DOCKET NO. 00 - 35555

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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**VAL ALBERT** and **GALEN COOK**,

Appellants, pro se,

**v.**

**LARRY JOHNSON, LOCAL 302** of the **INTERNATIONAL UNION** of **OPERATING ENGINEERS, CLYDE WILSON, JACK JAKUBIEC**, and **BARRY RIEDESEL**,

Respondents.

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Appeal from the U.S. District Court for Western Washington
at Seattle
Cause No. C98 - 1180Z
The Honorable Judge Thomas Zilly, Presiding

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# REPLY BRIEF

Submitted by Appellants, Pro se

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## INTRODUCTION

The appellee's answer concludes with three specific requests to the Court: (1) dismissal of this appeal on grounds that the appellants failed to comply with the Court's deficiency order, (2) alternatively, that the Court affirm the grant of summary judgment from the defendant's motion, and (3) fees and costs be awarded to the appellees. The appellants respectfully request that the Court deny all three requests for the reasons stated herein.

The appellant's reply brief includes: (1) clarification of the Statement of the Case, (2) a denial of the appellee's corresponding Statement of Facts, (3) a rebuttal to the corresponding arguments by the appellees, (4) a Conclusion, and (5) an attached Appendix with supplemental exhibits.

## STATEMENT OF THE CASE

On August 25, 1998, the plaintiffs filed two separate, but essentially identically briefs. U.S. District Court No. C98-1180Z was filed against the business manager, Larry Johnson. No. C98-1181C was filed against Local 302 and three subordinate officers. The plaintiffs separated the actions because Johnson resigned in early 1997, just eight months into his new 36-month term, and the plaintiffs believed that the union should be barred from paying Johnson's legal bills over an action that emanated from Johnson's participation and orchestration of fraud. The plaintiffs believed that they could demonstrate a reasonable

likelihood of success on the merits. See Milone v. English, 306 F2d 814, 817 (D.C. Cir. 1962).

The plaintiffs also attempted to disqualify the regular union attorney, Russell J. Reid, (Court Docket 8) from defending individual union officers, because Reid was intimately familiar with the officers charged in wrongdoing and because a conflict existed when Reid attempted to represent both the union officers and the union entity. Reid's intimate knowledge of union affairs, obtained at the expense of the union, worked against union democracy, and more particularily, against the democratic rights of plaintiff Val Albert. From an ethics viewpoint, Mr. Reid should have self-disqualified, to disrupt the cozy relationship between union officers and regular counsel and to preserve democracy within the entity. (see Appendix; Deposition of Barry Riedesel as Exhibit No. 1 in this Reply).

Instead, Mr. Reid was granted his motion to consolidate the two cases under C98-1180Z, thereby simultaneously defending the union officers (both active and resigned) and the union entity from Albert, who's democratic union rights had been shrunk by the defendants and the union attorney. As a result of lost democratic union rights, Mr. Albert faced false charges by the supposedly fair and neutral election chairman, and further faced a kangaroo trial conducted by the incumbent officers who cheated Mr. Albert out of a fair election.

Meanwhile, plaintiff Cook, who had taken an honorable withdrawal after 15 years of service in the union, had his

withdrawal cancelled by the defendants and the union attorney. The defendants maintain that Cook was not protected under the LMRDA because Cook was no longer a member when the complaint was filed. But the union's constitutional provision from which Cook's alleged violation occured applies only to active members. Without any due process afforded to Cook whatsoever, the union discarded the residual democratic rights entitled to Cook under an honorable withdrawal. The union (in its haste to punish and retaliate against Cook), technically made Cook a full member through operation of the union constitution during the time the charges were levied against Cook to cancel his withdrawal.

## STATEMENT OF FACTS

**Galen Cook:**

Cook, originally from Fairbanks, Alaska, served as a loyal rank-and-file member of Local 302 for 15-years. In 1990, Cook received an honorable withdrawal and put himself through law school with personal funds earned from his work as a member.

Cook never urged Albert to file the 1996 injunction against the union. Cook merely informed Albert of the options available to him in an attempt to restore the democratic rights of union members who faced undemocratic elections. Cook never brought the suit, nor did he sign the 1996 Complaint on behalf of Albert's attorney, Stan Talcott (presently a law school dean in Florida). See Exhibit No. 7 of Appellant's Excerpt of Record.

In an effort to seek an honest election, Albert sent a fax to election committee chairman, Barry Riedesel, requesting six additional safeguards. Even though the election was just a few weeks from occuring, the fax was a clear attempt by Albert to pursue his internal remedies before the suit was filed. (see Appendix; Deposition of Barry Riedesel as Exhibit No. 2 in this Reply).

By letter dated November 1, 1996, Cook's withdrawal card was cancelled due to Cook's alleged violation of Article XVII, §4 "All Court Actions Superceded" of the Constitution of the IUOE. (see Exhibit No. 25 of the Appellant's Excerpt of Record). The defendants and Mr. Reid alleged that Cook himself brought suit against the union as a **member**, without first exhausting his internal remedies. (see page 24 of the Appellant's Opening Brief). The fact is, Cook never brought suit against the union in 1996, nor was Cook ever a named plaintiff in the 1996 action.

Article XVII, §4 "All Court Actions Superceded" of the Constitution of the IUOE, makes no reference whatsoever in its provision for the actions filed by non-members. Moreover, the article makes no reference to the suits of those individuals on honorable withdrawal, or those individuals who 'urge' members to file suits. The article only applies to **members.** (see Appendix; Article XVII, §4 of the Constitution as Exhibit No. 3 in this Reply).

Val Albert:

In 1997, Albert and Cook sought judicial review of the Secretary's decision not to invalidate the 1996 election. The evidence demonstrated that violations of the LMRDA, the union constitution, and the bylaws were intentionally committed by the incumbent officers and the election committee chairman to defeat Albert's candidacy.

In 1998, union attorney Russell J. Reid was granted a motion to consolidate the present cases under the same federal judge who denied Albert and Cook judicial review of the Secretary's decision.

There is no pending request by the appellants in this appeal for review of the actions previously raised by the appellants under Title IV, for violations in the 1996 election.

Election committee chairman Riedesel who had no experience at all in union elections, but supposedly believed in fairness, brought charges against Albert but not against business manager Johnson for committing identical acts. (see Appendix; Deposition of Barry Riedesel as Exhibit 4 in this Reply). Albert filed cross-charges against chairman Riedesel, which were promptly denied by the incumbents. Riedesel had been communicating and bargaining with incumbent officers during the election and just prior to Albert's expulsion trial, even though Riedesel provided sworn testimony that no communication had ever occured. (see Exhibit Nos. 16 and 17 of the Appellant's Excerpt of Record).

Albert was not afforded an attorney at his trial.

The tribunal was located at the defendant's new union hall before approximately 100 regularily attending members who are friends and employees of the incumbents. Local 302 has over 9000 members.

Albert had prepared a written defense statement, coordinated to respond to charges as they were enumerated in the formal letter sent to Albert on September 6, 1996. At the trial, the incumbents abruptly disallowed Albert to continue reading his defense statement in answer to the first charge. Albert was ruled out of order by the incumbent officers and ordered to surrender his written defense statement. Albert complied. The incumbent officers shouted at Albert, intimidating and ridiculing him before the tribunal.

Albert was ordered and escorted out of the union hall during the tallying of votes at the trial phase. Albert was not allowed to have an attorney represent him, he was not allowed to complete the reading of his own written defense, and he was placed in judgment before a very hostile tribunal. Then, Albert was ordered to leave the hall. Albert did not know that he would be asked to return to face the remaining charges. Albert did know that he would face an increasingly hostile and potentially dangerous pack of incumbent officers if he did return to the trial room.

Albert, a 40-year member in good standing and a former business manager, was convicted by a narrow margin of the votes cast. Albert was swiftly expelled by President Clyde Wilson,

who exercised complete discretion per his authority under the constitution. Wilson was appointed by the Executive Board (comprised of incumbents) to be the new business manager in 1997, only eight-months after Larry Johnson mysteriously resigned.

The two remaining charges, which also resulted in convictions and fines against Albert, were mysteriously expunged 33-months after the trial.

## ARGUMENT

**APPELLANT'S DID NOT FAIL TO COMPLY WITH THE COURT'S DECEMBER 12, 2000 DEFICIENCY ORDER.**

Gerald Rosen, Deputy Clerk for the Ninth Circuit Court of Appeals, first apprised the appellants of deficiencies in their opening brief on November 27, 2000. The appellants contacted the Court by phone on December 1, 2000. On that same day, the appellants corrected the deficiencies by sending the Court (1) fifteen darker blue covers, (2) a Certificate of Compliance, and (3) a Statement of Related Cases. On January 17, 2001, Deputy Clerk Rosen confirmed to the appellants by telephone that all of the deficiencies had been corrected. (see Appendix; Letter to the Court as Exhibit 5 in this Reply).

The appellee's false accusation is typical of their actions now and throughout this case. Ironically, it is the appellees who's brief should be deemed as deficient, as the appellees have submitted the wrong docket number on the cover

of their answer. The appellees used Docket No. 99-35919, a case which already has been dismissed. To compound matters of error, the appellees cited the wrong U.S. District Court Docket number, also on their cover. Cause number C98-1181Z is a non-existent case. In fact, it was the appellee's attorney, Russell J. Reid, who successfully motioned for the plaintiff's cases C98-1180Z and C98-1181C to be consolidated into C98-1180Z.

**APPELLEE'S ATTACK ON THE FORM OF APPELLANT'S PRO SE BRIEF IS BASELESS.**

The appellees make a generalized attack on the form of the appellant's Excerpt of Record. They loosely accuse the appellants of unsubstantiated allegations in the appellant's Excerpts of Record, without ever mentioning any specific example of an unsubstantiated allegation. This is further typical of the appellees and their attorney, to berate and ridicule the form of a brief by appellants who are pro se and have never presented an opening brief before this court. Appellants stand by their Excerpts of Record as an accurate record which is adequately referenced. However, the real fear of the appellees is not the form of the appellant's brief, but rather the substance contained within.

The "timeline" presented by the appellants shows the relevant relationship between crucial events in 1996 and the actual telephone communication by key defendants who previously denied the existence of the communication while under sworn oath. The "timeline" is not an official telephone record.

It is the reproduction of factual events used by the appellants to prove their allegations and to rebut the false denials provided by the defendants, who lied under sworn oath.

Further, the appellants had a suspicion that the defendant's attorney was being provided with information from the District Court that was not equally shared to the plaintiffs. This suspicion was raised in several instances during depositions, when the defendant's attorney alluded to having knowledge of a key event about to happen at the order of the Court. When asked further, the defendant's attorney would not answer the plaintiff's inquiry. Besides being generally obnoxious and arrogant during the depositions, the defendant's attorney repeatedly interrupted the plaintiffs during oral examination of the defendants and in one instance, the attorney failed to inform the plaintiffs that he was representing a deposed retired officer, until pressured by the plaintiffs mid-way through the deposition.

Finally, the appellees and their attorney continually refer to the appellants as "experienced litigators," and not typical pro se plaintiffs. Cook did graduate from law school. The only experience Cook and Albert have acquired as litigators are in these related cases.

Any technical oversight in the production of these briefs is unintended by the appellants. The appellants therefore apologize to the Court for their inexperience and lack of

training. It is also the sincerest request by the appellants to equally consider the briefing deficiencies by the appellees and their attorney, who has practiced law for 40-years.

**COURT'S ERROR IN GRANTING SUMMARY JUDGMENT.**

**As to Galen Cook:**

**A. The Court Abused its Discretion.**

Here, the District Court failed to administer discretion in a consistent manner that would lead reasonable people to believe that the Court was acting fairly. The example cited in the appellant's opening brief shows the failure of consistency through a double standard of justice. Before the same District Court Judge in 1997, the appellants motioned for summary judgment in another related matter. The appellants filed the motion under Western District of Washington LCR 7(b)(4) because the defendant was untimely in filing a response.

However, in 1999 the same judge granted summary judgment to the defendants in this matter because the plaintiff genuinely did not understand the filing deadline. The deadline was compounded by the granting of a 60-day extension of discovery, and by the pending request for additional time to respond to the summary judgment motion.

Besides failing to consider that a pro se plaintiff's document is to be liberally construed in favor of the plaintiff (see Estelle v. Gamble, 429 U.S. 97, 106 (1976)), the Court is supposed to administer discretion in a consistent manner.

Here, the Court ruled against the plaintiff on both occasions. First, when the plaintiff raised the timeliness issues against an experienced, licensed attorney, and again, when the plaintiff inadvertantly failed to comprehend a confusing matter of events simultaneously brought into play. The Court errored by not providing consistent discretion for the submission of timely briefs, and the Court further errored by not attempting to mitigate the confusion of the pro se plaintiff even when the plaintiff requested additional time to correct the problem.

**B. The Defendant's Motion Must Fail On The Merits.**

Like kitties with a big ball of yarn, the appellees and their attorney have really wrapped themselves up in their briefings to show that plaintiff Cook is "clearly" not a member. However, when the facts are closely examined, what does become clear is the appellee's attempt to intentionally mislead the Court. First, Cook was granted an **honorable** withdrawal from the union, a type of withdrawal that allows for some residual democratic rights (except a vote). Second, the appellees themselves technically considered Cook a member in 1996 because they accused him of violating a provision of the union constitution that applies only if an individual is a member. That alleged violation led to the cancellation of Cook's honorable withdrawal without as much as a notice or an opportunity by Cook to be heard and present a defense against the charge.

Third, the appellees contend that the reason Mr. Cook

was accused of violating Article XVII, §4 of the union constitution was because Cook "urged" Albert to file the 1996 suit. Article XVII §4 makes no mention at all of the word "urge." The article refers only to members who file a suit against their union. Cook never filed a suit against the union in 1996. Business manager Clyde Wilson even acknowledged this fact in his sworn depostion. (see Appendix; Deposition of Clyde Wilson as Exhibit No. 6). Furthermore, Cook never "urged" Albert to file a suit. But the union decided that they could "make" Cook a member for purposes of punishing him without notice or a trial. Since the defendants and their attorney completely fabricated Cook's involvement and his status in order to quickly cancel his withdrawal, there can be no alternative consideration but to "make" Cook a member for purposes of this appeal. Cook must be considered a member within the scope of LMRDA protection because the ranking union officers **themselves** considered Cook a member in 1996.

**As to Val Albert:**

**A. The Disciplinary Action Did Not Comply With Title 1.**

**1. Albert's Claim is not Frivolous.**

Democratic rights are an important aspect of being a union member, especially a member being tried on charges before his union. It is no secret that union attorney Russell J. Reid and the defendants despised Albert because he campaigned against them during internal elections. Albert had fired Reid in 1988 when Albert assumed the office of the business manager. Reid

was immediately rehired by defendant Larry Johnson after the 1990 election.

Those who presided at the union trial were incumbent officers who hated Albert. The charges were brought by the election chairman, Riedesel. The 100 or so members who usually show at the monthly union meetings are cronies and employees of the incumbents, hoping to maintain favorable status with their bosses. Local 302 has over 9000 members.

Albert's evidence shows that several members in attendance of the trial provided affidavits supporting Albert's claims of an unfair tribunal. There are genuine issues of material and crucial facts in dispute between the appellees and the appellant.

**2. The Defendants Intended to Prejudice Albert by Re-Sequencing the Charges.**

It's an old union tactic by incumbents and their attorney to shrink the democratic rights of a member and force a kangeroo trial. (see James, "Union Democracy and the LMRDA: Autocracy and Insurgency in National Union Elections, 13 HARV. C.R.-C.L. L. REV. 247, 280-81 (1978). This is exactly what occured at Albert's union trial. Albert was not allowed to be represented by an attorney. Albert responded with a written defense statement that was tailored to the charges sent to Albert in the mail. Albert did not have a fair opportunity to present a defense because the incumbents ruled him out of order when his defense did not correspond directly to the charges sent to him. Albert made several galliant attempts to exercise his

democratic right to participate in his defense, but was preempted by the deceitful tactics of the incumbents. This is a direct violation of LMRDA §101 (29 U.S.C. §411) which provides democratic rights of full participation by the members. Albert was further ordered to hand over his written statement to the incumbents. He complied. Witnesses at the trial testified in their affidavits that Albert was tricked and did not receive a full and fair hearing. There is a dispute of the genuine issues of material and crucial facts.

**3. Albert Was Ordered Out of the Union Hall.**

The appellees point to the official record as being the minutes taken on November 1, 1996, the night of the trial. The minutes were obfuscated and erroneous because they were written and maintained by the very incumbents who conspired to throw Albert out of his own union. Albert's affiants have stated that Albert was ordered out of the union hall and escorted by an incumbent officer. In light of the hostility generated by the incumbents against him at his trial, Albert believed that he wasn't invited back into the union hall, nor was it a prudent decision for Albert to return, as personal safety was an issue in Albert's mind. There remains a dispute of a genuine issue of material and crucial fact.

**B. The Defendant's Violated Title VI**

Business manager Clyde Wilson stated in his deposition that he had no evidence that Cook provided financial support to Albert during Albert's candidacy. (see Appendix; Deposition

of Clyde Wilson as Exhibit No. 7 in this Reply). In fact, Cook did not provide any financial support of any kind to Albert.

Appellees refer to the "outsider rule," prohibiting financial support by non-members in Steelworkers v. Sadlowski. The "outsider rule" however, refers to the financial contributions from sympathetic individuals and organizations outside of the union. Cook was not a true outsider, as he was a 15-year member of Local 302 on an honorable withdrawal. Moreover, a close examination of the Steelworker's Constitution from which the holding of Steelworkers is derived, includes more specific language:

> prohibits any candidate from soliciting or accepting financial support or any other direct or indirect support of any kind **(except an individual's own volunteered personal time)** from any non-member.

UNITED STEELWORKERS OF AMERICA CONST. art.V,§27.

Cook falls into a category of individuals to which Steelworkers addressed. That is, Cook was an individual who volunteered his personal time to help campaign for Albert.

Since Albert did not violate the "outsider rule," but was nevertheless unlawfully expelled from the union, Albert is entitled to damages. Brooke v. Local 287, (decided by the 9th Cir. April 21, 1999). Cook is entitled to damages under the same legal theory. Consequently, Albert's claims are meritorious and summary judgment should not have been granted to the defendants.

**C. The District Court Abused Its Discretion In Declining To Excercise Supplemental Jurisdiction.**

The factual evidence supports the appellant's allegations that conspiracy, fraud and other unlawful conduct by the defendants led to the plaintiff's harm. The accumulation of evidence against the defendants would lead any reasonable person to believe that acts of wrongdoing were committed by the defendants. The District Court declined to take the time to examine the plaintiff's evidence. Instead, the Court used words such as "speculation and innuendo and inadmissable evidence" as a substitute for a reasonable and thorough evaluation of the plaintiff's evidence. The District Court abused its discretion by not being inclined to take pro se litigants seriously. Equal justice demands the law to move in, not to move on.

**D. Order to Fully Develop a Case Does Not Reconcile With Protective Order.**

If the appellees had nothing to fear, they would not have motioned for a Protective Order. Obviously, fear of being caught in lies and unlawful acts is what forced the union attorney to motion the Court to shorten time for a protective order. The truth lays in the defendant's phone records. Even the phone records of the union attorney show his unethical involvement in helping the union defendants cover up their wrongdoing.

Pro se plaintiffs should be granted wider latitude

by the Court to "fully develop their case" as was granted in the June 4, 1999 Order. The Court must be inclined to allow the plaintiffs to follow their leads to wrongdoing by union officeholders.

The appellees did not obtain the phone records in a manner impermissable by law. The records were granted by the telephone company from properly executed subpoenas. The appellees implicitly designated the appeal of the Protective Order under "all claims" such as to be used as supporting evidence towards proof of those claims.

Additionally, the propriety of the Magistrate's Protective Order was reviewed by the District Court when the defendants motioned for contempt against the plaintiffs. The defendants based their false contempt allegations on the use of the phone records. A contempt hearing was conducted and the judge denied the defendants.

## CONCLUSION

For the reasons stated above, the plaintiff/appellants respectfully request that the Court deny the defendant's request for dismissal of the appellant's appeal based on allegations of non-compliance of the Court's deficiency notice, or in the alternative, for their request to affirm summary judgment in all particulars. The appellants further request that the defendant's request for fees and appropriate costs be denied.

The appellants respectfully request that a trial be

ordered so that Albert and Cook may be afforded a real opportunity to prove their allegations. Additionally, the appellants respectfully request that they be allowed to complete the full development of their case by reversing the protective order issued by the Magistrate Judge.

Finally, the appellants respectfully request that Russell J. Reid be disqualified from this action because of Reid's severe conflict of interest. Reid represents both the union entity and the wrongdoers (both active and resigned) who are incumbent officers of the entity. This form of dual representation restricts the democratic rights of the general membership and defeats the aims of the LMRDA to protect the democratic rights of individual members.

DATED this 22nd day of January, 2001.

Respectfully submitted,

Val Albert by Galen Cook

Val Albert

Galen Cook

## APPENDIX

Exhibit #1: January 29, 1999 Deposition of Barry Riedesel, pgs. 51, 52.

Exhibit #2: January 29, 1999 Deposition of Barry Riedesel, p. 82.

Exhibit #3: Article XVII, §4 of the Constitution of IUOE, p. 61.

Exhibit #4: January 29, 1999 Deposition of Barry Riedesel, pgs. 12, 26, 57, 58.

Exhibit #5: December 1, 2000 letter by Appellants.

Exhibit #6: April 27, 1999 Deposition of Clyde Wilson, p. 57.

Exhibit #7: April 27, 1999 Deposition of Clyde Wilson, pgs. 79-80.

IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WASHINGTON

AT SEATTLE

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| VAL ALBERT and GALEN COOK, | ) | |
| | ) | |
| Plaintiffs, | ) | |
| | ) | |
| v. | ) | No. C98-1180Z |
| | ) | |
| LARRY JOHNSON, | ) | |
| | ) | |
| Defendant. | ) | |

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Deposition Upon Oral Examination
Of
BARRY RIEDESEL

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Taken by: Tracey L. Juran, CCR
CCR No. JURANTL364BC

January 29, 1999

Seattle, Washington

A. International.
Q. I'm sorry; International.
Now, Mr. Riedesel, do you remember what day or approximately what day nominations night was?
A. It was the first Friday in June.
Q. And do you happen to know what day this lawsuit was brought or approximately?
A. No, I don't.
Q. How about late July of 1996, is that about right?
A. I have no idea.
Q. How about the 11th of July, 1996? That sound about right?
MR. REID: He says he has no idea. That's his answer.
MR. COOK: Okay.
Q. (by Mr. Cook) Did you ever see a copy of the lawsuit?
A. No.
Q. Never did.
How did you first hear about the lawsuit?
A. I believe we were advised by Russ Reid at our first meeting that --
MR. REID: Excuse me.
I'm going to object to any discussions that -- I realize you didn't solicit the response precisely, but any discussions of conversations between



Exhibit #1

myself and Mr. Riedesel or of the other members of the union I will not permit him to answer.

MR. COOK: Are you invoking a privilege between you and your client, then?

MR. REID: I am.

MR. COOK: Okay, objection noted.

A. And then the next time, I saw it in his campaign literature that was, again, sent to my home, in that he stated he had filed a suit in district court.

Q. (by Mr. Cook) Now, were you familiar with any communication written between Mr. Albert and officers of the union regarding the conduct of any of the election-committee members prior to your knowledge about the suit?

A. Conduct of committee members?

Q. Yes.

A. No.

Q. None at all?

Had it ever -- had you ever heard of an incident between Mr. Albert and Mr. Chromey?

A. No.

Q. Never.

A. Not till you mentioned it this morning.

Q. So you did hear something this morning from me.

MR. REID: Well, you asked him a question about