

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

WILLIAM F. MURPHY,)
)
Plaintiff) No. C 73-1336
)
v.) POST-JUDGMENT
) MEMORANDUM OPINION
INTERNATIONAL UNION) AND ORDER
OF OPERATING ENGINEERS,)
LOCAL 18, et al.,)
)
Defendants)

LAMBROS, DISTRICT JUDGE

On July 18, 1978 this Court entered its Findings of Fact and Conclusions of Law and Judgment in this matter. Since that time numerous post-judgment motions have been filed.

The time within which an appeal must be filed has been stayed pending resolution of the post-judgment motions and will begin to run from the date of filing of this post-judgment order.

I. PLAINTIFF'S MOTION TO AMEND JUDGMENT I AND PLAINTIFF'S MOTION TO SUBSTITUTE EXECUTRIX FOR DECEASED DEFENDANT JOHN POSSEHL

Paragraph 128 of the Findings of Fact and Conclusions of Law awards three thousand five hundred dollars (\$3,500.00) damages against defendant Possehl payable to the treasury of Local 18. The award is not stated in the Judgment itself and plaintiff moves to amend the Judgment to reflect the award.

This Court views the award of damages against defendant John Possehl as essentially personal and punitive in nature. Defendants' opposition to plaintiff's motions points out that defendant Possehl is deceased. This Court shall not obligate the estate of defendant Possehl to pay a damage award that is personal and punitive in nature. Accordingly, this Court hereby vacates the three thousand five hundred dollar (\$3500.00) damage award against defendant John Possehl. This

Court therefore views as moot plaintiff's Motion to Amend Judgment I and Motion to Substitute Executrix.

II. PLAINTIFF'S MOTION TO AMEND JUDGMENT II

Plaintiff moves this Court to order the defendant Union to prepare a summary of this Court's Findings of Fact and Conclusions of Law and Judgment, to submit the summary for approval by this Court, and to disseminate the approved summary to the Union membership by publication or by mail. Plaintiff asserts that such summarization and distribution is necessary to more fully vindicate his rights and remedy his injury.

Defendants' brief in response indicates that the news media in Cleveland, Columbus, Cincinnati, Akron and Ashtabula publicized plaintiff's victory. Defendants also point out that the Buckeye Engineer, the Union newspaper, has reported the status of the case and has done so without editorial comment. Additionally, defendants argue that the judgment alone vindicates plaintiff's rights and provides him with a remedy and that the judgment is subject to appellate review.

Plaintiff counters defendants' arguments by pointing out the adverse publicity to which he was subjected by the Buckeye Engineer. He asserts that publication of such a summary in the newspaper is therefore necessary to "expunge" his Union record, which defendants are required to do pursuant to the Judgment. Plaintiff also informs this Court that the Toledo media and the Kentucky media did not publicize the judgment.

Plaintiff's Motion to Amend Judgment II is denied. The Findings of Fact and Conclusions of Law and the operation of the Judgment fully and precisely describe the basis for defendants' liability and provide a remedy for plaintiff's injury. Moreover, to compel publication in the media, either printed or electronic, of any newsworthy topic is repugnant to

this Court. Notwithstanding the potential remedial effect of the publication plaintiff seeks, this Court views any such publication as an encroachment on the first amendment rights of the Buckeye Engineer.

III. MOTION TO VACATE AWARD OF PUNITIVE DAMAGES AGAINST DEFENDANT FRANK

In its Judgment this Court indicated that it would consider vacating the punitive damages award against defendant John Frank in the event:

Frank agrees, through the submission of an appropriate written document, to refrain from seeking, campaigning, and holding any local or international office in the International Union of Operating Engineers for a period of five (5) years.

Defendant Frank on April 3, 1981 filed with this Court an affidavit stating that he agrees to refrain from seeking, campaigning for or holding any International Union of Operating Engineers office for a period of five years. Accordingly, defendant Frank shall not seek, campaign for or hold any Union office during the five (5) year period following the date of entry of this order. The award of punitive damages against defendant Frank is hereby vacated.

IV. PLAINTIFF'S MOTION TO WITHDRAW ORIGINAL SUBMISSION ON ISSUE OF COMPUTATION OF DAMAGES TO WHICH PLAINTIFF IS ENTITLED AS A RESULT OF LOST EARNINGS AND SUBSTITUTE IN ITS PLACE A REVISED SUBMISSION

Paragraph 127(b) of the Findings of Fact and Conclusions of Law outlined the guidelines by which plaintiffs compensatory damages are to be calculated. With regard to lost wages, Paragraph 127(b)(1) states:

Lost wages for the period of April 1, 1970 to September 1, 1973, to be computed by subtracting plaintiff's total income for this period, as reflected by plaintiff's federal income tax returns, from the average total income earned in this period by those engineers registered in the same referral deck as plaintiff. .395/Pro-rations shall be made where necessary to accurately reflect this damage figure.

Footnote 395 states:

395. The Court notes that it is virtually impossible to compute plaintiff's exact loss of wages due to defendants' manipulation of the referral process, requests, the disparity in operative skills and equipment qualifications among the various engineers, and the inability to completely restructure the employment orders and referrals over this period. However, by taking the average salary of those engineers of comparable skills as plaintiff, the above variable factors should be substantially negated as to arrive at an accurate damage figure for lost wages.

Plaintiff filed his original calculations regarding lost wages on December 4, 1979. Defendants objected to various portions of the calculations by filing the affidavit of expert witness Dr. Robert N. Baird on November 3, 1980. Plaintiff has moved this Court for leave to withdraw his original computations and submit revised computations. Defendants have filed nothing in opposition to this motion. Plaintiff is hereby granted leave to file with this Court his revised computations.

V. PLAINTIFF'S MOTION TO ALLOW EXPERT FEES TO BE TAXED AS COSTS AGAINST DEFENDANT UNION AND DEFENDANTS' MOTION TO STRIKE PLAINTIFF'S MOTION AND AFFIDAVIT OF PLAINTIFF'S COUNSEL

Plaintiff has received invoices for economic and statistical services rendered by his two expert witnesses and consultants, Dr. John F. Burke and Dr. J. Berettoni. Plaintiff now moves this Court to order defendants to bear the costs of these experts' services. Plaintiff asserts that the "(s)ervices rendered by these experts were reasonably and necessarily incurred in preparation of reports necessary to the proof of discrimination in employment referrals by defendant Union and in the computation of the lost wages to which plaintiff is entitled." Defendants' motions to strike and supporting brief will be considered as an argument in opposition to plaintiff's motion.

Plaintiff contends that this Court may, pursuant to Rule 54(d), Fed. R. Civ. P., exercise its discretion and order that defendants bear the costs of these services. The Supreme

Court of the United States, however, has specifically ruled that with respect to a prevailing party's expert witness fees a District Court has no such discretion. Henkel v. Chicago, St. Paul, Minneapolis and Omaha Railway Company, 284 U.S. 444 (1932).

In Henkel the Court recognized that Congress had specifically prescribed by statute the amounts payable and taxable as witness fees. The Court reasoned that Congress had dealt with the matter comprehensively, that it had made no provision for the award of expert witness' fees, and that District Courts were bound by the purview of the statute.

The Henkel decision specifically prohibits District Courts from taxing as costs the fees of the expert witnesses of the prevailing party. Plaintiff's motion is therefore denied.

VI. DEFENDANTS' MOTION TO VACATE OR AMEND JUDGMENT

Defendants have moved this Court to vacate that portion of its Judgment based on violations of plaintiff's rights under 29 U.S.C. §411 which were redressed by application of 42 U.S.C. §1985(3).

Defendants' first argument in support of their motion to vacate is based on Great American Savings and Loan Association v. Novotony, 442 U.S. 366 (1979). Defendants assert that Novotony stands for the proposition that only deprivations of constitutional rights may be remedied through §1985(3). There having been no finding of a violation of plaintiff's constitutional rights in this Court's decision, defendants argue that the portion of the Judgment based on §1985(3) must be vacated.

This Court, however, does not read Novotony so broadly. Novotony held that violations of rights created by Title VII of the Civil Rights Act of 1964 may not be remedied through §1985(3). The Supreme Court's objective was to prevent

litigants who seek to vindicate rights created by Title VII from circumventing the comprehensive administrative procedures and remedies of Title VII by employing the remedy of §1985(3). The Supreme Court nowhere stated that violations of rights created by statute may not be remedied through §1985(3). Although Justice Powell did indicate in his concurring opinion that he would prefer to restrict the application of §1985(3) to redressing violations of constitutional rights, a majority of the Supreme Court has never taken such a position.

That Novotony does not compel this Court to vacate that portion of its Judgment based on §1985(3) becomes more evident when one notes that Congress did not establish an elaborate administrative remedial procedure through which the rights created by 29 U.S.C. §411 are to be vindicated. In direct contrast to the mandatory administrative procedures through which violations of rights created by Title VII must be remedied, 29 U.S.C. §412 enables a person to bring a civil action in District Court to redress violations of §411 rights.

In addition, the remedies established in Subchapter II of Chapter 11 of Title 29 of the United States Code (29 U.S.C. §§411-415; the Bill of Rights of Members of Labor Organizations) in no way limit the "remedies of any member of a labor organization under any State or Federal law. . . ." 29 U.S.C. §413. The remedies established in the Bill of Rights of Members of Local Organizations are clearly intended to be cumulative and not exclusive. The cumulative nature of the remedies by which violations of the rights established in §411 may be redressed is in direct contrast to the exclusive nature of the administrative remedies by which violations of the rights created by Title VII must be redressed pursuant to Novotony.

In short, Novotony does not compel the conclusion that §411 rights may not be remedied through §1985(3). No comprehensive administrative remedial procedure is circumvented when a litigant is permitted to vindicate §411 rights through §1985(3). Indeed, the remedies established in the Bill of Rights of Members of Labor Organizations are meant to be cumulative and not exclusive. Defendants' first argument is therefore rejected.

Defendants' other arguments are based on Browder v. Tipton, 630 F.2d 1149 (6th Cir. 1980).

Plaintiffs in Browder were employees of a freight line company who had been assigned to deliver fuel to a Cities Service plant in Tennessee. Defendants, four employees of Cities Service and their labor union, were picketing the Cities Service plant at the time plaintiffs sought to deliver their cargo. An altercation occurred between plaintiffs and one of the defendants at the time plaintiffs sought to cross the picket line. At a point later in time, defendants caused plaintiffs to be arrested by making false statements to a Magistrate.

Plaintiffs filed suit in District Court alleging that their civil rights had been violated and sought redress pursuant to §1985(3). Plaintiffs claimed to be members of a "class comprised of non-Cities Service personnel attempting to carry on business with Cities Service during the course of the strike." 630 F.2d at 1151. Plaintiffs argued that defendants had "violated §1985(3) by causing false arrests³ for the purpose of discriminating against members of this class." Id. (footnote omitted). The District Court dismissed the complaint and the Sixth Circuit affirmed.

In support of the motion to vacate, defendants initially argue that Browder holds that Novotony precludes the enforcement of the Federal labor laws through §1985(3).

Defendants point to the following footnote to support their contention:

We assume the sole deprivation is that of liberty-arrest without probable cause in violation of the Fourth Amendment. We recognize that defendants' alleged actions in interfering with a supplier's crossing a picket line may well have violated the Labor-Management Relations Act of 1947, as amended, see 29 U.S.C. Section 158(b)(4)(ii)(B)(1976). But redress of this infringement must be sought by way of the labor act's administrative scheme. Cf. Great Am. Fed. Sav. & Loan Ass'n v. Novotny, 442 U.S. 366, 99 S.Ct. 2345, 60 L.Ed. 2d 957 (1979) (Title VII action cannot be brought by way of Section 1985). Accordingly, we address only the infringement of liberty.

Id. n. 3.

This Court does not agree with defendants' argument. Notwithstanding the availability of §1985(3) to remedy conspiratorial violations of federal statutory rights that must be remedied through mandatory and exclusive administrative procedures, this Court concludes that violations of §411 rights, for which there are no exclusive administrative remedies, may be remedied through §1985(3). Remedies for violations of §411 rights are intended to be cumulative, 29 U.S.C. §413, and are to be pursued in the District Courts rather than through an exclusive administrative scheme. 29 U.S.C. §412.

Defendants next argue that Browder prevents this Court from concluding that the dissident faction of Local 18 is a "class" within the meaning of §1985(3). A fortiori, defendants contend, plaintiff could not have been the target of "some racial or otherwise class based invidiously discriminatory animus" within the meaning of Griffin v. Breckenridge, 403 U.S. 88 (1970).

The Sixth Circuit articulated in Browder guidelines concerning the definition of classes entitled to protection under §1985(3). The Court stated:

We hold that the class of individuals protected by the "equal protection of the laws" language of this statute are those so called 'discrete and insular' minorities that receive special protection under the Equal Protection Clause because of inherent personal characteristics. The persons protected under the

"equal privileges and immunities" language of the statute are those individuals who join together as a class for the purpose of asserting certain fundamental rights.

Browder v. Tipton, supra, at 1150.

Recognizing that plaintiffs had been denied the fundamental right to remain at liberty from state confinement absent probable cause for arrest, the focus of the Court's analysis was whether a "particular exercise of a fundamental right in a class-based manner" was the basis for the discrimination. Id. at 1153. The Court concluded that, although they may have been within a class recognized and protected by the Labor Management Relations Act, plaintiffs had not "suffered class-based discrimination on account of a peculiar exercise of a fundamental right." Id. (emphasis in original).

The situation that confronted this Court, however, was quite different than that in Browder. This Court's Findings of Fact and Conclusions of Law indicates that the basis for defendants' discrimination against plaintiff was his membership in the dissident faction of Local 18 and his seeking to exercise his §411 rights as a member of that faction. This Court concluded that plaintiff was discriminated against on account of the exercise of his §411 rights as a member of the dissident faction of Local 18.

Furthermore, in Browder the Sixth Circuit stated:

Following Griffin our Court has been faced at least eight times with groups claiming protection under §1985. Among the legitimate §1985(3) classes we have included supporters of a sheriff's political opponent, Cameron v. Brock, 473 F.2d 608 (6th Cir. 1973), [and] anti-Nixon demonstrators, Glasson v. City of Louisville, 518 F.2d 899 (6th Cir.), cert. denied, 423 U.S. 930, 96 S.Ct. 280, 46 L.Ed.2d 258 (1975). . . .

Id. at 1152. The Court also indicated why it considered these classes as protected under §1985(3):

Discriminating only against . . . anti-Nixon demonstrators, (Glasson), or particular local candidates (Cameron), deprives these groups of the

peculiar manner in which they exercise their "fundamental right" of free speech.

Id. at 1154.

In light of the continuing vitality of such classes under §1985(3) in the Sixth Circuit, it appears that the dissident faction of Local 18 is properly considered a class protected by §1985(3). This Court's Findings of Fact and Conclusions of Law clearly indicates that defendants' discrimination against plaintiff on account of his membership in the dissident faction deprived him of the peculiar manner in which he exercised his §411 rights. Furthermore, that plaintiff's rights of free speech, freedom of assembly, and freedom of association are statutory, 29 U.S.C. §411, makes them no less "fundamental" as the Court in Browder employed that term.

Defendants' arguments based on Browder are rejected. Furthermore, this Court having found defendants' arguments in support of the motion unpersuasive, defendants' motion to vacate that portion of the Judgment based on 42 U.S.C. §1985(3) is denied.

VII. DEFENDANTS' MOTION TO FILE SUPPLEMENTAL REPLY BRIEF IN SUPPORT OF DEFENDANTS' MOTION TO VACATE OR AMEND THE COURT'S CONDITIONAL JUDGMENT

Having denied defendant's motion to vacate or amend in Part VI of this Memorandum Opinion and Order, this Court views as moot defendants' motion for leave to file a supplemental reply brief in support of said motion.

VIII. DEFENDANTS' MOTION FOR WRITTEN RULINGS ON EVIDENTIARY OBJECTIONS RAISED DURING THE VIDEOTAPE PORTION OF TRIAL.

Having determined that this Court based its Findings of Fact and Conclusions of Law on only that evidence which was both relevant and admissible, all evidentiary objections raised during the videotape portion of the trial are hereby overruled.

IX. PLAINTIFF'S ATTORNEYS' FEES

Plaintiff has formally moved this Court for an award of reasonable attorneys' fees and has advanced several arguments in support of his motion. Plaintiff's attorneys have filed their affidavits documenting time spent on the case and the affidavits of attorneys in the community regarding hourly rates.

A. WHETHER PLAINTIFF IS ENTITLED TO REASONABLE ATTORNEYS' FEES

Reasonable attorneys' fees may be awarded in suits brought pursuant to 29 U.S.C. §412 to vindicate the rights enumerated in 29 U.S.C. §411. Hall v. Cole, 412 U.S. 1 (1973). The Court in Hall indicated that such an award is proper either when the defendants acted maliciously or in bad faith or when the plaintiff's vindication of his rights resulted in a common benefit to the union or its members. In this case, plaintiff is entitled to an award of attorneys' fees under both of the theories articulated in Hall.

In support of an aggregate punitive damage award of two hundred thousand dollars (\$200,000), this Court specifically found:

These defendants have intentionally, willfully and maliciously moved on all fronts to suppress plaintiff as a member of the dissident faction of Local 18.

Findings of Fact and Conclusions of Law, July 18, 1978, at 131-132. Such a finding of defendants' malicious conduct supports an award of attorneys' fees under the "malicious conduct" theory stated in Hall. That the awards of punitive damages were subject to being vacated upon certain conditions in no way precludes the finding of maliciousness from serving as a basis for an award of reasonable attorneys' fees.

With regard to the "common benefit" theory, the Court in Hall succinctly articulated the underlying rationale:

Another established exception [to the American Rule that prevailing parties are not entitled to an award of attorneys' fees] involves cases in which the

plaintiff's successful litigation confers "a substantial benefit on the members of an ascertainable class, and where the court's jurisdiction over the subject matter of the suit makes possible an award that will operate to spread the costs proportionately among them." Mills v. Electric Auto-Lite, [396 U.S. 375, 393-394 (1970)]. "Fee Shifting" is justified in these cases, not because of any "bad faith" of the defendant but, rather, because "[t]o allow the others to obtain full benefit from the plaintiff's efforts without contributing equally to the litigation expenses would be to enrich the others unjustly at the plaintiff's expense." Id., at 392. . . .

Hall v. Cole, supra, at 5-6 (footnote omitted).

The Court also indicated:

the rationale of these cases must logically extend, not only to litigation that confers a monetary benefit on others, but also to litigation "which corrects or prevents an abuse which would be prejudicial to the rights and interests" of those others.

Id., at 5 n. 7, quoting Mills v. Electric Auto-Lite Co., 396 U.S. 375, 396 (1970).

Plaintiff in Hall was a member of the Seafarers International Union of North America who had been discharged from the union after he had introduced a set of resolutions alleging instances of undemocratic actions and shortsighted policies on the part of union officers. The discharge was determined to have been in violation of his §411 right of free speech and he was ordered permanently reinstated to membership in the union. Although his monetary damage claims were denied, the District Court awarded him attorneys' fees under the "common benefit" theory. In upholding the Court of Appeals' affirmance of the District Court's award of attorneys' fees, the Supreme Court stated:

. . . there can be no doubt that, by vindicating his own right of free speech guaranteed by §101(a)(2) of Title I of the LMRDA, [plaintiff] necessarily rendered a substantial service to his union as an institution and to all of its members. When a union member is disciplined for the exercise of any of the rights protected by Title I, the rights of all members of the union are threatened. And, by vindicating his own right, the successful litigant dispels the "chill" cast upon the rights of others. Indeed, to the extent that such lawsuits contribute to the preservation of union democracy, they frequently prove beneficial "not only in the immediate impact of the results achieved but in their implications for the future conduct of the union's affairs."

Id., at 8, quoting Yablonski v. United Mine Workers of America, 466 F.2d 424, 431 (1972).

The situation in Hall is analogous to that in this case. Through plaintiff's vindication of his §411 rights, a series of reforms benefiting all members was initiated within Local 18.

It was this Court's intention that plaintiff's vindication of his §411 rights would effectively restore democracy to Local 18. This Court's goal in fashioning a remedy to redress the violations of plaintiff's §411 rights was to make Local 18 a more effective bargaining agent for its members and to assure them a full and fair opportunity to participate in union government and administration. See Preface to Findings of Fact and Conclusions of Law, July 18, 1978. The injunctive relief insuring against future misuse of the referral system, See Judgment, July 18, 1978, at 3, and the condition precedent imposed upon Local 18 to this Court's vacating the punitive damages against it, See Judgment, July 18, 1978, at 2 (Local 18 to submit for Court approval a plan to improve communication among and to the membership with regard to all serious candidates for Local 18 office without regard to platform, political affiliation, or financial position established as condition precedent to Court's vacating punitive damages against Local 18), do in fact confer a common benefit on the members of Local 18.

Plaintiff's success in this case conferred a substantial benefit on an ascertainable class, the members of Local 18, and an award of attorneys' fees against Local 18 will operate to spread the costs proportionately among them. Without such an award of attorneys' fees against Local 18 and Local 18's spreading the cost among its members through union membership dues, the members of the union would fully benefit from plaintiff's efforts without contributing to the litigation expense.

Defendants argue that, based on Alyeska Pipeline Service Co. v. The Wilderness Society, et al., 421 U.S. 420 (1975), plaintiff is not entitled to an award of reasonable attorneys' fees. Defendants contend that Alyeska Pipeline requires plaintiff either to have affected the statutory rights of all citizens or to have implemented public policy through the vindication of his rights in order to recover an award of reasonable attorneys' fees. Such an argument fails to recognize that Alyeska Pipeline was specifically limited to the "private attorney general" theory for awarding attorneys' fees. The Court in Alyeska Pipeline indicated that neither the "malicious conduct" theory nor the "common benefit" theory was under consideration in that case. With regard to the "malicious conduct" and "common benefit" theories, the Court specifically stated:

These exceptions [to the American Rule] are unquestionably assertions of inherent power in the courts to allow attorneys' fees in particular situations, unless forbidden by Congress, but none of the exceptions is involved here.

421 U.S. at 259 (footnote omitted).

This Court's award of attorneys' fees under the rationale of Hall v. Cole, supra, is expressly predicated on the "malicious conduct" theory and the "common benefit" theory. The "private attorney general" theory at issue in Alyeska Pipeline is not involved in this case. Defendants' arguments based on Alyeska Pipeline are therefore rejected as inapposite.

The second basis for awarding plaintiff reasonable attorneys' fees is the Civil Rights Attorney's Fees Awards Act of 1976. The statute provides, in pertinent part:

In any action or proceeding to enforce a provision of [section]. . . 1985 . . . of this title, . . . the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

42 U.S.C. §1988 (1976). Having denied at Part VI of this

Memorandum Opinion and Order defendants' motion to vacate that portion of the Judgment based on 42 U.S.C. §1985(3), plaintiff has prevailed on his claim to enforce his §411 rights through §1985(3) and is entitled to reasonable attorneys' fees pursuant to §1988.

Another issue raised by defendants is whether the involvement of the Legal Aid Society is a basis for denying plaintiff an award of reasonable attorneys' fees. This Court concludes that the involvement of the Legal Aid Society is not a basis for denying the award. Incarcerated Men of Allen County Jail v. Fair, 507 F.2d 281, 286 (6th Cir. 1974).

As a final note on whether plaintiff is entitled to reasonable attorneys' fees, that one of his counsel is a law school professor is not a basis for denying the award. Cf. Johnson v. Snyder, 470 F. Supp. 972, 975 (N.D. Ohio 1979) (attorney's fees awarded to law school professor who successfully represented plaintiff in action pursuant to Fair Housing Act).

Summarizing, plaintiff is entitled to an award of reasonable attorneys' fees under the "malicious conduct" and the "common benefit" theories as established in Hall v. Cole, supra, and under 42 U.S.C. §1988 (1976). That one of plaintiff's attorneys was affiliated with the Legal Aid Society and the other is a law school professor does not affect the award.

B. CALCULATION OF THE AMOUNT OF REASONABLE ATTORNEYS' FEES TO WHICH PLAINTIFF IS ENTITLED.

In Northcross v. Board of Education of Memphis City Schools, 611 F.2d 624 (6th Cir. 1979), the Sixth Circuit articulated guidelines by which attorney's fees awards pursuant to the Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. §1988, were to be calculated.

The Court's introductory remarks indicated:

This Court has been disturbed by the extraordinary variations in fee awards that have come before it on review, and by a marked failure on the part of the district courts to explain their reasoning, make necessary findings of fact, or demonstrate the calculations used to arrive at a fee. Such awards may well constitute an abuse of discretion while rendering the award virtually unreviewable. We therefore conclude that a uniform approach to awarding fees, with a requirement that the district court make clear and adequate findings of fact on the record, is necessary in order that we may discharge our statutory duty to award a "reasonable" fee. That which is arbitrary or conclusory is not reasonable, and is not fair to either of the parties involved.

611 F.2d at 636. While Northcross involved only an award pursuant to the Fees Awards Act of 1976, in an effort to achieve the "uniform approach" of which the Sixth Circuit spoke, this Court will apply the Northcross analysis even though plaintiff is entitled to fees under both the 1976 Act and the principles of Hall v. Cole, supra.

On October 2, 1980, both parties appeared before this Court for an informal post-judgment conference. At that conference the parties' counsel indicated that both parties were amenable to leave the determination of attorneys' fees to this Court on the record as it existed at that time and without further hearing, subject to plaintiff's filing with this Court affidavits of attorneys regarding prevailing hourly rates for similar services in the Greater Cleveland area. Plaintiff filed with this Court on November 3, 1980 the affidavits of William Martin Greene, attorney-at-law, and Robert P. Duvin, attorney-at-law.

Defendants supplemental brief filed on October 24, 1980 addresses the amount of attorneys' fees to which plaintiff is entitled. Defendants' arguments include an itemized analysis of plaintiff's claim under the checklist of factors established in Johnson v. Georgia Highway Express, Inc., 488 F.2d 714 (5th Cir. 1974). In Northcross, however, the Sixth Circuit expressly rejected the Johnson checklist approach to calculating attorneys' fees. 611 F.2d at 642-643.

Nevertheless, defendants' arguments will be considered and evaluated as this Court applies the principles and analytical framework of Northcross.

1. Hours of Service Provided

Northcross indicated that the District Court's analysis must first focus on the affidavits of counsel. The District Court need not automatically accept the hours claimed in such affidavits.

In complicated cases, involving many lawyers, we have approved the arbitrary but essentially fair approach of simply deducting a small percentage of the total hours to eliminate duplication of services.

* * *

Beyond this allowance for duplicative services, however, we hold that if a district court decides to eliminate hours of service adequately documented by the attorneys, it must identify those hours and articulate its reasons for their elimination.

611 F.2d at 636-637 (citation omitted).

In support of his motion plaintiff has filed the affidavits of his two attorneys, Alan Miles Ruben and Edward R. Stege, Jr. The chart on the next page accurately summarizes the number of hours documented in the affidavits of attorneys Stege and Ruben.

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EDWARD R. STEGE, JR.

| <u>CALENDAR YEAR</u> | <u>OFFICE</u> | <u>LITIGATION</u> | <u>TOTAL</u> |
|----------------------|---------------|-------------------|--------------|
| 1973 | 14 | 0 | 14 |
| 1974 | 25.5 | 3 | 28.5 |
| 1975 | 48 | 7 | 55 |
| 1976 | 199.5 | 129.0 | 328.5 |
| 1977 | 54 | 2 | <u>56</u> |
| | | | 482.0 |

ALAN MILES RUBEN

| <u>CALENDAR YEAR</u> | <u>OFFICE</u> | <u>LITIGATION</u> | <u>TOTAL</u> |
|----------------------|---------------|-------------------|--------------|
| 1977 | 120 | 0 | 120 |
| 1974 | 98 | 3 | 101 |
| 1975 | 167.5 | 6.5 | 174 |
| 1976 | 385 | 190 | 575 |
| 1977 | 165.5 | 2 | 167.5 |
| 1978 | 74.5 | 0 | 74.5 |
| 1979 | 19.5 | 0 | 19.5 |
| 1980 | 10 | 3 | <u>13</u> |
| | | | 1244.5 |

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The "Office" category in the above chart includes preparation for interviews and meetings, attendance at interviews and meetings, trial preparation, preparation for depositions, research, writing, and similar office activities. The "Litigation" category reflects attendance at depositions, trial, and conferences with the Court.

Having reviewed the affidavits of attorneys Stege and Ruben, this Court concludes that they neither claimed unjustified hours nor duplicated each other's services. This Court will neither deduct hours for cause nor arbitrarily deduct a small percentage of the total hours for duplication of services. This Court finds that the hours for which attorneys Stege and Ruben are entitled to compensation are accurately summarized in the above chart.

2. Hourly Rate and Calculation of Fees

In Northcross, the Sixth Circuit indicated that the District Court should focus its inquiry on the fair market value of the services provided. When considering fees for attorneys who do not maintain a private practice, the Court indicated that rates customarily charged in the community may be consulted for guidance.

To aid this Court in determining the reasonable hourly rate for legal services in the Greater Cleveland area for the period 1973-1980, counsel for the parties have submitted their respective affidavits and the affidavits of four attorneys not involved in this case. The contents of those affidavits are summarized in the chart on the next page.

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| | <u>GREENE</u> ^{1/} | <u>DUVIN</u> ^{2/} | <u>BEYER</u> ^{4/} | <u>BUTLER</u> ^{5/} | <u>STEGE</u> ^{6/} | <u>RUBIN</u> ^{7/} | <u>FADEL</u> ^{8/} |
|------|-----------------------------|----------------------------|----------------------------|-----------------------------|----------------------------|----------------------------|----------------------------|
| 1973 | \$ 50 | 60/70 | - ^{9/} | - | 55 | 65 | - |
| 1974 | \$ 50 | 60/70 | - | - | 55 | 75 | - |
| 1975 | \$ 75 | 70/80 | - | - | 65 | 85 | - |
| 1976 | \$ 75 | 70/80 | 70 | 65 | 70 | 85 | - |
| 1977 | \$ 75 | 90/110 ^{3/} | 70 | 65 | 75 | 85 | 50 |
| 1978 | \$100 | 90/110 ^{3/} | 82 | - | - | 100 | 50 |
| 1979 | \$100 | 110/135 ^{3/} | - | - | - | 100 | 50 |
| 1980 | \$100 | 110/135 ^{3/} | 93 | - | - | 100 | 50 |

1/ William F. Greene: Senior partner of Fink and Greene Co., L.P.A. Admitted to California Bar in 1971 and Ohio Bar in 1972. Figures reflect his regular hourly rates.

2/ Robert P. Duvin: Senior partner of Duvin, Flinker and Cahn. Admitted to Indiana Bar in 1961 and Ohio Bar in 1963. Earned L.L.M. from Columbia University in 1963. Figures reflect his regular hourly rates designated by (office rate/litigation rate).

3/ Average figures.

4/ William D. Beyer: Engaged in full-time practice of law since 1978. Employed by Jones, Day, Reavis and Pogue, Cleveland, Ohio from 1978 to 1980. 1976 and 1977 figures are based on his personal experience and judgment. 1978 and 1980 figures are based on the hourly rate Jones, Day, Reavis and Pogue billed clients for his services.

5/ Dennis F. Butler: Engaged in the full-time practice of law since being admitted to the Ohio Bar in 1970.

6/ Edward R. Stege, Jr: Plaintiff's counsel. Director of the Law Reform Office of the Legal Aid Society during his involvement with this case. Admitted to the Ohio Bar in 1968. Figures reflect his standard billing rate.

7/ Alan Miles Ruben: Plaintiff's counsel. Professor of Law, Cleveland-Marshall College of Law, Cleveland, Ohio. Admitted to Pennsylvania Bar in 1957 and Ohio Bar in 1971. Figures reflect his standard billing rate during fiscal years running from July to June of the following year.

8/ William I. Fadel: Defendants' counsel. Admitted to Ohio Bar in 1969. Figure reflects hourly rate charged his clients for litigation.

9/ A dash (-) indicates that the individual's affidavit did not state a figure for the particular year.

Having reviewed the affidavits summarized in the above chart, it appears that attorney Stege's hourly rates as stated in his affidavit are reasonable for an attorney of his experience during the period of time he was involved in this case.

Attorney Stege is therefore entitled to thirty three thousand one hundred seven dollars and fifty cents (\$33,107.50) in attorney's fees calculated as follows:

| <u>CALENDAR YEAR</u> | <u>TOTAL HOURS</u> | <u>HOURLY RATE</u> | <u>TOTAL</u> |
|----------------------|--------------------|--------------------|-----------------|
| 1973 | 14 | \$55 | \$ 770.00 |
| 1974 | 28.5 | 55 | 1,567.50 |
| 1975 | 55 | 65 | 3,575.00 |
| 1976 | 328.5 | 70 | 22,995.00 |
| 1977 | 56 | 75 | <u>4,200.00</u> |
| | | | \$33,107.50 |

With regard to attorney Ruben, it appears that for the most part the hourly rates stated in his affidavit are in accord with the community standards for an attorney of his experience. For calendar years 1975 and 1976, however, attorney Ruben's rate of eighty five dollars (\$85.00) per hour is slightly excessive. This is particularly evident when the rate is compared with the hourly rates of attorney Robert P. Duvin, the attorney most comparable to Ruben with respect to experience and years as an attorney, for the same time periods. Accordingly, for services rendered during 1975 and 1976 attorney Ruben's fees shall be computed at eighty dollars (\$80.00) per hour.

Attorney Ruben is entitled to one hundred thousand two hundred thirty two dollars and fifty cents (\$100,232.50) in attorney's fees calculated as follows:

| <u>CALENDAR YEAR</u> | <u>TOTAL HOURS</u> | <u>HOURLY RATE</u> | <u>TOTAL</u> |
|----------------------|--------------------|--------------------|-----------------|
| 1973 | 120 | \$65 | \$ 7,800.00 |
| 1974 | 101 | 75 | 7,575.00 |
| 1975 | 174 | 80 | 13,920.00 |
| 1976 | 575 | 80 | 46,000.00 |
| 1977 | 167.5 | 85 | 14,237.50 |
| 1978 | 74.5 | 100 | 7,450.00 |
| 1979 | 19.5 | 100 | 1,950.00 |
| 1980 | 13 | 100 | <u>1,300.00</u> |
| | | | \$100,232.50 |

3. Costs and Expenses

Attorney Stege has filed an affidavit documenting the litigation costs incurred in this case by the Legal Aid Society of Cleveland.

In Northcross the Sixth Circuit recognized that some expenses are included in the concept of attorneys' fees as they are necessarily incurred while furnishing effective representation. Among the items included in this category are photocopying, travel expenses, and telephone costs. The Court also noted that District Courts have discretion pursuant to 28 U.S.C. §1920 to tax as costs items such as stenographic transcripts from court reporters and witness fees.

This Court has examined attorney Stege's affidavit documenting the Legal Aid Society's expenses. Defendants have filed no specific challenges to the amounts designated therein. This Court concludes that all items designated in attorney Stege's affidavit are properly taxable as costs within this Court's discretion. This Court therefore awards to the Legal Aid Society of Cleveland its costs of one thousand eight hundred twenty one dollars and forty six cents (\$1,821.46) as itemized in attorney Stege's affidavit.

C. PLAINTIFF'S MOTION FOR LEAVE TO FILE SUPPLEMENTAL AFFIDAVIT IN SUPPORT OF PLAINTIFF'S MOTION FOR ATTORNEY FEES

Having determined the reasonable fees to which plaintiff's counsel are entitled, plaintiff's motion for leave to file a supplemental affidavit regarding the hourly rates in the community is moot.

X. DEFENDANT LOCAL 18'S PROPOSED PLAN FOR COURT ADOPTION AND PLAINTIFF'S MOTIONS FOR CONTEMPT SANCTIONS

In its Judgment, this Court indicated that it would consider vacating the punitive damage award against Local 18 provided:

Local 18 submits to the Court within Thirty (30) days from entry of this order a plan, to be considered for adoption as an order of the Court, which will ensure that the channels of communication among and to the membership of Local 18 remain open and accessible to all serious candidates for union office without regard to platform, political affiliation, or financial ability.

Judgment, July 18, 1978 at 2. On October 17, 1978 defendant Local 18 submitted such a proposed plan and requested that this Court vacate the punitive damage award against it. The proposed plan was comprised of three parts: A. Purposes and Principles; B. Referral Procedures; and C. Membership Rights and Union Elections. The parties have each filed extensive memoranda addressing the proposed plan and whether this Court should approve it.

On September 15, 1981 plaintiff moved for contempt sanctions against Local 18 on the ground that it had failed to comply with the injunctive relief regarding the referral system set forth in this Court's July 18, 1978 Judgment. Local 18 conceded that it had not implemented the injunctive relief, but asserted that it was under the impression that implementation was conditional pending this Court's final decision on the proposed plan. On November 30, 1981 this Court expressed its view that the injunctive relief regarding the referral system was not conditonal and ordered Local 18 to

immediately and fully implement said injunctive relief. This Court, however, did not grant plaintiff's motion for sanctions inasmuch as it recognized Local 18's position on the timing of the injunctive relief was not taken in bad faith.

Plaintiff again moved for contempt sanctions on February 1, 1982 on the ground that Local 18 had failed to immediately implement the injunctive relief in accordance with this Court's order dated November 30, 1981, as amended by order dated December 2, 1981. A conference was held at which plaintiff's motion was discussed. The parties presented their respective views on the injunctive relief and the integrity of the referral system in general. The parties also indicated that they would be willing to explore whether a negotiated resolution of the implementation of the referral system injunctive relief could be achieved. This Court then referred the parties to Magistrate David S. Perelman for discussions concerning the referral system and the meaningful implementation of the injunctive relief in this Court's Judgment.

This Court also informed the parties that it perceived as the object of this injunctive relief to insure that the referral system would be fairly administered and to provide a mechanism by which Local 18 members could ascertain whether the system was being fairly administered. With this in mind, the parties entered into months of negotiations before Magistrate Perelman and arrived at the following agreement with respect to the referral system:

REFERRAL SYSTEM AGREEMENT

"WHEREAS, this Court entered, on July 18, 1978, a judgment granting the plaintiff injunctive relief regarding the defendant Union's operation of the exclusive hiring hall job referral system established in collective bargaining agreements between the Union and various employer associations; and

"WHEREAS, plaintiff filed a Motion for Contempt Sanctions on September 15, 1981 against the defendant Union; and

"WHEREAS, on November 30, 1981, this Court issued a Post-Judgment Order, which was amended by the Court on December 2, 1981; and

"WHEREAS, plaintiff filed a Supplemental Motion for Contempt Sanctions on February 1, 1982; and

"WHEREAS, the Court has issued an order of reference to a Magistrate of the District Court to develop the terms of the settlement in order to implement the Court's injunctive orders regarding the operation of the exclusive job referral system maintained by the defendant Union and various employer associations, to obtain the agreement of the parties thereto, and to incorporate such terms in an order for adoption by the Court; and

"WHEREAS, the officers of The International Union of Operating Engineers, Local 18, signatory to this consent decree, were not defendants in the case of William F. Murphy v. International Union of Operating Engineers, Local 18, et al., Case No. C 73-1336, and the Court has made no adjudication as to their conduct;

"NOW, THEREFORE, the defendant Union, without admitting liability, and preserving all rights to appeal at such time as a final judgment is entered by the Court, including but not limited to the right of the defendant to seek a stay of the Court's Order pending appeal, and to vacate this Court's punitive damage award of \$150,000.00, and the plaintiff, without waiving his rights of appeal or to oppose such Motions if filed by defendant, hereby agree as follows:

"1. The exclusive hiring hall system, as established in existing collective bargaining agreements between the Union and various Employer Associations and maintained by the

defendant Union in each of the six districts, shall be operated fairly, consistently, and reasonably, so as not to favor any individual or group or individual registrants because of their allegiance or relationship to or affiliation with the Union, its members, officers, business agents, or other employees or representatives, and not to discriminate against any individual referral registrants because of their allegiance or relationship to or affiliation with other members, or opposition, lack of allegiance, or relationship to, or affiliation with the officers, employees, business agents, and other representatives of the defendant Union. Referrals made pursuant to the exclusive hiring hall shall be based solely upon job qualifications as reflected in the registrants' cards.

"2. No officer, business agent, employee, or other representative of the defendant Union shall, directly or indirectly, whether personally or through intermediaries, suggest, recommend, or otherwise designate to any employer or representative of an employer, that any individual or individuals be employed in any job subject to being filled through the aforesaid referral system. This provision shall in no way prohibit any representative of the defendant Union from, upon unsolicited request, giving his opinion of the abilities of any registrant based solely upon personal knowledge of registrant's work experience and performance.

"3. No officer, business agent, employee, or other representative of the defendant Union shall directly, or indirectly, through others, recommend, suggest, or otherwise indicate to any employer, or representative of an employer, that any registrant not be requested or employed or, if such registrant has been dispatched to work, that his employment be terminated.

"4. Every registrant shall designate on his card the types or classes of equipment he is qualified to operate and

with respect to which he is willing to accept employment. Whenever a work order is received calling for special skills, abilities or designating particular models or specifications of equipment, each registrant, in order of their registration seniority, who has designated the general type or class of equipment on his registration card shall be contacted to determine whether he has or is able to operate the particular model or specification equipment called for and shall not be passed over in favor of a less senior registrant who may have indicated on his registration card the special skill or particular model or specification equipment. Nothing in this provision shall prohibit the hiring by employers of individuals in Group A of the registration system by name for a production machine or for a mechanic or mechanic welder position, provided that such individual has been registered on the out-of-work list for at least twenty (20) days in the district in which the work is to be performed. Such a request by name must be confirmed in writing on the letterhead of the employer and signed by either the employer or the superintendent of the project.

"5. All registration cards shall be stamped to indicate the date and time received and shall be maintained in a registry in strict chronological sequence.

"6. All dispatching of registrants shall be made during the periods 7:30 a.m. to 12:00 a.m. and 2:00 p.m. to 5:00 p.m., Mondays through Fridays, holidays excepted, and 7:30 to 12:00 a.m. on Saturdays provided, however, when extraordinary circumstances require the dispatching hours may be extended beyond the aforesaid time limitations.

"7. One or more telephones shall be designated in each office as dispatch telephones and shall be equipped at all times with an appropriate and adequate telephone recording device which will provide a verifiable means of recording the

sequence of calls made and the digit sequence of dialed calls, the signal and all statements made by the dispatcher to the party called and the party's response and the time and date of the call. Upon request of the member, the entire conversation shall not be recorded. Such system shall be in place within forty-five (45) days of entry of this order and within thirty (30) days hereof the defendant Union shall advise the Court of the nature and features of the system it proposes to adopt and shall, upon notice to the plaintiff, seek an order permitting implementation of the system. If the Court disapproves of the defendant's proposal, the defendant may, at its option, propose a different system which would be acceptable to the Court or may withdraw its consent to incorporation of this entire agreement into the Court's final order and the Court deems may thereupon amend its final order as the Court deems appropriate. If the Court approves a proposal over plaintiff's objections, the plaintiff may withdraw his consent to the incorporation of this entire agreement into the Court's final order and the Court may thereupon amend its final order as the Court deems appropriate. The original tape or other media containing the recordings shall be preserved for a period of ninety (90) days, provided, however, that in the event a dispute arises over whether a dispatch has been properly made or whether a registrant has been denied, or improperly offered a referral opportunity, the tape or other recording media containing the telephone calls relating to the disputed dispatch shall be preserved until the dispute is finally resolved. All registrants shall provide a working telephone number to the Union for purposes of receiving dispatch calls. All dispatch calls shall be made over a recorder equipped telephone, provided, however, that in the event of an excess work load another telephone may be used temporarily to meet workload demands, and a log kept of all

calls so made reflecting date, time, number and person called. If a call to a registrant for a referral is made on a telephone not equipped with a recording device and is not completed because the telephone is not answered or the line is busy or the telephone is answered but the registrant is not available, the registrant shall immediately be recalled over a telephone equipped with the recording device specified herein and the busy signal, failure to answer, or absence of the registrant shall be verified.

"8. If a registrant called for dispatch to a job opportunity cannot be reached because the call is not answered, then the dispatcher shall go on to call the next senior registrant listing the qualification to operate the class of equipment called for in the work order. In the event of a busy signal, the dispatcher is permitted to attempt a recall within ten (10) minutes before bypassing the registrant in favor of another less senior registrant. A registrant who has been called but has not been reached shall retain his seniority in the registry and shall be recontacted in accordance with his referral seniority, at the beginning of the next dispatching period until such time as he is contacted and is dispatched. After the dispatcher has attempted and failed to reach a registrant three (3) times because the call is not answered or the line is busy, the registrant shall be informed by certified mail that the dispatcher has been unable to reach the registrant, and the registrant will be requested to contact the dispatcher immediately.

"9. When a dispatcher is available, all dispatches shall be made by a dispatcher assigned the responsibility during office hours and no business agent or other representative of the Union shall dispatch registrants. However, in the event that a dispatcher is not available, or the dispatcher seeks assistance because of the workload, a

business agent may dispatch registrants, provided, however, that all dispatches made by a business agent or other representative of the Union shall be made in accordance with the terms of this Agreement, and the identity of the business agent shall be recorded.

"10. All work orders and all requests for or recalls of operating engineers registered for referral shall be directed to and received by dispatchers assigned the responsibility during office hours unless the dispatcher is unavailable or otherwise occupied, in which case the business agent or other representative of the Union shall accept such work order and process it in accordance with the provisions hereof. The identity of any person receiving the work order shall be noted on the order.

"11. All work orders shall be promptly stamped and reduced to writing so as to accurately indicate the date and time the work order was received. Work orders shall be filled in accordance with the sequence in which they are received; except that if it becomes necessary, because of the volume of work orders, the dispatcher may defer filling work orders for jobs starting later than the next working day, until work orders for jobs starting the next working day have been filled. The work orders together with the names of registrants dispatched in response thereto shall be retained at the office for a period of not less than one (1) year, provided, however, that should any dispute arise over the correctness or validity of a dispatch in response to a work order, then the work order or orders involved in the dispute shall be retained until such time as the dispute is finally resolved.

"12. Each Monday, each District Office shall compile and post a legible list of all work referrals made during the previous week containing notations of the name of the

registrants and their respective dates and times of registrations, date and time of work order, date of job start, name of employer, job location, type of equipment, recall, request, odd days or minority. If the Monday is a holiday then the posting shall be made on the next day on which the office is open for business. Each such posting shall be readily accessible and available for inspection and shall remain posted for fourteen (14) days. Original work orders used in compiling said list shall be preserved for at least one (1) year. A copy of the posting form is attached hereto.

"13. One (1) hour prior to and one (1) hour after each District meeting and Advisory Board meeting, the work registration cards including those filed in the "temporary deck," shall be available to members registered in that District for inspection. Members shall be entitled to inspect all work registration cards but shall not be entitled to handle such cards.

After dispatches have been posted as provided herein, each registrant shall be entitled to copy ten (10) cards of those registrants who have been dispatched to job sites the preceeding week on equipment that the inspecting member operates and has listed on his work registration card. Such copying may be done during regular office hours but not more than once every fifteen (15) days and shall be requested and responded to in good faith. The copying shall be limited to the registrants' names, registration date, and listed equipment. Copying shall not be permitted of the registrant's home address and/or phone number. Upon request the inspecting registrant shall be entitled to inspect the work orders giving rise to the ten (10) dispatches. Such work orders shall not be copied unless they vary from the posted information.

"14. Any registrant may inquire of officers, business agents, employees and other representatives of the defendant

Union as to job opportunities available under contracts between Local 18 and employers which are not subject to the referral system, and shall be given complete and accurate information concerning such job opportunities to the extent of the respondent's knowledge.

"15. Only between the hours of 12:00 noon and 2:00 p.m. shall a registrant be entitled to call into the office and inquire as to his relative position in the deck. The dispatcher, upon request, shall also advise the registrant as to the date of his registration, and the date of registration of the most senior registrant in the registry and the date of registration of the registrant whose card is filed immediately prior to the registrant making the inquiry. A dispatcher, upon request, shall also advise a registrant as to the number of registrants in the temporary deck and the dates of registration appearing on the first and last registration cards in the temporary deck. All such inquiries shall be made and be responded to in a responsible and reasonable manner.

"16. All rules pertaining to the referral system which have not been reduced to writing shall hereafter be reduced to writing and be posted in each District office.

"17. Should this Agreement be found inconsistent with any valid local, state, federal law or regulation, this Agreement shall be null and void to the extent of that inconsistency.

"18. This Agreement is being entered into as a method of expeditiously implementing this Court's injunctive order relating to the operation of the exclusive hiring hall system as established in collective bargaining agreements between the Union and various employer associations, and for no other purpose. Accordingly, the parties agree that this Agreement does not constitute an admission of liability by the defendant Union.

"19. The defendant shall develop and retain in its possession a roster of registrants in group A for each District as of the effective date of this Order."

This Court views this Agreement as plaintiff's and defendant Local 18's joint proposal to modify and amend the "Referral Procedures" section of Local 18's original proposed plan.

Parts A and C of Local 18's original plan remain intact:

"A. Purposes and Principles: The purpose of this Plan is to provide for the continued compliance by Local 18 with the principles of Union democracy, and to facilitate the free and open exchange of knowledge, principles and ideals which promotes the democratic process of the American Labor Movement.

* * * *

"C. Membership Rights and Union Elections: The Court has found that 'Local 18 has complied with the legal minimums required of it regarding membership access to union meetings, mailing lists and publications.' In addition, Local 18 shall undertake the following:

"(1) Local 18 shall publish in the May and October issues of the Buckeye Engineer a copy of Title I - Bill of Rights of Members of Labor Organizations as set forth in the Labor Management Reform Act of 1959.

"(2) Local 18 shall publish a Notice in the Buckeye Engineer advising all members that copies of the International Constitution and Local Union By-Laws are available in the Union office upon request and shall publish prior to each election all provisions of the International Constitution and Local Union By-Laws pertaining to Union elections, the rights of members and candidates for Union office.

"(3) Prior to the nominations and elections the Union shall publish a Notice in the Buckeye Engineer advising all members that the following publications printed by the United States Government and pertaining to Union elections the rights of candidates and the rights of union members are available upon request:

"(a) Electing Union officers, published U.S. Department of Labor, Labor Management Services Administration, December 1977 Edition.

"(b) Rights and Responsibilities under the LMRDA, published U.S. Department of Labor, Labor Management Services Administration.

"(4) During and for the period of nomination and election, the Union shall set forth in its agenda a specific portion of each general membership meeting and district meeting for all major candidates to speak to the membership and set forth their positions on the relevant issues of the election. Each candidate shall be allowed five (5) minutes.

"(5) Considering the size of the Union membership, the period of time for candidates to inspect the membership lists containing the names and the last known addresses of all members shall be extended to two eight (8) hour days."

Plaintiff contends that Part C of the proposed plan will not meaningfully further this Court's stated goals and urges this Court to adopt more comprehensive reforms. Examples of the reforms plaintiff seeks are requirements for publishing union office candidates' biographies and campaign platforms in the Buckeye Engineer and for rotating candidates' names on election ballots. In support of his position, plaintiff in his motion to reject defendant's proposed plan itemized that which are alleged deficiencies in the August 1978 Local 18 elections. Plaintiff contends that the proposed plan should be rejected inasmuch as it fails to remedy the

"kinds of abuses" he asserts took place during the August 1978 election.

This Court, however, specifically concluded that it lacked jurisdiction to consider plaintiff's claims pursuant to 29 U.S.C. §481 regarding Local 18's election practices. Findings of Fact and Conclusions of Law ¶105. Nevertheless, this Court recognized that the parties had addressed at length plaintiff's allegations regarding election practices and therefore offered "some guidance" in the area.

With respect to candidates' reasonable requests to mail campaign literature to union members at candidates' expense, this Court concluded, "Plaintiff has in fact made use of this service and has never been denied the right to have campaign literature mailed." Id. at ¶105.c.2. This Court also noted that, despite conflicting evidence on the subject, Local 18 had not used its membership lists in a discriminatory manner in election campaigns. Id. at ¶105.c.3. Lastly, this Court addressed the non discriminatory use of and access to union publications. This Court recognized that the comments and criticism in the Buckeye Engineer directed at plaintiff and his fellow dissidents was often harsh, but concluded, "The Buckeye Engineer does not evidence a consistent concentrated practice of coverage of incumbent officers, and denigration of dissidents as to cross that fine line which distinguishes proper reporting from re-election campaigning." Id. at 105.c.5. (footnote omitted). Furthermore, this Court had specifically found, "The fact that some editorial judgment is exercised in the management of the newspaper does not establish that The Buckeye Engineer has been used as a political weapon against the dissidents." Id. at ¶96.

It therefore appears that the extensive remedial measures plaintiff proposes as alternatives to the components of Part C of Local 18's proposed plan address areas over which

this Court concluded it had no jurisdiction. Consequently, this Court concludes that it is beyond the scope of this action to implement the comprehensive reforms in the election process and the Buckeye Engineer plaintiff advocates.

In one of his memoranda in opposition to Local 18's original proposed plan, plaintiff succinctly stated that which was a primary concern of this Court in fashioning a meaningful remedy:

While the assurance of fair referral opportunities is important in and of itself, the linkage between a non-discriminatory referral system and democratic governance of the Union cannot be overstated.

So long as individual members of the Union fear that their ability to obtain and keep employment is dependent upon their remaining in the good favor of the controlling officers of Local 18, they are unlikely to overtly express any views other than allegiance and loyalty. Indeed, the only way for members to succeed economically at their trade is to demonstrate intangible ways their support of the incumbent administration.

Accordingly, any efforts seeking to democratize the channels of communication and procedures of the defendant Union are doomed to failure so long as members perceive that their economic well-being depends upon their not being viewed as dissidents.

This Court concludes that the Referral System Agreement will meaningfully address this primary concern. The agreement provides for fair work referral and a mechanism by which members may determine whether the system is being operated fairly. When implemented in conjunction with the program for dissemination of information set forth in Part C of the proposed plan, this Court is confident that the members of Local 18 will be afforded a full and fair opportunity to participate in its governing processes without fear of retribution.

In conclusion, this Court incorporates by reference and hereby orders Local 18 to immediately and fully implement the following: 1. Part A of its proposed plan, "Purposes and Principles;" 2. The Referral System Agreement reached by the parties; and 3. Part C of its proposed plan, "Membership

Rights and Union Elections." With respect to the publications itemized in Paragraph 3 of Part C of the Plan, Local 18 shall make available upon request the most recent editions of said publications.

Having fully incorporated by reference and having ordered the implementation of Local 18's proposed plan as amended by the Referral System Agreement, this Court hereby vacates the punitive damage award against Local 18.

Pursuant to the Referral System Agreement among the parties, this Court views as withdrawn plaintiff's two motions for contempt sanctions.

XI. CONCLUSION

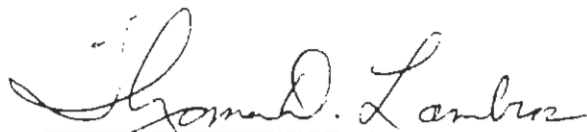
This memorandum opinion and order fully and comprehensively addresses each of the motions pending on the post-judgment docket. At this time, this Court reaffirms its hope that this lawsuit will renew democratic spirit within Local 18 and that each member will enjoy a full and fair opportunity to participate in its governance.

The parties and their counsel are to be commended for having made the effort to achieve a negotiated resolution of their differences concerning the referral system. This Court also recognizes the important role played by Magistrate David S. Perelman during the parties' negotiations.

Manipulation of the work referral system was at the core of this dispute. This Court is confident that, under the Referral System Agreement achieved by the parties, the system will operate smoothly and be administered in a fair manner.

That the parties reached an accord on this delicate issue indicates that a spirit of cooperation has gained a foothold in the relationship between Local 18 and its members. And cooperation is certainly more productive and beneficial than conflict.

IT IS SO ORDERED.



Thomas D. Lambros
United States District Judge

DATED: October 14, 1982