN and
DGE 844 of BROTHERHOOD OF
OMOTIVE FIREMEN AND EN
EMEN,

Defendants-Appellants.

LY BRIEF OF DEFENDANTS
OTHERHOOD OF LOCOMOTIVE
INEMEN and LODGE 844 OF
LOCOMOTIVE FIREMEN

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peal From Judgment of the
for Salt Lake
Honorable Lawrence

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Brotherhood of Locomotive
and Lodge 844 of
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IN THE SUPREME COURT OF THE STATE OF UTAH

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

Plaintiffs-Respondents,

- vs. -

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

Defendants-Appellants.

Case No. 11726

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

As suggested by Rule 75(p)(2), Utah Rules of Civil Procedure, this reply brief will be limited to answering new matters set forth in Respondents' brief. Appellants feel that Respondents have not met the argument set forth in their brief in chief, and will not dwell on Respondents' arguments as such. However, Appellants feel that Respondents have grossly miscited and misconstrued the facts shown in the record. The record

certainly speaks for itself, but Appellants feel duty bound to point out to the court the glaring errors and inconsistencies of Respondents' brief in this regard. Therefore, this reply brief will attempt to point out such errors and inconsistencies by highlighting portions of the record and Respondents' brief. Space does not permit, and it would serve no purpose, to attempt to re-argue the brief in chief herein.

POINT I

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

1. The evidence does not support the finding that plaintiff Oliver was ever a member of the BLF&E.

Respondents, in their brief (hereinafter cited as Resp. Br.), assert that defendants produced no records at trial indicating that Oliver had not made dues payments. (Resp. Br. at 5.) Oliver, as a plaintiff, had the burden to prove that he was a member of the BLF&E. Defendants were not obligated to produce any records of Kennecott Copper Corporation. If plaintiff Oliver wished to prove he had paid dues, it was his burden to produce such records. All of the records kept by the BLF&E indicate that Oliver never paid dues to the BLF&E. (R. 998; 924; 938; Exhibit D-190.)

2. **The evidence does not support the finding that alleged plaintiff Esquivel is a proper party plaintiff.**

Respondents assert that defendants "had practical notice" of plaintiff Esquivel's joinder. (Resp. Br. at 7.) In the final "Supplemental Notice of Joinder and Representation of Plaintiffs" filed on May 24, 1968, (R. 232-241) counsel for plaintiffs state:

> The attached amended Exhibit I, Part B, contains the names of those individuals who are members of the class of plaintiffs herein but who have not joined as individual plaintiffs herein and who are not, to date, represented by the undersigned counsel.

Plaintiff Heriberto Esquivel is listed on that amended Exhibit I, Part B. There was no further filing of notice of joinder by any plaintiff. Therefore, the last "practical notice" which defendants had was that Esquivel had not joined as a plaintiff. The order of the court which allowed such intervention states specifically:

> All members of the class desiring to join as parties plaintiff herein are to file an appropriate notice of joinder or otherwise express in writing their desire to so join, on or before May 24, 1968. (R. 190.)

Respondents citations to the record (R. 229) does not support a claimed extension; this is only Respondents' motion. No order granting such motion is cited. Alleged plaintiff Esquivel filed no notice of joinder. Defendants repeatedly objected to the failure of members of the class to intervene, and moved for dismissal without

prejudice as to those who had not intervened. (R. 192.) Further objection was made in defendants' memorandum on damages. (R. 311-312.) Additionally, defendants objected orally and moved to dismiss with reference to individuals who had not intervened at the beginning of the trial. (R. 667.)

3. The evidence does not support the finding that the defendants placed no condition other than membership on the payment of strike benefits.

Respondents assert that the record discloses that in prior Kennecott strikes the BLF&E paid strike benefits to persons who were not within the bargaining unit represented by the BLF&E. (Resp. Br. at 8.) Respondents fail to mention what else that record discloses. The record is also very clear that the BLF&E had no knowledge that members outside the bargaining unit were being paid. (R. 928.) Martin Jensen, in his testimony, indicated that the names of persons outside the bargaining unit placed on the 1967 payroll were placed there in error (R. 930.) and that he did not know it until after the strike. (R. 926-928.)

4. The evidence does not support the finding that plaintiffs Beck, D. P. Bennett, Glen Bennett, Carter, James, Kendrick, Tsutsui, Gale and T. N. Turner are entitled to recover strike benefits.

On page 14 of their brief, Respondents attempt to justify the failure of nine plaintiffs to introduce evidence in their behalf. There is clearly no evidence of reliance by these men in the record. There is no evi-

dence that they ever heard any representations allegedly made by employees of defendants. Respondents admit this when they admit these plaintiffs did not answer interrogatories propounded to them. Further, there is no evidence as to the good standing of these plaintiffs since they were excluded, by their own counsel, from the stipulation relied upon by the balance of plaintiffs. (R. 1060-1061.) The fact that none of the other plaintiffs failed to show reliance certainly has no relevance to these nine. This was a spurious class action and these plaintiffs had to prove their own case. Thus, plaintiffs Beck, D. P. Bennett, Glen Bennett, Carter, James, Kendrick, Tsutsui, Gale and T. N. Turner are not entitled to recover in this action. The finding of the court allowing them to recover is clearly unsupported by the evidence.

5. **Sub-points 4 through 11 of Respondents' brief contain numerous incorrect citations to the record in this case. The record does not support the findings made by the court.**

On page 11 of their brief, Respondents state that the Grand Lodge of Defendant had knowledge of promises allegedly made because "certain of the handbills and flyers which promised strike benefits were in fact prepared by the BLF&E in Cleveland, Ohio, and transmitted to Utah for circulation in the campaign." In support of that statement, Respondents cite R. 758-759, 1103-1104 and Exhibits P-54, 60 and 70. The record at pages 758-759 is the testimony of H. E. Gilbert, President of the BLF&E. President Gilbert specifically stated

that he did not know where the brochure labeled Exhibit 70 was produced. The only evidence that it was produced in Cleveland is "testimony" of plaintiffs' counsel Mr. Rooker. There is no evidence whatsoever in the record that preparation of that document was supervised by the Grand Lodge officers of the BLF&E. The record at pages 1103 and 1104 contains testimony of Mr. Trujillo, one of the plaintiffs. Mr. Trujillo stated that he did not know where Exhibit P-60 was prepared. The Union stamp on the back of that exhibit indicates it was printed in Salt Lake City. Trujillo said he didn't see Exhibit P-54 until about the time of the debate (March 24, 1967) or maybe "a little bit after the debate." (R. 1104.) He doesn't say where Exhibit P-54 was produced. There is no evidence in the record as to who prepared these exhibits or where they were prepared, except what is shown on the exhibits themselves. The exhibits do not support Respondents' point.

Exhibit P-70 cited by Respondents in fact supports defendants' position. That exhibit contains the following statement:

> With BLF&E *Representation* a man gets strike pay. (Exhibit P-70, page 1.) (Emphasis added.)

That exhibit clearly shows that strike benefits were conditioned upon representation. One not represented by the Union (not in a bargaining unit represented by the BLF&E) was not entitled to benefits. (*See* Appellants' Brief [hereinafter cited as App. Br.] at 16-33.)

Respondents admit, by their reliance upon the record they cite, that Exhibits P-60, 70 and 54 were not used until the final days of the campaign. This is in direct contradiction to their statement found on pages 16 and 17 of their brief that these exhibits were used "throughout the campaign."

Respondents cite R. 756-757 and Exhibits P-41 and D-162 and 163 as support for the proposition that:

> 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. (Resp. Br. at 12.)

Those citations in no way support the quoted proposition. The record, at pages 756-757, reports testimony of H. E. Gilbert, President of the Grand Lodge, BLF&E. Mr. Gilbert stated that the quotation read to him by counsel for plaintiffs (Exhibit D-162) was correct. There is no request by Mr. Iman for authority in Exhibit D-162 or in the record. Further, the quote states that Mr. Gilbert assured new members they would receive strike benefits "as spelled out in our Constitution." This would clearly prohibit strike benefits to plaintiffs since the BLF&E Constitution allows benefits only to those in a bargaining unit represented by the Union and plaintiffs were not in a bargaining unit represented by defendants. (See App. Br. at 16-21.) Exhibits P-41 and D-163 are to the same effect. Both indicate that the only authority given was to promise strike benefits "in accordance with

the Constitution." Further, Exhibit D-163 clearly states that Iman had not cleared his "strike benefit" promises with the Grand Lodge. (Exhibit D-163, page 2.)

The citation by Respondents to the Record, pages 1201-1202 and to Exhibits P-159 and D-144 on page 12 of their brief, is completely inaccurate and out of context. Mr. Iman testified that he did not know whether the "committee" actually talked to Mr. Gilbert. When Mr. Cole, a member of the "committee," testified, plaintiffs did not ask him.

The record clearly does not support the statement found on page 13 of Respondents' brief that defendant Grand Lodge ratified "in all respects" the activity of Mr. Iman. The citations to the record are all to the testimony of Mr. Iman and Mr. Cole. Clearly, ratification of an agent's unauthorized acts cannot be proved from the mouth of the agent. Even if ratification could be so proved — those pages of the record cited by Respondents do not contain any ratification. At page 1189, the testimony refers to a period of time prior to any activity by Iman. Clearly, a principal cannot *ratify* action before it happens. Page 1217 contains nothing remotely related to ratification. The fact that Gilbert never admonished Iman means he didn't know what Iman was doing, not that he approved of it. Pages 1232 and 1233 contain testimony of Mr. Cole to the effect that he had sent certain flyers to Mr. Gilbert, *after* the strike began, to show him what went on. Clearly, Mr. Gilbert did not ratify the conduct of BLF&E agents after the strike — at that time he did just the opposite

— he refused to pay strike benefits to plaintiffs. Further, the law is clear that a party can only ratify acts which it could have authorized initially. As set forth in our previous brief, the BLF&E could never have authorized strike benefits to these plaintiffs. (App. Br. at 16-33.)

Respondents state that unconditional promises of strike benefits were made by defendants throughout the entire course of the organizational campaign from October, 1966, to June, 1967. (Resp. Br. at 15.) They cite Exhibits P-1, 11, 21, 41, 51, 72 and 140. These exhibits give no support to that contention. (See discussion of these same exhibits, *infra*, at pages 27-28.)

On page 16 of their brief, Respondents cite interrogatory answers by plaintiffs in support of the proposition that unconditional promises were made "before the debate on March 24, 1967." These answers do not report, however, when such promises were made — whether two days before or six months before. Note that many of the plaintiffs did not join the BLF&E until after the debate (March 24, 1967). (Exhibit D-190). The evidence is clear that any such promises were not made until the time of the debate. (See App. Br. at 10.)

Respondents grossly contradict themselves and the record. They intimate that Exhibit P-54 was used all during the representation campaign and cite as authority testimony of their own witness, Mr. Trujillo. (Resp. Br. at 16.) They fail to cite the rest of Mr. Trujillo's testimony regarding Exhibit P-54, previously cited by Re-

spondents themselves on page 11 of their brief. Mr. Trujillo stated, in response to a question as to when Exhibit P-54 was used:

> I would say that this would have had to have been pretty close to the debate, because it might have been a little bit after the debate. (R. 1104.)

This gross mischaracterization of the evidence shows the weakness of Respondents' case. There is no evidence in the record to support a finding that Exhibit P-54 was used "throughout the campaign." The evidence is to the contrary.

At page 17 of their brief, Respondents completely mischaracterize the brief of defendants and then proceed to discredit their characterization; an obvious attempt to set up and knock down straw men. Although defendants deny the authority of their representatives to make such promises, defendants have never asserted that promises of strike benefits were not made prior to February, 1967. Defendants have asserted, and the record clearly shows, that *unconditional* promises of strike benefits were not made *prior* to that time. To that point, strike benefits had been conditioned upon the Constitution of the BLF&E which grants benefits only as enumerated therein. There is no evidence whatever in the record showing unconditional promises being made prior to that time. Respondents have pointed to none. The citations in the record (R. 671 and 1060-1061) purportedly supporting Respondents' position, do not do so. The purported stipulation at page 671 of the record was not

accepted by plaintiffs and even had it been, that stipulation referred to strike benefits "in accordance with the Constitution." The stipulation at pages 1060-1061 also referred to strike benefits in general. That stipulation specifically limits any promises of strike benefits regardless of the outcome of the election (unconditional promises) to a period after the debate (March 24, 1967).

Respondents cite Exhibit P-138 in support of their proposition that plaintiffs were included in the strike call issued by defendants. (Resp. Br. at 17.) That document says nothing of the sort. It does state, in part:

> Authority granted for peaceful withdrawal effective 12:01 A.M. M.D.T. July 15, 1967, unless *satisactory settlement* can be attained in interim. (Emphasis added.)

The italicized portion of the above quote clearly shows plaintiffs were not included in the call. It refers to settlement of the dispute between the Union and the company. The Union only has the authority to obtain settlements for those in the bargaining unit it represents. (See App. Br. at 16-21, 29-33.) Plaintiffs were not in that unit and hence were not called out on strike by defendants. (R. 1222-1224.)

Respondents, at page 18 of their brief, indicate that while serving picket duty they carried a placard stating they were on strike on behalf of the BLF&E. In support of this proposition, they cite Exhibit P-73. Upon examination of Exhibit P-73, it will be noted that there is nothing contained thereon stating who carried that

sign. This sign may well have been carried by one of the men in the bargaining unit represented by the BLF&E.

Respondents cite R. 141-142 on page 18 of their brief. This citation is to defendants' answer. It in no way supports the proposition for which it is cited.

In the argument covering pages 18 through 21 of their brief, Respondents assert that the strike payroll (Exhibit P-78) was valid. They seem to assert that a document fraudulently conceived and filled out by local officers then signed by a Grand Lodge officer, with no knowledge of the fraud, is forever binding on the Union even after the fraud is uncovered. Officers of the defendant Local 844 testified that they put plaintiffs' names on the payroll (Exhibit P-78) knowing they were placing them in improper categories. (Martin Jensen, R. 1145-1146.) Such impropriety cannot bind the Grand Lodge.

On page 20 of their brief, Respondents cite the BLF&E Constitution (Exhibit P-1, Article 10, Section 3(h) [page 197]) for the proposition that strike benefits are "mandatory." This is not so. That provision states that the payroll should be approved "if correct." The evidence clearly shows the payroll (Exhibit P-78) was not correct. (R. 1145-1146.) (See App. Br. at 12.)

Respondents then cite R. 296 for the proposition that defendants paid strike benefits to persons not within the bargaining unit in *prior* strikes. (Resp. Br. at 21.)

On page 926 of the record, Martin Jensen is speaking of the strike involved in the *present suit* (*not a prior strike*) and further he states:

> At the time I made out the payroll there were no members, to my knowledge, that were not in the bargaining unit.

Mr. Jensen then stated that he later found out that three or four men were not in the unit. Respondents have completely misstated the record. There is no evidence in the record to show that any letter of explanation was appended to the strike payroll when signed by Mr. Brehany, the only officer of the Grand Lodge to sign it.

On pages 22 and 23 of their brief, Respondents indicate that President Gilbert knew as early as "November 21, 1966, that such unconditional promises of strike benefits were being made." For this proposition, they cite numerous exhibits in the record, none of which indicate in any way that President Gilbert was aware of them, and only one of which, Exhibit P-54, says anything about unconditional strike benefits. The record clearly establishes that Exhibit P-54 did not come out until February or March, 1967. (R. 889-892; R. 1060-1062; R. 1104; R. 1181.) Every other one of these exhibits which speaks of strike benefits speaks of them "according to the Constitution." The Constitution clearly limits benefits to members of the bargaining unit represented by the BLF&E. (See App. Br. at 16-21.) Further, none of the exhibits cited in support of this proposition contain any dates indicating when the purported representations were made. Most of those exhibits contain no

dates at all. Such a shallow attempt to support their position indicates clearly that Respondents can produce no evidence that President Gilbert was aware of such promises prior to the commencement of this action.

Further on page 23 of their brief, Respondents misconstrue the evidence stating that defendants had "knowledge for a fifteen-week period [prior to the strike] that such unconditional promise [sic] of strike benefits had been made to plaintiffs and defendants at no time informed the plaintiffs that they would not be paid." This is entirely incorrect. There is no evidence that President Gilbert had knowledge of these unconditional promises prior to the strike. Plaintiff Trujillo himself testified that he helped gather up the flyers to send to President Gilbert to show him what went on out here. (R. 1142-1143.) This was after the strike had begun.

POINT II

THE COURT BELOW ERRED IN ITS FINDING THAT VALID CONTRACTS HAD BEEN ENTERED INTO BY PLAINTIFFS AND DEFENDANTS. THE TERMS OF ANY AGREEMENT BETWEEN THE UNION AND PLAINTIFFS WERE LIMITED BY PROVISIONS OF THE UNION CONSTITUTION. THE COURT FURTHER ERRED IN ITS FINDING THAT ALLEGED CONTRACTS ENTERED INTO BY EMPLOYEES OF THE UNION WERE BINDING UPON THE UNION.

1. The alleged agreement entered into by plaintiffs and employees of defendant was clearly prohibited by the Union Constitution.

Point II, Sub-point 1 of Respondents' brief is based upon an entirely inaccurate reading of Article 10, Section

3 of the BLF&E Constitution. Section 3(a) of Article 10 states to whom strike benefits may be paid and the legal rate authorized to be paid. Sub-section (b) is merely a policy statement referring back to 3(a); it grants nothing which was not granted by 3(a). Thus, the limitations found in 3(a), allowing strike benefits only to "members and non-members engaging in a legal strike authorized by this organization" are not affected by subsection (b). As set forth in our previous brief, subsection 3(a) must be interpreted to mean "members or non-members" in the bargaining unit represented by defendants. (App. Br. at 16-21; 30-33.)

2. **Plaintiffs, as Union members, were not "similarly situated" to those other Union members in the bargaining unit represented by the BLF&E and hence were not entitled to strike benefits.**

Subparagraph 2 of Respondents' Point II is also based upon a misconception as to the facts. Respondents state that Union members "similarly situated" were entitled to the same benefits. This is absolutely true. This is what defendants have argued from the beginning. There is no evidence whatsoever in this record that anyone in the position of plaintiffs in this action has been *intentionally* granted strike benefits. All persons similarly situated have been denied such benefits when their "situation" has come to the attention of the BLF&E. (See App. Br. at 6, 13, 14 and 15.) Further, on page 27 Respondents state that "the obligation of the

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." This is absolutely true. The cases cited by defendants do support this position. However, note the underlined portion of the foregoing quote from Respondents' brief. They admit that the obligation runs only to members of the same bargaining unit. As has been set forth in our previous brief, the facts show that plaintiffs were not members of defendants' bargaining unit. (R. 1223-1224.) (See App. Br. at 16-21.) Respondents' whole argument in this sub-point clearly supports defendants' position.

3. **Respondents, as Union members, are not entitled to strike benefits allegedly promised by employees of the Union if such promises were contrary to the Union Constitution.**

First, it should be pointed out that Respondents' citation to the record in support of their proposition that "representatives stated that the benefits were guaranteed by the Constitution" (Resp. Br. at 28) is wholly erroneous. Respondents cite R. 396-397, which, by letter dated October 14, 1969, has been amended to read R. 1060-1061. Even as amended, this citation is clearly erroneous. The citation is to the stipulation between counsel for the parties and there is no mention of the word "guarantee" whatsoever in this stipulation. In support of their sub-point 3 in Point II, Respondents cite numerous insurance cases. Such cases are clearly inapposite. The instant case does not involve an insurance company, and Union strike benefits are in no way

to be likened to an insurance benefit. These benefits are welfare benefits. They are welfare benefits offered by a union constitution, under certain conditions, to members of a non-profit, unincorporated association. Respondents' attempt to liken a union strike-benefits program to insurance is a gross misapplication of the law and facts. Respondents cite no cases which even remotely suggest that insurance law should be applied to a strike-benefit situation.

Even if the insurance cases were applicable, the evidence is clear in this case that plaintiffs were repeatedly shown the Constitution of the BLF&E. (R. 1060-1061.) They testify that on numerous occasions they were shown the Constitution, *e.g.* (R. 832; 869; 951, 967; 983) and specifically page 105, *e.g.* (R. 850, 869; 952; 983). Although the Constitution may be 300 pages long, the portion of the Constitution relevant here is one particular section of that document. Plaintiffs' attempt to rely on page 195 in order to obtain benefits but say they cannot be held responsible to have read page 196, which is a continuation of the same section. Further, plaintiffs continually characterize themselves as "untutored" and "unlettered." The record in this case does not support that characterization. The record shows no one of plaintiffs who was unable to read or write. Further, the provisions which defendants rely upon are printed in the same size of type as those upon which plaintiffs attempt to rely. There has been no attempt in this Constitution to hide limitations on the payment of strike benefits. Section 3(e) of Article 10 sets forth specifically, in language anyone can under-

stand, that said strike benefits are directory only and are not the basis of legal liability on the part of the Brotherhood. There is nothing ambiguous about this language.

On page 31 on their brief, Respondents cite *Henningson v. Bloomfield Motors, Inc.*, 32 N.J. 358, 161 A.2d 69 (1960). This is a case involving the manufacturer's disclaimer of warranty in a product's liability action. How that case has any relevance to the instant situation is impossible to understand. Further, the record is absolutely clear, and it was stipulated by counsel for plaintiffs, that plaintiffs had access to a copy of the Constitution from the time they joined the Union. (R. 1060-1061.) Thus, in order to understand strike benefits, all plaintiffs had to do was read one page in the Constitution. Several of them mentioned that "page 195" was repeatedly pointed out to them. (R. 850; 869; 952; 983.) At trial, Respondents knew even the page number of the part they wished to rely upon, but now they assert that they could not even read the next page of the Constitution due to their "limited education." The BLF&E is an unincorporated association made up of members, many of whom have this same "limited education." The members themselves drafted the Union Constitution. All of the members are bound by their Constitution, as was set out in our previous brief. (App. Br. at 16-21, 29-37.) One member cannot assert a benefit he is not entitled to against other members simply by stating he has "limited education."

Respondents state that most of the plaintiffs did not have access to the BLF&E Constitution "until a later date," insinuating that plaintiffs did not get the Constitution until sometime after they had joined the Union. (Resp. Br. at 31.) This is clearly contrary to the record The record is absolutely clear that

> [A] copy of the BLF&E Constitution was either given or made available to these plaintiffs before or upon joining. (R. 1060.)

Further, the testimony of plaintiffs themselves shows that they had access to the Constitution. (R. 850; 869; 952; 983.)

The insurance cases cited by Respondents under this Point are all based upon ambiguity in the written document. The Constitution of the BLF&E expressly states that the provisions as to strike benefits are directory only and cannot be the basis for legal liability. There is no ambiguity whatsoever in Article 10, Section 3(e). That provision states in part:

> The provisions of this section concerned with payment of strike benefits are directory only, and shall not be the basis of any legal liability on the part of the Brotherhood.

The foregoing clause is not susceptible of more than one interpretation. There is nothing in that clause which a court can construe. Respondents assert no other construction of this provision — they seem to ignore it, citing cases based upon ambiguity but pointing to no ambiguity in the provision relied upon by Appellants.

In addition, on page 32 Respondents allege that their comprehension of their bargain was "undoubtedly" determined by what they read in the Union campaign leaflets. It is amazing that plaintiffs, being so "untutored" and "unlettered" could read the campaign leaflets – especially that they could read Exhibit P-54 which purports to be material copied directly from the BLF&E Constitution which they allege they cannot read. The absurdity of this argument becomes evident upon its statement. A Union welfare program in the form of strike benefits can in no way be likened to commercial insurance transactions. The reliance and expectations of both classes are in no way similar.

4. Rights of Union members to receive Union funds are clearly governed by the provisions of the Union Constitution.

Plaintiffs' citation of *Seal v. Tayco, Inc.*, 16 Utah 2d 323, 400 P.2d 503 (1965) is clearly inapposite in this case. There is no ambiguity whatsoever in the disclaimer of liabilities found in Article 10, Section 3(e) of the BLF&E Constitution. That provision is not at all susceptible to two interpretations and need not be interpreted by a court. See discussion, *infra*.

5. The defense of ultra vires is clearly available to defendants.

On page 34 of their brief, Respondents state that the defense of *ultra vires* is not available to defendants and in support of this proposition cite the Utah Corporations Code, Utah Code Annotated, Section 16-6-23.

This citation is clearly inapplicable. As Respondents are well aware, the BLF&E is not a corporation. It is an unincorporated association and clearly not covered by the Utah Corporations Code. The cases cited by Respondents have nothing to do with the defense of *ultra vires.*

Respondents state that the decision in *Amalgamated Clothing Workers v. Kiser,* 174 Va. 229, 6 S.E.2d 562 (1939) and *United Brotherhood of Carpenters and Joiners v. Moore,* 206 Va. 6, 141 S.E.2d 729 (1965) could not have been reached under Utah Code Annotated Sectio 16-6-23. This is absurd. The Utah Corporations Code does not cover unincorporated associations and in no way can it be said that this provision would prevent a result as reached in those cases. Those cases are squarely in point with the instant case and both hold that union members cannot recover on promises made by employees of the union when said promises are outside the scope of the union constitution. All of the cases cited by Respondents are cases involving facts not applicable to the instant case. It will be noted that Respondents have not bothered to cite the facts of any of the cases upon which they rely. Further, Respondents have not distinguished the clearly controlling cases set forth in Appellants' brief.

The defense of *ultra vires,* a valid common-law defese, as it relates to unincorporated associations, has not been changed by statute in Utah. The statute cited by plaintiffs concerning the *ultra vires* defense, Utah Code Annotated 16-6-23, is in derrogation of the com-

mon law and must be very strictly construed. The statute cited by Respondents refers to non-profit corporations. The Unions involved as defendants in this case are not non-profit corporations. Had the legislature wished to include unincorporated associations in this statute, it would have done so. There is a sound policy dictating a difference where unincorporated associations of members are involved. These associations are made up of individual members, none of whom are obtaining profit from the association. The defense is especially applicable when one group of members is attempting to profit from another group by an *ultra vires* act. Each member, when he joins the group, is entitled to rely upon the protection of the Constitution. One member should not be allowed to recover on an unconstitutional obligation against a fund created by and for other members. Each has the duty to know and understand the provisions of the constitution. *See* App. Br. at 34, 25-29. The cases cited by Appellants in their previous brief are apposite and clearly the law. Respondents have cited no cases holding otherwise. The cases cited by Respondents as support for their proposition that the labor union should be treated as a corporation were all cases involving suits by an outsider against a labor union. None of those cases involved intra-union questions such as are involved in the instant case. This is clearly a distinguishing factor and while it may not be unjust to allow an outsider to recover against the labor union as if it were a corporation, it would be manifestly unfair to allow recovery by one member against a fund created by other members for a specific constitutional

purpose unless that purpose were fulfilled. Under the law, all union members are bound by the same constitution. It is noteworthy that plaintiffs make no attempt to distinguish *Pratt v. Amalgamated Association of Street and Electrical Railway Employees,* 50 Utah 472, 167 Pac. 830 (1917), a Utah case which is clearly controlling in this situation. They sidestep that issue by stating that it is "outdated and wholly unjustifiable." (Resp. Br. at 37.)

POINT III

THE COURT MAY NOT ALTER THE CONTRACTUAL LIABILITIES OF A LABOR UNION REGARDING STRIKE BENEFITS TO ITS MEMBERS WHICH ARE SET FORTH IN THE UNION CONSTITUTION.

Point III of Respondents' brief, beginning at page 38, clearly misreads Point III of Appellants' brief. Respondents continually argue that Appellants are asserting that the court has no jurisdiction because of the provisions of the Union Constitution. This is clearly incorrect. The Appellants, in point III of their previous brief, merely assert that the provisions of the Union Constitution regarding liability for strike benefits may not be ignored by the court. Appellants further argue that those provisions are binding upon Union members. The cases cited in Appellants' brief clearly sustain this argument. Respondents have not bothered to distinguish those cases. Appellants have not argued that he court should be precluded from taking jurisdiction over the action by the BLF&E Constitution. The only argument made by Appellants is that the court, in a dispute between a union and a union member, should be bound

by the provisions of the union constitution and should not grant recovery contrary to those provisions which are binding upon all members. There is clearly no violation of due process involved. Respondents have tried to create a Constitutional Due Process argument of straw so that they can knock it down for its impact on the court.

Appellants have never asserted that plaintiffs in this case had no remedies in court. Appellants have asserted, and still assert, that plaintiffs had a duty to exhaust their intra-union remedies prior to going to court. Thus, Respondents' argument at page 43 of its brief regarding arbitration agreements is clearly another straw man. Appellants do not quarrel with the authority cited by the Respondents that the Utah rule is against arbitration agreements. However, Appellants have never asserted that the Constitution of the BLF&E constituted an arbitration agreement precluding plaintiffs from seeking court action. The Constitution of the BLF&E in no way prevents a member from seeking court action. It is notable that the respondents have cited no section of the Constitution for their assertion. Appellants have never argued that Respondents should "so confine their dispute." Appellants do not assert that the provision above cited in the BLF&E Constitution "purports to confer final judicial authority on private arbitrators and tends to divest the official courts of jurisdiction." This was a problem with the arbitration clause involved in *Barnhart v. Civil Service Employees' Insurance Company,* 16 Utah 2d 223, 398 P.2d 873 (1965). Appellants have never felt there was anything akin to an arbitra-

tion agreement involved in the instant case. Article 10, Section 3(e) of the BLF&E Constitution merely states that the provisions on strike benefits do not create a legal liability upon defendants. All defendants ask the court to do is to interpret that Constitution in the only way that it can possibly be interpreted — the provisions on strike benefits may not create a binding obligation on the Union. Upon such an interpretation, plaintiffs in this case cannot recover.

POINT IV

DEFENDANTS HAVE NOT WAIVED ANY RIGHT TO LIMIT STRIKE BENEFITS BY REASON OF EARNINGS OF THE PLAINTIFFS FROM OUTSIDE SOURCES. DEFENDANTS ARE NOT ESTOPPED FROM ASSERTING SUCH A LIMITATION.

Throughout their brief, Respondents repeatedly refer to plaintiffs as if there were only one plaintiff. It should be noted that this was a spurious class action and 190 separate plaintiffs were allowed to intervene. Thus, there are 191 plaintiffs. Except for common questions of law and fact, each of these plaintiffs must prove his own case. At page 48 of their brief, Respondents state:

> 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.

If the evidence does, in fact, say what Respondents assert, and it seems equivocal on that point, such a repre-

sentation can only aid the person to whom it was made or communicated. That certainly cannot be treated as a common question of fact since all plaintiffs were not even present. The fact that Mr. Fred Oneida might have been so informed cannot sustain the claim of any other person that he was also so informed. Each plaintiff had the obligation to show facts constituting an estoppel if he intends to rely on estoppel. As to a majority of the plaintiffs, there is no evidence whatsoever in this record which would sustain an estoppel with respect to the outside-earnings limitation. With the exception of the two or three plaintiffs who testified that representations were made to them, the court's finding with regard to an estoppel is clearly not supported by the evidence and should be reversed.

Further with respect to the claimed estoppel, at page 48 of their brief, Respondents refer to affidavits supposedly "used as recruiting tools to induce plaintiffs to join defendants." In support of this proposition they cite the record at pages 878 and 880 (Testimony of plaintiff Oneida). This is a completely inaccurate and false characterization of the evidence set forth in the record. With regard to these affidavits, Mr. Oneida stated, "I don't believe they were ever used."

Since evidence of plaintiff's own witnesses indicates that these affidavits were never used, they can certainly give no support to the court's finding regarding an estoppel.

In support of their estoppel argument on page 49 of their brief, Respondents make a completely inaccurate

reference to Article 10, Section 3 (i) of the BLF&E Constitution. Respondents state:

> Read in its entirety, that Constitutonal 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". (Emphasis added.)

It is submitted that the use of the word "thereafter" by Respondents is completely inaccurate and mischaracterizes that portion of the BLF&E Constitution. Since the Constitution speaks for itself, Appellants urge that court to read that particular provision.

On pages 49 and 50 of their brief, Respondents allege that defendants made no attempt to ascertain the monthly earnings of their members during the time strike benefits were being paid or were payable. The citations to the record given do not support this proposition. Interrogatories answered by plaintiffs clearly show that defendants made inquiries. There is absolutely no evidence in the record as to whether defendants disqualified any members during the 1967-68 nation-wide copper strike. Respondents' statement that "defendants admittedly did not disqualify a single member from strike benefits during the 1967-68 nationwide copper strike by reason of outside earnings during the course of the strike" (Resp. Br. at 50) is not supported by the evidence. Respondents cite as support the tesimony of Martin Jensen, the Financial Secretary of the BLF&E.

This testimony does not support Respondents' proposition. Mr. Jensen stated that it was not his job to disqualify members for outside earnings and that therefore *he* had not done so. He did not state that the BLF&E had not done so or made inquiries. (R. 929-930.) Further, the interrogatory answers of defendants to which Respodents cite were never offered or admitted in evidence. Therefore, they are not before the court and were not before the trial court for determination of the case. Reliance cannot be had upon these interrogatories and answers. Even if reliance could be had upon the answers, the answers do not state that defendants made no inquiries.

According to the Constitution of the BLF&E, Article 10, Section 3(i), a member earning in excess of $150.00 per month should cut himself off from strike benefits by notifying the President of his earnings. Each member has a duty to notify the International President as to his earnings and the International President must then notify the General Secretary and Treasurer to remove such member's name from the payroll. That section allows the International President to request affidavits of members regarding their earnings, but it does not require him to do so. Affidavits in the form of interrogatory answers were required of plaintiffs in this suit because it came to the attention of the International President that many of them were working at outside jobs. Had other incidences of earnings come to the attention of the International President, he undoubtedly would have acted in the same manner with regard to those members.

At page 50 of their brief, Respondents state:

> E. H. 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 strike benefits. (R. 1006). Brehany took no exception to that assurance.

As set forth in the Constitution previously cited, it is the duty of each member to report his earnings to the President. The Constitution puts no burden on the International Vice President to make such a report. Further, if in fact such conduct could be the basis of an estoppel, only those who were present on that occasion or who relied on he statement could take advantage of it. There is nothing in the record indicating whether any of the plaintiffs other than Mr. Lindauer were present on that occasion or relied on that statement. Thus, none of the plaintiffs except Mr. Lindauer could use such evidence to support an estoppel. The trial court erred in finding defendants estopped from asserting this limitation. The facts of the case do not support such a finding for each of the plaintiffs.

On page 51 of their brief, Respondents cite the record at pages 787-880, 1002-1004, for the proposition that "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." Respondents' citation to pages 787 to 880 is completely unintelligible. They cite 100 pages of the record and it is impossible to know to what they refer. Pages 1002-1004 contain the testimony of Mr. Fred Lindauer only. Such a statement cannot be the basis for an estoppel finding on the part of all plaintiffs. If, in fact, that evidence is the basis for an estoppel, it can only be applicable to plaintiff Lindauer. The process of intervention in a spurious class action does not remove the burden on each plaintiff to prove his case. Certainly, reliance sufficient to support an estoppel is not a common question of fact.

On page 52 of their brief, Respondents allege that defendans *knew* that BLF&E members had earned in excess of $150.00 per month during prior strikes and that defendants *knew* that their representatives were assuring plaintiffs that no Constitutional limitation was invoked then and that defendants *knew* that numerous members receiving strike benefits in 1967-68 strike had earned in excess of $150.00 per month. In support of this, Respondents cite Exhibit P-1, R. 158, 215, 878-880, 898, 929, 934-935 and 1002-1004. Exhibit P-1 is the BLF&E Constitution. Record 158 is plaintiffs' interrogatories to defendants. Record 215 is defendants' answers to plaintiffs' interrogatories, which were never offered or admitted in evidence. Record 878-880 and 898 is testimony of plaintiff Oneida. Record 929, 934-935 is testimony of Martin Jensen. Record 1002-1004 is testimony of plaintiff Lindauer. None of the foregoing citations give any indication as to what was *known* by defendant Grand Lodge. It is submited that the evidence clearly indicates

that defendant Grand Lodge was not aware that any of these promises had been made until after the commencement of the strike. Mr. Trujillo himself, one of the plaintiffs, testified that he gathered up flyers and brochures used "out here" to send to Mr. Gilbert to show him what went on. (R. 1142-1143.)

POINT V

IT WAS NOT WITHIN THE TRIAL COURT'S DISCRETION TO ALLOW COUNSEL FOR PLAINTIFFS TO CIRCULARIZE POTENTIAL PLAINTIFFS TO INTERVENE, AND IN SO DOING THE TRIAL COURT ERRED.

The cases cited by Respondents in their brief, page 54, for the proposition that plaintiffs had a right to circularize notice of the spurious class action are equivocal and not controlling. The correct rule is set forth by Justice Pickett in his dissent in *Union Carbide and Carbon Corportion v. Nisley,* 300 F.2d 561 (10th Cir. 1962). Since it would serve no purpose to recite the judge's excellent work, Appellants here recommend it to this court.

York v. Guarantee Trust Company of New York, 143 F.2d 503 (1944) was an action by certain note holders for themselves and on behalf of others similarly situated. These notes had been sold to the public through Guarantee Trust Company of New York. The relevant portion of the opinion begins on page 528 where discussion is had regarding limitations and laches as to these unnamed plaintiffs who had not yet intervened. The court held that such plaintiffs could intervene and

take advantage of the position of the named plaintiffs in that respect. The question was whether such note holders could intervene after judgment. Since the case came up on appeal from the summary judgment granted for *defendants,* there was no judgment in the case which unnamed plaintiffs could participate in. The case was remanded and as far as research shows, was never retired. Thus, even though the court does state that "appropriate steps be taken to notify all note holders to intervene (if they have not theretofore done so)" this is clear dictum and so far as reported no such notice was ever granted as allowed.

In *Hormel v. United States,* 17 FRD 303 (S.D.N.Y. 1955) the court denied a motion by the named plaintiffs for an order directing that appropriate steps be taken to notifq all persons simlarly situated to intervene in the action, decision in whch was being appealed by defendant. In clear dictum, the court stated:

> I can see nothing wrong about the plaintiffs circularizing all others with similar claims against the Government.

This was not the motion beofer the court. The court in the *Hormel* case went on to enumerate the many possible abuses to this process and in response to plaintiffs' arguments attempting to sustain notice, stated:

> The natural answer to those arguments would be that these plaintiffs are not their brothers' keepers. *Hormel v. United States, supra.*

The court goes on to state:

> If litigants are to be given any such novel and revolutionary rights, courts should be authorized by statute or court rule to accord it. *Hormel v. United States, supra.*

This is clearly defendants' position in the instant case and as expressed by defendants' prior brief, no such action can be allowed absent proper legislation. The solicitation carried out in the instant case under the apparent authority and recognition of the court is clearly prejudicial to defendants and contrary to the law.

POINT VI

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

1. **Damages must be limited to those damages proximately attributable to the plaintiffs' reliance upon the actions of defendants' agents.**

At page 55 of their brief, Respondents shrug off Appellants' argument with regard to damages by the mere statement that these arguments are "irrelevant, because plaintiffs relied upon something other than the apparent authority of defendants' agents to make the representations made." Yet, Respondents cite no evidence in the record of any actual authority given to defendants' employees to make such representations. It is submitted that the record is devoid of any evidence indicating actual authority for such representations. Further, the Constitution of the BLF&E, Exhibit P-1, clearly limits the scope of any such representations as set forth above. The only possible theory of recovery remaining

to Respondents is one based upon apparent authority. Respondents make no response to Appellants' previous arguments relating to the measure of damages when apparent authority is involved. Appellants rely on that argument. (App. Br. at 52-57.)

2. **Estoppel is not a substitute for consideration and the measure of damages to a plaintiff who has relied upon the apparent authority of defendants' agents to make representations are those damages proximately attributable to plaintiffs' reliance upon the actions of defendants' agents.**

Respondents' argument at page 55 of their brief that estoppel is a substitute for consideration and therefore a plaintiff who has relied should receive the value of the contract is wholly without merit. The case relied upon by Respondents, *Easton v. Wycoff,* 295 P.2d 332, is completely miscited by Respondents. That case involved an oral agreement to lease real estate. The action was by the lessee to recover damages for breach of contract when the lessor refused to sign a written lease. The lessee's theory was that the statute of frauds could not be relied upon by the lessor since in fact the lessor had agreed to reduce the oral agreement to writing and had never done so. The case in no way holds that estoppel is a substitute for consideration on a contract. In fact, the case holds that there was no estoppel on the facts presented. Dictum in the case discusses what is required to invoke estoppel against a defense based upon the statute of frauds. In dictum the court states that under certain circumstances estoppel might be

substitute for part performance in order to take an oral agreement out from under the statute of frauds. However, the facts were not present in that case to justify an estoppel. Respondents' citation to II Williston, Contracts, Section 553A is unintelligible to counsel for defendants. No such section or volume has been found and hence no response to that citation can be given. The citations to the Restatment given are completely inapposite. Section 20 is entitled "Requirement of Manifestation of Mutual Assent" and refers to ways in which *mutual* assent to a contract can be given. Section 90 refers to "Promises Reasonably Inducing Definite and Substantial Action" and has nothing to say about estoppel being a substitute for consideration. In all the illustrations given under Section 90, there was consideration in the form of substantial performance. If plaintiffs are awarded any damages, said damages must be limited to those proximately caused by their reliance, as set forth and supported in Appellants brief at pages 52 through 57.

If plaintiffs in fact relied upon defendants' representations to the extent of paying dues and performing strike duty, no evidence as to the extent of such reliance is found in the record. There is no evidence as to how many times each plaintiff performed strike duty, or as to the amount he paid in dues. The record, in fact, indicates that most of the plaintiffs were suspended for nonpayment of dues in August and September of 1967. This was one month after the strike began. (Exhibit P-190.) If there was any reliance upon the part of plaintiffs as far as the record goes, said reliance was

miniscule and cannot be the basis for the recovery granted in the trial court. In the minutes of the local lodge membership meeting of July 27, 1967, it is stated that during this strike members' dues would be reduced to $1.85 per month. That same minute entry states that picket assignments would be six hours every other week. (Exhibit P-72.) At most, said recovery should be limited to the damage proximately incurred by plaintiffs due to their reliance, *e.g.* refund of dues paid or payment for hours worked on picket duty. Even if Restatement Section 90 were applicable, the examples stated therein all contain instances wherein consideration in the form of substantial performance was given by the promissee. In the fourth example where the promissee did not make any substantial performance, the example holds the promissor's promise is not binding, thus supporting defendants' theory set forth in its previous brief.

POINT VII

THE JURISDICTION OF THE COURTS OF THE STATE OF UTAH OVER THE SUBJECT MATTER OF THIS ACTION IS PREEMPED BY THE NATIONAL LABOR RELATIONS ACT.

At pages 56 and 57 of their brief, Respondents state that there is evidence in the record that a promise of strike benefits regardless of election results was made from the inception of the campaign. In support of this proposition, Respondents cite the record at page 671. Upon perusal of page 671 in the record, the court will find that this is a stipulation offered by counsel for defendants and never accepted by counsel for plaintiffs. Further, the stipulation states that:

> The benefits of membership in the Brotherhood of Locomotive Firemen and Enginemen were pointed out to these people as part of the organization campaign and that included within such benefits was that with reference to the payment of strike benefits in accordance with the Constitution.

This was no admission of unconditional promises of strike benefits. It states that strike benefits were promised in accordance with the Constitution. As explained in our previous brief, the Constitution clearly limits the payment of strike benefits to members of the bargaining unit represented by the BLF&E. (App. Br. at 16-29.) Respondents cite the stipulation found on pages 1060 and 1061 of the record. That stipulation states:

> From and after the debate between the competing labor organizations in the election campaign, March 24, 1967, it was represented to plaintiffs that they would be paid strike benefits if they were members in good standing and voted for the BLF&E at the NLRB election regardless of the outcome of such election.

This is not an unconditional guarantee from the *inception* of the campaign. This stipulation was specifically limited to the period after March 24, 1967. Further, this stipulation required that members vote for the BLF&E in the NLRB election. There is no evidence whatsoever in the record that any of the plaintiffs voted for the BLF&E in the NLRB election. As a matter of fact, defendants lost the election. This citation to the record clearly does not support the position alleged by plaintiffs.

As further support for this proposition, Respondents cite Exhibits P-1, P-11, P-21, P-41, P-51, P-72 and P-140. These exhibits do not support the proposition for which they are cited. Exhibit P-1 is the BLF&E Constitution which clearly limits strike benefits to members of the Union in the bargaining unit represented by the Union. Exhibit P-11 says nothing whatsoever about unconditional promises of strike benefits. It merely states the opinion of one man regarding commitments made as to strike benefits. It says nothing about what these commitments were.

Exhibit P-21 speaks of unconditional guarantees but the man who wrote that letter states that he did not arrive in Utah until after the debate. Hence, any comments he makes regarding promises of strike benefits must refer to a time after March 24, 1967, and cannot be said to apply "from the inception of the campaign."

Exhibit P-41 is a letter to H. E. Gilbert from Carl L. Morelli. This letter speaks of unconditional promises with respect to the date of the March 24 debate. This letter in no way supports the proposition that such unconditional promises were made from the beginning of the campaign.

Exhibit P-72 contains excerpts from the minutes of the meetings of Lodge 844, BLF&E. At no place in these minutes is there any specific mention of strike benefits, much less unconditional promises of strike benefits.

Exhibit P-140 is apparently a draft of a brochure. It is undated, contains pencilled in and lined out provisions and contains no reference whatsoever to strike benefits regardless of election outcome. The only reference to strike benefits is found in the first paragraph where it states:

> The Brotherhood pays strike benefits directly to members. This one fact alone makes the Company respect our *bargaining power.* Hundreds of thousands of dollars in strike benefits have been paid to Brotherhood members at Bingham Canyon down through the years. (Emphasis added.)

The above-quoted statement specifically relates payment of strike benefits to bargaining power. As set forth in our previous brief, this is absolutely true. Only those people for whom the BLF&E could bargain, those in the bargaining unit represented by the BLF&E, were eligible under the BLF&E Constitution to obtain strike benefits. (App. Br. 16-29.)

At page 58 of their brief, Respondents state:

> 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.

Respondents go on to state the nature of their alleged action. Notable, however, is the absence of any citation to the record. The record in this case does not establish any such efforts by anyone.

POINT VIII

SECTION 501 OF THE LABOR MANAGEMENT REPORTING AND DISCLOSURE ACT PREVENTS RECOVERY BY PLAINTIFFS IN THIS ACTION.

On page 64 of their brief, Respondents state that:

> 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.

In support of this proposition, Respondents cite the record (R. 917-939, and Exhibits P-179 to 84 [sic]). The record cited is the testimony of Martin Jensen and it clearly indicates that defendants knowingly paid strike benefits only to those members in the bargaining unit which they represented. These were the only persons for which the BLF&E could authorize a strike. The testimony further indicates that the only members outside the bargaining unit who were paid strike benefits were paid erroneously and without knowledge of the fact that they were not in the bargaining unit. Such information did not come to the attention of the BLF&E until the strike was over. (R. 926-928.) The citations to Exhibits P-179 to 84 are completely unintelligible. These exhibits are all flyers put out by the Mine-Mill and Smelter Union. They have absolutely no relevance to the proposition for which they are cited by respondents.