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December 18, 1992

via hand delivery

Sidney Strickland, Secretary
Interstate Commerce Commission
12th Street & Constitution Avenue, N.W.
Washington, DC 20423

Re: Finance Docket No. 30400 (Sub-No. 21), Santa Fe Southern Pacific Corp.--Control--Southern Pacific Trans. Co.

Dear Mr. Strickland:

Enclosed for filing with the Commission are the original and ten copies of the "Opening Brief and Evidence of Brotherhood of Maintenance of Way Employes and International Association of Machinists and Aerospace Workers".

This material is being filed under seal and contains material subject to a protective order.

Sincerely,

Donald F. Griffin

Donald F. Griffin

cc: all parties of record

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Attorney for Plaintiffs
Appellants

UNITED SATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

SIEU MEI TU AND JOSEPH Z. TU Plaintiffs Appellants VS SOUTHERN PACIFIC TRANSPORTATION COMPANY; ATCHISON, TOPEKA, SANTA FE RAILROAD COMPANY; PACIFIC FRUIT EXPRESS COMPANY; T. ELLEN; E.E.CLARK; d. W. FEND; T. R. ASHTON; DOE DEFENDANTS ONE TO TWO THOUSAND; WHITE COMPANY; BLACK CORPORATION; BROTHERHOOD OF RAILWAY, AIRLINE AND STEAMSHIP CLERKS; R. B. BRACKBILL; J. M. BALOVICH; SANTA FE SOUTHERN PACIFIC CORP. Defendants Appellees	NO: 89-16186 APPELLANTS' BRIEF

APPEAL

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CASES ALPHABETICAL

2. STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Propriety of District Court's refusal to remand complaint to State Court when Plaintiffs brought action on torts, breach of private written contract with employer, and state discrimination claims.

2. Are all employees who are members of a union, subject to a collective bargaining agreement, barred from trial of actions in state court based on tortious conduct brought under 45 USC 51, breach of separate private contract and/or violations of state statutes prohibiting discrimination.

3. When a wholly owned subsidiary has been timely served with process, in an action which names both the subsidiary and the parent corporations as defendants, and the parent corporation has appeared in the action, should the parent corporation be thereafter dismissed under Fed. R. Civ. P. 4 (j). Were the defendants estopped from making a claim to entitlement to dismissal under Fed. R. Civ. P 4 (j). Was the time for service extended by the court?

4. Do Plaintiff's first, second, and third causes of action state a cause of action for wrongful termination.

5. Has plaintiff stated a cause of action for conspiracy?

6. Has plaintiff stated a cause of action for intentional infliction of emotional distress, and for negligent infliction of emotional distress entitling plaintiff to a trial by jury in a state court of law and or a federal court?

7. Has plaintiff stated a claim for breach of good faith and fair dealing against defendant railroads?

8. Do the pleadings, depositions, answers to interrogatories and admissions on file, together with affidavits, show that there existed genuine issues as to material facts between defendants and plaintiffs so that summary judgment should not be granted defendants?

9. Were defendants entitled to summary judgement as a matter of law?

10. When a employer contractually agrees to continue a particular employees work benefits including salary to retirement age, even if there is a severe decline in business and no work for the employee, can the employer then discriminate against that employee, terminate all rights of the employee, and avoid liability for that discrimination on claim of entitlement due to economic decline?

11. Was the trial courts refusal to grant plaintiffs motion for reconsideration of granting of summary judgment for defendant Southern Pacific proper?

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STATEMENT OF JURISDICTION

CIRCUIT RULE 28-2.2

(a) Appellants believe jurisdiction of the matter lies with the Superior Court of the State of California In and For the City and County of San Francisco. Plaintiffs objected to the

jurisdiction of the United States District Court (DEN* 9, EX**24).

(b) The basis for claiming that the judgments or orders appealed from are final or otherwise appealable is that they dispose of the action as to all claims by all parties. 28 USC 1291.

(c) (I) The date of entry of the judgments or orders appealed from are:

(i) Order denying Plaintiffs motion to remand entered 10/13/87 (DEN 24 EX 253).

(ii) Order granting Defendants' motion to dismiss entered 4/8/88 (DEN 36 EX 284).

(iii) Order dismissing causes of action and parties, retaining pendent jurisdiction, entered 7/1/88 (DEN 51 EX 304).

(iv) Order granting Defendants' motion for summary judgment as to Plaintiff's claim for discrimination, loss of consortium and breach of fair representation 2/8/89 (DEN 98 EX 890).

(v) Judgment entered 2/8//89 (DEN 99 EX 889).

(vi) Order denying Plaintiff's motion for reconsideration as to defendant Southern Pacific. Entered 5/11/89 (DEN 114 EX 915).

(vii) Order granting defendants' motion for summary judgment and dismissing with prejudice Plaintiffs' second amended complaint. Entered 8/21/89 (DEN 130 EX 1143).

(viii) Judgment 8/21/89 (DEN 131 EX 1142).

*DEN refers to Docket Entry Number
**EX refers to Excerpts of Record

(II) The date of filing of the notice of appeal was September 8, 1989.

(III) The statute governing the timeliness of the appeal is 28 USC 2107.

3. STATEMENT OF THE CASE

(A) NATURE OF CASE

Plaintiffs filed an action in The Superior Court of the City and County of San Francisco (DEN 1, EX 5) on causes of action for wrongful termination of employment, breach of private (non collective bargaining agreement) contract of employment, breach of covenant of good faith and fair dealing, intentional and negligent infliction of emotional distress, employment discrimination under California State Statutes (California Government Code 12900 et seq.), Conspiracy, and Loss of Consortium.

Defendant PFE appeared by Acknowledgment of Receipt of Summons (EX 17) and by answer (DEN 3). Defendant Southern Pacific Transportation appeared by answer on March 23, 1987 (DEN 8 Ex 18), Defendants Atchison, Topeka and Santa Fe and Santa Fe Southern Pacific Corporation appeared by answer on December 24, 1987 (DEN 25 EX 260).

Defendants filed a Petition For Removal to The United States District Court for the Northern District of California (DEN 1), Plaintiffs objected to the jurisdiction of the Federal Court (DEN 9, EX 24), and moved to remand to the state court (DEN 16. Ex 26). Defendants admitted in their

Memorandum in Opposition (DEN 17 page 3, lines 21 & 22) that "All causes of action are pled under state law." By order filed October 9, 1987 (DEN 24, Ex 253) the motion to remand was denied. At the hearing on the motion to remand, Plaintiffs advised the court, that if the matter would not be remanded they required time to procure service of the other defendants. (EX 251). The court in response granted Plaintiffs more than 60 days to accomplish that (EX 251). Within the time allowed service was made on the other railroad defendants (EX 258). On February 29, Defendants moved to dismiss and for summary judgment (DEN 28). By order filed April 6, 1988, (DEN 36 EX 284) the court dismissed Plaintiffs first and second causes of action, (wrongful termination of employment, breach of agreement of employment); did not rule on Plaintiffs third cause of action for intentional and negligent infliction of emotional distress, breach of covenant of good faith and fair dealing; refused to exercise pendent jurisdiction over Plaintiffs fourth and fifth causes of action (discrimination, conspiracy). On April 29, 1988, Plaintiffs filed their First Amended Complaint (DEN 38). Defendants moved to dismiss and for summary judgment (DEN 39 & 42). By order dated June 30, 1988 (DEN 51, EX 304), the court vacated its April 6, 1988 order as to pendant jurisdiction, determined to exercise its pendant jurisdiction over the fourth and sixth causes of action, dismissed with prejudice the second (breach of covenant of good faith and fair dealing); third (intentional infliction of emotional distress); fifth (conspiracy); and seventh (negligent infliction of emotional distress) causes of

action, dismissed the railroads from the eighth cause of action (breach of collective bargaining agreement and breach of duty of fair representation); and dismissed defendants Santa Fe and Railway from all causes of action. By order filed February 6, 1989 (DEN 98 EX 890) the trial court granted summary judgment against Plaintiffs on their discrimination claim and on the claim for loss of consortium and on the claim for breach of duty of fair representation. On Motion for Reconsideration (DEN 104) by order filed May 3, 1989, (DEN 114 EX 915), the court denied Plaintiffs motion as to Southern Pacific, but granted it as to the Union Defendants, and directed Plaintiffs to file an amended complaint by June 2, 1989. Plaintiffs filed their Second Amended Complaint June 2, 1989 (DEN 115 EX 919). Defendants Union moved to strike various causes of action and for Summary Judgment (DEN 117 & 118). None of the other defendants responded in any way to the Second Amended Complaint. By order filed August 14, 1989, the court granted Defendants Union's motion for summary judgment as to plaintiffs claim for breach duty of fair representation, and dismissed with prejudice plaintiffs' second amended complaint. (DEN 130 EX 1143). Judgement was thereon entered August 21, 1989 (DEN 131 EX 1142). Plaintiffs filed their Notice of Appeal on September 8, 1989 (DEN 133 EX 1150).

(B) STATEMENT OF FACTS

Evidence of the following material facts, is present in this action, through verified pleadings, depositions, declarations, and transcripts of proceedings in this matter:

Joseph Z. Tu (JZT) and Sieu Mei Tu (SMT) are husband and wife. (EX 41). Sieu Mei Tu is a female, born in China on September 4, 1926. (DEN 1 EX 6) (EX 40). On May 15, 1962, SMT commenced working for Defendant Railroads at the San Francisco offices (EX 334) of the Southern Pacific as a key punch operator (DEN 90 EX 733) (EX 40) (EX 47). On or about December 18, 1978, her private contract of employment was reduced to a writing of one page (DEN 1 EX 15, EX 195-199, 202-203). That contract provided among other things, that if no job were available for her, she would continue to be paid her salary and benefits to age 65. The provision as it was expressed in the private contract read as follows:

> "Her position with this company is not only permanent in nature but she is, under our contract with the Brotherhood of Railway, Airline & Steamship Clerks, "fully protected" so that in the unlikely event we were not to have a job for her, she would continue to be paid under that contract until she reaches age 65 and can retire under the provisions of Railroad Retirement Act and receive the appropriate pension therefrom.
>
> Mrs. Tu holds the position of Payroll Clerk and her current salary is over $1,300 per month, and is due for an increase therein of some ten percent more. She is, and has always been, a valued employee and even if her present position were to be eliminated, we would find some other position for her to hold as we would not want to lose her services." (EX 15).

The contract with the Brotherhood of Railway, Airline & Steamship Clerks referred to therein, provided as follows:

> "Section 11- In the event of a decline in a carrier's business in excess of 5% in the average percentage of both gross operating

> revenue and net revenue ton miles in any 30-day period compared with the average of the same period for the years 1968 and 1969, a reduction in permanent positions and employes may be made at any time during the said 30-day period beyond the operation of attrition as referred to in Section 12 of this Article to extent of one percent for each one [percent the said decline exceeds 5%...
> **THE PROVISIONS OF THIS SECTION WILL NOT APPLY TO PACIFIC LINES EMPLOYES IN THE SAN FRANCISCO GENERAL OFFICES WITH SENIORITY DATE OF MARCH 16, 1963 OR EARLIER...."**
> (emphasis added) (EX 971).

SMT's seniority date was **MAY 15, 1962** (DEN 90 EX 867) (DEN 225) (EX 648, 672 & 738).

Sieu Mei Tu's work was exemplary (EX 227).

Commencing in the year 1982, there was a concerted effort by the management of Defendant Railways to curtail the business of refrigerated car transportation (DEN 90 EX 737-738), to discourage customer inquiries and to not inventory sufficient freezer cars to service the customers. (DEN 90 EX 737-738). This was coincidental with Mr. Tom Ellen becoming the chief officer of PFE. (DEN 90 Ex 738). At the same time there was a shift in the treatment of Plaintiff Sieu Mei Tu, in that managerial people told her crude sexual jokes, and made fun of her when she didn't understand. When desk assignments were made, although she was one of the most senior workers involved, she would be denied the more favorable desk positions. She was moved into jobs that would cause her to have the greatest friction with management personnel. Plaintiffs age, race and or sex were resented in relation to her assertive insistence that management personnel properly account for their use of cash funds and expenses, and her

refusal to go along with and overlook their conduct.(Ex 159-164). She was advised by her superiors to take jobs at lower pay than she was receiving, and when she did so, she was required to perform the same work as she had performed at the higher paying position (EX 72). There was exhibited by management a perceived attitude that persons who were not native born were inferior. Any mistake she made was attributed to her national origin. Her accent, language and cultural differences were the point of ridicule by the company. (EX 154-159, 165-167 & 309). Sieu Mei Tu, an accounting clerk, was assigned janitorial jobs and house cleaning jobs when persons less senior were not required to perform these duties. Plaintiff was assigned to work in an unsafe location (EX 74). When her supervisor gave her a 10 on her performance review, the controller required the supervisor to drop her level to an 8. Management created an atmosphere of fear that if Plaintiff exercised her rights to seek damages against the company for personal injuries received on the job, she would fall from grace and her job would be in jeopardy. (EX 309) There was a concerted effort to attempt to force her to leave "voluntarily". (DEN 90 EX 733).

In December, 1983, the Santa Fe Southern Pacific Corporation acquired all the stock of Southern Pacific Transportation Company. (EX 1124) and formed the intent to merge the Santa Fe and Southern Pacific railroads and sell and spin off the valuable assets of Southern Pacific Transportation Company and Pacific Fruit Express. (DEN 38 page 12, DEN 45, and DEN 115 page 12 and Exhibit F thereto) (EX 1124). When

the ICC refused to authorize the merger (October 10, 1986), the Railroad defendants were ordered by the ICC to attempt to sell off the business of the SP (EX 1124). . The Union that was suppose to represent Plaintiff in protection of her employment rights attempted to buy the SP on its own and sought to become the bargaining agent for the consolidated railroads. (DEN 38 page 15) (EX 189-193 & 884). The Railroad defendants determined to close the offices of PFE, and move its work to the SP headquarters in San Francisco. (DEN 115 page 12).

Sieu Mei Tu was moved into at least four different positions. Except for one job that she bid for and was promoted to in March, 1984, as General Clerk, all subsequent jobs were at lesser pay rates (EX 91), and no other person in her position experienced this type of treatment (EX 350-355). Beginning in March, 1985, her job as General Clerk was abolished. She was moved to a different job description at a lower rate of pay and moved to a different department downstairs (Car Service Clerk). In two weeks that job was abolished and she was moved to a third job at a still lower rate of pay. Then a bulletin was posted as to the availability of Job 141 (miscellaneous clerk) (Job 141 had previously been described as General Clerk) and Job 150 (bills payable clerk). Since Sieu Mei Tu had performed both of these jobs in the past, and was eligible to select either one, she decided to bid for the bills payable clerk job.(EX 364).

She told her supervisor she was going to bid for the bills payable clerk job. He asked her not to do so.

That job was given to a Caucasian woman approximately 11 years younger than Sieu Mei Tu, who was subsequently transferred to SP, leaving Sieu Mei Tu in the position of miscellaneoous clerk (EX 101-110), which job was abolished (EX 77), and Sieu Mei Tu was terminated (EX 48 & 184), at 2:30 in the afternoon, told not to return to work, and forced to use personal leave time.(EX 514).

Sieu Mei was told the reason her job was being abolished and she was not being transferred to SP was because two of her superiors "didn't like her" (EX 185). She was told a younger person, with less seniority who was caucasian was being transferred to SP while Sieu Mei's job was being abolished because those two superiors had determined that was the way it was going to be (EX 186). She was terminated after twenty-two (22) years and four (4) months, without severance pay, without continuance of salary or benefits, without accrual of further retirement rights, and without the benefit of retirement (EX 202). She was embarrassed and distressed (EX 202, 463). She was too young to qualify for retirement. By October, 1988, Sieu Mei Tu was the only PFE employee with accrued benefits who was not either transferred to SP, severed with substantial benefits and pay, or retired with special circumstances. She was the only one without any golden parachute or job.(EX 735- 738, 393, 399-404, 483).

Thereafter she interviewed for a open clerks position at SP as a new hiree,. She was told by the interviewer that there would be no recognition of her seniority or years of service if she were rehired. One of the attorneys

for the employer witnessed the interview process. After being put through that interview process no job was offered to her.(DEN 64, 88, 332). It was clear she was being further discriminated against because she filed this law suit, and had filed a charge of discrimination with the California Fair Housing Office. (EX 735-738).

Since the business of PFE has been transferred to SP, it has shown substantial profitability. Numerous jobs of the categories performed by Sieu Mei Tu have been created and filled with new employees.(EX 426-427) None of these positions were offered to Sieu Mei Tu.(EX 454-455, 735-738)

The number of Chinese employed by PFE has never been reflective of the number of Chinese living in the Bay Area and available for employment in jobs performed at PFE.(EX 736)

In the process of transferring PFE operations to Southern Pacific Transportation, statistically 1/8th of those on the PFE Seniority District 1 list on October 1, 1985 were of Chinese national origin, while 7/8ths were Caucasian. 1/2 of those of Chinese national origin were transferred to SP and 1/2 terminated, while 8/13ths of the Caucasian population were transferred to the SP, and 5/13ths "furloughed". 100% of the Caucasian population is now employed at SP or offered employment at SP, while 50% of the Chinese population has neither been transferred nor offered employment at SP. (EX 531-534, 735-737) 1/3 of those over age 55 were transferred to SP, while 2/3 of those over 55 were furloughed. 7/17ths of the population at PFE covered by the

Union contract were females, while 9/17ths were male. 4/7ths of the female population were transferred while 5/8ths of the male population were transferred (DEN 87 EX 526)

Defendants then employed young workers who had not previously worked for Defendants to perform the duties Plaintiff performed prior to her termination (DEN 90 EX 733).

The Defendants claimed they were entitled to discharge Sieu Mei Tu under the collective bargaining provision concerning decline in business (EX 871).

Upon her discharge, Sieu Mei Tu, requested the Union to institute proceedings and render its aid for her defense against this unwarranted treatment by her employer, and notified the employer of her desire to engage in administrative process for resolution of her claims. The employer refused to engage in administrative resolution with Sieu Mei Tu independently and advised her that the Union had filed claim under the collective bargaining contract and her claim was being handled under the Railway Labor Act ("RLA") procedures. The Union's only response was that Mrs. Tu's letter had been sent to a wrong address and to assure her that the Union was "progressing a claim in accordance with the PFE/B.R.A.C. Agreement in behalf of Mrs. Tu and all other B.R.A.C. PFE clerical employes affected by PFE Management decision to close the Brisbane PFE office." (DEN 50 EX 286-290). The Union refused to talk to Sieu Mei Tu (EX 188) and failed to protect her (EX 192) even though through out this time she paid and they accepted her union dues (EX 191, 333). On at least three

occasions, the attorney for Plaintiff telephoned the Union to determine the nature and progress of the claim the Union was supposedly pursuing for Plaintiff Sieu Mei Tu, and the name and location of the attorney handling the matter. He was finally given the name of an attorney on the East Coast, whom he called. That attorney advised Plaintiffs' attorney he knew nothing of a claim on behalf of Sieu Mei Tu, but was acting for the Union in a suit filed against the Railroads and then pending in the United States Court in Utah, but that that action only concerned PFE employees who had been transferred to SP and did not involve any issues concerning PFE employees that had been "furloughed". Plaintiff's attorney requested copies of the pleadings filed in that matter, but never received the same. (DEN 89 EX 696) Plaintiff's attorney filed suit in the state court to protect and pursue Plaintiff's California causes of action.

After Southern Pacific Transportation appeared, its counsel requested Plaintiffs not to serve the other defendants inorder to facilitate early settlement of this matter. Pursuit of the objective of settlement rather than trial appeared to Plaintiffs to be a worthy objective. Plaintiffs believed reliance on such a representation was good cause for not serving the other defendants. When it became apparent that there would be no good faith meaningful settlement discussions, and the matter would not be remanded to the state court, Plaintiffs served the other defendants. (DEN 45) Until the lower court ruled that the matter was properly removed to the Federal Court Plaintiff had good cause to

believe that the matter would be remanded to the State Court, and thus good cause to believe that Rule 4(j) would be inapplicable to this action. (DEN 89 Ex 694-696). At the hearing on the motion to remand (EX 249) the plaintiff advised the court, that if the matter were not to be remanded, plaintiff would require time to complete service on the remaining railroad defendants. The court granted plaintiff more than 60 days to accomplish that, and service was effected within said time period. (EX 250, 256, 258)

In the arbitration proceedings between the Union and PFE, none of Plaintiff's claims of discrimination or exemption from termination by reason of decline in business were presented. (EX 1116-1123)

In proceedings before the ICC the Union presented no evidence of the adverse effect of the merger on employees of the Railroad (EX 1124 & 1135-1140). On January 25, 1989, the ICC refused to include determination of the issue of adverse effect of the merger on employees and provided that employees that had such a claim should pursue those claims in a civil action. (Ex 1124-1128).

The Union has never claimed that it made a judgmental determination not to process all of plaintiff's claims. It's failure to do so is obviously a procedural and/or ministerial failure, not involving the exercise of judgment, with no rational or proper basis for the union's conduct. The Union was well aware of plaintiff's claim of discrimination, and the inapplicability of the decline in business provision to her. (EX 610)

During this time frame, the Union was attempting to both purchase the SP, and become the bargaining agent for any combined railroad that might develop out of the matter. (EX 494-496).

The defendants blocked the taking of discovery by Plaintiff affecting her ability to meet the motions for summary judgment and or dismissal. (EX 694-731, 501, 879).

4. ARGUMENT

I

SUMMARY JUDGEMENT SHOULD NOT BE GRANTED DEFENDANT EMPLOYER

A

STANDARD OF REVIEW

The district court's grant of summary judgment is reviewed **de novo** , Miller v. Fairchild Indus., Inc., 797 F.2d 727 (CA9th 1986); Gallon v. Levin Metals Corp., 779 F.2d 1439, 1440 (CA9th 1986).

B.

A TRIABLE ISSUE OF FACT AS TO THE ESTOPPEL OF THE EMPLOYER TO CLAIM JUSTIFICATION FOR DISCRIMINATION BASED ON ECONOMIC DECLINE PROHIBITS GRANTING OF SUMMARY JUDGMENT ON THE DISCRIMINATION CLAIMS

Plaintiff presents ample evidence of discrimination by her employer. Even the lower court recognized that she had done so. (EX 89) The lower court stated:

> "In the present case, plaintiff Sieu Mei has stated a prima facie case of discrimination. She is a member of three protected groups. Her job

> performance prior to her dismissal was at the very least satisfactory, and several of her superiors rated her work as exceptional. She was furloughed instead of being transferred to SP in 1985. Other employees who were not over 40, female, or asian, were transferred into positions at SP that Sieu Mei was qualified to perform. Thus, a prima facie showing of intentional discrimination has been made by plaintiffs."

Summary judgment is appropriate only if there is no genuine issue of material fact.

In Perez v. Curcio, (CA9th 1988) 841 Fd2d 255, Perez, an employee of the City of Phoenix, brought a age discrimination against the city. Summary judgment for the city was granted by the District Court. On appeal the 9th Circuit reversed and remanded stating at 258:

> "In this case, Perez must demonstrate that the City's asserted reasons for her demotion and termination were pretextual; i.e., either that a discriminatory reason more likely than not motivated the employer or that the employer's explanation is unworthy of credence. In ruling on a summary judgment motion "(t)he evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in her favor." (citing authority) As long as Perez has introduced some evidence from which a jury could believe Perez's explanation rather than the City's explanation and material questions of fact exist, the case must go to a jury."

In the instant matter Plaintiff has set forth a history of discrimination against her beginning in 1982, where she has been treated differently than others, finally coming to the present day where she is in a position of being discriminated against in retaliation for her having called into question her employers

actions. Here Plaintiff was an exemplary employee, serving for 22 1/2 years the same employer, getting exemplary performance reports, being promoted, and receiving pay raises. Then when she is only 2 1/2 years away from fully qualifying for full retirement benefits (25 years service) the rug is yanked out, and jobs she has performed with distinction are given to younger inexperienced and/or lesser experienced people. Every other of her co workers are protected but she is signalled out for example and denied her job and dignity. All this because two of her superiors didn't like her. (EX 162, 185)

In Rollins v. Techsouth, Inc. (CA 11th 1987) 833 Fd2d 1525 at 1528 the court reviewed the criteria for establishing a prima facie case of age discrimination. It stated:

> "The plaintiff must first establish a prima facie case of age discrimination, by showing (1) that plaintiff was between forty and seventy, and thus in the protected age group, (2)that plaintiff was qualified to do the work, (3) that the employer discharged plaintiff, and (4) that the employer subsequently replaced plaintiff or sought a replacement. If plaintiff can establish a prima facie case, a presumption arises that defendant fired plaintiff for discriminatory reasons."

In the instant matter Plaintiff has shown that she was 59 years of age when discharged (EX 526), that she was qualified to do the work (EX 733) that she was discharged (EX 608 & 733), the employer subsequently replaced plaintiff (EX 735-737).

In the instant matter, plaintiff presented evidence that the employer represented to her that she was "fully protected" (EX 15). In reliance on that she continued to

perform her employment duties above average without complaint, suffered extreme treatment, stayed with the employer even though her commute was significantly increased when the offices were moved from San Francisco to Brisbane. (EX 72, 74, 154-167, 309, 733).

Plaintiff, being the party opposing motion for summary judgement with sworn declarations is entitled to her sworn statements taken as true for purposes of deciding the motion; the court can not resolve credibility issues with respect to direct evidence. McLaughlin v. Liu (CA9th 1988) 849 F.2d 1205. That court quoted at 1208 with favor from T. W. Elec. Serv. v. Pacific Electric Contractors Assn. (CA9th 1987) 809 F.2d 626, 630-31 as follows:

> "the judge does not weigh conflicting evidence with respect to a disputed material fact....Nor does the judge make credibility determinations with respect to statements made in affidavits, answers to interrogatories, admissions, or depositions....These determinations are within the province of the fact-finder at trial. Therefore, at summary judgment, the judge must view the evidence; in the light most favorable to the non moving party; if direct evidence produced by the moving party conflicts with direct evidence produced by the nonmoving party , the judge must assume the truth of the evidence set forth by the nonmoving party with respect to that fact."

The single page representation of the employer (Ex 937), the oral representations of her superiors that she was "fully protected" (EX 15), and the collective bargaining agreements (Ex 938) establish the making of a statement on which it was

intended plaintiff would rely, and the evidence presented by plaintiff demonstrates that she did so rely on the representations, so that the triable, material issue of estoppel is presented by plaintiff, making the granting of summary judgment to the employer inappropriate.

Clearly an issue of the employer being estopped from claiming the right to discriminate against her based on a decline in business is a triable issue of fact so that summary judgement should not be granted.

C.

SUMMARY JUDGEMENT SHOULD NOT BE GRANTED WHERE A TRIABLE ISSUE OF FACT IS PRESENTED BY PLAINTIFF THAT THE EMPLOYERS RELIANCE ON DECLINE IN BUSINESS IS A PRETEXT TO COVER THE DISCRIMINATION EXERCISED AGAINST PLAINTIFF

WHERE AS HERE PLAINTIFF PRODUCES EVIDENCE THAT THE EMPLOYER IS CONTRACTUALLY BOUND NOT TO DISCHARGE PLAINTIFF BECAUSE OF ECONOMIC DECLINE, THE EMPLOYER PURPOSEFULLY CAUSED THE ECONOMIC DECLINE, WHEN THE BUSINESS WAS TRANSFERRED TO SP IT PROSPERED, PLAINTIFF IS THE ONLY EMPLOYEE TREATED IN THIS FASHION, AND NEW, YOUNGER, NON CHINESE EMPLOYEES, WITH LESS EXPERIENCE THAN PLAINTIFF ARE HIRED TO PERFORM THE DUTIES PREVIOUSLY PERFORMED BY PLAINTIFF.

The issue presented here of an employer purposefully causing an economic decline in aid of a planned merger with another railroad, in order to circumvent a collective bargaining agreement and using that decline in business as a pretext for discriminating against an employee appears to be an issue of first impression. Under California contract law of offer and acceptance, it appears evident, that the collective bargaining agreements involved in the instant matter, to the extent they provide for the right of the employer to "furlough" employees during a formulated decline in business (EX 971) or where business is interrupted by

emergencies (EX 962), were intended to concern themselves only with conditions beyond the employers control, but the intent and purpose of the agreement can not be to allow the invocation of those provisions when the employer causes the conditions for the very purpose of negating the contractual terms.

The fact that the employees inorder to protect themselves when these conditions apply must stand ready to return to work on two weeks notice further demonstrates the intent and purpose of these provisions to deal with temporary conditions of the market not purposefully created by the employer.

To allow such conduct would be to make a mockery of the collective bargaining process.

D.

SUMMARY JUDGMENT SHOULD NOT BE GRANTED DEFENDANT EMPLOYER ON DISCRIMINATION CAUSE OF ACTION WHEN THERE IS A MATERIAL TRIABLE ISSUE OF FACT OF VIOLATION OF STATE STATUE PROHIBITING DISCRIMINATION AGAINST EMPLOYEES BASED ON THEIR EXERCISE OF RIGHT TO INSTITUTE PROCEEDINGS CLAIMING DISCRIMINATION

In the instant matter, there is a triable issue of fact presented of discrimination post discharge of plaintiff because of her exercise of her right to institute proceedings concerning her discriminatory discharge. Post termination, she interviewed for a clerk's position at SP as a new hiree, was not hired, while numerous jobs of the categories previously performed by Sieu Mei Tu with distinction have been created and filled with new younger workers (EX 733 & 736-738). All other employees at PFE, including the Union Local Chairman, Mr. Balovich, have all been rehired at SP,

given the opportunity of substantial severance pay benefits or continued employment, or allowed to retire with full retirement rights to age 65, or other golden parachute provisions. Sieu Mei Tu is the only terminated employee who has not received such benefits. She is the only terminated employee the employer was contractually obligated to give "full protection" , being the only employee on the roster at termination with a seniority date prior to March 16, 1963 (EX 736-738). The evidencce presents an issue that the real reason for her termination was discriminatory reasons of the two superiors responsible for transfering work to SP not liking Sieu Mei. That is what she was told the day of her discharge and that,it appears clear, was why she was treated so badly. (EX 185).

Where the party opposing summary judgment presents evidence that tends to support his claim, as here where plaintiff has presented retaliatory discrimination evidence, summary judgment should not be granted.

In Eisenberg v. Insurance Co. of N. Am. (CA 9th, 1987) 815 F2d 1285, Plaintiff brought an action against his former employer, an insurance company alleging retaliatory discharge and fraud. Defendant employer moved for summary judgment, claiming that the fraud claim was unfounded and that other claims were time-barred. In his response to the motion, Plaintiff asserted that he had been fired for refusing to violate California Law. The district court granted summary judgment for defendants on all claims, ruling that plaintiff's response to the motion was conclusory and thus inadequate.

The court of appeals reversed, holding that summary judgment was improperly granted.

The court stated at 1290:

> "However, termination in retaliation...would not constitute discharge for good cause....ICNA merely asserts that it had good cause to terminate the Appellant's employment--namely, considerations of econonomy. The Appellant, however, has adduced his declaration and the memoranda as direct evidence to contradict this assertion. Since the evidence must be taken as true, T. W. Electrical at 630-31, the Appellant's breach of contract claim is not vulnerable to summary disposition."

E.

DEFENDANT RAILROADS ARE NOT ENTITLED TO SUMMARY JUDGMENT ON PLAINTIFFS TORT CLAIMS ON THE BASIS THAT THE TORT CLAIMS FRAMED IN THE FIRST AND SECOND AMENDED COMPLAINTS ARE MINOR DISPUTES, SO THAT THE SOLE REMEDY IS ARBITRATION UNDER THE COLLECTIVE BARGAINING AGREEMENT.

PLAINTIFF IS ENTITLED TO PROCEED ON HER FELA CLAIMS AND IS NOT LIMITED TO ARBITRATION UNDER THE COLLECTIVE BARGAINING AGREEMENT

In the lower court the railroad defendants argued that Plaintiffs exclusive remedy on her tort claims for infliction of mental distress was arbitration under the collective bargaining agreement and the lower court so ruled (EX 306). Under the circumstances of this case, this was patently incorrect. In Atchison, Topeka and Santa Fe Railway Company v. Jim Buell, (1987) 107 S. Ct. 1410, 771 F2d 1320 (CA9th opinion) a railroad employee brought an action in tort for emotional distress arising from his employment conditions. The railroad filed an answer, asserting, among other defenses, that the employees sole remedy was before the NRAB. The Dis-

trict Court granted summary judgment to the railroad on this issue.

The Ninth Circuit reversed, 771 F2d 1320. The Supreme Court on review stated at 1413:

> "Additionally, although the question had neither been raised by the parties, nor addressed by the District Court, the Court of Appeals proclaimed that a relevant "issue, one of first impression in this circuit, is whether a Railroad employee's wholly mental injury stemming from his railroad employment is compensable under the [FELA]." Id, at 1321. The Court of Appeals concluded that the FELA does authorize recovery for emotional injury."

The Supreme Court affirmed the Court of Appeals in its determination that the RLA does not preclude actions brought by railway employees against their employers for emotional injuries. Id, at 1418. In arriving at its decision, the Court stated at 1415:

> " The court has, on numerous occasions, declined to hold that individual employees are, because of the availability of arbitration, barred from bringing claims under federal statutes (citing authority). Although the analysis of the question under each statute is quite distinct, the theory running through these cases is that notwithstanding the strong policies encouraging arbitration, "different considerations apply where the employee's claim is based on rights arising out of a statute designed to provide minimum substantive guarantees to individual workers." (citing authority)
>
> The principle is instructive on the question before us. The FELA not only provides railroad workers with substantive protection against

> negligent conduct that is independent of the employer's obligations under its collective-bargaining agreement, but also affords injured workers a remedy suited to their needs, unlike the limited relief that seems to be available through the Adjustment Board. It is inconceivable that Congress intended that a worker who suffered a disabling injury would be denied recovery under the FELA simply because he might also be able to process a narrow labor grievance under the RLA to a successful conclusion. As then District Judge K. Skelly Wright concluded, " the Railway Labor Act...has no application to a claim for damages to the employee resulting from the negligence of an employer railroad."

Afortiori, the same must apply to a claim for damages resulting from the intentional acts of an employer railroad.

F.

SUMMARY JUDGMENT SHOULD NOT BE GRANTED WHEN OPPOSING PARTY HAS BEEN DENIED DISCOVERY BY DEFENDANTS AND NONMOVING PARTY REQUIRES ADDITIONAL TIME FOR DISCOVERY.

Rule 56 (f) provides:

> "Should it appear from the affidavits of a party opposing the motion that the party cannot for reasons stated present by affidavit facts essential to justify the party's opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just."

In the instant matter, plaintiff demonstrated that defendants had prevented plaintiff from procuring discovery and advised the lower court of plaintiff's need to conduct discovery to meet the motions for summary judgment and dismis-

sal (EX 694). It was a gross abuse of discretion for the court to proceed to judgment without plaintiff being given an order requiring the defendants to respond to the demands for discovery. 6 Part 2 Moore's Federal Practice 56-304

II.

SUMMARY JUDGMENT SHOULD NOT BE GRANTED TO UNION DEFENDANTS

A

STANDARD OF REVIEW

The district court's grant of summary judgment is reviewed de novo, Miller v. Fairchild Indus., Inc., 797 F.2d 727 (CA9th 1986); Gallon v. Levin Metals Corp., 779 F.2d 1439, 1440 (CA9th 86).

B.

WHERE AS HERE THE UNION FAILED TO PERFORM PROCEDURAL OR MINISTERIAL ACTS WITHOUT ANY RATIONAL OR PROPER BASIS FOR THE UNION'S CONDUCT REFLECTING A RECKLESS DISREGARD FOR THE RIGHTS OF THE INDIVIDUAL EMPLOYEE SUMMARY JUDGMENT SHOULD NOT BE GRANTED

The standard for finding a breach of the duty of fair representation is whether the unions conduct is arbitrary, discriminatory, or in bad faith. Vaca v. Sipes 386 U.S. 171, 190, Peterson v. Kennedy, (CA 9th 1985) 771 F. 2d 1244, cert. denied ____ U.S. ___, 106 S. Ct. 1642 (1986). In the context of a grievance, this standard prohibits a union from ignoring a meritorious grievance or processing that grievance perfunctorily. Galindo v. Stoody Co., (CA 9th 1986) 793 F.2d 1502.

In the instant matter the record demonstrates that the Union failed to perform the procedural act of advising the arbitrator of Sieu Mei Tu's claim of discrimination in her discharge, nor of her claim of discrimination in retaliation for her having exercised her right to claim discrimination, nor her claim of exemption from the decline in business exception under the collective bargaining agreement. By doing so the Union engaged in a reckless disregard for the rights of Sieu Mei Tu.

The Union makes no claim it made a judgmental decision not to present all Sieu Mei Tu's claims. It's failure to do so was a procedural and/or ministerial act, not involving an exercise of judgment, were there was no rational or proper basis for the union's conduct.

The Union Defendant, undertook to represent the interests of the Plaintiff Sieu Mei Tu, a member of the union, in the administrative resolution of the matter of her claim for the Railroads wrongful and tortious breach of the collective bargaining contract of employment. In breach of its obligation of fair representation, the union failed to present any evidence to support plaintiffs claims of discrimination in termination, discrimination in rehiring in retaliation for bringing discrimination claim, exemption from decline in business provisions for furloughing under the collective bargaining agreement.

In the leading case of Vaca v. Sipes, 386 U.S. 171 (1967), the Supreme Court held that the duty of fair representation could be enforced in a damage action by an

employee against a union. That court granted to the union wide discretion in making the decision whether to take a grievance to arbitration, but provided that if the union does process the grievance it may not arbitrarily ignore a meritorious grievance or process in a perfunctory fashion.

In Vaca supra at 191 the court stated:

> "... we accept the proposition that a union may not arbitrarily ignore a meritorious grievance or process it in perfunctory fashion...."

In Wise v. Southern Pacific Co. (1963) 223 CA2d 50; 35 C.R. 652, held that a railroad employee may bring and maintain a common-law or, where a state so provides, statutory action for damages for his wrongful discharge from employment in breach of a collective bargaining agreement, and is not barred from doing so by the Railway Labor Act. This view was confirmed by the California Supreme Court in Wise v. Southern Pac. Co., 1 C3d 600; 83 CR 202; at 603. See also Shaw v. Metro-Goldwyn-Mayer, Inc., (1974) 37 CA 3D 587, 597; 113 CR 617.

In the instant action, Union decided to process administratively Plaintiff's claim for wrongful termination. However in processing that claim Union acted in an arbitrary, prejudicial, perfunctory manner in that Plaintiff's Union failed among other things to perform the procedural and ministerial duties of presenting evidence at the arbitration hearing held in regard to the claims of plaintiff, did not confer with the Plaintiff or her attorney concerning her claims, failed to make any claim of discrimination on behalf of Plaintiff, failed to protect her from retaliation by reason of the

claims she made personally, and procedurally failed to advise the arbitrator the application of decline in business to Plaintiff's "furlough" was inappropriate despite the inapplicability of that provision to her by reason of her seniority. (EX 602)

Union failed to act from a conflict of interest, in that at the time it was suppose to be fairly representing Plaintiff it was acting in its own self interest seeking to purchase Defendant SP, and simultaneously seeking to become the bargaining unit for any combined railroad in the event the pending sale to Santa Fe or some other railroad was ultimately approved.(EX 189-193, 884)

Rule 56 Rules of Civil Procedure does not permit entry of summary judgment, where there are, as here, genuine material issues of fact. In Traylor v. Black, Sivalls & Bryson, (CA8th, 1951) 189 F2d 213, at 216, the court stated the rule as follows:

> "A summary judgment upon motion therefor by a defendant in an action should never be entered except where the defendant is entitled to its allowance beyond all doubt. To warrant its entry the facts conceded by the plaintiff, or demonstrated beyond reasonable question to exist, should show the right of the defendant to a judgment with such clarity as to leave no room for controversy, and they should show affirmatively that the plaintiff would not be entitled to recover under any discernible circumstances....A summary judgment is an extreme remedy, and under the rule, should be awarded only when the truth is quite clear....And all reasonable doubts touching the existence of a genuine issue as to a material fact must be resolved against the party moving for summary judgment."

See also Lane Bryant v. Maternity Lane, Ltd. of California, (CA9th 1949)173 F2d 559;Lew v. Kona Hospital, (CA9th, 1985) 754 F2d 1420; Eisenberg v. Insurance Co. of North America (CA9th, 1987) 815 F2d 1285.

III.

THE RAILROAD DEFENDANTS SHOULD NOT HAVE BEEN DISMISSED FROM THE ACTION

A
STANDARD OF REVIEW

In reviewing orders of dismissal, the court of appeals must view the evidence most favorable to the plaintiff, and plaintiff is entitled to the benefit of all inferences that may be reasonably drawn from the evidence presented. Reimche v. First Nat. Bank of Nevada, (CA 9 1975) 512 F2d 187.

B.

SUMMARY JUDGMENT WAS NOT GRANTED ON THE SECOND AMENDED COMPLAINT ON PLAINTIFF'S CAUSES OF ACTION FOR INTENTIONAL AND/OR NEGLIGENT INFLICTION OF EMOTIONAL DISTRESS, CONSPIRACY, BREACH OF CONTRACT OF EMPLOYMENT, BREACH OF GOOD FAITH AND FAIR DEALING, CONSPIRACY NOR ON ANY CAUSES OF ACTION AGAINST RAILROAD DEFENDANTS, YET COURT DISMISSED WITH PREJUDICE THE ENTIRE SECOND AMENDED COMPLAINT WHICH HAD BEEN SERVED ON ALL RAILROAD DEFENDANTS AND UNION DEFENDANTS.

The lower court by its order of May 3. 1989, (EX 915) directed Plaintiffs to file an amended complaint by June 2, 1989. Plaintiffs complied by filing a Second Amended Complaint (EX 919). All railroad and all Union defendants were served by mail (EX 1129). None of the Railroad defendants responded in any fashion to the Second Amended Complaint.

Defendant Union filed a motion to strike causes of action one through five, seven, and eight, and moved for

summary judgment as to the sixth cause of action

The lower court incorrectly ruled:

> "Since only 'Doe' defendants remain in the action, this Court DISMISSES plaintiffs' second amended complaint WITH PREJUDICE." (EX 1143)

All parties who have appeared in an action remain in the action until a final judgment is rendered. In this action, when the Second Amended Complaint was filed and served, there was no final judgment. Therefore the court's position that only doe defendants remained was grossly in error, and its ruling dismissing the Second Amended Complaint was a gross abuse of discretion necessitating this court to remand the state causes of action to the Superior Court of the State California, in and for the City and County of San Francisco, and the federal causes of action to the District Court for jury trial against all defendants. Dayton Board of Education v. Brinkman (1977) 433 US 406.

C.

SECOND AMENDED COMPLAINT ANSWERED COURTS BASIS THAT FOR VIOLATION OF 49 USC 11347 MUST FIRST GO TO ICC. SECOND AMENDED COMPLAINT ALLEGES THAT PROCEEDINGS WERE COMMENCED BEFORE ICC AND ICC AUTHORIZED INDIVIDUAL EMPLOYEES TO PROCEED WITH CIVIL REMEDIES, THEREFOR DISMISSAL OF SECOND AMENDED COMPLAINT WAS A GROSS ABUSE OF DISCRETION

By its order dated June 30, 1988 (EX 305), the district court dismissed Plaintiff's fifth cause of action for conspiracy and violation of 49 USC 11347, as follows:

> "Insofar as a private cause of action might exist for termination due to the aborted merger, this court concludes that it is not the proper forum for an initial determination of this matter. The Interstate Commerce Commission is the appropriate agency for an initial determination of any claimed violation of 49 U.S.C. §11347, which provides for employee protection in any rail carrier merger." (EX 305)

Thereafter, by order of court, a Second Amended Complaint was filed (EX 919). In that verified Second Amended Complaint, plaintiff set forth the decision of the ICC (Ex 1124), which provided that ICC would not proceed with determination of the claims of the individual employees under 49 USC 11347. The district court then proceeded sua sponte to dismiss the Second Amended Complaint. This action was a gross abuse of discretion and grievous error, causing plaintiff to be denied a fair hearing on her claim, so that this court must remand and direct the lower court to proceed to trial.

IV.

IT WAS GROSS ABUSE OF DISCRETION AND GRIEVOUS ERROR, WHICH DENIED PLAINTIFF A FAIR HEARING FOR THE DISTRICT COURT TO REFUSE PLAINTIFFS MOTION TO REMAND THE ORIGINAL COMPLAINT TO STATE COURT

A.
STANDARD OF REVIEW

When the trial court grossly abuses its discretion and or commits grievous error, so as to deny plaintiff a fair hearing on her claim, the reviewing court must remand and direct the lower court. Dayton Board of Education v. Brinkman (197[illegible] 433 US 406

B.

THE ORIGINAL COMPLAINT WELL PLEAD STATE COURT CAUSES OF ACTION, IT WAS FILED IN THE STATE COURT AND WRONGFULLY REMOVED TO THE DISTRICT COURT. ON PLAINTIFFS MOTION TO REMAND BACK TO THE STATE COURT IT WAS GROSS ERROR NOT TO DO SO.

Plaintiffs complaint in this matter alleges various tortious causes of action based on negligent and or intentional bad faith, unfair, oppressive, fraudulent and malicious termination of plaintiff Sieu Mei Tu's long standing employment by Defendant Pacific Fruit Express, in violation of laws of the State of California. The Complaint seeks special damages; general damages for emotional distress; and punitive damages.

The question of whether the federal district court had jurisdiction of the subject matter of the complaint (ie the nature of the action) which had been removed from the state court, is required to be answered under California law. Electronic Race Patrol, Inc. (D.C.N.Y. 1961) 191 F. Supp. 364. Removal statutes are strictly constructed in favor of state court jurisdiction. Strange v. Arkansas-Oklahoma Gas Corp. (D. C. Ark. 1981) 534 F. Supp. 138. Removal statutes are to be strictly construed against removal and in favor of remand. Heatherton v. Playboy. Inc. (D.C. Cal 1973) 60 F.R.D. 372.

28 USC 1445 (a) provides:

> "A civil action in any State court against a railroad...arising under sections 51-60 of Title 45, may not be removed to any district court of the United States."

45 USC 51 provides:

> "Every common carrier by railroad

> while engaging in commerce between any of the several states ...shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce....

The complaint in this matter was brought by two plaintiffs. All of the causes of action of the complaint are actions under state law. Plaintiffs neither alleged nor relied on the Railway Labor Act. All causes of action were plead under state law. The complaint was properly filed in state court and the issues raised should be tried in state court. The Railway Labor Act does not preempt plaintiffs' state court actions.

In Caterpillar Inc. v. Williams, 107 S.Ct. 2425 (1987), the United States Supreme Court by Justice Brennan held that where former employees brought action against former employer for breach of individual employment contracts and the action was removed to the United States District Court for the Northern District of California, where Charles A. Legge, J., denied motion to remand , and dismissed, the Supreme Court ruled on basis that (1) complaint asserting breach of individual employment contracts was not completely preempted by federal labor law, and (2) fact that employer raised defense that individual contracts were superseded by subsequent collective bargaining agreement, and thus preempted by federal labor law, did not establish that employees claims were removable.

The court stated at 2429:

> Only state court actions that originally could have been filed in federal court may be removed to federal court by the defendant. Absent diversity of citizenship, fed-

> eral question jurisdiction is required. The presence or absence of federal-question jurisdiction is governed by the "well-pleaded complaint rule," which provides that federal jurisdiction exists only when a federal question is presented on the face of plaintiff's properly pleaded complaint. See Gully v. First National Bank, 299 U.S. 109, 112-113, 57 S.Ct. 96, 97-98, 81L.Ed. 70 (1936). The rule makes the plaintiff the master of the claim; he or she may avoid federal jurisdiction by exclusive reliance on state law.

In the instant matter the common law agreement is subsequent to the collective bargaining agreement and is magnificently simple in its application. (EX 15) It provides that in addition to her rights under the collective bargaining agreement, "even if her present position were to be eliminated, we would find some other position for her to hold...." This does not require interpretation or application of the collective-bargaining agreement. It presents a simple contract right between two contracting parties, easily understood, and applied. It presents no federal issues. It should not have been removed and should be remanded.

In Caterpillar Inc. v. Williams, supra, the court points out, at 2431:

> ... individual employment contracts are not inevitably superseded by any subsequent collective agreement, covering an individual employee, and claims based upon them may arise under state law. Caterpillar's basic error is its failure to recognize that a plaintiff covered by a collective-bargaining agreement is permitted to assert legal rights independent of that agreement, including state-law contract rights, so long as the contract relied upon is not a collective bargaining agreement. (citing authority) Caterpillar impermissibly attempts to create the prerequisites to removal by ignoring the set of facts (i.e. the

individual employment contracts) presented by respondents, along with their legal characterization of those facts, and arguing that here are different facts respondents might have alleged that would have constituted a federal claim. In sum, Caterpillar does not seek to point out that the contract relied upon by respondents is in fact a collective agreement; rather it attempts to justify removal on the basis of facts not alleged in the complaint. The "artful pleading" doctrine cannot be invoked in such circumstances.

The court specifically states at 2427:

> " The presence or absence of federal-question jurisdiction is governed by the "well-pleaded complaint rule," which provides that federal jurisdiction exists only when a federal question is presented on the face of the plaintiff's properly pleaded complaint. (citing authority) The rule makes the plaintiff the master of the claim; he or she may avoid federal jurisdiction by exclusive reliance on state law."

Again the court in Caterpillar at 2430 states:

> Caterpillar assets that respondents' state-law contract claims are in reality completely pre-empted Section 301 claims, which therefore arise under federal law. We disagree. Section 301 governs claims founded directly on rights created by collective-bargaining agreements, and also claims "substantially gaining dependent on analysis of a collective bargaining agreement." (Citing authorities). Respondents alleged that Caterpillar had entered in and breached individual employment contracts with them. Section 301 says nothing about the content or validity of individual employment contracts. It is true that respondents, bargaining unit members at the time of the plant closing, possessed substantial rights under the collective agreement, and could have brought suit under Section 301. As masters of the complaint, however, they chose not to do so.

The court goes on to hold that the Respondents claims do not arise under federal law and therefore may not be

removed to federal court. The court also points out that the defendants can not inte ject a federal question into an action in order to raise a federal issue and defeat plaintiffs state court actions. (Caterpillar at 2433).

5.CONCLUSION

The motions of the defendants for Summary Judgment and for Dismissal are met with material triable issues of fact by the Plaintiff, so that the entire matter should be remanded to the State Court for trial by jury, and if not to the State Court then to the United States District Court for trial by jury.

Plaintiff has presented material facts that the reliance by the employer on decline in business was a mere pretext to cover for their bias and discriminatory action against Sieu Mei Tu, because they are estopped from making such a claim, and they are contractually prohibited from asserting such a claim. The decline in business itself was pretextural in that it was purposefully induced by the employer, and disappeared when the business was transferred to SP. The retaliatory discrimination practiced after the discharge can not be excused in any regard by reason of decline in business. Plaintiff having presented triable material issues of retaliatory discrimination post discharge, the employer has offered no explanation for that conduct. The infliction of emotional distress claims addittionally are not excused by decline in business, and the employer can not be excused from its conduct on such grounds. Summary judgement for the employer is inappropriate, denies Plaintiffs their

fundamental right to trial by jury, and under the circumstances of this case would be gross abuse of discretion and grievous error.

The Plaintiffs have presented material facts that the Union Defendants in this matter failed to perform procedural or ministerial acts without any rational or proper basis for their conduct reflecting a reckless disregard for the rights of the Plaintiff so that summary judgment should not be granted to them.

All defendants should be ordered to answer the Second Amended Complaint of Plaintiffs, and the entire action remanded for trial by jury.

DATED APRIL 14, 1990

Respectfully submitted,

LEE J. KUBBY, INC.
A PROFESSIONAL CORPORATION
BY:

LEE J. KUBBY
Attorney for Plaintiffs
and Appellants
SIEU MEI TU AND JOSEPH Z. TU

DECLARATION OF SERVICE BY MAIL

I, Lee J. Kubby, say and declare:

I am a citizen of the United States, over eighteen years of age, and not a party to the within action. My business address is BOX 60267, Palo Alto, California 94306. I am an attorney at law licensed by the State of California.

That on April _14_____, 1990

I served TWO (2) copies of the attached:

APPELLANTS BRIEF

via United States First Class Mail on the following parties of record:

PATRICK W. JORDAN
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and by then sealing said envelope and depositing same into the United States mail, postage fully prepaid.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on April _14___, 1990. at Palo Alto, California.

_____ LEE J. KUBBY

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UNITED SATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

SIEU MEI TU AND JOSEPH Z. TU Plaintiffs Appellants VS SOUTHERN PACIFIC TRANSPORTATION COMPANY; ATCHISON, TOPEKA, SANTA FE RAILROAD COMPANY; PACIFIC FRUIT EXPRESS COMPANY; T. ELLEN; E.E.CLARK; d. W. FEND; T. R. ASHTON; DOE DEFENDANTS ONE TO TWO THOUSAND; WHITE COMPANY; BLACK CORPORATION; BROTHERHOOD OF RAILWAY, AIRLINE AND STEAMSHIP CLERKS; R. B. BRACKBILL; J. M. BALOVICH; SANTA FE SOUTHERN PACIFIC CORP. Defendants Appellees	NO: 89-16186 APPELLANTS' ANSWERING/ REPLY BRIEF

APPEAL

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INTRODUCTION

THIS ANSWERING/REPLY BRIEF IS ORGANIZED SO AS TO GROUP ANSWERS TO A PARTICULAR APPELLEES' BRIEF IN ONE SECTION, SO THAT THERE ARE THREE SECTIONS TO THIS BRIEF. NOT WITH STANDING THAT ORGANIZATION, TO THE EXTENT THE SAME IS APPLICABLE TO TWO OR MORE APPELLEES, SUCH ORGANIZATION SHOULD NOT PREJUDICE APPROPRIATE APPLICATION

This Answering/ Reply Brief is organized so as to group answers/replies to a particular Appellees brief in one section, so that there are three sections to this brief. The first responds to Appellees Southern Pacific Transportation Company-Paific Fruit Express' Brief (SP), the second to the brief of Union Defendants (who are also the only defendants who have filed a cross appeal herein), and the third to the Brief of Atchison, Topeka and Santa Fe Railway Co. and Santa Fe Southern Corp. (ATSF). Not withstanding that division of this brief, to the extent any argument is applicable to two or more appellees, such application should be made.

I

THE SP DEFENDANTS

(A) DEFENDANTS WERE CONTRACTUALLY, EQUITABLY, AND LEGALLY PROHIBITED FROM APPLYING A CLAIM OF DECLINE IN BUSINESS TO DENY SIEU MEI TU OF HER EMPLOYMENT AND BENEFITS

It is undisputed that PFE is a wholly owned subsidiary of Southern Pacific (DEN*115 page 2, paragraph 2) that Plaintiff commenced working at the SP San Francisco

*DEN refers to Docket Entry Number

general office(ER*36, 73, 663, 664, 815, 856), that plaintiff was advised in writing on December 18, 1978, that if there was no work for her, she would still be paid her full salary-she would be fully protected (DEN 115, Exhibit A). The representation in that exhibit before the court, makes reference to the fact that the contract between her employer and her Union gives her that protection. That full protection requires the non application of section 11 termination for economic decline. (DEN 30; Supplemental Excerpts of Record** filed by SP at 000215-000234.). That she would be fully protected until she was 65 was told to her by various of her supervisors (DEN 30, Exhibit I; SP Supp ER 000231-000234). As of October, 1985, Sieu Mei Tu was the only terminated employee having a seniority date preceding March 16, 1963 (DEN 71 Exhibit D)

The complaint alleges that each of the defendants was the agent of each of the other defendants in doing the acts complained of (DEN 115, page 3, paragraph 7) and alleges that PFE was at all times material a wholly owned subsidiary of SPT (DEN 115, page 2, paragraph 2). That Sieu Mei Tu worked in the SP General office from the time of her employment until 1980 when the building she worked in was

*ER refers to plaintiffs Excerpt of Record.
**It should be noted that the Supplemental Excerpts of Record filed by SP is incomplete in that for instance the declaration of Kevin Block lists Exhibits A-I, but only what purports to be Exhibit I is included in the Supplement. It should also be noted that SP'S Supplemental Excerpts includes a brief of said defendants in contravention of the Rules of this court-Rule 30-1.4).

changed to Brisbane, a town adjacent to San Francisco (ER 36, 73, 663, 664, 815, 856) even after the move to Brisbane the SP office supervised the activities of Sieu Mei Tu (ER 127, 130, 131, 343, 364). The intention to merge SP and ATSF commenced in 1980 (Kraus v. Santa Fe Southern Pacific Corp, 878 F2d 1193 (9th Cir 1989) at 1195). * The defendants acted to avoid giving terminated employees New York Dock conditions upon the merger. (Kraus, supra at 1196). In issues of this type, it is proper to look not only at the condition of the subsidiary entity claiming financial decline, but upon the financially fit parent as well. (New York Dock RY-Control-Brooklyn Eastern Dist.Fin. Dkt. 28250 at 401-403 (April 11, 1978)

The conditions applicable hereto which the defendants sought to avoid by terminating Sieu Mei Tu prior to the complete merger of the railroads are set forth in Appendix III New York Dock, supra at 415-421.

(B) THIS COURT HAS RULED THAT AN AGGRIEVED EMPLOYEE CAN PROCEED ON STATE LAW ACTION NOT WITHSTANDING THAT A MATTER MAY BE PENDING AND UNDECIDED BEFORE THE ICC.

In Kraus, supra at 1199, these same defendants argued that the ICA preempted the state law tort claim. This court held at 1200:

> "The judgment of liability and damages in favor of the plaintiffs on the state law claim is AFFIRMED."

*The Kraus case supra was decided on appeal on July 3, 1989, and published after plaintiffs' Motion for Reconsideration had been denied as to SP (May 3, 1989).

In the instant action plaintiffs' state court actions are not pre empted by the jurisdiction of the ICC. These defendants motions for summary judgement on the state court causes of action should be denied. The matter should be remanded to the state court for trial.

(C) IN THIS ACTION PLEADINGS, DEPOSITIONS, ANSWERS TO INTERROGATORIES, AND ADMISSIONS ON FILE AND THE AFFIDAVITS FILED SHOW THERE IS A GENUINE ISSUE AS TO WHETHER ECONOMIC DECLINE WAS THE REASON FOR THE TERMINATION OF PLAINTIFF SIEU MEI TU AND THE RIGHT OF THE DEFENDANTS TO RELY ON ECONOMIC DECLINE AS A LEGITIMATE CAUSE FOR HER TERMINATION AND DENIAL OF BENEFITS

Exhibit A to the Complaint (ER 15), to the First Amended Complaint (DEN 38) and to the Second Amended Complaint (ER 937) is SP's own admission that Plaintiff was "fully protected" as an employee- if the employer did not have a job for her she would continue to be paid and accumulate credit for appropriate retirement. (See also SP ER 000231-234). Said Exhibit A also establishes that Sieu Mei Tu was hired May 31, 1962. Plaintiff worked in the San Francisco General Offices of the SP from the time of her initial employment, until her operations were moved to Brisbane (ER 36, 73, 663, 664, 815, 856,). This is further proved in the declarations of the defendants filed herein and in Sieu Mei's personnel file, (ER 740-867).

The applicable collective bargaining agreement exempted Sieu Mei Tu from discharge because of a decline in business (ER 971, 1003, 1007-1014, 1039) stating:

" The provisions of this section will not apply to Pacific Lines Employes in the San Francisco General Offices with seniority date of March 16, 1963 or earlier."

Sieu Mei Tu earned that benefit at least as early as September 16, 1971 (ER 958, 1003, 1007-1014, 1039).*

The evidence (DEN 38 & 115 Exhibit A; DEN 90; ER 937) further demonstrates that SP advised Sieu Mei that under no circumstances would she loose the benefits of her employment.

The lower court correctly pointed out that plaintiff had demonstrated a prima facie case of discharge due to discrimination (ER 894) stating , "In the present case, plaintiff Sieu Mei has stated a prima facie case of discrimination."

The opening Brief on Behalf of Appellees SP claims to the court (SP Brief 29) that PFE employees were not included in the Pacific Lines employees under the September 16, 1971 Tops agreement. This is patently incorrect. Defendants have not produced a scintilla of evidence to support that proposition. That proposition is contrary to the admitted and uncontested facts presented to the lower court and at a minimum presents a factual issue for trial, (DEN 1003, 1005-1014) so that summary judgment should not be

*Defendant SP's contentions in its brief at 37 et seq. that plaintiffs' contentions were not based on admissible evidence is without foundation. All the evidence necessary to a determination that Sieu Mei was terminated without cause, for discriminatory reasons, and that SP was not entitled to rely on economic decline as an excuse for such termination were before the District Court. In fact much of it was from the declarations of the defendants themselves.

granted. The evidence demonstrated that the provision applies to Sieu Mei Tu. No evidence was produced to the contrary.

Defendant's reliance on Celotex Corp. v. Catrett, 106 S. Ct. 2548 (1986) is misdirected. There the court found that there was a complete failure of proof concerning an essential element of the non moving party's case. That certainly is not the situation with Sieu Mei Tu. The Kraus case supra collaterally estops defendants and is res judicata of the fact that the railroad defendants (SP and ATSF) from 1980 forward were embarked on a conspiracy to avoid their responsibilities to their employees as part of the imminent merger.

Clearly, summary judgement should not be granted and this matter should proceed to trial.

(D) DEFENDANTS SP'S EVIDENTIARY OBJECTIONS TO THE DECLARATION OF SIEU MEI ARE NOT TIMELY, NOT HAVING RAISED THEM IN THE DISTRICT COURT, AND ARE INCORRECT UNDER APPLICABLE RULES OF EVIDENCE.

Defendant SP argues that certain declarations of plaintiff Sieu Mei are inadmissible under evidentiary rules. No objection was made by SP in the District Court. The declarations were before the District Court. SP incorrectly argues that a party can not testify as to their opinions or inferences. Federal Rule of Evidence 701 specifically permits the same, stating:

> "If the witness is not testifying as an expert, his testimony in the form of opinions or inferences is limited to those

> opinions or inferences which are which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of his testimony or the determination of a fact in issue.

Clearly what is a fact and what is opinion, perception, or inference needs reference to the record. Here defendants blocked the taking of discovery by plaintiff from the defendants, while plaintiff fully cooperated in giving discovery to the defendants (ER 694-732; 33-239; 321-525).

Likewise SP's argument that plaintiffs deposition testimony was not before the District Court is without merit. It has been cited and referred to through out this case. (for example see DEN 123,Exhibits A and B, DEN 30 Exhibit I, SP's Supplemental ER 000215-000234). SP's contention (SP Brief 42) that deposition testimony and interrogatory answers are not properly included in the excerpts of record pursuant to 9th Cir. R. 30-1 is not to be found in the rule. The matters which are specifically excluded under some circumstances under that rule are briefs or other memoranda of law filed in the district court, not depositions or declarations. It is to be noted that SP in its Supplemental Excepts includes a brief filed by itself contrary to the very rule it seeks to use against plaintiff. (SP Sup ER 000210).

Plaintiffs' complaint is verified, is based on personal knowledge, and sets forth specific facts as do her declaration, the excerpts of her depositions, and the declarations of the defendants so that as observations, percep-

tions, admissions, business records what otherwise might be excludable as heresay, are admissible. (FRE 701; 801 (d 2); 803(1),(6),(24); 804(b 1); 805; 901(a);902 (6))

E DEFENDANT SP'S CONTENTION THAT SIEU MEI FAILED TO PRODUCE ANY EVIDENCE OF HER QUALIFICATION FOR JOBS TRANSFERRED TO SP IGNORES THE RECORD WHICH SHOWS SHE WAS ALWAYS FOUND EXCEPTIONAL IN THE PERFORMANCE OF HER DUTIES, AND HAD PERFORMED THE SAME ADMINISTRATIVE DUTIES FILLED BY SP WITH YOUNGER, NON CHINESE, AND OR MALE WORKERS

Defendant SP argues (SP Brief page 33) that plaintiff did not submit any evidence that she was qualified for the jobs available. This ignores ER 748, a business document and an admission against interest, in her personnel file (DEN 88-90) which is an assessment by her immediate supervisor which states:

> October 2, 1985
> TO WHOM IT MAY CONCERN:
> REGARDING: PFE Employee, Sieu Mei Tu
>
> This is a letter expressing my thoughts about a PFE employee who has worked for me for a period of 10 years, and possibly more, with occasional jobs in other departments due to job abolishments and subsequent displacements.
>
> I had heard good reports of her when she first came to work under my supervision. My Head Clerk of Materials/Supplies gave her a 10 on the rating scale, which I downgraded to an 8, or thereabouts, after reaction from Asst. Controller who said "nobody is perfect."
>
> She proved to be a very fine efficient worker and absorbed new information rather fast. Little supervision was required of her but she always gave the opportunity to "check" her work, and would take correction in proper stride.
>
> In later years, after the Split, Sieu held

> almost every job in disbursements at one time or another, and she did not have to be "baby sat" to learn it. A few questions now and then to get the basics would get her going full speed ahead. Once acquainted with the job, she was very fast and efficient. In a pinch, due to job abolishments, she has performed three jobs at once.
>
> She would anticipate ahead for deadlines, discounts, schedules, and "issue alert warnings" when a facet of work was falling behind.
>
> She was furloughed effective October 9, 1985, and a good worker has been lost. This letter is for her personal record for whomsoever may read it.
> Charles C. Carroll
> Chief Clerk Disbursements

ER 749, describes the duties Sieu Mei performed just prior to her discharge (Position 141). The same page describes Position 150, clerk, then filled by S.A. Hauff. S. A. Hauff, a white, younger, female was transferred to the SP (ER 531). Sieu Mei had previously been employed in Position 150 (ER 733-734). That position was less demanding than Position 141. (ER 734) Thus there was material evidence presented as to her qualification for positions not terminated and transferred.

(F) DEFENDANTS HAVE TOTALLY FAILED TO RESPOND TO PLAINTIFFS EVIDENCE THAT THE DEFENDANTS ARE ESTOPPED FROM ASSERTING DECLINE IN BUSINESS AS A CAUSE FOR DISCHARGING PLAINTIFF WITHOUT CONTINUING BENEFITS. PLAINTIFF HAS PRESENTED EVIDENCE OF ESTOPPEL SO THAT SUMMARY JUDGMENT SHOULD NOT BE GRANTED TO DEFENDANTS

Plaintiff has presented significant evidence of representations by the defendants and her reliance thereon (ER 937, 958, 1003, 1007-10014, 1039; SP ER 231-234; DEN

90) to invoke an equitable estoppel of the defendants prohibiting them from raising an issue of economic decline as cause for her termination.

Defendants do not respond to this equitable right which establishes Sieu Mei Tu's discharge as pretextural.

(G) PLAINTIFFS SECOND AMENDED COMPLAINT (DEN 115) SPECIFICALLY CHARGES DEFENDANTS WITH RETALIATORY DISCRIMINATION CONTINUING TO JUNE 1, 1989

Each of Plaintiff's complaints have charged Defendants with retaliatory discrimination. (DEN 115 page 10; DEN 38 page 10; DEN 1 Complaint Exhibit A page 7).

All of the retaliatory discrimination is evidence of the initial discrimination and of the unlawfulness of the discharge of Sieu Mei Tu.

II

THE UNION DEFENDANTS

(A) MATERIAL FACTS PRESENTED AS TO BREACH OF DUTY OF FAIR REPRESENTATION BY UNION

All of the facts applicable to the claim against SP are equally applicable against Union, but will not be repeated here. In addition, the following material facts are before the court:

On October 18, 1985, plaintiff in writing advised ATSF that her employment had been wrongfully terminated for discriminatory reasons because of her age, sex, and national origin (DEN 30, Exhibit G). On the same day

Plaintiff sent a copy of that writing to the Union and demanded "for your union to protect its member, Sieu Mei Tu, and to provide her legal representation and support in this time of great travail." (DEN 30 Exhibit G). The Union did not feel that demand requested a response or that one was necessary (DEN 71 page 9). On January 20, 1986, counsel for plaintiff wrote to the Union as follows:

> "On October 18, 1985, I wrote to you concerning the termination of Mrs. Tu from her position with Southern Pacific and demanded for you to protect her interest and support. You have made no response to that letter and taken no action to protect the interest of Mrs. Tu.
> This is to advise that unless you immediately take action no later than five (5) days from the date of this letter, I intend to include you in an action concerning her rights and to hold you responsible for a bad faith refusal to perform your contractual duties to Mrs. Tu regarding this distressing incident." (DEN 71 Exhibit R)

On January 28, 1986 the Union advised Sieu Mei's counsel as follows (DEN 71 Exhibit S):

> "Let me assure you, Mr. Kubby, that B.R.A.C. is progressing a claim in accordance with the PFE/B.R.A.C. Agreement in behalf of Mrs. Tu...."

No further word was received by Plaintiff concerning that process until January 4, 1988, when DEN 71 Exhibit T (the Leiberman arbitration) was received.(DEN 50) The Leiberman arbitration demonstrates that the Union did not process Sieu Mei Tu's individual claims under the collective bargaining agreement.

Thus there were triable material issues of fact of failure to perform ministerial and/or procedural

acts, ignoring Sieu Mei's individual rights and claims, failure to investigate her claims, recklessly disregarding her individual rights.

The Union during the period it was supposedly processing Sieu Mei's discrimination claim was also negotiating to become the sole bargaining agent for the combined railroads and also to purchase the SP. (DEN 115 page 15, ER 158-159, 877, 883-884, 933). Even if there had been a judgment call by the Union not to process her claims, which the Union has never claimed it made there would be a triable issue of fact as to a bad faith motive on the part of the Union.

The Union has never claimed it made a knowing decision not to submit Sieu Mei's individual claim for wrongful discriminatory discharge or her individual right to be exempt from the decline in business provision of the collective bargaining agreement to arbitration, so that the Union's failure to arbitrate Sieu Mei's discrimination claim or individual exemption from the collective bargaining agreement decline in business provision was a failure to perform a procedural or ministerial act. There was no rational or proper basis for its conduct. Such conduct presents a triable material issue of fact of reckless disregard for the rights of the individual employee that must be tried before a jury so that summary judgment should not be granted.

On at least three occasions after January 28, 1986 Counsel for Plaintiff telephoned the office of the

Union representative in charge of the PFE matter, Mr. Brackbill, to determine the nature and progress of the claim the Union was supposedly pursuing for Plaintiff, and the name and location of the attorney handling the matter. Counsel was finally given the name of an attorney on the East Coast, who counsel called. That attorney advised counsel that he was acting for the Union in a suit filed against the Railroads and then pending in the United States District Court in Utah, but that action only concerned PFE employees who had been transferred to SP and did not involve any issues concerning PFE employees that had been "furloughed". Plaintiffs counsel requested copies of the pleadings filed in that matter, but never received the same. (DEN 89 pages 3-4).

On April 29, 1988, plaintiffs filed their First Amended Complaint (DEN 38) setting forth their claims against the Union.

Plaintiff called Mr. Brackbill and advised him of her desire for employment with SP (DEN 71 page 12 15-17). On April 29, 1988, Sieu Mei interviewed at SP for such a position. (DEN 64) She was not given employment.(DEN 90 page 5 lines 21-24). The Union took no action to procure such employment for her, nor to commence arbitration for retaliatory discrimination on behalf of Sieu Mei. (ER 602).

In September, 1988, plaintiff attempted to take discovery from the Union. The Union did not comply. (DEN 89) in full and only partially later complied not with its own records but with records allegedly procured from

SP.*

On Motion for Summary Judgment filed November 23, 1988, SP argued that the ICC had exclusive jurisdiction of Sieu Mei's conspiracy claim. (DEN 62) In fact a proceeding had been held before the ICC prior to September 12, 1988, and an issue raised as to imposition of labor protective conditions to be imposed by reason of the ATSF merger. The Union, well knowing of the claims of Sieu Mei, did not present her matter to the ICC, did not advise her that such a proceeding was being conducted, and did not advise the District Court of the same, nor the fact that a decision had been arrived at on January 29, that the ICC did not have jurisdiction to determine the same, and that employees such as Sieu Mei, that were adversely affected by the disallowed merger could proceed in a civil proceeding. (DEN 115, EX F) The Union stood moot on the matter before the District Court (ER 869).

(B) THE UNION'S ASSURANCE THAT IT WAS ADMINISTRATIVELY PURSUING SIEU MEI'S CLAIMS UNDER THE COLLECTIVE BARGAINING AGREEMENT RELEASED PLAINTIFF (1) TO PURSUE HER STATE COURT REMEDIES FOR HER EMPLOYERS BREACH OF PRIVATE CONTRACT AND TORTIOUS CONDUCT, (2) NOT SEEK ENFORCEMENT OF FEDERAL CAUSES OF ACTION, AND (3) NOT TO NAME UNION IN HER STATE COURT ACTION

*It should be noted that SP also did not comply leaving plaintiff in a disadvantaged position to respond to the Summary Judgment motions of SP and Union. Plaintiff requested the District Court to allow completion of discovery before considering the Motions for Summary Judgment, but the court did not grant the request. (ER 879).

The Union's assurance that it was pursuing Sieu Mei's termination claim under the collective bargaining agreement, (DEN 120, Exhibit S; ER 682; Union's Supplemental ER 102) was sufficient cause for plaintiff to rely on the Union to pursue her claims under the collective bargaining agreement and not to sue the Union until after receipt of the Leiberman Award, when she first learned that the position of the Union was not true--that the Union had not progressed an administrative claim under the collective bargaining agreement on behalf of Sieu Mei as to the unlawfulness of her discharge. Thus the provisions of Galindo v. Stoody Co, 793 F. 2d 1502 (9th Cir. 1988) are very applicable to this matter.

In Galindo, supra the district court found a breach of the duty of fair representation in the manner in which the union investigated, prepared, and handled a grievance, the Court of Appeals stated at 1513:

> "To establish a breach of a union's duty of fair representation, an employee most show that the Union's conduct was 'arbitrary, discriminatory, or in bad faith.' Vaca v. Sipes, 386 U.S. 171, 190, 87 S.Ct. 903, 916, 17 L.Ed.2d 1244, 1253 (1967); Peterson v. Kennedy, 771 F. 2d 1244, 1253 (9th Cir., 1985), cert. denied, __U.S. __, 106 S. Ct. 1642, 90 L.Ed.2d 187 (1986); Castelli v. Douglas Aircraft Co., 752 F. 2d 1480, 1482 (9th Cir. 1985. In the grievance context, this standard prohibits a union from ignoring a meritorious grievance or processing that grievance perfunctorily." (emphasis added)

The court then went on at 1514 quoting with approval from Dutrisac v. Caterpillar Tractor Co., 749 F. 2d 1270, 1274 (9th Cir. 1983):

> "([W]e limit or holding that union negligence may breach the duty of fair representation to cases in which the individual interest at stake is strong and the union's failure to perform a ministerial act completely extinguishes the employee's right to pursue his claim") cited in Evangelista v. Inlandboatmen's Union of Pacific, 777 F.2d 1390, 1399 n. 4 (9th Cir.1985); see also Eichelberger v. NLRB. 765 F. 2d 851, 855 n. 7 (9th Cir.1985) ("Dutrisac may further be limited to situations where a true ministerial act is involved.").
> Under Peterson and Dutrisac then, the crucial inquiry is whether the union's error involved a judgmental or ministerial act. Additionally, the union's conduct must prejudice a strong interest of the employee. See Dutrisac, 749 F.2d at 1274; Eichelberger, 765 F. 2d at 855.
>
> **C. The Failure to Notify Stoody**
>
> Under the Peterson Standard, or any other test, it is hard to imagine a more clear case of arbitrary conduct than Peon's failure to notify Stoody that Galindo was a steward. This was a mere "ministerial" act that required no judgment. There is no rational explanation for Peron's failure simply to write or telephone Stoody. Moreover, the act was severly detrimental to a strong individual interest; had Stoody been notified, Galindo would probably not have been laid off. See Dutrisac, 749 F.2d at 1274 (finding breach of duty of fair representation where union failed to pursue a meritorious grievance); Tenorio v. NLRB, 680 F.2d 598, 602 (9th Cir. 1982)(finding breach of duty of air representation where union rejected grievance without hearing employees' explanation of facts leading to their discharge).

The Union has never presented any factual material that it exercised any judgement not to pursue Sieu Mei's claim of unlawful dicriminatory discharge. It's

failure to do so was purely procedural or ministerial demonstrating a reckless disregard for the rights of the individual, Sieu Mei Tu, and falling squarely within the authority of Peterson v. Kennedy, 771 F.2d 1244, (9thCir. 1985), cert. denied, 475 U.S. 1122 (1986).

The authority of Peterson, supra was considered by the District Court (DEN 130 page 7). The District Court recognized it had the duty to determine whether the act in question involved the union's judgment or whether it was "procedural or ministerial." (DEN 130 page 4). The District Court misconstrued whether there was any evidence before the court presenting an issue of whether the failure to act in question involved the union's judgment or was procedural or ministerial. There was evidence before that court that the failure to act was not judgmental but was procedural or ministerial presenting a material question of fact to be determined by a jury and not on motion for summary judgment.

The Union cited Peterson, supra in its motion brief before the District Court (DEN 122 pages 3, 5, 6, 21) and conceded that the court was required to determine whether the acts complained of required judgment on the part of the Union or was procedural or ministerial.

(C) THE ISSUE AS TO THE UNION DEFENDANTS IS AND ALWAYS HAS BEEN WHETHER A MATERIAL ISSUE OF FACT EXISTS AS TO WHETHER THE UNIONS CONDUCT FALLS WITHIN THE LAW ESTABLISHED BY VACA V. SIPES, 386 U.S. 171 (1967). NEITHER SINGLETON V. WULFF, 428 U.S. 106 (1976) NOR GREATER LOS ANGELES COUNCIL ON DEAFNESS, INC. V. ZOLIN, 812 F.2D 1103 (9TH Cir. 1987) ARE APPLICABLE HEREIN

Consistently since the filing of the First Amended Complaint and through two motions for summary judgment, plaintiffs' have argued that the Union under the facts of this case have failed to fairly represent Sieu Mei Tu and that this failure falls within the authority established in Vaca v. Sipes, supra. (DEN 125 page 2; ER 1135-1137; DEN 105 page 5; ER 911-912; ER 877-879.) The facts concerning the Union's conduct as being unfair representation have likewise been before the court since the Union's appearance.

Defendant urges the application of Singleton v. Wulff, supra to this matter.* Neither it nor Greater Los Angeles v. Zolin, supra. are applicable here because all of the facts argued here were before the District Court and the District Court itself recognized if the evidence presented showed a triable issue of fact as to the action of the union being ministerial or procedural, summary judgment could not be granted, and if the evidence presented showed a triable

*The Union further argues that the plaintiff enmeshed the federal courts in her labor dispute before the Union had exhausted the contractual remedies. This completely flies in the face of the facts that plaintiff initiated her action in the state court, solely on state court causes of action and left to the Union the pursuit of her federal causes of action when the Union assured her that it was in fact progressing her claims of discrimination under the collective bargaining agreement. It was the defendants tnat brought plaintiffs into the Federal Courts over the plaintiffs objections. It was only after the Union failed to fairly represent her, and the arbitration process had terminated that she amended her complaint to spell out her federal causes of action (DEN 1 and DEN 38). See Woolley v. Eastern Airlines, 250 F2 86 (CA Fla 1957); cert. denied 356 U.S. 931.

issue of fact that the union made a judgmental call for a bad motive, or in bad faith, or arbitrarily, summary judgment should also not be granted.

In Del Costello v. International Brotherhood of Teamsters, 462 U.S. 151, at 164 n. 14, 103 S. Ct. at 2290 n. 14 the Supreme Court stated:

> "The duty of fair representation exists because it is the policy of the National Labor Relations Act to allow a single labor organization to represent collectively the interests of all employees within a unit, thereby depriving individuals in the unit of the ability to bargain individually or to select a minority union as their representative. In such a system, if individual employees are not to be deprived of all effective means of protecting their own interests, it must be the duty of the representative organization to "serve the interests of all members without hostility or discrimination toward any, to exercise it discretion with complete good faith and honesty, and to avoid arbitrary conduct."

In Peterson, supra, at 1253 this court stated:

> "Whether in a particular case a union's conduct is "negligent", and therefore nonactionable, or so egregious as to be "arbitrary", and hence sufficient to give rise to a breach of duty claim, is a question that is not always easily answered. A union acts "arbitrarily" when it simply ignores a meritorious grievance or handles it in a perfunctory manner, see Vaca v. Sipes, 386 U.S. at 191, 87 S.Ct. at 917, for example, by failing to conduct a "minimal investigation" of a grievance that is brought to its attention. See Tenorio v. National Labor Relations Board, 680 F.2d 598, 601 (9th Cir. 1982). We have said that a union's conduct is "arbitrary" if it is "without rational basis," see Gregg v. Chauffeurs, Teamsters and Helpers Union Local 150, 699 F.2d 1015, 1016 (9th Cir. 1983), or is "egregious, unfair and unre-

lated to legitimate union interests." See Johnson v. United States Postal Service, 756 F.2d 1461, 1465 (9th Cir.1985). In Robesky v. Qantas Empire Airways Ltd., 573 F.2d 1082, 1089-90 (9th Cir.1978), we held that a union's unintentional mistake is "arbitrary " if it reflects a "reckless disregard" for the rights of the individual employee, but not if it represents only "simple negligence violating the tort standard of due care." In Dutrisac v. Caterpillar Tractor Co., 749 F.2d 1270, 1274 (9th Cir.1983), we concluded that unintentional union conduct may constitute a breach of the duty of fair representation in situations where "the individual interest at stake is strong and the union's failure to perform a ministerial act completely extinguishes the employee's right to pursue his claim."

There are some significant general principles that emerge from our previous decisions. In all cases in which we found a breach of the duty of fair representation based on a union's arbitrary conduct, it is clear that the union failed to perform a procedural or ministerial act, that the act in question did not require the exercise of judgment and there was no rational and proper basis for the union's conduct. For example, we found a union acted arbitrarily where it failed to: (1) disclose to an employee its decision not to submit her grievance to arbitration when the employee was attempting to determine whether to accept or reject a settlement offer from her employer, see Robesky, 573 F.2d at 1091; (2) file a timely grievance after it had decided that the grievance was meritorious and should be filed, see Dutrisac, 749 F2d at 1274; (3) consider individually the grievances of particular employees where the factual and legal differences among them were significant, see Gregg, 699 F.2d at 1016; or (4) permit employees to explain the events which led to their discharge before deciding not to submit their grievances to arbitration. See Tenorio, 680 F.2d at 601)."

In Castanedo v. Dura-Vent Corp. 648 F. 2d 612 (9thCir. 1980) this court stated at 618:

> "After reviewing the record, we agree with the district court that appellants have not made a showing that they exhausted the contractual grievance procedures. However, appellants really do not contend to the contrary. They contend that their efforts to obtain the Union's assistance in processing their grievances were repeatedly ignored and, because of the lack of Union support, many employees were fearful of retaliatory discharges if they complained. Their main thrust on appeal is that the Union breached its duty of fair representation in handling and processing their grievances. And, as to this issue, we agree with the appellants that summary judgment was not appropriate."

In the instant matter, the union did not do the simple act of calling up the plaintiffs attorney to find out what her beef was, or to let the arbitrator know that as to Sieu Mei's claim her seniority date preceded March 16, 1963, so that the decline in business provision of the contract did not apply to her, or when learning that she had not been reemployed initiating a claim on her behalf for retaliatory discrimination. There was a complete failure by the union to act, without any judgment on its part not to act, so that its conduct was completely arbitrary causing plaintiff to loose the benefits earned after twenty three plus years of service to her employer and twenty three plus years of membership and paying dues to her union.

III

THE ATSF DEFENDANTS

(A) THE LOWER COURT CONTRARY TO LAW DISMISSED DEFENDANTS ATCHISON, TOPEKA, SANTA FE RAILROAD COMPANY AND SANTA FE SOUTHERN PACIFIC CORP. UNDER RULE 4 (j) RULES OF FEDERAL PROCEDURE

The docket of the instant matter (ER* 1150) demonstrates the following time sequence:

March 20, 1987 (DEN 1) case removed to Federal Court
October 15, 1987 Summons issued
July 20, 1987 (DEN 16) Plaintiff moves to remand to state court
October 9, 1987 (DEN 24) Motion to remand denied
October 15, 1897 Summons issued
November 2, 1987, (DEN Exhibits A and B) copies of the Summons and Complaint mailed to ATSF* defendants
December 8, 1987, (DEN 40 Exhibits A and B) Defendants ATSF acknowledge receipt of Summons and Complaint
December 24, 1987 (DEN 25) Answer filed by Atchison, Topeka, Santa Fe Railroad Company and Santa Fe Southern Pacific Corp.(ATSF)
April 29, 1988 (DEN 28) First Amended Complaint filed and served by mail on ATSF.
May 19, 1988 (DEN 39) ATSF Motion to Dismiss Complaint
June 30, 1988 (DEN 51) Motion granted

Thereafter all Plaintiffs pleadings were served on ATSF by service by mail to their attorneys of record, pursuant to Rule 5. No motion was ever made by ATSF to dismiss the First Amended Complaint or the Second Amended Complaint.

(B) THE FIRST AMENDED COMPLAINT WAS PROPERLY SERVED ON THE ATSF DEFENDANTS

The First Amended Complaint was served on the ATSF Defendants by mail pursuant to Rule 5 (b) on April 29, 1988. The order of the court of June 30, 1988, does not dismiss these defendants on the First Amended Complaint. Therefore these defendants remained of record in the matter not withstanding the court order of June 30, 1988.

(C) THE TRIAL COURT SPECIFICALLY GRANTED PLAINTIFFS LEAVE TO FILE A FIRST AMENDED COMPLAINT

The trial court by its order of April 6, 1988, specifically authorized leave for Plaintiffs to amend and file its amended complaint. The order (DEN 36) specifically states:

> "Defendants motion to dismiss is GRANTED; plaintiffs are GRANTED leave to amend the complaint to state a federal cause of action; amendment must be filed with 30 days."

Thus defendants argument that amendment was made without leave of court is without merit. These defendants chose not to move for dismissal of the First Amended Complaint under Rule 4(j) which would have been a frivolous act since the First Amended Complaint had been properly served, but limited their motion only to dismissal of the <u>original complaint</u>, at a time (May 19, 1988 DEN 39) when the original complaint had already been dismissed (April 6, 1988 DEN 35), and a First Amended Complaint been served and filed (April 29, 1988 DEN 38).

(D) IT WAS ABUSE OF DISCRETION TO APPLY RULE 4 (J)

When a named party defendant answers the complaint voluntarily, service of summons is an idle act which the law abhors. An answer is a authorized pleading (Rule 7). Here also service was effected on two defendants, Southern Pacific Transportation Company and Pacific Fruit Express (SP), before removal. The 1988 Practice Commentary C-4-35 points out that in removed cases the Rule 4 120 day provision does not apply but Rule 81 (c), would be applicable, requiring a defendant to plead 20 days after the receipt of a copy of the initial complaint. ATSF was mailed a copy of the original complaint on November 2, 1987 and accepted service on December 8, 1987 (DEN 40 Exhibits A and B; DEN 45 page 8 lines 11-14). Defendants ATSF accepted service of the complaint and answered without raising any issue of 120 day service, evidencing lack of prejudice to these defendants, and waiver of the issue of the application of Rule 4 (j).

(E) IF RULE 4 (j) WERE POSSIBLY APPLICABLE THE LOWER COURT SHOULD NOT HAVE APPLIED 4(j) AS PLAINTIFFS SHOWED GOOD CAUSE AND/OR UNDER Rule 6 (b)(2) EXCUSABLE NEGLECT. TO HAVE DISMISSED WAS AN ABUSE OF DISCRETION

Rule 4(j) provides in its pertinent parts:

> "If a service of the summons and complaint is not made upon a defendant within 120 days after the filing of the complaint <u>and</u> the party on whose behalf such service was required cannot show <u>good cause</u> why such service was not made within that period, the action shall be dismissed as to that defendant without prejudice...." (emphasis added).

Rule 6(b)(2) provides:

> When by these rules... an act is required... within a specified time, the court for cause shown may at any time in its discretion... permit the act to be done where the failure to act was the result of excusable neglect...."

Here the action originated in the State Court. (DEN 1) The removal to the Federal Court was not proper. Plaintiffs had filed in the state court, a complaint which they believed was a well pled complaint of actions all triable in the state court, and not necessarily implicating the collective bargaining agreement. At the time of that filing, the statute of limitations for action by the Union had not expired, Plaintiffs were told by Defendants that Union was pursuing Plaintiff Sieu Mei Tu's claims under the collective bargaining agreement, so Plaintiff had good cause to believe that it was not necessary for her to pursue her collective bargaining rights in the Federal system, but recognized that as to her state law causes of action it was necessary to move forward with the filing of her complaint. Furthermore Defendants SP, subsidiaries of Defendants ATSF, through their counsel, requested Plaintiffs not to serve the other defendants inorder to facilitate early settlement of this matter (DEN 45 attached declaration).

Pursuit of the objective of settlement rather

than trial appeared to Plaintiffs to be a worthy objective. Plaintiffs' reliance on such a representation was good cause for not serving the other defendants. When it became apparent that there would be no good faith meaningful settlement discussions, and the case would not be remanded to the state court Plaintiffs served the other defendants.

Until the lower court ruled that the matter was properly removed to the Federal Court Plaintiff had good cause to believe that the matter would be remanded to the State Court, and thus good cause to believe that Rule 4(j) would be inapplicable to this action.

Since California permits the service of summons within three years of issuance (CCP 583.210) Rule 4(j) was not applicable under the holding of Russo v. Prudential Ins. Co., 116 FRD 10, (E.D. Pa., 1986).

A defendant may waive and be estopped any application of Rule 4(j). See United States v. Gluklick, 801 F2d 834 (CA6 1986). In this proceeding ATSF answered the complaint without raising the Rule 4(j) objection thus waiving any procedural issue.

At the time of the filing of the original complaint all non rail activities of the railroad defendants were merged into ATSF (Kraus v. Santa Fe Southern Pacific Corp, 878 F2d 1193 at 1195 (9th Cir. 1989) so that SP'S request not to serve the other defendants was in fact the request of ATSF.

The lower court abused its discretion by dismissing ATSF defendants under the circumstances.

Defendants argument that the filing of an amended complaint can not overcome the effect of a Rule 4(j) dismissal (Brief of Defendants/Appellees Atchison, Topeka and Santa Fe Railway Co. and Santa Fe Southern Corp page 17) completely ignores that the rule itself provides that a dismissal pursuant to its terms is without prejudice.

(F) THE ICC DETERMINED THAT IT HAD NO JURISDICTION TO IMPOSE EMPLOYEE PROTECTION PROVISIONS TO THE SUBJECT MERGER, BECAUSE THEIR JURISDICTION ONLY EXISTED IF THEY APPROVED THE MERGER, AND HERE THEY DENIED THE MERGER

Excerpt of Record 1126 is the ICC decision concerning the imposition of Employee Protection Provisions to the subject merger. It specifically states:

> "Based upon the comments and replies filed and upon further consideration, we conclude that we do not have authority to impose labor protection as a condition to our action disapproving a merger proposal. Section 11347 speaks in terms of approved transactions....
> Persons injured by a carrier violating the Act or an order of the Commission may file suit, and the carrier is liable for the damages sustained as a result of those violations. 49 U.S.C. 11705."

Thus defendants argument that plaintiffs' conspiracy claim must first be decided by the ICC (Brief of ATSF page 18-21) is without merit. This Court in Kraus, supra has ruled that a injured plaintiff can pursue their state court cause of action for interference with advantageous relationship even though the ICC had not determined the application of 49 USCA

§10101 et seq. This court held that 49 USCA 10101 et seq. does not preempt state law claims.

Plaintiffs' conspiracy claim is a state law cause of action which plaintiff is entitled to pursue pursuant to Kraus, supra and is not pre empted by the ICA.

(G) THE TRIAL COURTS ORDER OF JUNE 30, 1988, IN SO FAR AS IT DEALS WITH THE DISMISSAL OF DEFENDANTS SANTA FE AND RAILROAD FROM ALL CAUSES OF ACTION (DEN 51 PAGE 4 PARAGRAPH 6) MAKES REFERENCE ONLY TO PLAINTIFFS COMPLAINT AND ITS SERVICE. IT DOES NOT ADDRESS THE FACT THAT A FIRST AMENDED COMPLAINT HAD BEEN SERVED AND FILED

The trial courts order of June 30, 1988, in so far as it dealt with the dismissal of the ATSF defendants from all causes of action makes reference only to Plaintiffs' complaint and its service, but did not address the fact that a First Amended Complaint had been served and filed, after the original complaint had been dismissed on grounds other than the application of Rule 4 (j) and before Defendants motion to dismiss the complaint (not the First Amended Complaint) under Rule 4(j). (DEN 51 page 4 paragraph 6).

(H) DEFENDANTS REQUEST FOR SANCTIONS IS UNSUPPORTED BY THE RECORD

Defendants request for sanctions based upon a charge of frivolous appeal, misstatement of record and vexatiously multiplying these proceedings is totally unsupported by the record. The record is scrupulously documented in Plaintiffs brief (page 11) as to what transpired (ER 251). at the cited hearing.

The appeal is meritorious and necessary so as to achieve justice for an injured person, who has been wronged by each of the defendants.

IV

CONCLUSION

It is respectfully submitted that applying the required standard on appeal that all possible inferences from the record must be drawn in favor of the non-moving party (Gee v. Tenneco, Inc., 615 F.2d 857, 859 (9th Cir.1980); Dolphin Tours v. Pacific Creative Services, 773 F.2d 1506, 1509 (9th Cir.1985) considering all of the declarations, pleadings, depositions, admissions, answers to interrogatories it is shown that there are genuine issues for trial and summary judgment should not have been granted as to any defendant nor should plaintiffs state causes of action have been dismissed. This matter should be remanded for trial to the state court, and if not there to the District Court.

The SP defendants and the ATSF defendants for the clear purpose of avoiding their responsibilities to their employees and the Unions stubborn failure to look at Plaintiffs individual rights, have caused plaintiff great harm. Equity cries out that Sieu Mei Tu be treated justly.

August 6, 1990

Respectfully submitted,
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