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In the

Supreme Court of the United States

PAUL HALL, etc., et al.,

Petitioners,

v. No. 72-630

JOHN COLE,

Respondent.

Washington, D. C.
March 21, 1973

Pages 1 thru 36

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Wednesday, March 21, 1973

The above-entitled matter came on for argument at 11:08 o'clock a.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM O. DOUGLAS, Associate Justice
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
HARRY A. BLACKMUN, Associate Justice
LEWIS F. POWELL, JR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice

APPEARANCES:

HOWARD SCHULMAN, Esq., 1250 Broadway, New York, New York 10001; for the Petitioners.

BURTON H. HALL, Esq., 401 Broadway, New York, New York 10013; for the Respondent.

C O N T E N T S

* * *

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in No. 72-630, Hall against Cole.

Mr. Schulman.

ORAL ARGUMENT OF HOWARD SCHULMAN, ESQ.,

ON BEHALF OF THE PETITIONERS

MR. SCHULMAN: Mr. Chief Justice, and may it please the Court:

Although arising within the context of an internal labor matter--and it could arise in any variety of contexts--the fundamental issue present here is whether courts may fashion and utilize the extraordinary remedy of awarding counsel fees in statutory actions to successful litigants, notwithstanding that Congress, which provided the right and remedy, has not expressly authorized counsel fee awards.

The facts very briefly as found by the trial court was that Mr. Cole, the respondent, was a member of the petitioning union, and his union for many years, a score of years in fact, competed with another union for membership and job rights for American unlicensed seamen. These two unions represented generally all the American unlicensed seamen.

The other union in the late 1950's and early 1960's--a repetition of conduct which had been going by both sides competing for jobs--attempted to take the employment opportunities in particular fleets away from the petitioning

members of their union. These activities, it was found, if successful, would seriously adversely affect both the employment rights, pension rights, welfare, vacation rights of the members of the petitioning union. And the petitioner here then acted to repel these raids and pursued certain activities.

In connection with the activities of his union, Mr. Cole was opposed to it, proposed a resolution at a union meeting condemning his union's defense against such raids and the activities and the methods it used, resorted to, to defend against it. There were two fundamental reasons for it, as he expressed.

First, they infringed upon his employment rights, which in the maritime industry is called shipping rights. Secondly, it was contrary to what he had expressed. It was his general trade union concepts that union people should not fight with each other.

He then, to implement this philosophy, introduced a resolution at a union membership meeting, which was overwhelmingly rejected by his fellow members. In fact, just two votes were cast with his own vote and someone who seconded it.

As a consequence of these activities, which the union felt threatened its very existence, internal union charges were filed against Mr. Cole. He received notice.

A hearing was held. He participated--and I must say contrary to the ACLU amicus brief--he participated and that is the testimony.

The trial body, the internal trial body, recommended his expulsion. It was sent to the general membership--and their membership meets in a peculiar manner at meetings, not one meeting. There are meetings held all over the country because of the nature of the calling, both in Houston and the West Coast and various places. And the membership concurred in the decision of its trial body.

As a consequence of that, he appealed. Appeals were denied. About a year later--in fact, I think the last appeal was in February--in December he commenced the action, Mr. Hall commenced the action. A motion was made for temporary injunction. Our position the district court sat on for I think close to four months, three and a half, four months, and then issued an injunction reinstating Mr. Cole to membership.

Appeal was had as a consequence, and the decision was affirmed. The complaint was amended, and in 1965--this was almost three years already--an amended answer was interposed. Then the counsel for plaintiff failed to observe local court rules, and the case was marked off the calendar in 1966, restored to the calendar some time in the middle of 1968, and tried in January, 1970.

On trial, which lasted several days, the district court made some significant findings. Number one, the court found that as continued by this union the respondent's activities, the court said, may be resulting in a decrease of the number of jobs available to his fellow union members. It may very well reduce the union treasury and the membership. Nevertheless, the court said, Mr. Cole's activities were protected under the act, and that the proviso which is in the Section 101(a)(2), which says that each member of the union shall have a responsibility toward the union as an institution--the court said in this particular case that proviso was inapplicable as the same was not intended to discourage Mr. Cole's activities merely because the ultimate result would not benefit his union.

The court further found no evidence to support the trial committee's findings that respondent violated the union constitutional provisions as charged. They submit this was prior to this Court's decision in Hardeman. And the district court found respondent sustained no damage at all as a result of his expulsion, that every one of his rights prior to the temporary injunction--that almost 14 month period between expulsion and injunction--each and every one of his rights was assured; his employment, his insurance and welfare benefits remained unimpaired. And, in fact, in 1967 Mr. Cole retired and is presently receiving a pension, $250

per month, from the Joint Union Management Pension Fund. And his wife, as the trial showed, had received about the time of the trial almost $4,500 in some welfare medical payments. She had been seriously ill.

Q What about the period between the time of his termination and the time of the district court judgment?

MR. SCHULMAN: Everything all right, Your Honor.

Q He was--

MR. SCHULMAN: He was accorded every single right and that is what the court found.

Q That included back payments?

MR. SCHULMAN: I do not understand.

Q You say he has been receiving a pension.

MR. SCHULMAN: Oh, he retired in 1967 and since '67 to date he has been receiving a pension. Prior to that he had been actively employed.

Q He would not have received that, absent the district court judgment; is that correct?

MR. SCHULMAN: No, he would have received it anyway.

Q He would have received it in any event?

MR. SCHULMAN: Yes, in any event, he would have received it. In other words, there was no discrimination against him in any shape, manner or form, and that is what the court found.

Q What do you say the court's relief consisted of?

MR. SCHULMAN: The court's relief--the court went on to make, as I say, some very significant findings. The court went on further and said that all the defendants in this case acted in good faith and believed they had a right to do what they did to protect their organization. The court further concluded there was no malice at all, absolutely no malevolence by any of these officers. The court, in fact, did not find, as the Third Circuit decision in Gartner which the court relied upon for the award of attorneys' fees--in this case the court did not find that the plaintiff acted in good faith, a significant finding in the Gartner case, but it found, on the contrary, that his complaints and his grievances and his accusations were in part motivated by desire, political ambition for office.

All causes of actions were dismissed against all individual defendants, and the court granted a mandatory injunction against the union, requiring the reinstatement permanently of Mr. Cole.

Then it came to the issue of attorneys' fees, which is the issue before this Court. The court said, based upon the authority of Gartner v. Saloner, 384 Fed. 2nd, Third Circuit, that the court had authority under Section 102 of the act to award the counsel fees.

Q This is the district court?

MR. SCHULMAN: This is the district court, Mr. Justice Rehnquist, yes.

And that in addition to that, the absence of express statutory provisions authorizing attorneys' fees does not stop the court in a case such as that for awarding attorneys' fees, relying upon this Court's decision in Mills.

Q I expecting also pointing out that general provisions, such relief as may be appropriate or something like that.

MR. SCHULMAN: He did not say that.

Q Not the district court.

MR. SCHULMAN: Not the district court.

Q That was the court of appeals.

MR. SCHULMAN: The court of appeals fundamentally affirmed and said as may be appropriate, as you just said, Mr. Justice Brennan.

It appears to us that present here is a determination and a fundamental decision which is contrary to a very long established rule. I think it is in 1784. And that is that ordinarily attorneys' fees are not awarded absent express statutory authority, and the court has used express statutory authority, or a contract providing therefor. And there have been exceptions; we will come to them in a

moment. We do not think any of these exceptions apply to this case. But equally significant--and I think quite significant--is that when you examine the legislative history, when you examine Congress's intent as a plenary body, it becomes manifest that Congress did not authorize attorneys' fees.

When we look at the statutory provisions with which we are concerned, which are Section 102, it provides that the district court may grant such relief, including injunctions, as may be appropriate. I need not belabor the point. There is no express provision for it other than to point out, as this Court has pointed out in the Fleischmann case, Congress is not reluctant. When Congress wants to award attorneys' fees in express statutory action, it says so. The footnote, 16 I believe it is, in Fleischmann.

As more recently, Title II, Civil Rights Law, Fair Housing Law. There is no question that when Congress wants it done, it knows how to say it. In fact, in this statute, as we shall come to, it so expressly stated in certain instances.

When we examine the legislative history and the derivation, we find the bill started, as this Court knows, with the Kennedy-Ervin Bill on the Senate side in 1959. And with respect to Section 102, which we are talking about,

Senator McClellan had introduced his bill of rights. But under his bill of rights, Section 102 and 103, there were two provisions. One, it was that the Secretary of Labor is authorized to apply for such relief as may be appropriate. And the second was a criminal provision, penal provision. Sections 102 and 103--at that time 102 in the McClellan Bill--was a penal provision.

A debate raged in the Senate on this point as to the problem which would be attended if the Secretary of Labor was to be the one to initiate and process these sort of matters.

The consensus was finally arrived at through an amendment by Senator Kuchel. And Senator Kuchel's amendment in substance substituted for the Secretary of Labor as the party to seek the relief the private party affected. And, as the legislative history shows, done solely to avoid bureaucratic chaos, absolutely no intent to provide for attorneys' fees and certainly no one can seriously contend that the Secretary of Labor, if successful, would be entitled to attorneys' fees.

Section 102 in the Senate bill as passed then went over to the House. On the House side, Senator Goldwater took the unusual step of appearing before the House Committee on Education and Labor, and explained to them the meaning of the language which was utilized and specifically pointed

out, as we have in our brief at page 13 and 14, that with respect to Section 102, it does not provide for attorneys' fees. It further pointed out, as distinguished from the Fair Labor Standards Act, which does provide expressly for attorneys' fees, this provision does not apply for it.

Q Mr. Schulman, did the Senator carry his argument to the Senate?

MR. SCHULMAN: No, he did not carry it to the Senate.

Q Which was his own house.

MR. SCHULMAN: Which was his own house, that is correct, Mr. Justice.

Q Is there anything indicative in that fact?

MR. SCHULMAN: No, there is--I think the manner in which the debate occurred brought this about, because the Kuchel amendment to 102 did not come out of a committee; it came right up on the floor over this problem of bureaucratic chaos. And we have been unable to ascertain any discussion on the Senate side relative to providing for attorneys' fees.

We do, however, call this Court's attention to the fact that this issue in substance was before this Court in the Hardeman case.

When Senator Goldwater went over before the House, he testified as to a whole series of items which the Senate

bill had contained. As this Court said, it was an authoritative analysis of the language in the Hardeman case. Senator Goldwater discussed Section 102. He discussed Section 104. In fact, as a consequence of his testimony, the Senate bill, Section 104, which was the exhaustion provision and was a sixth month period, was reduced to four months.

Q Reduced by the House?

MR. SCHULMAN: The House bill then contained four months and in committee accepted as four months.

Q Do you think that Senator Goldwater's position perhaps was the fight having been lost in the Senate, he was going over to the House to try to get them to stiffen the thing?

MR. SCHULMAN: I think it was a combination of both, Mr. Justice. I think, number one, he was explaining to the House this was the meaning of the language. Look at these provisions. I do not think it was a situation of a loser trying to express, beguiling, his disappointment in being unsuccessful. No, I think this Court has recognized that in the Hardeman case, that this was an explanation and so, "Look, gentlemen. Look at the language, look at what the statute says. Look at what the Fair Labor Standards Act says. This language, standing in and of itself, will put the burden upon the individual. Why do we not do something about

it? That as well as other items."

Q So, he is trying to get the House to do something that the Senate was unwilling to do?

MR. SCHULMAN: That is correct. I would say that is correct.

Q I got some impression, Mr. Schulman, out of this record--and you perhaps can clarify it for me--that the legislative history suggests that one of the reasons why they did not affirmatively provide for attorneys' fees is that there was some thought that the statute without that explicit provision was broad enough to give very broad relief.

MR. SCHULMAN: I will direct myself, Mr. Chief Justice, to that question. There is nothing at all by any contender of this bill saying that their language will encompass attorneys' fees. Someone must only assume that. Overt there is nothing in it. In fact, it is pointed out, as I shall come to in a moment, after Senator Goldwater concluded histestimony, and Senator McClellan equally testified, if I recall in the Hardeman brief presented to this Court, Senator McClellan took a similar position to Senator Goldwater. After that testimony there was reported the Elliott Bill in the House on the Senate's bill. The Elliott Bill, after reported, did not succeed, and a minority House report was filed in substance saying, as I

see it, that there is no provision for attorneys' fees.

However, the Elliott Bill could not command a majority, and Congressmen Landrum and Griffin proposed their bill. But the provision with respect to attorneys' fees, which was a House minority dissent, could not command a majority of the House, and the bill as it came out took Section 102 of the House bill, the Kuchel Amendment, with one change not significant here--the conference report parenthetically inserted the words "including injunctions"--

Q There had been an earlier draft in the House that specifically provided for attorneys' fees, but it failed and the bill that came out of the House did not provide.

MR. SCHULMAN: That is not so, Mr. Justice. No bill as such--either the Elliott Bill or Landrum-Griffin Bill as such--provided for the authorization expressly of attorneys' fees. Neither bill did.

Q Was there a difference between the Elliott draft and the ultimate Landrum-Griffin Bill?

MR. SCHULMAN: No. Both accepted in substance the Kuchel Amendment.

Q And neither dealt with attorneys' fees?

MR. SCHULMAN: And neither dealt with attorneys' fees. That is correct, Mr. Justice.

But there are equally significant issues in this matter. In the debate on the House, Congressman Griffin

stated, directing his attention to the 102 original McClellan provision which provided for penal remedies, said, "Look, the kind that we are talking about here is comparable to Taft-Hartley unfair labor practice charges. That is a comparable conduct. And there are no criminal penalties for that. There is accepted, generally accepted, provisions and they are all civil." And this was his understanding, one of the sponsors, of the conduct which sought to be remedied here. And I think this is as far back as 1941. It has been determined that the only compensatory or other damages of any kind available in unfair labor practice charges is lost time, compensatory damages.

And I think equally significant is that when we turn again to the provisions itself of the act and track it, we find very significant language, the identical language which appears in 102 and which I say rejects any inference that attorneys' fees--first were not even expressly authorized--were even inferentially authorized.

And I am referring to the following. The language used in Section 102, such relief as may be appropriate. When we examine Title II, which is the provision of the act which provides for filing reports, responsibilities and so forth, the enforcement provision of that is the identical language, the Secretary of Labor being the enforcement officer. Here we have Congress using this same language.

And we are now asked to say it means one thing here, it means another thing here.

Now we go to Title III and we find the same thing in the enforcement provision with respect to that matter which in substance is the same context and used again for individuals to exercise their rights. Again, you have to have a different meaning for the same language.

And when we go to Title V--which is very significant, that is the fiduciary, that is the akin to the Mills case which is property rights--and when they come to that section, Congress specifically said appropriate relief plus accounting, damages, and attorneys' fees. I think when you track that language it becomes very significant that not only was it not expressed, nor can it be inferred.

The question of inferring, just to direct a few moments to, it appears--

Q If I may interrupt you again, Mr. Schulman--

MR. SCHULMAN: Yes, Mr. Chief Justice.

Q --I think I put my finger on what raised this subject in my mind. Congressman Elliott apparently in debate responding, it would seem in this context, to this problem about fees said that the court's jurisdiction "to grant such other and further relief as may be appropriate" gives it wide latitude to grant relief according to the necessities of the case to cover any loss suffered by members.

MR. SCHULMAN: Yes, that language referred to, but at no time was there any mention at all with respect to attorneys' fees, and it rose within a context--

Q Was that not a response to a suggestion or in the general context of the debate about adequacies of the bill?

MR. SCHULMAN: It would appear to me that if I were to make an objection that there were not provisions for attorneys' fees and that that was intended as a reply, certainly the inference would be this is broad enough to cover everything, including attorneys' fees. We must guess and hypothecate whether or not that was intended for that purpose. And it appears to me hen you have--

Q His views, if any of these views carry any weight, his views would be of more utility than the views of the--

MR. SCHULMAN: Sponsors.

Q --people who were protesting, would they not?

MR. SCHULMAN: No, because his bill was never adopted. Congressman Elliott's bill was not adopted. It was the Landrum-Griffin Bill that was adopted, which was substituted for the Elliott Bill in the House, and that is what happened. The Elliott Bill could not command a majority, and you have that dissent to it; and you therefore had, then, coming up the Landrum-Griffin Bill which apparently could

not either command a majority with respect to the minority report that it does not provide for attorneys' fees. And that is how it came through.

I would like, if I may, just direct a few of my remarks or I can maintain a few minutes for rebuttal with respect to the Mills decision and the exceptions provided therein. The judge created exceptions.

What we are talking about, first of all, when we examine this statute, we find it falls foursquare within this Court's decision in Fleischmann. When you look at this legislative scheme, Title I, II, right through, Congress lays out the rights. Congress provides the remedies. When it wants attorneys' fees, it says attorneys' fees. When it describes the nature of accounting, it says accounting. It lays it out within what I think Fleischmann says are the boundaries which Congress intended to be utilized.

And then we come to the exceptions. And the Mills case fundamentally is discussing a property right, a stockholders right. I must call attention to one fact. The Mills case per se is not an express statutory right. In fact, this Court specifically said that the only right under Section 14(a) of the Security Exchange Act was a declaration avoidance, leaving to this Court the obligation to imply a right. And obviously when the Court implies a right, of necessity it must make some provision how that right will

be implemented, how it will be enforced, and that is the remedy.

The Mills decision does not apply here. This is not a property right case. In fact, Section 501(b) of this act, which is the akin to Mills, the derivative stockholders action, property held by a third party, acted upon improperly, the therapeutic purpose of that, Congress was specific. It said that is a breach of fiduciary obligation. That is 501. And specifically said, "We shall give in that instance reasonable attorneys' fees."

As it appears to me, this does not fall within one of the exceptions. The legislative history sets forth what it is. There is no express provision under these circumstances, I think, to permit in a case such as this where Congress has not expressly provided attorneys' fees and in effect said equity, you have equitable powers and you can grant attorneys' fees and I think will be applicable to most any litigation, any statute enacted, and I think would vitiate a rule which we have had since 1789. And if that is to be vitiated, it is the function of Congress; it is a plenary power. Thank you.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Schulman.

Mr. Hall.

[Continued on page following.]

ORAL ARGUMENT OF BURTON H. HALL, ESQ.,

ON BEHALF OF THE RESPONDENT

MR. HALL: Mr. Chief Justice, and may it please the Court:

I would like to go back to the facts just briefly to correct what I believe to be some errors in my friend's presentation.

Mr. Cole introduced his resolution at a union meeting--at a meeting in 1962. He was fully in order to introduce it. He was declared to be in order. He was not, however, allowed to read it. It was read in garbled fashion by one of the officials of the union. The head of the union then took the floor and denounced him as an ingrate and a variety of other bad things. He was not allowed to answer.

The motion was put to a vote. He and his seconder were the only ones who dared put up their hands in favor of it.

I think that reveals not only the nature of how this union's internal affairs have been run in recent years; it also reveals the nature of the benefit that this suit has conferred upon the union and upon the membership.

According to the union officers themselves, those officers believed--and they say they believed it in good faith and there has been a finding below to that fact--that they can expel a member who introduces a resolution critical

of them at a union meeting. If they believed it, the members must have believed it also or believed that they were not secure in their ordinary democratic rights guaranteed them by the Bill of Rights title of this act, Landrum-Griffin Act.

This was already three years after the Landrum-Griffin Act had gone into law. It was more than four years after the State of New York Court of Appeals, the highest court of the state, had declared in very clear language that public policy requires that union members be protected in their rights to express views and opinions critical of the union's leadership and its officers, even when the criticism is hard-hitting and ardent.

Despite all this and despite the fact that the union was represented and is represented by very able counsel, the union officers insist they still believed they could freely expel a man. What is more, they must have believed they could expel him on no evidence whatsoever, because their trial committee was unable to find any evidence whatsoever to support the charges that Cole had maliciously vilified the union president.

One more point on this. The resolution was critical of certain violations of the union's established shipping procedure and called for more regularized hiring. This related to the union's practice or the union officers'

practice of raiding other maritime unions. The reason it related is rather complicated.

In addition to the ordinary picketing that the union carried on from time to time by membership approval, the officers were leading men in what was called voluntary picketing and rewarding the--which involves disputes that the union was not a party to and which had not been approved by the union membership. It was rewarding this voluntary picketing by giving or shipping men off their voluntary picket lines, and that was one of the variations--in fact, it was the chief variation--from the established shipping rules that Mr. Cole was complaining about.

His motives in introducing the resolution are there right on the face of the resolution. Mr. Cole testified as to his motives, and it is clear that his motives, the motives that he testified to, are exactly the same as the motives that are indicated by the resolution itself; namely, he wanted more regularized hiring, and he wanted to end this dog-eat-dog warfare between sister unions where one union, in particular this union, would raid another union by offering--by sending strike breakers through the other union's picket lines, by offering men to work at lower wages and under worse conditions than the other union did, the two instances here, and I think they are the only instances of those particular practices committed by this

union, I believe, against the others.

Cole wanted to stop that because he wanted better conditions for all seamen for reasons that I think are obvious. He was brought up on charges by the port agent for this, charge of malicious vilification of Mr. Hall. We are no relation to each other. He was put through the appearance of a trial committee which, as I say, could find no evidence or could produce in its report no evidence of any malicious vilification on his part or of any other violation of the section under which he was charged. And this was put out for ratification and approved by all the members voting in the same way at the various ports by hand vote.

It took him more than nine years to get this far in his lawsuit.

Q Cole was not himself a union officer or agent? He was a rank and file member?

MR. HALL: He was a rank and file member; that is right.

Q And employed as a seaman?

MR. HALL: That is right.

In the course of this suit, about 1966-7, he suffered aboard ship a back injury, and that is why he is now retired. He was not able to work anymore.

It has taken him more than nine years to bring--this case was brought in December of 1963. It has run through a

long series of obstructive--opposition tactics, shall we say. Mr. Schulman is in error when he says that it was removed from the calendar because of a failure to observe local court rules. It was removed from the trial calendar on motion of defendant, because defendant a year after the calendar, it had been down for trial, desired to serve interrogatories.

The actual putting it down for trial was delayed at defendant's request because they had said that they wanted to serve interrogatories. No interrogatories were served, and it was put down for trial I think the day before a calendar order would have gone into effect dismissing the case. A year later the defendant came forward with his 195 interrogatories. After those were disposed of, the defendant depositions of the plaintiff, and from there on it went to trial. It has been, of course, to the court of appeals twice, once on the preliminary injunction and, second, on this instance here.

Q Would you raise your voice a little?

MR. HALL: Oh, I am sorry.

Getting on to the real meat of the question, which is the nature of the power of a court in equity to award attorneys' fees where the doing of justice requires, I would suggest that this case is on all fours with Mills v. Electric Auto Lite Company. In fact, it would be almost possible to

strike out the word "corporation" and put in the word "union" and have the identical case before us.

In Mills certain minority stockholders brought suit, as Your Honors know, to challenge a merger. This Court's decision did not decide the merger question, but it was found by the district court, and this Court agreed, that there was a violation of the duty of the corporation officers to send out non-misleading information. The benefit, conferred, in other words, on the corporation and its members by the Mills case was a non-property benefit. It was a non-monetary benefit. It was the benefit of fair and democratic proceedings within the corporation, just as the benefit which Mr. Cole has contributed to this union and to its members is the guarantee of democratic rights on the part of those union members.

Q What was the source of the cause of action in the Mills case?

MR. HALL: I believe it was a suit to challenge a merger on the ground that the--

Q Equity action or of statute--

MR. HALL: It arose under the Security Exchange Act under a guarantee of non-misleading statements to be sent out in shareholders' votes.

Q It was not part of a structured statutory scheme, or was it, that provided for stockholder suits and

stockholder claims and remedies?

MR. HALL: The statute did provide for a suit in other sections and it provided specifically for attorneys' fees in other sections.

I believe in the section under which it was brought, I believe Section 14, it does not specifically say that suit can be brought, I believe.

Q Was that not one of the reasons the Court used to distinguish Mills from Fleischmann where they have held that attorneys' fees were not permissible, was that in Fleischmann the statute had provided a private remedy, whereas in Mills the Court had to imply the private remedy and therefore it was free to also imply attendant attributes as a remedy?

MR. HALL: I believe there are two distinctions and were two distinctions in the Fleischmann case. Fleischmann did not discuss Mills. I am thinking of the discussion of Sprague. But turning it around, in Mills discussion of Fleischmann, first of all, Fleischmann was not such a suit as could confer a benefit or as conferred a benefit on the defendant corporation or its members. There was no way in Fleischmann that a fee award could operate so as to spread the costs of the litigation among the persons benefited by the litigation. Fleischmann was a straight trade mark case.

The second distinction, the one that Your Honor is referring to, is the fact that in Lanham Act, Section 35, the suit under which Fleischmann was brought, there is an extremely specific and intricate statutory scheme for relief. The statute specifies that profits may be obtained in addition to damages, in addition to costs. It spells out the various ways in which profits are to be determined or, if the district court does not find the actual profits adequate, will find new ones.

The statute has prescribed in elaborate detail in the Lanham Act what the man may get if he brings suit. Here there is no such spelling out. There is simply the provision by the statute that you can bring a suit for such relief as may be appropriate. That is to say, it is the equivalent of saying you could bring suit. Obviously, the court gives such relief as it deems appropriate.

It would be impossible, I think, for Congress ever to specify--to give no general language to indicate a more general intent as to the nature of the relief given than it has in Section 102 of the Landrum-Griffin Act.

Q Unless you take Mills where it did not specify any private right at all--I mean, this is really somewhere between Mills and Fleischmann.

MR. HALL: It is somewhere in that sense. I believe the section--I do not have the section in the SEC

that clearly in my mind to answer very specifically. But I believe the cause of action was newly discovered in Mills. I think that is about as far as that point can be put. I think that the Congress intended the action. My recollection of Section 18 is much more clear than the Railway Labor Act guarantee, inferred guarantee, of a right to sue for fair representation. I believe there is statutory indication that, for instance, an action done in violation of the requirement about non-misleading information would be void and presumably would be actionable to make it void. But I will have to retreat because I do not have the statutory language in front of me.

Q. Do you have any comment about Section 501(b)'s specific provisions?

MR. HALL: 501(b) is a suit involving fiduciary--section involving the--well, 501(a) imposes a fiduciary duty on officials. And 501(b) is a suit to obtain for the benefit of the union relief for breach of the fiduciary duty. It does not give, to my mind, general equitable powers to the court. What is more, the nature of the suit contemplated in 501(b) is such that there would be no fee award in the sense of award payable by the defendant as such. Rather, 501(b) talks about division of the monies recovered for the benefit of the union. I believe the operative language is, "The district court may allocate a portion of the recovery

for counsel fees."

The district court's power--and I would suggest it does have the power in a 501(b) suit--to award counsel fees in addition would not come out of that clause, as I understand it, but would come out of the fact that perhaps the amount recovered was not sufficient and it was necessary to give a counsel fee award.

There is another distinction between the sections--I did not mean to jump into it in the middle this way--that the two sections which specify attorneys' fees awards in the Landrum-Griffin Act are the only sections which specifically say that suit could be brought in state as well as in federal court. The power of a court in equity to award counsel fees has been essentially a federal matter. The states are various in their views on that question. And it is, I believe, possible, that the Congress may have had in mind a desire to make clear to all the state jurisdictions that counsel fees are properly awardable under the two sections. One is 201(c), which relates to accounting assets and so on, and the other is the 501(b) that we have been talking about.

The history of the act indicates very clearly that many people in Congress--and certainly the ultimate drafters of the act--felt very strongly that counsel fees should be awardable in a case of this kind. Senator Goldwater was

extremely outspoken on the question, as Mr. Schulman has commented. He apparently at first thought that the Senate bill or that Title I as it came out of the Senate did not provide adequate guarantee that there would be counsel fees. And so he voted against the bill. He was the only senator who did. He won it in that initial time it came up in the Senate. And so he urged some other kind of provision in the House bill.

The House had before it not the Senate bill directly but the Elliott Bill. And the Elliott Bill was somewhat different in its language. I have quoted the operative language on page 31 of my brief. I would suggest that although, as Congressman Elliott indicates, he intended very general relief by that provision, that in the style in which it is written it would suggest a somewhat flabbier approach to the powers of the court it comes before.

That at least was the opinion of the nine Republican members of the House Committee. Those nine members--and they included Congressman Griffin--submitted a set of dissenting views or a minority report to the House report on the Elliott Bill. They started it by saying, "We, the undersigned members of the committee, are convinced beyond doubt that HR 8342"--that is the Elliott Bill--"in its present form is grossly inadequate as a means of dealing with corruption and racketeering in the labor management field."

Down further in their dissenting views it becomes clear that they are talking in large part about the Bill of Rights. They say it is watered down along with the elimination of adequate enforcement provisions. That is their first reason given for saying that the Elliott Bill is inadequate.

Then they come around specifically--and they talk about counsel fees. They say, "One of the most serious inadequacies"--now, they refer to the Senate bill for reasons which I would suggest are simply a terminological error here--"is the lack of any effective enforcement procedure to protect union members from those few union officials who fail to recognize that a union belongs to its members," and so on. And they emphasize that there must be counsel fees awardable.

Then at the end of their dissenting views they say very clearly that because of these inadequacies, we--us nine people--we are going to oppose this bill and we intend to support the Landrum-Griffin Bill when it comes up on the House floor. Now, in fact, they did support the Landrum-Griffin Bill. In fact, one of these was Mr. Griffin. And the Landrum-Griffin Bill replaced the Elliott Bill. That is, it replaced the text, the entire text of the Elliott Bill after the enacting clause was deleted and the text of the Landrum-Griffin Bill put in.

I would submit that at the very least those statements by Mr. Griffin and by the other eight minority people indicate that when they pushed for the Landrum-Griffin Bill, they were pushing for language which they believed would be adequate, which would guarantee counsel fees to union members, which would be adequate, in other words, to meet the problem of corruption and racketeering in the union.

Whether or not the Elliott Bill really was inadequate, of course, is a dispute between them and Mr. Elliott. Mr. Elliott believed that it gave wide relief--the language that he had drawn up--gave wide latitude to grant relief according to the necessities of the case. They disagreed and so they opposed Mr. Elliott's bill and they put in their own. And their own is virtually identical except for a few additions, like the parenthetical phrase "including injunctions," with the act as presently adopted.

I would suggest that as far as Senator Goldwater is concerned, Senator Goldwater on reflection must have concluded that the language of the Senate bill--because the language of the Senate bill was identical to the language of the Landrum-Griffin Bill was after all sufficient, that its generality did give courts power to grant equitable relief, including attorneys' fees.

Nothing, at least, more was said on the matter

and it came before the Senate again. My recollection is, although I cannot say it with definite certainty, that Senator Goldwater ultimately voted for it. I think if you are to conclude, as my friend would, that these Congressmen and Senators did not intend their final bill to give attorneys' fees, then you would have to conclude that they deliberately pushed a bill which they believed to be inadequate, which would not meet the needs that were called for to combat corruption and racketeering.

I would suggest that that implies a kind of machiavellianism that should not be assumed and they should not be accused of unless there is something more to suggest it. I think--and I think one must draw from the overall history--that these Congressmen and Senators wanted attorneys' fees to be available; they said so. They felt that any bill which failed to make them available would be woefully inadequate. And so they chose language which, on reflection and study, was sufficient to make an attorneys' fee awardable under ordinary equitable principles.

Thank you.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Hall.

Mr. Schulman, do you have anything further?

REBUTTAL ARGUMENT OF HOWARD SCHULMAN, ESQ.,

ON BEHALF OF THE PETITIONERS

MR. SCHULMAN: Yes, just a few comments, if I may.

Number one, I would just like to direct a few comments to the issue of malice and the findings in connection therewith. I think the trial court's findings will determine that, and I do not intend to devote my time to that.

The issue I would like to point out specifically to this Court is that as this Court has so often admonished and advised us and told us, that labor legislation is a compromise of extreme views. And the question of getting legislation passed is a distillation of the compromise. And I think that is most reflected in the additional statement by the Honorable Philip M. Landrum and Honorable Robert P. Griffin talking about the principal differences between the Elliott Bill and their bill. And they say in paragraph one, "Title I of the substitute, the Bill of Rights for union members, is essentially the Bill of Rights in S 1555 as it passed the Senate. Those who have tried to put a union busting label on our Bill of Rights"--he is talking about the Landrum-Griffin--"would pin the same label on 90 members of the other body," manifesting to me so clearly that what the bill was in the Senate and which Senator Goldwater went before them, the House committee, to tell them what the language meant, could not command a majority to bring forth any language to provide for, expressly as required by the American law, for the authority to grant counsel fees.

Thank you very much.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen.

The case is submitted.

[Whereupon, at 12:00 o'clock p.m., the case was submitted.]

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