3-19-1980

Brief for Plaintiffs-Appellees and Plaintiff-Intervenor-Appellee

Lewis M. Steel '63

Michael D. Ratner

79-7842

To be argued by
LEWIS M. STEEL

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

ROYSWORTH D. GRANT and WILLIE C. ELLIS,
Plaintiffs-Appellees,

and

LOUIS MARTINEZ,
Plaintiff-Intervenor-Appellee,

against

BETHLEHEM STEEL CORPORATION, JAMES DEAVERS, RICHARD DRIGGERS, THOMAS C. CONNOLLY, and the INTERNATIONAL ASSOCIATION OF BRIDGE, STRUCTURAL AND ORNAMENTAL IRON WORKERS, AFL-CIO,
Defendants,

and

LOCAL 40, BRIDGE, STRUCTURAL AND ORNAMENTAL IRON WORKERS, AFL-CIO, RAY CORBETT, RAY MULLETT, and JERRY PLACE, individually and as officers of Local 40,
Defendants-Appellants.

BRIEF FOR PLAINTIFFS-APPELLEES AND PLAINTIFF-INTERVENOR-APPELLEE

EISNER, LEVY, STEEL & BELLMAN, P.C.
Attorneys for Plaintiffs-Appellees
351 Broadway
New York, New York 10013

Of Counsel
LEWIS M. STEEL
RICHARD A. LEVY

MICHAEL D. RATNER
Attorney for Plaintiff-Intervenor-Appellee
351 Broadway
New York, New York 10013

TABLE OF CONTENTS

TABLE OF CASES

ISSUES PRESENTED

1. Whether the Record Supports the District Court's Findings that Local 40 Retaliated Against Appellees for Engaging in Protected Activities?

2. Whether the District Court Abused its Discretion in Imposing the Remedy in this Case?

INTRODUCTION

Roysworth Grant, Willie Ellis and Louis Martinez are mature working men who have spent all their lives laboring productively in the ironwork industry. Grant and Ellis are black and Martinez is a dark-skinned Puerto Rican. The record before this Court reveals that these three men, in 1975, began to challenge the referral practices of Local 40, Bridge, Structural and Ornamental Ironworkers, AFL-CIO, and its officers (hereinafter sometimes referred to collectively as Local 40). In complaints filed with the Equal Employment Opportunity Commission (EEOC) and the New York State Division of Human Rights (NYSDHR) and thereafter in this federal court proceeding, which was commenced in February, 1976, these three men contended that Local 40 refused to refer them to work on the basis of their race and national origin.

After filing this legal challenge to Local 40's practices, Grant, Ellis and Martinez began to find that Local 40 was no longer referring them to jobs, or giving them referrals to short-term work. The uncontroverted record facts proved: that Grant did not receive a single referral over a five month period (November 16, 1976 through April, 1977, 237a-239a, SA487-8).*/ Willie Ellis

*/ Appellants have filed both an Appendix and, at the request of appellees, a Supplemental Appendix. References to the Appendix appear as (___a); references to the Supplemental Appendix appear as (SA___). At times, this brief will cite a particular exhibit or deposition referred to as well as the Appendix reference. These additional references will be keyed to the references used by the (Cont.)

attended the hall for 139 consecutive days between August, 1976 and March, 1977 without a referral (SA450), and Martinez shaped the hall 65 times from December, 1976 through March, 1977 without a referral (SA467).

By contrast, Local 40 was referring out men out to work during this same period who had sat in the hall only two to three days (SA450-488).

The decision below, which found that Local 40 retaliated against appellees for engaging in protected activities, details these statistics (1249-54a). The district court opinion also points to other critical uncontroverted facts in this case: that Local 40 had notice that Grant, Ellis and Martinez had filed discrimination charges and a federal complaint (1245a, 1249a, 1251a); that Local 40 knew appellees were waiting in the referral hall for referrals and knew they had been there longer than ironworkers who received referrals (1247a, 1250a, 1251-2a); that Grant, Ellis and Martinez were qualified to be referred out (1244a, 1248a, 1251a); that Local 40 gave shifting and conflicting explanations in defense of its actions (1248a) and at times simply gave no explanation to justify its failure to refer appellees

*/ (fn. cont.) district court in its opinion. For example, the depositions of appellants Place and Mullett will be referred to respectively as "D.P." and "D.M." Such references will appear as (___a[D.P.] or SA___[D.P.]). Appellees at times will also refer directly to a specific finding in the Magistrate's Report (e.g., "M.R. 104") and to the decision below ("D.Ct.").

(1251a).

Appellants in their brief to this Court simply ignore these detailed findings of the district court. Local 40 does not dispute the fact that appellees sat in its hall for months at a time without a referral while men with less time were referred. Local 40's brief does not dispute the fact that its business agent knew appellees were not being referred out. Nor does appellant challenge the conclusions of the court below that Local 40 shifted its defenses throughout the proceedings and sometimes submitted no explanation at all for its conduct. Instead of coming to grips with the opinion below, appellants' brief attempts to lay down a smokescreen to obscure what actually occurred. Thus, Local 40 quibbles with the district court as to the exact date when its business agents were notified of appellees' EEOC or NYSDHR complaints in order to argue that it may have made certain referrals to appellees after notification, and points to Local 40's few short-term referrals to appellees. It asserts this Court should reject the district court's analysis, which considered these short-term referrals, because the union did, in fact, offer appellees a few days' work, and claims that retaliation was not proved because the Local's arbitrary methods of running its referral hall also may have disadvantaged other ironworkers. In effect, appellants ask this Court to accept their excuses, based upon a record analysis which fails to discuss the evidence relied upon by the court below.

Following this Introduction, appellees set forth a Counter-Statement of the Case, which relates its history, and includes a detailed analysis of both the decision below and the Report of the Magistrate, who took the evidence in this case. At Point I of the Argument, appellees will marshal the evidence presented, and show that the district court's decision is overwhelmingly supported by the record. The brief will conclude with a discussion of the appropriateness of the court's remedy.

COUNTER-STATEMENT OF THE CASE

A. The History of This Dispute

This action was filed in the Southern District of New York in February, 1976, by appellees Grant and Ellis, the procedural requirements for filing a Title VII complaint having been met.*/ At the time the complaint was filed, Grant was working as an ironworker for Bethlehem Steel Corporation (1245a). Ellis was out of work (1249a). Martinez intervened in the action in April, 1976 (1251-2a). At the time he intervened, Martinez had completed a period (December, 1975 and most of January, 1976) of sitting in the hall for 34 days without a referral, while men with less time were referred out (1251a), which was followed by a two month period (the end of January, February and March, 1976) in which he received only 13 days work from short-term referrals (1251a). Other ironworkers during this period were receiving longer term referrals (1136a [M.R. 104]). During the spring and summer of 1976, Ellis and Martinez sought work outside of the Local 40 hall.

Ellis also attended the hall sporadically in May and June and was in regular attendance from August, 1976 (1249a, SA450) until the retaliation hearing eight months later. Grant returned to the hall in July, 1976 when his Bethlehem job was over, and

*/ The action was commenced against Bethlehem Steel Corporation and several of its employees, in addition to the Union defendants. The cases against the Company and the Union were severed.

attended the hall regularly thereafter (1245a, SA487).

In September, 1976, Grant and Ellis, with their attorney, had a meeting with counsel for Local 40 concerning discovery. At that meeting, appellees' counsel complained that his clients were not getting work and asked Local 40 counsel to do something about it. Appellees' counsel asked "Why don't you suggest to your clients to send my men to work?" (406a, see also, 399-401a, 404-405a).*/

On November 15, 1976, counsel to Grant and Ellis wrote to Robert A. Kennedy, counsel to Local 40, seeking work for his clients. In this letter, he said: "it appears that your client has taken retaliatory measures against Messrs. Grant and Ellis, and has refused to refer them out for meaningful work." (SA433). The letter stated that appellees were seeking either supervisory or non-supervisory jobs. It documented the lack of referrals and the fact that only short-term referrals had been offered these individuals, at a time when long-term jobs were available. The letter concluded by asking Local 40's attorneys to use their good offices to encourage the Union to make appropriate referrals to Grant and Ellis and thereby avoid the need to bring retaliation charges (SA433-4).

Local 40's counsel responded on December 3, 1976. His letter disputed the charge that Grant and Ellis had been retaliated

*/ Testimony of this conversation was not controverted by apellants and the district court credited it (1250a).

against, but concluded by stating that if they attended the hall, counsel would use his best efforts to see that they were referred out on a non-discriminatory basis (SA435-6).

In January, 1977, after no referrals were forthcoming for Grant and Ellis despite their regular attendance in the hall (SA450, SA487), appellees' counsel informed Local 40's counsel that appellees were going to have to bring a retaliation motion (402-3a). Still, appellees received no referrals despite their continued regular attendance in the hall. On March 3, 1977, appellees filed a motion for preliminary injunction, supported by detailed affidavits, seeking to enjoin Local 40's refusal to refer appellees to work (64-128a). At the same time, appellees filed an amended and supplemental complaint, seeking, inter alia, monetary and injunctive relief for Local 40's retaliation (70-84a).

At oral argument on this motion before the district court, attorneys for Local 40 claimed, among other things, that Grant's low number of referrals could be accounted for because his name had been forged in the Union sign-in sheet.*/ Because such defenses were raised, the district court referred the matter to a Magistrate to hear and report (1248a).

Finally, after the referral to the Magistrate, appellees began to receive work out of the union hall (1246-7a, 1249-50a,

*/ The district court was later to comment on the fact that the appellants never even raised the so-called "forgery" issue before the Magistrate (1248a).

1252a).

B. The Magistrate's Hearing and His Report

The Magistrate conducted five days of hearings in April, 1977. All three appellees testified and a series of exhibits, including the referral hall records were introduced in their behalf. The referral experience of the appellees was compared with that of other ironworkers. Local 40 called one of its business agents and other union witnesses who tried to explain why appellees had fared so poorly in the referral hall. Depositions of the business agents who ran the hall, Place and Mullett, as well as of the appellees, were submitted with the consent of both sides (305-7a, 778a, 924a).

The Magistrate filed his 64-page report on July 5, 1977. In this report, the Magistrate concluded that the union's referral hall practices were supposed to be governed by an order of the late Judge Gurfein entered in 1972 to rectify a pattern and practice of racial discrimination in violation of Title VII of the 1964 Civil Rights Act (SA438-446). The Magistrate further found that appellants Place and Mullett had routinely disregarded and failed to comply with the Gurfein Order (1099a [M.R. 16]). The Magistrate found that one of the business agents, Mullett, "created on the witness stand" the criteria he allegedly had been using in determining who to refer to work (1102a [M.R. 25]). The Magistrate pointed out that Place and Mullett routinely contra-

dicted each other as to how the referral hall was operated (1103a [M.R. 26-7]). He found that the business agents were "patently unbelievable" when they testified they were unaware that they were favoring certain ironworkers in their referrals (11072a [M.R. 36]).

Although the Magistrate found that the business agents were familiar with the major construction jobs in their jurisdiction and could predict "with some degree of certainty" how long the jobs would last (1107-8a [M.R. 37]), he reported that there was no credible proof that these business agents considered the possible duration of a job in making a referral (1108a [M.R. 38]). [This finding, which was not adopted by the district court, overlooked Mullett's own testimony that he does make decisions as to who is to get short-term and who is to get long-term work (SA717) and Place's remarks to Grant in which he admitted sending him out to short-term work (509a), as well as the testimony of another ironworker who said the agents do specify the length of the jobs (1074a)].

The Magistrate found that the appellant's officers choose the steward on each job, that the steward is the first man on the job and the last off, that stewards are selected by purely subjective standards and that the appellees, although qualified to be stewards, have never received such appointments (1108a [M.R. 39]).

The Magistrate made the following findings as to Grant: "He has been an ironworker for 35 years and is experienced in all phases of the work and has held supervisory positions" (1109a [M.R. 40]). He filed his first EEOC charges in June, 1975. Thereafter, in 1975 he received referrals from the union (1110-1112a

[M.R. 42-45]). Grant filed his federal district court complaint in February, 1976, while working for Bethlehem Steel Corporation (1110-1112a [M.R. 42-45]). From the time his Bethlehem job ended in July, 1976 through March 8, 1977, Grant attended the referral hall on 126 days. During that period of time, he received three referrals. The first occurred on September 15, but Grant could find no construction at the job site and returned to the union hall. In a discussion with Place, he was told the job was in the back of a post office building. Grant asked how long it would last. Place stated he did not know the duration. Because he was seeking long-term work and was afraid he would lose his accumulated time in the hall if he took a short-term job, he did not take the referral. In fact, according to the Magistrate, the job lasted only six and a half days (1113a [M.R. 47]). On November 15, 1976, Grant was offered a one-day job in Yonkers. Again, he rejected the one-day referral, fearing it would cost him his accumulated days in the hall (1113a [M.R. 48]). The third job referral came the next day, November 16, 1976. That job, according to the Magistrate, lasted approximately one week (1113-4a [M.R. 49]). Thus, all three of the referrals were for short term work. During the same period of time, Harris Construction Company and Koch Construction Company were hiring ironworkers for long-term employment (1113a). The Magistrate then made the following findings:

> After November 16, 1976, Grant received no further referrals from the hall for five months.

* * *

> Grant had a greater number of consecutive days in the hall than many of the men referred out during this period. He also had far more reported accumulated days than other men who received referrals during the entire period he spent in the hall.
>
> (1149a [M.R. 50]).

Despite a series of other findings concerning this period (1115-1119a [M.R. 51-63]), including a finding that there was "no excuse" for the failure to refer Grant out on certain days (1119a [M.R. 60]), the Magistrate made no finding as to why Grant was made to sit in the hall for so long without referral.

Willie Ellis was also qualified in every facet of ironwork after 25 years in the industry, according to the Magistrate (1120a [M.R. 64]). Like Grant, Ellis had also worked as a foreman in the industry (1121a [M.R. 65]). With regard to Ellis' 1975 referral problems, the Magistrate justified Local 40's actions on the grounds that Ellis was only seeking supervisory work (1121-1126a [M.R. 66-80]). The Magistrate then shifted his focus to late summer 1976 when Ellis returned to the hall after being absent in July, 1976 (1127a [M.R. 83]). He found that Ellis was offered a referral by a union official, Mat Steinberg, who was temporarily replacing Mullett and Place in the hall, but that Ellis turned it down when Steinberg was unable to tell him the approximate length of the job. Steinberg then checked with Mullett by phone concerning Ellis. Mullett informed Steinberg that Ellis would only accept

supervisory referrals. Steinberg did not check this out with Ellis (1128a [M.R. 85]). [Ellis was attending the hall every day during this period (SA450)]. When he signed in, he indicated he was seeking non-supervisory as well as supervisory work (1122a, 340-2a)]. The Magistrate noted that in November Ellis' counsel wrote the letter discussed above (SA433) emphasizing that Ellis would accept either supervisory or non-supervisory work (1129a [M.R. 86]). Despite the Magistrate's finding that Ellis was "at the hall on a daily basis" after the union's receipt of this letter and still did not receive referrals (1130a), the Magistrate failed to make findings as to why Ellis was not referred.

According to the Magistrate's Report, Martinez, with 35 years in the trade, was capable of doing all ironwork jobs (1130a [M.R. 88]). Martinez filed his State Division charges on November 26, 1975 (1132a [M.R. 94]). The report then states that Martinez was offered a job with Bethlehem on December 3 or 4, 1975, but refused it. According to the report, the parties stipulated that Local 40 had notice of the administrative charges before making this referral (1133a [M.R. 94]).

Thereafter, Martinez attended the hall 34 times prior to receiving a referral on January 29, 1976. Individuals were sent out to work during this period with less time in the

hall than Martinez (1134a [M.R. 98-100]). The Magistrate noted appellant Mullett's concession that he could offer no explanation why he and Place had passed over Martinez on some of these days (1135a [M.R. 102]). When Martinez was finally sent out on January 29, 1976, he received the job which resulted in shorter employment than three of the four ironworkers who were referred that day (1136a [M.R. 104]). The Magistrate also found that Martinez received a few other short-term referrals over the next two months (1136-7a [M.R. 105-106]). After receiving short-term referrals only, Martinez intervened in this lawsuit in April, 1976 (1137a [M.R. 109]). Thereafter, Martinez ceased attending the hall, but returned on December 13, 1976 (1137a [M.R. 110]). From December 13, 1976 until after the retaliation motion was filed two and a half months later, Martinez received no referrals despite his regular attendance (64 days in the hall without a referral). During that period of time, the Magistrate found that ironworkers with many less days in the hall, sometimes with as little as two or three days, were referred out for work (1137-8a [M.R. 111]). Once again, the Magistrate failed to make findings as to why Martinez received this treatment.

The Magistrate recommended to the court below that it not issue an injunction. Essentially, he made this recommendation because he believed that while appellees had shown that Local 40 had failed to apply objective referral hall procedures as required by the Gurfein Order, they had not shown that they were the only

ironworkers who were subjected to arbitrary treatment (1088a, 1140-1141a). According to the Magistrate, the district court would be granting appellees an illegal preference if it ordered them referred to work as a remedy (1084-86a).

C. The Objections Filed by Both Sides

Appellees filed timely and detailed objections to the Magistrate's report with the district court (1144-1185a). Local 40 also filed objections to the report, but these were limited to the findings with regard to non-compliance with the Gurfein Order (1238-9a). Local 40 made absolutely no objection to the Magistrate's other proposed findings including those in which the Magistrate had rejected outright the testimony of its business agents and those finding that appellees had far greater accumulated time in the hall than ironworkers receiving referrals.

The Equal Employment Opportunity Commission also intervened at this point as amicus curiae, filing a brief in support of appellees' objections to the Magistrate's Report (4a).

D. The District Court's Decision Finding Retaliation

The district court's December 23, 1977 decision found that Local 40 retaliated against the three appellees. In its decision, the court below "relying essentially on the facts found by the Magistrate" (1252a) disagreed with the Magistrate's ultimate con-

clusions. Like the Magistrate's report itself, the decision below is replete with record references as well as references to the report.*/

The court below adopted and expanded upon the Magistrate's findings with regard to Local 40's violations of the Gurfein Order (1241-44a). Like the Magistrate, the court below analyzed what occurred to the individual appellees. Unlike the Magistrate, the district court specifically analyzed and made determinations regarding the validity of the defenses raised by Local 40 to justify the pattern of either no referrals or short-term referrals to appellees.

Grant: The district court noted that appellant Mullett claimed Grant was not being referred out for general ironwork jobs but only as a welder. The court then noted that this explanation was contradicted by Mullett's deposition where he testified that Grant was being considered for all work. Moreover, the district court pointed out that, "men referred for work as welders between mid-November of 1976 and April of 1977 had less recorded time than Grant." (1247a).

The court further noted that Place's and Mullett's attempt

*/ In the decision below, the Magistrate's Report is referred to as "M.R." followed by the specific finding number. Pages of the transcript of the hearing before the Magistrate are denoted by the symbol "Tr." The depositions of Local 40's business agents are referred to either by the deponent's name -- e.g., "Place deposition" -- or his initial, e.g., "D.P.," followed by the page number.

to explain Grant's lack of referrals by claiming that he lost all his accumulated time in the hall each time he refused a short-term referral. This was Local 40's "back to zero" defense. As to this defense, the court stated:

> In his deposition, Mullett testified that Grant, Ellis and Martinez, alone among all the union members, were placed in a category of workers whose refusal of work caused their time to fall back to zero. (1248a) (emphasis added).

The court also pointed out that Place, in his deposition, contradicted Mullett by stating that there was no back to zero rule (1248a). Finally, the court noted that while Local 40 had initially raised a forgery defense as to Grant, claiming that he had lost his right to be referred because his name had been forged on sign-in sheets, the defense had been dropped entirely (1248a). The court concluded:

> The Union's explanations - its "welder referrals only" theory, its "back to day one for refusals" theory, and its abandoned "forgery" defense - are all transparent pretexts. Nor can Grant's referral record be justified as but one manifestation of a widespread unfairness that accompanied the Local's blatant disregard of the Gurfein order . . . . We conclude that Grant's inability to obtain a referral was punishment for his pursuit of a

Title VII claim.

(1254a).

Ellis: Local 40's defense that Ellis was not referred because he was only seeking supervisory work was accepted by the court for the period from late 1975 to August 1976 (1250a). However, it rejected this defense as a legitimate explanation for Local 40's failure to refer Ellis for the period after August 3, 1976 to April, 1977, when the retaliation motion was brought. It was on August 3 that Ellis, after some absence, returned to regular attendance (1249a). The court pointed out that by the summer of 1976, Ellis' 1975 statements that he was seeking only supervisory work were no longer of recent vintage (1255a) and that the union did not even claim Ellis repeated his statements during or after August of 1976 when he was seeking work. Instead, union agent Steinberg admitted that Ellis, when offered a referral in August, asked merely whether it was for a long or short-term job (1249a). The court also noted that in September of 1976, Ellis' counsel requested that Ellis (as well as Grant) be referred to work, and that "no mention was made at that time by union representatives that Ellis sought work as a foreman only" (1250a). Again, the court noted that in the November 15, 1976 letter (SA433), appellees' counsel specifically stated that Ellis was seeking both supervisory and non-supervisory work, and that the union understood this. The court said:

> Mullett indeed testified that he under-

> stood the letter to mean that Ellis sought any work (1250a).

Putting these facts together with appellant Place's admission that he knew of no ironworker with more time in the hall (1250a), the court rejected Local 40's "supervisory work only" defense and concluded that Ellis had not received work since his return to the hall in August because of retaliation.

Martinez: The district court's analysis as to Martinez stressed the Magistrate's findings with regard to the long periods of time this appellee sat in the hall without any referrals, only to eventually receive short-term referrals (1251-2a). The court also stressed the failure of Local 40 officials to explain why Martinez had been passed over during these periods. In its conclusion, the court stated:

> The union's only explanation is inadvertence and oversight. We do not find that explanation adequate, and conclude that Martinez has established his retaliation claim. (1256a).*/

As noted above, the court had previously observed that Martinez had been relegated to that special class of men consisting only

*/ In one instance, the court noted, as had the Magistrate that the business agent claimed to "overlook" Martinez "even though Martinez had signed in with a 'quite distinctive green ink' while all other names and numbers were in pencil" (1251a).

of appellees who lost their accumulated time if they rejected a referral (1248a).

With regard to all three appellees, the court rejected the suggestion by Local 40's counsel that appellees' lack of referrals was merely sumptomatic of an industry-wide decrease in work. The court found with regard to this "defense":

> Although the amount of construction work may indeed have declined in the relevant period, we find that any ensuing hardships were not shared equally by the entire union membership, but rather fell disproportionately on plaintiffs (1257a, fn. 2).

E. The District Court's Determination to Enter Judgment on the Merits

In their brief to the district court in support of their objections to the Magistrate's report, appellees moved that the court utilize F.R.Civ.Pro. 65(a)(2) to bring this aspect of their case against Local 40 to a close by issuing a final judgment on the issue of retaliation.*/ At no time thereafter did appellants inform the district court that they wished to submit additional

*/ Plaintiffs' memorandum appears as Document No. 68 of the record on appeal. The reference is to page 36.

testimony or other evidence. The court below consolidated the application for a preliminary injunction with the trial on the merits of the retaliation claim and adopted its opinion as its findings of fact and conclusions of law (1256a). Despite many applications to the court thereafter with regard to the retaliation claim, including a dispute as to the periods of retaliation with respect to Martinez, which the court resolved in a later opinion (1261a), appellants did not challenge the court's utilization of the Rule 65(a)(2) procedure. Nor did appellants request the court to reconsider on the basis of additional evidence. Appellants' brief to this Court does not challenge the court's utilization of Rule 65.

F. The District Court's Determination Relating to Relief

On June 28, 1978 after further submissions from the parties, the court rendered a memorandum and order (1258-61a) relating to relief. This opinion will be discussed in detail in Point II of this brief, which answers appellants' challenge to the court's method of determining damages. After the June 28 opinion, the parties entered into a stipulation which resolved any possible conflicts concerning the mathematical computations which had to be made under the court's opinion (SA742). The final judgment incorporated the stipulated figures (1236-1265a).

ARGUMENT

I.

THE RECORD AMPLY SUPPORTS THE DISTRICT COURT'S FINDINGS OF RETALIATION

Appellees agree with appellants' analysis of what they were required to prove below in order to establish their claim. Appellants stated the legal requirements as follows:

> In order to establish retaliation under §704(a) of Title VII, the plaintiffs must establish three elements: first, protected participation or opposition under Title VII known by the alleged retaliator; second, an employment action or actions disadvantaging persons engaged in protected activities; and third, a causal connection between the first two elements, that is a retaliatory motive playing a part in the adverse employment actions.
> (Appellants' Brief at 10).

The appellants have also acknowledged in their brief that:

> 1. "There is no dispute that the named plaintiffs were engaging in activities protected under the Act."
> (Appellants' Brief at 12).
>
> 2. "In addition, there is no dispute that the Union defendants had knowledge of plaintiffs' participation in protected activities."
> (Appellants' Brief at 13).

Appellants also do not appear to challenge the findings of fact of both the Magistrate and the district court that Grant, Ellis and Martinez at various times after Local 40 officials had knowledge that they were engaging in protected activities sat in

the hall for months without a referral while other members of Local 40 were repeatedly referred to work with far less time in the hall.

Instead of challenging these findings, Local 40 in this Court attempts to utilize its massive violations of Judge Gurfein's order (SA438) which was entered in a previous Title VII case brought by the United States against the Union to stop discrimination. United States v. Local 638 . . . Local 40, 347 F. Supp. 169 (S.D.N.Y. 1972).

Local 40 now offers its violations of the Gurfein order as a defense to the charges of retaliation; its argument is as follows: "This showing [that the referral hall was operated unfairly] places the plaintiffs in the same class as all other Local 40 members for which the system allegedly failed during the period in question . . ." (Appellants' Brief at 17). In effect, Local 40 challenges the district court's rejection of its claim that what occurred to appellees was merely one "manifestation of a widespread unfairness that accompanied the Local's blatant disregard of the Gurfein order" (1254 a [D.Ct.]) and its findings that the Local punished appellees particularly for pursuing their Title VII claims (1254-1255a [D.Ct.]).

Not only have appellants failed to marshal evidence to establish that the district court's findings were erroneous in this regard, Local 40 has pointed to no evidence to bolster its bald claim that appellees were treated no more unfairly than

other members of the Union who spent so many months in the referral hall without receiving referrals. Even if Local 40 could, by combing the referral hall records put in evidence, find such a man, it would have had to prove that this ironworker had actually attended the hall, as Grant, Ellis and Martinez did, and had the qualifications to do all types of work in the industry, as Grant, Ellis and Martinez proved. Even then, the showing would not overcome the clear inference, drawn by the district court, that the particularly unfair treatment of appellees was retaliatory.

All appellants have been able to show, to bolster their claim that they treated many people unfairly, including the appellees, is that on certain days, they failed to refer out other members, as well as Grant, Ellis and Martinez, who had accumulated more time than some of the men who were referred.

This hardly establishes, however, that other members who may have had more time than someone referred had built up the staggering number of days without a referral that appellees had. Nor can appellants show that men, other than Grant, Ellis and Martinez were overlooked time after time after time.

Local 40 has also failed to deal with the admissions of business agent Mullett that all three appellees, and only they, were placed in a special category by the Union which made it difficult, it not impossible, for them to receive work referrals. Mullett testified that on instructions from Place (SA722),

Grant and Martinez were placed in a category of members whose time in the hall went back to zero because they turned down referrals. Before the hearing, Place had filed an affidavit that this was the rule Local 40 followed (139a). Mullett stated that it was his understanding that if you turn down "two, three [or] four" referrals (SA722), you become junior man in the hall. When first asked who in the Union was in this category, Mullett stated that only Grant and Martinez were included (SA723). Finally, however, Mullett decided that Ellis was included, because "he had repeatedly refused those referrals" (SA726). Mullett, however, never told Grant, Martinez or Ellis that they were placed in a special category, nor to his knowledge did anyone else so inform them (SA721-6). At the Magistrate's hearing, the appellants abandoned the "back to zero for refusal" category and shifted their defenses to other grounds. Appellants' abandonment of the explanation as to why they kept appellees in a special category which prevented them from receiving referrals leaves standing the admission that appellees were in fact in a category of their own, and prevented from receiving referrals. In other words, the disabling categorization of appellees is admitted; the justification is abandoned.

Having abandoned "back to zero" as a defense to all three retaliation claims, Local 40 concocted defenses aimed at the individual appellees. They are equally pretextual.

Roysworth Grant, appellants say, was not retaliated against after he returned from the Bethlehem job in the summer of 1976, because he rejected three short-term jobs. Appellants admit that Grant sat in the hall from July 19, 1976 until September 15, 1976, before he received and rejected the first short-term referral (Appellants' Brief at 34-5). Appellants also admit that Grant waited another two months before receiving another short-term referral on November 15, 1976, which he rejected (Appellants' Brief at 35). The following day, appellant Place said to Grant, when offering him another short-term referral, "Since you don't want a one-day stand, I got a two day job for you" (509a). [Testimony concerning this conversation was not challenged below and the trial court credited it (1245a)]. Grant replied that he would not take this November 16 short-term job because he knew that at the time appellant Place was referring men to long-term work. He told Place he was looking for meaningful jobs like other ironworkers were getting (510a). Appellants complain that the district court should have found that the business agents did not consider length of the job when making referrals. The court, however, could hardly have made such a finding as Mullett admitted that the business agents not only knew the length of jobs but considered this when making referrals (SA 717; see also 509a, 1074a). From November 16, 1976, after Grant refused the third and last short-term referral, until after the retaliation motion was being liti-

gated five months later, Grant received no further referrals of any type despite his regular attendance in the hall.

The court below clearly was entitled to find that these few early short-term referrals were part of Local 40's method of retaliation against Grant. Now, Local 40 challenges this finding by arguing that Grant need not have feared that if he had accepted one of these short-term jobs, he would have lost his accumulated time in the hall (Appellants Brief at 36). To the contrary, the Gurfein Order itself states that an ironworker is to be referred out based upon the number of "consecutive days he had appeared at the hall without receiving employment" (SA445). In fact, Local 40's counsel once argued in a letter to the Magistrate (SA448) that it interpreted the Gurfein Order to require the checking of accumulated days a man had without a referral. Local 40's counsel did not then claim that acceptance of a short-term referral would not cancel a member's accumulated days. Once again, therefore, Local 40 is constructing an argument contrary to its own previous position. Moreover, appellants never told appellees, or anyone else for that matter, what would happen to accumulated time if a short-term referral were accepted. Local 40's argument that appellees had nothing to fear by accepting a short-term referral is absurd.

Next, appellants argue that Grant's referral chances were "severely limit[ed] because of the way he entered his accumulated time in their referral hall sheets (Appellants' Brief at 37-8).

This argument is equally absurd. Appellants have not contested the fact that Grant was in their hall day after day during the relevant period, nor have they denied being aware of his daily presence. Additionally, Local 40's business agents never asked Grant to explain or clarify his entries, nor does Local 40 assert that there actually was a correct way of reporting time in the hall. Given the above, appellants' quibbles to this Court concerning Grant's method of signing in merely emphasizes their bad faith.

Finally, appellants persist in analyzing Grant's referral experience by comparing it with only one category of ironworkers, welders. This defense, that Grant was only eligible to be referred to work as a welder, was not raised in Local 40's answering affidavits to the retaliation motion (134-140a, 157-161a). Nor did Mullett or Place raise this explanation in answer to specific questions at their depositions regarding the reasons why Grant was not referred. (SA343-4 [D.P.]; SA604, 608 [D.M.]). To the contrary, appellants admitted in their depositions they knew Grant was signing in for all types of work and admitted that lack of qualifications was not the reason they did not refer him (ibid). Moreover, appellants admitted at the retaliation hearing that they never told Grant that they were considering him only for welders' jobs and admitted they had never raised that claim in any court paper (906-907a). Given the facts,

and given Grant's conceded competence to perform all types of ironwork, the court below was literally required to reject appellants' "welders only" defense, as it did.

Willie Ellis. In this Court, appellants' explanation as to why they did not refer Ellis is equally unworthy. Appellants' brief stresses its referral actions during the period of time (late 1975) for which the court below did not find retaliation (Appellants' Brief at 44-48). The court below found that during 1975, Ellis was only seeking referrals as a foreman and therefore did not find retaliation to have been the cause of his lack of non-supervisory referrals then. The issue here is whether the evidence supports the district court's finding that Local 40 retaliated against Ellis eight months later.

It is uncontroverted that after December, 1975, Ellis never told any Local 40 official that he only wanted foreman's work.*/ In fact, Local 40 concedes in its brief, at page 45, that Ellis signed in for all categories of work. Appellants also admit in their brief, that in 1976 Ellis escalated his protected

*/ Appellants argue at page 49 of their brief that in April, 1976, Ellis sought work at Cardinal Construction Company as a supervisor only. Local 40 neglects to tell this Court, however, that this job was in South Carolina, out of Local 40's jurisdiction, that the rates were below New York's, and that Ellis testified he did not want to leave his family for non-supervisory short-term work in the South (406-410a). Moreover, it is uncontroverted that Ellis worked in Brooklyn in the summer of 1976 as a non-supervisory ironworker out of Local 40's jurisdiction (357-358a).

activity against the Union by filing his federal complaint (Appellants' Brief at 48). From that point until after the retaliation hearing in the spring of 1976, Ellis obtained no referrals of any nature from Place or Mullett despite the fact -- conceded by Local 40 -- that he had more time in the hall than any other ironworker, including the many men who received referrals (SA148 [D.P.], SA450). The question that the court below had to consider, therefore, was whether appellants had a good faith basis to believe that Ellis was still seeking only foreman referrals during this period and that that belief accounted for their failure to refer him.

In analyzing Ellis' case, appellants simply ignore the testimony of their own witness with regard to what occurred in August, 1976, when Ellis received his one 1976 offer of a referral. On August 24, 1976, a substitute for Mullett and Place, Matt Steinberg (564a), was in charge of the Local 40 referral hall (557a, 575a, 581a). According to Steinberg, he offered Ellis a referral to work as an ironworker (557a). Ellis told Steinberg that he wanted to know how long the job was for, as his medical benefits were running out (576a). Steinberg answered that he did not know whether the job was for "a day, a week, a month" (581a).*/ Steinberg also specifically remembered that Ellis

*/ Steinberg testified he generally knew which jobs were long-term work (572a).

did not say anything to him that would indicate he was only seeking to work as a foreman (577a). Ellis turned the job down after Steinberg did not tell him its probable duration (558a).*/ Immediately afterwards, Steinberg called Mullett who was at a convention in California and reported his conversation with Ellis (586-7a). Steinberg testified Mullett told him, "That's it, the man wants a foreman's job" (587a). Steinberg said he understood by Mullett's comment that he was to refer Ellis only to foreman's work (587a). Yet, Steinberg said he also knew that no referrals were coming into the hall at that time for foremen (588a). Notwithstanding the fact that he had been instructed to refer Ellis only to foreman's work and knew no such work was available, Steinberg did not tell Ellis this, even though he saw him continue to shape the hall (588-9a, SA450). Steinberg also admitted that no matter how long Ellis kept coming to the hall, as far as he was concerned, Ellis would not get work unless a call came in for a foreman (590a). From that day onward, Steinberg never referred Ellis out again to work (585a). Nor did Place or Mullett when they returned to their duties in the hall.

Mullett, in his deposition, attempted to justify his failure to refer Ellis. He stated that Ellis "has got a couple

*/ Under the Gurfein Order, if Ellis had taken short-term work, appellants may well have claimed he lost his accumulated days.

of categories of his own" (SA 722). When asked to explain, Mullett stated that, "Mr. Ellis is a man who wants to be referred out as a foreman" (SA 722). Yet Mullett admitted that Ellis was never told that he had been put in a "foreman only" category (SA 725), a clasification in which he alone was included (SA 725). From the time Ellis was put into this category, Mullett stated he had no conversations with anyone as to whether Ellis should have his "foreman only" label removed (SA 724). Moreover, at the Magistrate's hearing, Mullett admitted he kept Ellis in this guaranteed no-work classification for five months, even after he knew from Ellis' attorney's letter of November 15, 1976 (SA433) that Ellis was seeking non-foreman's work (1001-2a).*/ Obviously, the fact that Ellis was seeking other than foreman's work did not interest Mullett, who merely wanted a pretext to cover Local 40's decision not to refer him.

The court, therefore, had ample evidence to conclude that Local 40, by August of 1976, was merely using Ellis' eight months' earlier expressed interest in foreman's work to cover its retaliatory refusal to refer him to any work. Given this record, the court below hardly could have accepted the "foreman only" defense for the period from August on. It properly ruled:

> . . . [W]e are not convinced that the agents did in fact believe that Ellis, who was signing in every day using all conceivable designations, was seeking only foreman's work that he must have known was unavailable. At a minimum if the agents had thought that Ellis

*/ Ellis had also asked the union for work in September, 1976 (406a; see also 399-401a, 404-405a). The court pointed out that the union had not responded to this request by telling Ellis it would send him out if he sought regular ironwork (1250a).

> wanted referrals only for supervisory work, we believe that they would have advised him of the futility of his efforts, had they lacked a retaliatory animus. Bearing in mind the Union's treatment of Grant, we therefore conclude that defendants have failed to rebut the prima facie case of retaliation against Ellis for the period beginning August 3, 1976. (1255a).

Louis Martinez. With regard to Martinez, appellants simply presented no defense. In its brief, Local 40 makes much of the fact that Martinez turned down an ironworker's referral to Bethlehem on December 4, 1975.*/ At no time, however, did Martinez state that he would take only a foreman's job. In fact, appellant Place admitted he understood Martinez was only turning down the job with Bethlehem because he had an application pending on that particular job for work as a foreman (SA 333). Nonetheless, Mullett claimed that Martinez's rejection of this referral put him in the special category with Grant and Ellis, in which he lost all credit for any prior time in the hall and became the junior man in the hall (SA 722). In light of the Union's admission that in reality there was no such practice -- having a member's days go back to zero for refusing a referral -- the court below was literally compelled to find that Martinez was treated this way in retaliation for filing an administrative charge against Local 40. The court below was thus fully warranted in

*/ Martinez explained that he turned down this referral because he believed it was simply an effort by the Union and Bethlehem to foreclose his chance of obtaining a foreman's job on the project in question (866a).

finding that Martinez was retaliated against commencing December 5, 1975 (1261a) the day on which Mullett punitively put his time in the hall back to zero. From this date, Martinez attended the hall for 34 days without receiving a referral. The Union admitted that during this period individuals with less time were referred ahead of Martinez (1134a). On the 35th day, Local 40 began to subject Martinez to the tactic of offering him short-term referrals, which the court below properly found to be a part of the retaliation against him. Driven out of the hall by these tactics, Martinez intervened in this action. When he returned in December of 1976, he was ignored altogether by the Local 40 business agents, despite regular attendance, until after the retaliation motion was filed the following year (SA459-468). Once again, the Union simply presented no defense to explain Martinez's treatment, other than to claim they inadvertently "overlooked" him. Given that appellants stated they took all of Martinez's accumulated time away from him within a day of learning that he had filed charges against the union, and given his referral history from that point on, this defense is preposterous.

Other General Defenses: Appellants argue that they made some referrals to appellees shortly after learning about the charges filed against them. They claim these referrals preclude a finding of retaliation.

The court below did not agree with appellants that Local

40 made certain referrals to Grant after receiving notice of charges.*/ Even if this Court were to agree with appellants that the findings of the court below were erroneous in this regard, however, such a determination would do nothing to undercut the obvious validity of the decision below.

Whether or not a union immediately retaliates against a member whom it learns has filed charges against it does not absolve it from its later retaliatory actions. A union may wait to see how serious a complainant is about his administrative action, or whether he can be mollified or convinced to settle or

*/ Appellants argue that Local 40 had notice of Grant's discrimination charge in July of 1975. The Magistrate, in finding 42, agreed with appellants but also stated in the same finding that the union stipulated it had notice of Grant's charges no later than November 21, 1975 (1110a). In between these dates, Local 40 made certain referrals to Grant. The Magistrate's finding was based upon Mullett's oral testimony only (780a) which the Magistrate himself so thoroughly discredited in other respects (e.g., 1102-1104a, 1197a). At the hearing before the court below, counsel for Local 40 was able to present no other evidence to support its claims that it received notice shortly after the charge was filed. Therefore, the court below did not accept the Magistrate's finding in this regard (1245a). In any event, the court below did not find that Local 40 retaliated against Grant until the fall of 1976, one year later.

Appellants also argue at page 14 of their brief that the Magistrate was correct in believing that the evidence "suggested to him that the union had notice of Ellis' charges by November 12, 1975" (1249a). Local 40 seeks to establish this as the date because it made certain referrals to Ellis between then and the November 21, 1975 stipulated outside date of notice. The court, however, did not resolve this factual problem as it ruled in Local 40's favor that Ellis was not being retaliated against during this period. The "argument" concerning this "issue" in this Court is purposeless.

drop his claim. Here, the record is clear that appellants increased the intensity of their protected activity. Martinez joined the efforts of Ellis and Grant in November, 1975, the union receiving notice in early December (1256a). A federal complaint was filed in February, 1976. Obviously, a union's total conduct must be scrutinized, not just its actions at any one point in time in order to determine whether retaliation occurred.

The facts in this case perfectly illustrate why this is so. Even assuming Local 40 made meaningful referrals to appellees in 1975 after receiving notice of the discrimination charges, these referrals stopped in December of 1975. In that month, Mullett admitted he had a conversation with Place in which the two agents decided to put the appellees in their disabling categories (SA722). The court below exonerated Local 40 from liability prior to December of 1975, and only found retaliation after that date.

From the time of this December conversation onward, appellees received no more long-term referrals, and only the few short-term referrals discussed, supra. Most of the time, of course, appellees sat in the hall, watching other ironworkers with far less time being referred out. The court, therefore, was entitled to reject these short-term referrals as proof that Local 40 was not retaliating. To the contrary, they served as additional proof of union animus. By the fall of 1976, of course, appellees were receiving absolutely no referrals from the referral hall, despite

requests from their attorneys to counsel for Local 40 and despite their constant attendance.

In deciding this case, the court below relied "essentially on the facts found by the Magistrate" (1252a [D.Ct.]). The findings of the district court, therefore, may not be set aside unless clearly erroneous. DeCosta v. Columbia Broadcasting System, Inc., 520 F.2d 499, 509 (1st Cir. 1975), cert. den. 423 U.S. 1073 (1975). That the district court's ultimate conclusions were different than the Magistrate's does not affect the standard of review in this Court. The ultimate recommended findings of the Magistrate were in effect legal conclusions which the district court was absolutely free to accept, reject or modify. DeCosta v. Columbia Broadcasting System, Inc., supra, 520 F.2d at 508-509. See also, Small v. Olympic Prefabricators, 588 F.2d 287 (9th Cir. 1978).

No matter what standard of review this Court utilizes, however, it is obvious that the decision below is overwhelmingly supported by the record. Appellants simply have been unable to marshal any attack on the well documented findings of the district court.

II

THE DISTRICT COURT'S DECISION ON BACK PAY WAS PROPER.

At the outset, it is noteworthy that the district court's back pay award was conservatively drawn, in many ways to the advantage of appellants. The court, having determined the periods of retaliation, awarded back pay for such periods subject to the following:

> (a) That such back pay would only be paid for days appellees actually sat in the referral hall during the relevant periods seeking employment;
>
> (b) That such back pay award would be reduced by any income appellees earned from other employment during the periods of retaliation;
>
> (c) That any unemployment insurance received would be deducted; and
>
> (d) That there would be a deduction for any period of time "in which they [appellees] would have worked had they not refused referrals."

Disputes regarding the deductions were to be referred to a magistrate on the request of either party (1259-1260a [D.Ct.]). No such request was ever made.

Appellants' dispute with the court's back pay award falls into two categories. First, appellants argue that the district court's decision was ambiguous about the applicable periods of retaliation*/ and the amounts of "credit" appellants should receive

*/ After the court's initial opinion, Local 40 raised a question as to what the periods of retaliation for Martinez were. The court resolved this issue in its second opinion (1261a).

when an appellee might have worked had a referral not been refused (Appellants' Brief at pp. 68-9). The second argument is that the district court failed to take into account the "high rate of unemployment in the ironworking trade during the period of the alleged retaliation" and, therefore, that the "formula" utilized gave appellees an award greater than the earnings of the average ironworker (Appellants' Brief, pp. 66-7).

The first argument is improperly raised. Appellants are fully aware that there is no dispute whatsoever regarding the clarity of the district judge's findings with respect to periods of retaliation or periods of work lost by plaintiffs due to the refusal of referrals. Plaintiffs and the union stipulated on the exact dollar amounts of lost back pay (SA743). The stipulation was, as it only could have been, reached after the parties understood and agreed on the precise number of days involved. Having failed to avail themselves of the court's offer to refer disputes to the magistrate, and having failed to call any disputes to the attention of the district court itself, the union should not now be heard to argue about "ambiguities" on appeal.

With respect to the judge's alleged failure to take into account conditions in the industry during the periods of retaliation, Local 40 is misstating the facts. The district court did take into account claims by Local 40 with respect to the income experience of the "average" ironworker employed during the years in question. The court considered all that Local 40 had to say

in support of its claim that the "average ironworker" profile should be used as a standard by which to judge appellees' losses, then concluded:

> Defendants, on the other hand, would award back pay -- if at all -- based on what a hypothetical "average ironworker" earned during the relevant periods. The differences between these formulas could be minimized by refining the "average ironworker" profile to more accurately portray those persons actively engaged in the industry.[4] No amount of refinement, however, would enable us to determine precisely how much plaintiffs would have earned had they been referred on a non-retaliatory basis.[2] Nor should unrealistic exactitude be required in determining back pay. Equal Emp. Op. Com'n v. Enterprise Ass'n Steamfitters, (2d Cir. 1976), 542 F.2d 579, 587; Pettway v. American Cast Iron Pipe Co., (5th Cir. 1974), 494 F.2d 211, 260. We believe that plaintiffs' formula is a reasonable method of calculating back pay. Any possible gains in accuracy that could be achieved through use of some more precise method would, in our view, be more than outweighed by the added litigation costs involved in the formulation and application of such a method -- costs for which defendant would be liable under Title VII's attorneys' fees provision, 42 U.S.C. §2000e-5(k).[3] (1259-1260a).

The district judge's footnotes reveal further refinement in his analysis. The first footnote states:

> The Union's portrait of its "average ironworker" is a composite drawn from the pool of ironworkers in its jurisdiction. Many such workers were undoubtedly far less persistent in their pursuit of work than were plaintiffs here. The pool apparently includes, for instance, ironworkers who rarely appeared at the hiring hall because of illness or de facto retirement. The accuracy of the "average ironworker" composite could

> be enhanced by eliminating such workers from the reference group and drawing the composite only from those workers whose habits closely resembled plaintiffs'. Needless to say, this would be no easy task.

The union did not thereafter attempt to supplement its submission by offering the average earnings of ironworkers whose profiles were closer to appellees, i.e., men actively in the trade, competent in all tasks and regularly signing in to the referral hall.

The district court in footnote 3, also pointed out that while it was not certain that a finer analysis would result in a greater or lesser award, it was ". . . mindful . . . that in Title VII actions, 'uncertainties in determining what an employee should have earned but for the discrimination, should be resolved against the discriminating [party].' Enterprise Ass'n Steamfitters, supra, 540 F.2d at 587" (1262a). This comment takes on significance in light of the court's understanding that appellees could have received referrals which would have lasted for a year (1262a, fn. 2).

In short, there was no failure by the district court to consider the various approaches offered by the parties. Appellants, while complaining of the court's formula offered no sensible alternative.

As a matter of fact, the court's formula was not at all one sided. Had appellees received long-term referrals or been appointed stewards, they could have worked every day during the periods of retaliation and beyond. In that event, appellees would have earned much more than they will receive under this formula, which limits

their recovery to days they actually sat in the hall. Under this formula, appellees receive no back pay for missed days, even if they were seeking work elsewhere on those days, or if they were working at a lower paying job.

Appellants cite Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975) and Waters v. Wisconsin Steel Works, 502 F.2d 1309 (7th Cir. 1974), cert. den., 425 U.S. 997 (1975), for the proposition that the court below applied an incorrect formula. Neither case supports appellants.

The whole thrust of Albemarle Paper Co. is that those subjected to discrimination should be made whole. As the Supreme Court pointed out, "Congress took care to arm the courts with full equitable powers" to achieve this end. 422 U.S. at 418. Moreover, the Congressional purpose was "to make possible the fashion[ing] [of] the most complete relief possible." 422 U.S. at 421.

In Waters, supra, the court ordered a make whole remedy. Because the case arose in a plant setting, however, the district court's task of calculating back pay was far easier than in the instant case. Thus, the Court of Appeals directed the district court to resolve a question as to whether the employee in question would have been laid off from his job on a particular day, as the employer had claimed. The situation here is not analogous.

In this case, back pay can not be so precisely calculated. This is so because the duration of referrals greatly vary. Moreover, the appellant business agents themselves played the crucial

role in determining who gets what referral. Under such circumstances, the Waters circuit does not require unrealistic exactitude. In Stewart v. General Motors Corp., 542 F.2d 445, 452 (7th Cir. 1976), cert. den., 433 U.S. 919, that court held:

> The major difficulty in attempting to compute a back pay award in a case such as this one is that the subjectivity of defendant's method of filling job vacancies renders impossible anything like a precise calculation of the pecuniary effects of discrimination. In light of the uncertainty which clouds the task before us, we must set down three general rules: (1) unrealistic exactitude is not required; (2) ambiguities in what an employee or group of employees would have earned but for discrimination should be resolved against the discriminating employer; (3) the district court . . . must be granted wide discretion in resolving ambiguities.

The court below correctly referred to Equal Employment Opportunity Commission v. Enterprises Ass'n Steamfitters, 542 F.2d 579, 587 (2d Cir. 1976) for authority that unrealistic exactitude is not required in this Circuit either. The court below therefore properly used its discretion in tailoring a reward. Its decision is entitled to great weight here. As the Supreme Court instructed in Albemarle Paper Co.:

> . . . the standard of review will be the familiar one of whether the District Court was "clearly erroneous" in its factual findings and whether it "abused" its traditional discretion to locate "a just result" in light of the circumstances peculiar to the case.
> 422 U.S. at 424.

No serious argument can be made that the district court abused its discretion in rendering this limited back pay award,

particularly in a case in which there existed no precise methods of calculating the financial loss to appellees stemming from appellants' retaliation and where the cost of litigating the issue further would probably have exceeded any diminution or addition to the back pay award which resulted.

CONCLUSION

For all of the above reasons, the decision below should be affirmed in all respects.*/

Dated: New York, New York
March 19, 1980

Respectfully submitted,

EISNER, LEVY, STEEL & BELLMAN, P.C.
Attorneys for Plaintiffs-Appellees
351 Broadway
New York, New York 10013
(212) 966-9620

MICHAEL D. RATNER
Attorney for Plaintiff-Intervenor-Appellee
351 Broadway
New York, New York 10013

Of Counsel

LEWIS M. STEEL
RICHARD A. LEVY

*/ Appellees respectfully submit counsel should be awarded attorneys' fees for this appeal, with the amount to be determined after submission of appropriate documentation.