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Reply Brief for Plaintiff-Appellants Joseph Rodonich, Alex Chotowicky, Wasyl Lawro, Harry Diduck, Edward T. Markunas, Executor of the Estate of Harry Diduck

Lewis M. Steel '63

92-7394, 93-9262

In The

United States Court of Appeals

For The Second Circuit

JOSEPH RODONICH, ALEX CHOTOWICKY, WASYL LAWRO, HARRY DIDUCK, EDWARD T. MARKUNAS, Executor of the Estate of Harry Diduck,

Plaintiffs-Appellants,

vs.

HOUSEWRECKERS UNION LOCAL 95 OF LABORER'S INTERNATIONAL UNION OF NORTH AMERICA, LABORER'S INTERNATIONAL UNION OF NORTH AMERICA, JOHN SENYSHYN, individually, and as president, JOHN ROSHETSKI, individually, and as treasurer, STEPHEN MCNAIR, JOSEPH SHERMAN, ANDREW KLEBETZ, ALBERT BENDER, WILLIAM NAHAY, PHIL CHILLAK, JOSEPH PASTROSKI, SAMUEL ADAMS, HAROLD SPELLMAN, PETER JONES, JOHN SLAN, EARL DUPREE, JOHN CHILLAK, ALBERT NAHAY,

Defendants-Appellees.

REPLY BRIEF FOR PLAINTIFFS-APPELLANTS JOSEPH RODONICH, ALEX CHOTOWICKY, WASYL LAWRO, HARRY DIDUCK, EDWARD T. MARKUNAS, EXECUTOR OF THE ESTATE OF HARRY DIDUCK

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LIUNA'S ATTEMPT TO CHARACTERIZE THIS CASE AS A PRIVATE PERSONAL INJURY SUIT, RATHER THAN A VINDICATION OF STATUTORY UNION DEMOCRACY RIGHTS, HAS NO MERIT

A. The Statutory Policy Enforced By Private Suits Under Title I's "Bill of Rights"

The central postulate of LIUNA's brief is that the enhancement of democracy is an insufficient "benefit" to warrant fee-shifting under the LMRDA, and that this case is, in any event, for personal injury alone. This position ignores both the purposes of the Act and the nature of Diduck's claim.

Title I--the Bill of Rights of Members of Labor Organizations, articulates and implements the central policy of the statute--protection of the democratic process in unions. Although Title I creates privately enforceable rights, the concern reaches far beyond the individual whose rights have been violated. Individual rights were protected to increase the responsibility of union self-government, for responsible self-government was preferred to government control of union policies. Senator McClellan, in introducing the Bill of Rights, stated his belief that "racketeering, corruption, abuse of power and other improper practices" would never be prevented until Congress prescribed "minimum standards of democratic process." cf. Hall v. Cole, at 7 and note 9. "Without such protection, he declared, "other provisions of law may be of little benefit and

meaningless," II Legislative History of the Labor-Management Reporting and Disclosure Act of 1959, U..S.Dept. of Labor, Government Printing Office, 1960 (hereinafter "Leg.Hist."), p. 1098. During the course of the debate, he summarized the basic policy underlying Title I, and explained that union members would be able to protect their unions from corrupt officials through the exercise of their inherent constitutional rights: " ... we will be giving them the tools they can use themselves. II Leg. Hist. 1102-1103.

When democracy is suppressed, and officers gain authoritarian control, the union can no longer fulfill Congress's labor relations policy. Congress, by conferring upon each recognized or certified union the equal status of exclusive bargaining representative of all the workers in an administratively-established "bargaining unit' (29 U.S.C. Section 159(a), 45 U.S.C. Sections 151 et seq.), "has seen fit to clothe the representative with powers comparable to those possessed by a legislative body both to create and restrict the rights of those whom it represents." Steele v. Louisville & Nashville R.R., 323 U.S. 192, 202 (1944). But if the bargaining representative has is not subject to democratic control, then it is incapable of performing its quasi-legislative function; and it is more likely to become a vehicle for graft and corruption, for "sweetheart" dealing and betrayal of the workers whom it ostensibly represents--or, in simpler language, it becomes a "racket". Or a "racketeer-influenced" and "corrupt organization" in which the

members' democratic rights are "extorted" by force and violence. See: as to Local 95, the 1985 RICO jury verdict in this case (A 767-769). See: as to LIUNA, President's Commission on Organized Crime, Report to the President and the Attorney General The Edge, Organized Crime, Business, and Labor Unions, (Judge Irving R. Kaufman, Chairman) (hereinafter "Kaufman Commission") (A 1263).

But use of those "tools" requires that members of unions be protected, and know that they are protected, against organizational reprisals, not only by guarantees contained in a statute but also by recognition of and respect of their basic democratic rights on the part of the persons in power in the unions. When a disciplined member, by bringing suit, demonstrates that the Congressional guarantee of freedom of expression has genuine meaning, all members gain an increased sense of freedom--and are enabled to use that "tool" for the purposes that Congress intended. The union's officials are compelled to respect those rights. One member, by insisting on his right of free speech, wins free speech for all fellow members.

Diduck was engaged in precisely the kind of conduct Congress sought to encourage and protect. He criticized the union president, and reported acts of violence within the local, in a letter copied to his international (A 522). For this he was disciplined: a $500 fine was imposed with a warning to the effect that if he spoke out in the future, he risked expulsion from the union (A 523). His discipline served to drive home to every other rank-and-file member the fact that they, too, spoke out at

their peril--at the risk of potential penalties including expulsion from membership. In a published, official decision of this Court, Diduck's suit has established both the illegality and the bad faith of LIUNA's conduct, and has, therefore, articulated for the officers and the members that there should be "full and active participation by the rank and file in the affairs of the union", Hall v. Cole, that is, union members have a right to criticize their officers. Diduck's suit helped make clear in concrete terms, to the officers and the members, the kind of process Congress intended. A suit such as this was essential both to inform the members of their rights, and teach the international officers to respect those rights.

There is a common fund from which these costs can properly be paid through the vehicle of fee-shifting -- the international union treasury. The union treasury is a fund made up of contributions by the members and held for the benefit of the organization and its members. It would be a perversion of justice and a flaunting of Congressional policy to permit the use of union funds to pay counsel fees incurred in resisting recognition of the democratic rights and deny the use of those funds to reimburse the fees incurred in protecting those rights on behalf of all members.

LIUNA's contention that the common benefit of enhanced democracy benefits the union and its members no differently than society as a whole is, then, mistaken. (LIUNA Br. at 15). LIUNA lacks the power to discipline "society as a whole". LIUNA's

discipline of Diduck threatened all LIUNA members--the class of all persons similarly subject to potential discipline by LIUNA.

LIUNA is also incorrect in stating, at page 21 of its brief, that the plaintiff in Hall v. Cole "benefited" his fellow members more "concretely" by "invalidat[ing] the union rule" permitting discipline on grounds of "malicious vilification". No such relief was granted. The only relief Cole obtained in his suit, apart from the award of counsel fees, was his personal reinstatement to membership.

B. The Need For A Routine Award of Counsel Fees

The need for award of counsel fees is particularly acute in most Title I actions if Congressional policy is to be implemented or union members are to enjoy fully the rights guaranteed by the Title. The reasons for this are quite obvious and were plainly stated in Hall v. Cole.

First, the rights involved are essentially political rights--equal rights to nominate candidates, vote in elections, and participate in union meetings, Section 101(a)(1); the right of freedom of speech and assembly, Section 101(a)(2); and the right to a fair trial, Section 101(a)(5). Monetary values cannot be placed on these rights and their violation seldom entitles the aggrieved member to substantial compensatory damages.

Petramale v. Local 17, 847 F.2d 1009 (2d Cir. 1988) is illustrative. In Petramale, the jury awarded plaintiff the largest compensatory damage award ever, to counsel's knowledge, in an individual LMRDA case concerning discipline for exercise of

free speech rights: $200,000. In addition, Petramale was awarded punitive damages of $50,000 against the local union and $5,000 against each of three local union officers, Ibid. at 1012. The court, granting defendants' motion for judgment n.o.v. pursuant to Fed.R.Civ.P. 50(b), ordered that Petramale should receive nominal damages of $1.00. 671 F.Supp. 261 (S.D.N.Y.1987).

Reversing, this Court nonetheless held both the $200,000 compensatory damages award, and the $50,000 punitive damage award against the union excessive ("[While] Petramale and his sons testified that the problems with the union led to his emotional distress, marital problems, and injured reputation; yet it is unclear how much of his injuries were caused by the illegal punishment as opposed to general problems with the union"; Ibid. at 1013). The Court reduced the total amount of Petramale's compensatory and punitive damages to $125,000. This amount grossly insufficient to cover his attorneys' fees for the years of protracted litigation required to win his individual free-speech claim--an amount reckoned by the district court at $270,000. cf. Petramale v. Local 17, 1992 WL 22605 (S.D.N.Y. Aug. 25, 1992).

LIUNA's claim that "[m]any successful LMRDA cases result in money damage awards sufficient to pay lawyers' fees" is unsupported (LIUNA Br. at 26). Aguinaga v. URCW, 993 F.2d 1480 (10th Cir. 1993), a case cited by LIUNA in its brief and one in which substantial back-pay damages were recovered, was not an LMRDA case, but a class-action duty of fair representation suit.

Second, the defendants can draw upon the full resources of the union to exploit every procedural device to frustrate the suit. cf. Hall v. Cole. If plaintiff cannot rely on the likelihood of eventual recovery of a fully compensatory attorneys' fee, he will be compelled to abandon vindication of his rights--as before Hall v. Cole was decided. Summers, The Law of Union Discipline: What the Courts Do in Fact, 70 Yale L.J.175, 220-1 (1960). Justice Tom C. Clark, writing the opinion for this Court in Cole v. Hall, engaged in no hyperbole when he said, "Not to award counsel fees in cases such as this would be tantamount to repealing the act by frustrating its basic purpose." 462 F.2d 777 at 780, quoted in Hall v. Cole, 412 U.S. at 13.

It is no answer that the NLRB has belatedly held that violations of the federal labor laws generally constitute unfair labor practices, including violations of the LMRDA (LIUNA Br. at 26). Congress determined that the LMRDA would be best enforced through the vehicle of private federal court actions by individual union members. The original draft of the bill provided for enforcement by the Secretary of Labor. II Leg.Hist. 1102 "[I]n the interests of justice", Congress decided instead to entrust enforcement of the "Bill of Rights" to the federal courts. II Leg. Hist. 1232.

The scope of the NLRB's protection of the democratic rights of individual union members is not co-extensive with that

afforded the federal courts under Section 102.[1] The courts may award any appropriate" relief, including punitive damages and compensatory damages for injury to reputation and emotional distress. The NLRB's authority as to damages is limited to awarding "make-whole" damages: back pay. The Supreme Court has held, in the duty-of-fair-representation context, that the NLRB does not provide a satisfactory forum for vindication of individual rights. The Board has unreviewable, unlimited, discretion not to prosecute an unfair labor practice charge filed with the agency; Vaca v. Sipes, 386 U.S. 171 (1967); Breininger v. Sheet Metal Workers Int'l Assoc., 493 U.S. 67 (1989).

If Diduck is not now awarded litigation costs and counsel fees, the overriding lesson for all LIUNA's members will be to not insist on asserting the rights proclaimed by Title I and attempting to vindicate them in the courts. His rights will be nominally vindicated, but the policy of Congress will not have been enforced, and the benefits to the other members of the union will be effectively reduced, if not negated. For all the union members will know, and their officers will know they know, that Title I is but empty words which hold a promise to the ear but break it to the heart. The lesson for LIUNA, which disciplined

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[1]Section 102 of the Act, 29 U.S.C. Section 412, provides in pertinent part:

> 'Any person whose rights secured by the provisions of this subchapter have been infringed by any violation of this subchapter may bring a civil action in a district court of the United States for such relief (including injunctions) as may be appropriate.'

Diduck in bad faith, will be that suppression of free speech is worth the price.

LIUNA's discipline of Diduck, and its obdurate opposition to his lawsuit, has been in manifest bad faith. As long ago as April, 1963, this Court explicitly held in a widely publicized decision that unions could not discipline union members for slander. Salzhandler v. Caputo, 316 F.2d 445, cert. denied 375 U.S. 946 (1963). For eighteen years after Salzhandler, LIUNA retained "slander" in its Constitution as grounds for discipline. It did so even though, according to LIUNA, it knew that its "slander" provisions were unlawful and void. Shortly before its 1981 International Convention, LIUNA affirmed facially invalid discipline of member Petramale on free speech grounds.

This was no mere technicality. In Petramale, as here, LIUNA acted in bad faith in affirming local union discipline "with full knowledge of its unlawful character", Petramale v. Local 17, 847 F.2d 1009, 1014 (2d Cir. 1988), citing Rodonich v. Housewreckers, 817 F.2d 967, 976 (2d Cir. 1987). Each and every one of the three charges against Petramale unambiguously included free speech as an essential element. Petramale v. Local 17, 736 F.2d 13, 17-18 (2d Cir.) cert. denied 469 U.S. 1087 (1984). LIUNA's professions of innocence in Petramale were then, as they are now, in the words of this Court "altogether cynical". In February 1982, even after it removed those "slander" provisions from its Constitution at its September 1981 Convention, LIUNA affirmed,

and by such affirmance imposed, unlawful discipline on Diduck on grounds of slander.

In a more candid moment, at the 1981 Convention, LIUNA stated that it was striking the "slander" provisions because "restrictions on free speech...expose the Union to litigation at any time due to their 'chilling effect'" (A 570). In view of this admission, it is "altogether cynical" for LIUNA to argue to this Court that its actual imposition of discipline for slander had no "chilling effect". In spite of its admission, LIUNA has stubbornly insisted on protracting the litigation of Diduck's case. It is "altogether cynical" for LIUNA to turn tail and assert, at this late date, that its liability here was so obvious that plaintiff should have won the case on summary judgment. LIUNA Br. 41. The district court denied Diduck's motion at trial for judgment notwithstanding the verdict and denied his renewed post-trial motion for judgment notwithstanding the verdict (A 776, 791, 806).

C. Imposition of Discipline Upon An Individual Union Member For Speaking Out Has an Inherently "Chilling Effect" Upon the Exercise of Free Speech Rights by His Fellow Members

The defendants say in their brief that in order to qualify for an award of counsel fees in this case Diduck must prove that other members of the International knew about the discipline and were deterred by it and that Diduck himself was "chilled" or deterred from speaking out as a result of the discipline meted out to him. The defendants are wrong on both counts.

The constitutional concept of "chilling effect" grows out of a long line of Supreme Court decisions of which Hall v. Cole was one. In all of these cases, the Court looked to the act of the defendant, the state prosecutor or the plaintiff in a libel action, rather than search for the state of mind of the victim of the injury to free speech or that of those others similarly situated with the victim. LIUNA shifts the focus of the inquiry away from the defendant's actions. It asks the Court to determine the impact "in fact" of plaintiffs' discipline on the future exercise of rights by him and other union members. This attempt to impose an additional burden on plaintiff has no legal basis. Rather, the "chilling effect" of sanctioning one individual for his exercise of protected rights is inherent in the imposition of discipline. In penalizing Diduck, LIUNA set itself up as the "censor" of all its members who might similarly wish to exercise their free speech rights.

Free speech rights are "sensitive", the "threat of sanctions may deter ... almost as potently as the application of sanctions." Dombrowski v. Pfister, 380 U.S. 479, 487, 486 (1965).

As the Court put it in Thornhill v. Alabama, 310 U.S. 88, 97 (1940) (Murphy, J.), the power of the censor "is pernicious not merely by reason of the censure of particular comments, but by reason of the threat to censure comments on matters of public concern. It is not merely the sporadic abuse of power by the censor but the pervasive threat inherent in its very existence that constitutes the danger to freedom of discussion," citing

Near v. Minnesota, 283 US 697 ('essence of censorship" lay in "potential" of punishment for publication of newspaper, "threatening those who validly exercise their rights of free expression with the expense and inconvenience of criminal prosecution"). The threat of the imposition of penalty or sanction for the exercise of protected free speech rights thus "results in a continuous and pervasive restraint on all freedom of discussion that might reasonably be regarded as within its purview". Thornhill, Ibid., at 98. In its inherent tendency to suppress free speech, fear of subsequent punishment is just as effective as any other previous restraint on the exercise of protected rights. Thornhill at 101-102, and note 19. And see: Smith v. California, 361 U.S. 147, 151, 154 (1959) (potential penalty for obscenity under ordinance dispensing with element of scienter would "tend" to result in "self-imposed restriction" of free speech and "self-censorship"); Speiser v. Randall, 357 U.S. 513, 526 (1958) (imposing burden of proof of entitlement to tax exemption upon taxpayer "necessarily ...can only result in a deterrence of [free] speech" because "[t]he man who knows" he bears the burden of proving "the lawfulness of his conduct necessarily must steer far wider of the unlawful zone."); Cramp v. Board of Pub. Inst. County,Fla. 368 U.S. 278, 287 (1961) (Stewart, J.) (teacher's loyalty oath "operates to inhibit the exercise" of free speech rights); Baggett v. Bullitt, 377 U.S. 360, 379 (1964) (White, J.) (loyalty oath for teachers and public employees "deters constitutionally protected conduct"); NAACP v.

Button, 371 U.S. 415, 432-433 (1963)(Brennan, J.) (There "inheres in the statute [sanctioning legal solicitation] the gravest danger of smothering all discussion looking to the eventual institution of litigation of the rights of members of an unpopular minority"; Ibid. at 434, so that statute's "mere existence could well freeze out of existence all such [lawful] activity on behalf of the civil rights of Negro citizens"; Ibid. 436. Similarly, protection against civil actions for libel of public officials are necessary "if the freedoms of expression are to have the 'breathing space' that they need ... to survive'" New York Times Co. v. Sullivan, 376 U.S. 254, 271-272 (citation omitted).

The "chilling effect" articulated by Dombrowski has been applied by the courts to the LMRDA. Mallick v. Int'l Br'd of Electrical Workers, 644 F.2d 228, 236 (3d Cir. 1981) ("[t]he need to avoid chilling of free speech rights is just as compelling in the context of the Landrum-Griffin act."; Keefe Brothers v. Teamsters, Local Union No. 592, 562 F.2d 298, 304 (4th Cir. 1977); Bradford v. Textile Workers Local 1093, 564 F.2d 1138, 1144 (4th Cir. 1977). And see: Rosario v. Almalgamated Ladies' Garment Cutters' Union, 605 F.2d 1288 (2d Cir. 1979)

For the same reason, ordinary rules of standing do not apply to challenges of penal statutes on grounds of facial invalidity by reason of overbreadth. The statute must be struck down in its entirety in order to remove the deterrent to protected speech, rather than await "case by case" testing "only by those hardy

enough to risk criminal prosecution to determine the proper scope of regulation"; Dombrowski, Ibid. at 487 and authorities collected therein. And see: Zwickler v. Koota, 389 U.S. 245, 252 (1967) (forcing plaintiff to "suffer the delay" of state court proceedings caused by federal court abstention in First Amendment case attacking overbroad penal provision "might itself effect the impermissible chilling of the very constitutional right he seeks to protect")[2]. Also: Dorman v. Sati, 862 F.2d 432 (2d Cir.1988).

In short, those whose expression is "chilled" cannot be expected to adjudicate their own rights, lacking by definition the willingness to risk challenging prosecution. On the other hand, the character of the plaintiff in Houston v. Hill, 482 U.S. 451 (1987) may be taken as typical of the type of individual sufficiently "hardy" to mount a challenge to vindicate free speech protections. In finding that Hill had standing to challenge the ordinance at issue, the Court noted Hill's four arrests under the ordinance and his "adopted role as citizen provocateur". Ibid. note 7 at 459, 453 and note 1, 455.

LIUNA's constitution provides members of all of its locals with an internal-union appeal to the international from a local

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[2] Nor is the degree of severity of the penalty significant. In the First Amendment context "[T]he restraint is not small when it is considered what is restrained. ... If the restraint were smaller than it is, it is from petty tyrannies that large ones take root and grow. This fact can be no more plain than when they are imposed on the most basic rights of all. Seedlings planted in that soil grow great and, growing, break down the foundations of liberty"; Thomas v. Collins, 323 U.S. 516, 543 (1945) (Rutledge, J.) (registration requirement for labor organizer to address workers on eve of NLRB election).

union's imposition of discipline. Under Section 101(a)(4) of the Act, members may be required to "exhaust" that internal union appeal for up to four months before bringing suit. When LIUNA, affirmed wrongful discipline of Diduck for the exercise of free speech rights imposed by his local, all of LIUNA's members were "threatened" by the prospect that it would similarly affirm wrongful discipline by any one of its other affiliated locals.

Diduck was Local 95's "gadfly". In every election, he ran for office against the incumbent Business Manager on an anti-corruption platform; he had so run on the opposition slate with Rodonich, Chotowicky and Lawro in the 1980 elections. He was well-known, in particular, for writing letters to LIUNA protesting what he conceived to be corruption within the local; he had written scores of such letters over the years. His discipline for writing a letter was, then, politically charged. In 1979 Diduck charged the Business Manager with corruption: regularly driving a boss's car (cf. A 459). In response, Lorello, LIUNA's Regional Vice-President, advised LIUNA President Angelo Fosco that Diduck was a "constant complainer" whose letters should be ignored (A 458, 459).

LIUNA's members within Local 95 knew of Diduck's discipline. In September 1981, Local 95's discipline of Diduck, Rodonich, Chotowicky and Lawro was put to a vote of the local's members, LIUNA members all (Pl.Exs. 2(D)(2), 3(W), 4(T), & 5(N)). They also knew of this Court's published decision finding that LIUNA had disciplined Diduck unlawfully and in bad faith. In opposing

plaintiffs' motion for equitable relief in 1989, Local 95's Secretary-Treasurer informed the district court by affidavit that, "The membership is well aware of the original jury decision and judgment, and the Court of Appeals decision relating to Diduck. These decisions were reported to the membership at membership meetings. The plaintiffs over the years have also distributed numerous leaflets to the membership referring to the decisions" (A 839).

Diduck was disciplined simultaneously with the three union officer-leaders of the opposition movement within Local 95 (Rodonich, Chotowicky and Lawro) (A 547-558; 523;565; 585; 660). The disciplinary removals from office of these three, and simultaneous free speech sanction of their political crony, was the culmination of a protracted effort by the local's membership to oppose what they conceived to be growing corruption on the part of the political group led by President Senyshyn.

As this Court found, this case "arises out of a political struggle between two warring union factions for control of Local 95", the "Rodonich faction" and the "Senyshyn faction", Rodonich, at 970. As "political disruption within the union intensified...[a]cts of violence were reported...and [i]n a letter dated May 25, 1981 and addressed to Senyshyn with copies to LIUNA, Harry Diduck reported that he was threatened by Adams" and charged Senyshyn with corruption in connection with the demolition of the Bonwit Teller Building. Ibid. Cf. Diduck v. Kaszycki, 974 F.2d 270 (2d Cir. 1992).

Paralleling the events within Local 95, a similar scenario was transpiring throughout LIUNA. Prior to the 1981 International Convention, a nation-wide organization to promote democratic reform of the international union had formed known as the Laborers' for a Democratic Union ("LDU") (A 1115). During the September 1981 International Convention, violence within LIUNA, too, intensified. Contrary to LIUNA's unsupported assertion that its discipline of Diduck was an isolated incident of which none of its members, outside of Local 95, had knowledge, the Kaufman Commission found a centralized pattern of LIUNA's suppression of its members' rights. See: Kaufman Commission Report (A 1263-1285). This report includes findings that "At the 1981 LIUNA convention a symbolic candidate, who had no chance of winning the election, was beaten by fellow delegates in full view of the convention when he attempted to speak on the floor" (A 1278-79) and that as a result of "the use of violence and intimidation ... the membership [of LIUNA] has little opportunity to express itself democratically." (A 1277) And See: 1992 Affirmation of LIUNA/LDU member Chris White in support of plaintiffs' fee application and exhibits thereto (A 1115 et seq.). More specifically, Diduck's discipline was not a secret; see: White affirmation (A 1124, 115-16). Obviously, each act of suppression added to the climate of intimidation.

The law as to the NLRB's powers to issue company-wide injunctions restraining future unfair labor practice violations on the basis of acts committed at decentralized plant locations

clearly has no application here. Rather, this case concerns plaintiff's fee entitlement for litigation required to correct past violations of the LMRDA. Torrington Extend-A-Care Employee Ass'n v. NLRB, 1994 U.S.App. LEXIS 3646 (2d Cir. Feb. 28,1994), and the standard laid down in N.L.R.B.v. S.E.Nichols, Inc., 862 F.2d 952 (2d Cir. 1988), has no bearing on the matter cf. LIUNA Br. at 31. But even if they did, they would not justify denial of attorneys' fees here. LIUNA's discipline of Diduck did not occur in a local, but rather at the international's central offices, where LIUNA similarly reviews discipline of its members from all locals throughout the country. cf. Nichols, at 961, Diduck's discipline and its outcome were known both by LIUNA's members within Local 95 and others across the country--as far away as Fairbanks, Alaska. During the same time period, LIUNA imposed similar discipline upon one of its members in a Kingston, New York local (Petramale, A 1100, 1102). As in Nichols, this history indicates a general knowledge by LIUNA's members of its willingness to engage in coercive activity in response to dissident activity throughout the international. Ibid. at 961,

Obviously, a fee application should not degenerate into a drawn out second litigation, Hensley v. Eckerhart, 461 U.S. 424, 437 (1983). and courts commonly refer to matters of public knowledge in assessing the importance of plaintiff's accomplishments in ruling on fee applications. Grant v. Martinez, 973 F.2d 96, 102 (2d Cir. 1992), cert. denied, 113 S.Ct. 978. Certainly, this record totally negates LIUNA's absurd and

irrelevant claim that its discipline of Diduck was an isolated matter which could not "chill" other LIUNA members.

D. The Applicable Legal Standard

LIUNA argues that the district courts must re-consider, in each Title I case, whether "exceptional circumstances" and "overriding interests of justice" justify application of the common benefit doctrine. In effect, LIUNA would require every successful LMRDA plaintiff to relitigate Hall v. Cole. To the contrary, the district court's discretion to deny fees is narrow. Absent unusual circumstances, fees should be awarded.

The Supreme Court knew what it meant, and meant what it said, in stating, with particular reference to free speech rights, that by vindicating his own rights of free speech guaranteed by Section 101(a)(2) of Title I of the LMRDA, plaintiff necessarily dispels the "chill" cast by the "threat" of discipline upon the rights of other members, and so renders a substantial service to his union as an institution and to all of its members. In so holding, the Supreme Court made a finding of general application to an entire class of cases, namely, Title I cases. The appropriateness of such relief in a Section 102 case springs from the nature of the rights protected and the relationship of the parties--factors that are the same in all, or nearly all, Section 102 cases. Beyond question, with respect to discipline imposed for the exercise of paramount free speech rights at the very least, an individual member who vindicates his own rights confers a benefit by dispelling the chill cast upon

the rights of his fellow members. It is difficult to imagine a free speech/discipline case in which a union member would not "necessarily" confer the benefit of the preservation of union democracy upon his fellow members and his union. Except in rare cases involving unusual circumstances, then, this benefit necessarily warrants fee shifting to the union treasury, so that the costs may be spread among those so benefited.

The Supreme Court emphasized this aspect of its holding in Hall v. Cole by its citation, 412 U.S. at 13-14, of Newman v. Piggie Park Enterprises, Inc., 390 U.S. 400, 402 (1968). In Piggie Park, the Court had emphasized one factor which reinforced the successful plaintiff's right to counsel fees in civil rights cases--the limited resources of the individual civil rights litigant to prosecute violations of federal law.

Necessarily then, as in Piggie Park, the granting of fee awards under the LMRDA must be the rule--not the exception to the rule--and the scope of the district court's discretion in denying fees must be viewed as limited.

It is not true that the federal courts have "often" denied attorneys' fees to prevailing LMRDA Title I litigants. On the contrary, apart from Shinman v. Int'l Union of Operating Engineers, Local 18, 744 F.2d 1226 (6th Cir. 1984) and its progeny, they have denied fees rarely, in only a handful of exceptional cases and only once (and that once erroneously) in a case involving unlawful discipline. Lacy v. Highway and Motor

Freight Employees, Local 667, 99 LRRM 2403 (W.D.Tenn. 1978), aff'd without opinion 620 F.2d 303 (6th Cir. 1980).

The other cases cited by LIUNA (at 21-22) did not involve unlawful discipline. Patterson v. United Brotherhood of Carpenters, 906 F.2d 510 (10th Cir. 1990), local unions challenged a per capita dues increase imposed by the international. Landry v. Sabine Independent Seanmen's Association, 623 F.2d 347 (5th Cir. 1980) also concerned a challenge to a dues increase. In upholding the denial of fees, the Court acknowledged that Hall v. Cole would require a different result had plaintiffs' case vindicated free speech rights. Ibid., note 4 at 351. In Markam v. international Association of Iron Workers, 901 F.2d 1022 (11th Cir. 1990), a Title III trusteeship case, the court did not consider whether plaintiffs' case had conferred a benefit. Instead, the case involved whether plaintiffs were "prevailing parties". Finally, Local 317, 696 F.2d 1300 (11th Cir. 1980) was not an LMRDA case at all, but suit for certain violations of a union constitution under Section 301 of the Labor Management Relations Act, 29 U.S.C. Section 160(a).

In actuality, the trend of the federal courts has been to extend the common benefit rationale of Hall v. Cole to award counsel fees in non-LMRDA labor cases in other contexts in which a members' litigation conferred a benefit upon his union, as in cases brought under the duty of fair representation doctrine. cf. Holodnak v. Avco Corp., 381 F.Supp. 191 (D.Conn. 1974) (Lumbard, Circuit Judge, sitting by designation), aff'd 514 F.2d 285, 287

(2d Cir. 1975); Harrison v. United Transportation Union, 530 F.2d 559 (4th Cir. 1975), cert. denied, 425 U.S. 958 (1976); Emmanuel v. Omaha Carpenters' District Council, 560 F.2d 382, 385 (8th Cir. 1976); Bygoitt v. Leaseway Transportation Co., 637 F.Supp. 1433, 1441) (D.Kan. 1991).

E. Hall v. Cole, Not Alyeska, Controls This Case

Throughout its brief, LIUNA relies on Alyeska Pipeline Service Co. v. The Wilderness Society, 421 U.S. 240 (1975) as though that decision governed the outcome of this case, rather than Hall v. Cole, 412 U.S. 1 (1973).

Certainly, a prevailing Title I plaintiff does vindicate Congress's statutory policy in enacting the LMRDA, namely, enhancement of democratic rights of his union. This is not to say that a prevailing LMRDA litigant merely confers the same benefit upon his union as upon "society as a whole" by so enforcing the basic statutory policy of the Act. And, of course, Alyeska does not suggest that whenever important statutory policies are vindicated through an individual plaintiff's successful litigation to the general benefit of society, the common benefit doctrine is inapplicable. LIUNA's suggestion to the contrary--and the district court's contrary holding below--is a misreading of Alyeska.

In Alyeska, the two basic elements of the common benefit exception laid down in Mills and Hall v. Cole were not present. Defendant pipeline company did not benefit from the plaintiffs' lawsuit; fee-shifting did not spread the burden among the class

benefited. While finding the "common benefit" doctrine--and the other traditional exceptions to the American Rule, inapplicable in Alyeska,the Court reaffirmed those exceptions.

POINT II

PLAINTIFFS ARE ENTITLED TO FEES FOR THEIR MOTION FOR PRELIMINARY INJUNCTIVE RELIEF

LIUNA asserts that the remedies plaintiffs sought by preliminary injunction in 1983 were unavailable because they "would have 'substantially delay[ed] or invalidate[ed] an ongoing election' or amounted to court supervision, and therefore are outside the court's Title I jurisdiction"; LIUNA Brief, at 42, citing Local No. 82 Furniture Moving Drivers v. Crowley, 467 U.S. 526, 546-48 (1984). Plaintiffs filed their motion well before the election. Crowley, which concerned certain relief after the election ballots had been sent out, thus during an ongoing election, is inapplicable. In Crowley, at 541, the Supreme Court held that while Title IV "bars Title I relief" after the completion of an election, and limits the scope of "appropriate" relief during an ongoing election, "the full panoply of Title I rights is available to individual union members 'prior to the conduct' of a union election." Thus the "full panoply" of Title I rights was available to plaintiffs here. And see: Schonfeld v. Penza, 477 F.2d 899 (2d Cir. 1973).

LIUNA is also incorrect in asserting that the motion did not benefit "the entire international union membership". Plaintiffs, by forcing LIUNA to address the rights of its members within one

local, obviously put LIUNA on notice that it must similarly respect rights of its members in other locals.

Finally, LIUNA's claim that plaintiffs' counsel made a "misrepresentation" as to Magistrate Raby's findings (LIUNA Br. at 46) is nonsense. The Magistrate held that "in the face of plaintiffs' charges, the defendants have made arrangements for supervision of the proposed election" (A 305) and that the disqualification issue had been "rendered moot" (A 306). Judge Cannella stated that the court "need not determine from where the directive [for supervision of the election by the ...Mediation Board] emanated." A 1320 (note 16). Judge Cannella may have confused the pre-election nominations meetings with the election itself: although several pre-election nominations meetings were conducted, only one hand-ballot election was eventually held (A 1303-1304). Nonetheless, although the letter apprising the court of the elections supervision arrangements was from Local 95's counsel, the Judge's observation makes sense in view of the fact that LIUNA was not merely processing plaintiffs' appeals at the time: rather, in response to plaintiffs' motion, it had taken over, and assigned to its Regional Office, the supervision of the local's pre-election nomination proceedings. The Judge may have confused LIUNA's Regional Office with the State Mediation Board, but more likely he considered it not improbable (in view of LIUNA's assumption of control) that the "directive" had in fact "emanated" from LIUNA,

POINT III
REJECTING LIUNA'S LACHES ARGUMENT WAS NOT AN ABUSE OF DISCRETION

The district court, in ruling on plaintiffs' fee application on the merits, rejected, by necessary implication, LIUNA's laches argument. Throughout the period of delay, plaintiffs' motion for equitable relief was sub judicie before the district court. The district court indulged counsel's requests for extensions until it decided the motion for equitable relief. Then the court gave plaintiffs 30 days, which plaintiffs met (A 865). LIUNA was not prejudiced. LIUNA counsel (Baird) still practices law in Washington, and provided an opposition affidavit; LIUNA's chief trial counsel was not Baird, but Theodore Green (A 1082). In view of these facts, and counsel's reasons for the adjournments (A 1083-1085), there was no abuse of discretion. cf. New York Association of Retarded Children v. Carey 711 F.2d 1136 (2d Cir. 1983) (two-and-a-half-year delay); Perry v. O'Donnell, 729 F.2d 702 (9th Cir. 1985 (no prejudice; defendants on notice of intention to file for fees; litigation continued); Max M v. New Tier High School District No. 203, 859 F. 2d 1297 (7th Cir. 1988) (one-year delay).

Respectfully submitted,

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