UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
219 SOUTH DEARBORN STREET
CHICAGO, ILLINOIS 60604

CHAMBERS OF
MORTON DENLOW
MAGISTRATE JUDGE

(312) 435-5856



August 4, 2000

00-CV-F

Mr. Peter McCabe
Administrative Office of the United States Courts
One Columbus Circle, NE
Washington, D.C. 20544

Re: Trial on the Papers

Dear Mr. McCabe,

At the suggestion of Magistrate Judge John Carroll, I am writing to offer a suggested rule change to the Federal Rules of Civil Procedure. The basis of the suggestion is a clarification of the option for judges of what I call a "trial on the papers" or what some courts have referred to as a "case stated." This is a little known and seldom used procedure that has been developed by federal case law. A trial on the papers allows a judge to engage in fact-finding in making a decision on a paper record submitted in a nonjury case in which legal issues predominate. Trial on the papers is a useful alternative to cross-motions for summary judgment because there is always a decision and there is never a reason for a remand after appeal.

My enclosed article, entitled *Trial on the Papers · An Alternative to Cross-Motions for Summary Judgment,* points out the pros and cons of this procedure and the appropriate circumstances in which it should be considered. I have also enclosed several cases which have recognized this procedure. I believe a rule amendment is necessary to alert lawyers and judges to the existence and utility of this procedure.

Suggested language to amend Rule 39(b) is as follows:

Rule 39 (b): Add the following after the last sentence:

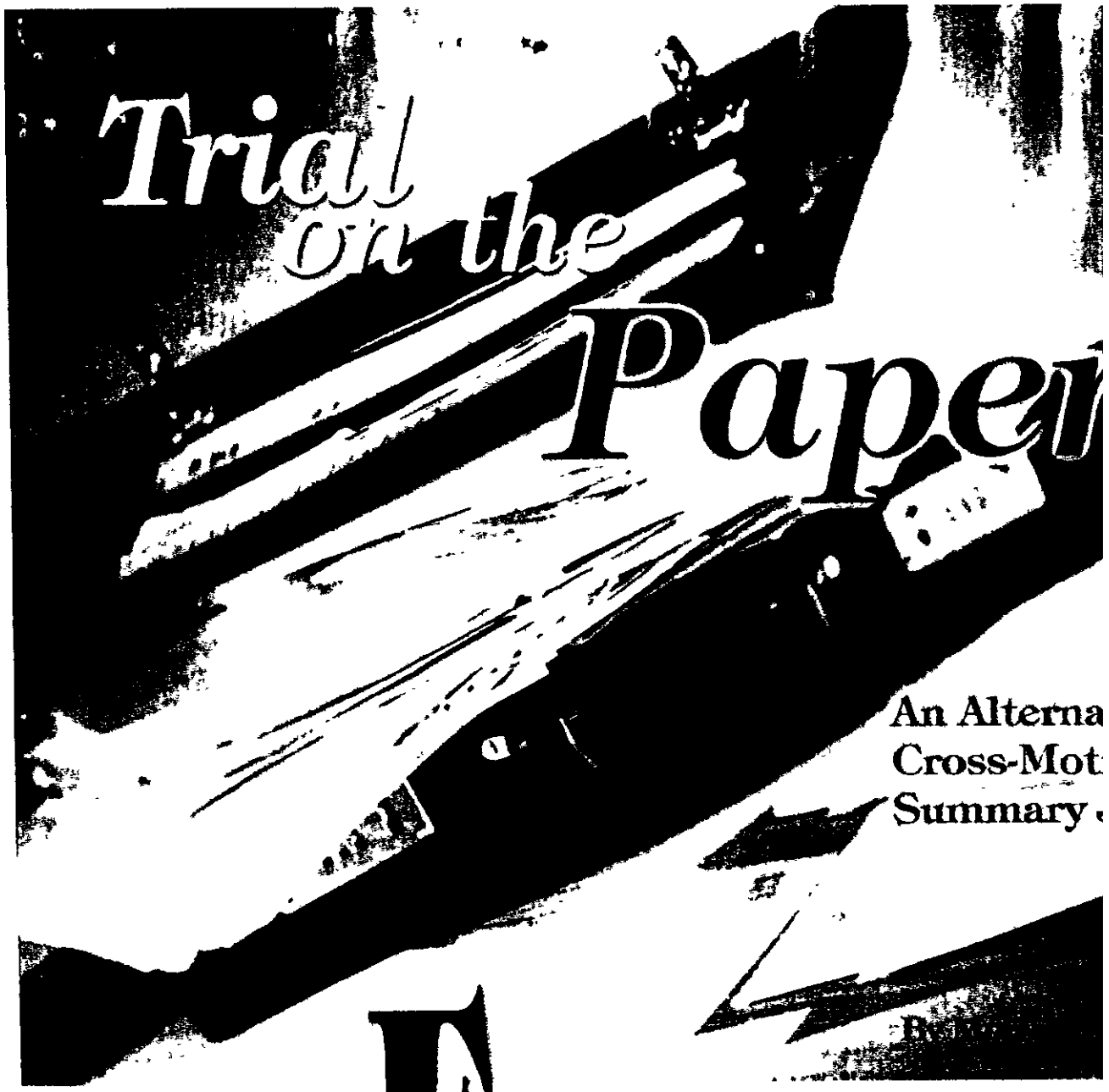
> Upon consent of all parties, in nonjury cases, the court may conduct a trial on the papers and enter findings of fact and conclusions of law in accordance with Rule 52(a) based upon the paper record.

I look forward to discussing this with you at your earliest convenience.

Regards,

Morton Denlow
United States Magistrate Judge

cc: Chief Magistrate Judge John Carroll



# Trial on the Paper

## An Alterna
## Cross-Mot
## Summary

For many judges, the thought of cross-mo
summary judgment is unpleasant if not downright painfu
jures up a stack of documents that could fill the bed of a
truck; the procedure can involve up to two briefs in suppo
motions for summary judgment, two response briefs, and t
briefs, for a total of six briefs to read by the judge and law
the Northern District of Illinois, it also includes tv

Rule 12(M) Statements of Material Facts and two Local Rule 12(N) Responses to the Local Rule 12(M) Statements of Material Facts.[1] If the case entails administrative review, there is also an administrative record. Preparing summary judgment is a burden for lawyers and expensive for clients. With all this effort and expense, one would expect a decision disposing of the case. However, this result does not always follow. The fact that both parties are simultaneously arguing that there is no genuine issue of material fact does not necessarily make it so.[2]

The standard for summary judgment requires the facts to be viewed in the light most favorable to the nonmoving party. Summary judgment may be granted only when there is no "genuine issue as to any material fact." This standard presents a major problem with cross-motions for summary judgment. Although the parties and the court may invest substantial time and effort, cross-motions for summary judgment can both be denied. As a result, the litigation may not be advanced and the work put in by the lawyers and the court may be largely wasted.[3]

Courts sometimes remedy this situation by conducting a "trial on the papers," based on the summary judgment record, where the court draws inferences, applies the preponderance-of-the-evidence standard, and decides the case. For example, *United States v Gears* involved an action brought by the United States to recover the cost of the defendant's education at the Naval Academy.[4] The court denied cross-motions for summary judgment, finding varying inferences permissible from largely undisputed facts. Thereafter, the parties agreed to submit the case for decision on the summary judgment record, with supplemental briefing. Consequently, the court made its findings in accordance with Fed. R. Civ. P. 52(a) and entered judgment. By doing so, the court was able to salvage much of the work expended in the cross-motions for summary judgment. However, this remedy was only partial because of the duplication of effort required in supplemental briefing and a second decision.

## *The Alternative*

### Trials on the Papers

So what is the alternative to cross-motions for summary judgment? How is it possible to avoid a nondecision or a second proceeding and move directly to a final decision? The answer is trial on the papers. When the parties agree that the papers contain all the necessary materials for a decision and the court can draw inferences from the papers, a trial on the papers results in a decision on the merits. One court observed that "[t]here is no reason why parties cannot agree to try certain issues on the merits and if the parties have done so, [the court] properly may treat such proceeding as a trial on those issues even though cast in the form of a motion for summary judgment."[5]

Although recognized by courts and scholars, this tool is not widely used. In *Acuff-Rose Music Inc v. Jostens Inc*, the Second Circuit held that if the parties so stipulate, a court may conduct a bench trial on the record compiled in summary judgment proceedings.[6] The court emphasized that the parties must clearly waive their respective rights to a full trial and the decision must be rendered under Rule 52(a) rather than Rule 56. Because the parties agreed to submit the case on a paper record and expressly waived their right to a full trial, the court reviewed the district judge's decision pursuant to the clearly erroneous trial standard, not the de novo summary judgment standard.

**The standard for summary judgment requires the facts to be viewed in the light most favorable to the nonmoving party.**

Scholars have also noted the option of using this procedure. Professor Charles Alan Wright remarked:

> that when the court is ruling on cross-motions, the facts sometimes become fully developed at the hearing on the motions. When this occurs in a nonjury case the court may proceed to decide the factual issues and render a judgment on the merits without any further delay if it is clear that there is nothing else to be offered by the parties and there is no prejudice in proceeding in this fashion. As a practical matter, of course, this procedure amounts to a trial of the action and technically is not a disposition by summary judgment.[7]

### Advantages

Parties and the court gain several advantages from the use of a trial on the papers, as compared with cross-motions for summary judgment. As the court observed in *May v. Evansville-Vanderburgh*:

> [S]ometimes both parties move for summary judgment because they do not want to bear the expense of trial but instead want the trial judge to treat the record of the summary judgment proceeding as if it were the trial record. In effect the judge is asked to decide the case as if there had been a bench trial in which the evidence was the depositions and other materials gathered in pretrial discovery.[8]

First, a trial on the papers results in a decision in favor of a party rather than a possible nondecision. Given the crowded dockets facing most judges, it is preferable to devote one's time to a process that

will generate a resolution. In a trial on the papers, the court's energies are directed to deciding the case in favor of a party, even where a fact question exists

Second, a trial on the papers is less expensive because there is no need for preparing and presenting live witnesses, or a second round of briefing or hearings. Sometimes the amounts in dispute do not warrant the expense of bringing in witnesses from out of town. In those circumstances, parties may be willing to forego live testimony and instead rely upon depositions or affidavits. This is particularly appropriate when the issue of witness credibility does not stand at the heart of the dispute. For example, in *May v. Evansville-Vanderburgh*, the issues in dispute involved the scope of the First Amendment free speech clause, and the factual record was adequately developed without live witness testimony. Although the case was presented on the basis of cross-motions for summary judgment, the appeals court concluded that the parties had in effect asked the trial judge to decide the case as a trial on the papers.

Third, a trial on the papers helps those involved avoid scheduling problems. Because the court is able to consider the papers at its convenience, the procedure avoids the logistical issue of assembling counsel and witnesses for trial. This can result in an earlier ruling because the court, the attorneys, and the parties need not block out trial time

Fourth, a trial on the papers should result in fewer appeals because a deferential standard of review applies. One reason for the abundance of appeals from grants of summary judgment is the *de novo* standard of review.[9] On the other hand, the clearly erroneous standard of review applies to trial on the papers. It is easier to establish that a question of fact exists than to establish that a court clearly erred. Because the chances of reversal are lower, parties will be less likely to appeal a decision arising out of a trial on the papers.

Finally, appeals from trials on the papers should not result in remands for trial. At the appellate level, when a grant of summary judgment is reversed, the case returns to square one in the trial court.[10] On the other hand, if a trial on the papers decision is reversed, the appellate court should direct a final judgment for the appealing party because the entire record is before it.[11] Consequently, the use of a trial on the papers should lead to a final resolution on appeal and no trials on remand.

## Disadvantages

Trials on the papers are not without possible disadvantages. First, a trial on the papers requires a party to waive its right to present live testimony In an instance when a credibility determination is at the heart of the case, a waiver of the right to bring in live witnesses does not make sense A decision maker, be it a judge or a jury, can best decide credibility by seeing the witness

Second, a trial on the papers requires the parties to waive their respective rights to jury trial A jury trial has the potential of providing a tactical advantage to one party over the other. One of these tactical advantages, for example, might be raising the specter of a large damage award. When a party waives its right to a jury trial by proceeding with trial on the papers, any possible tactical advantage created by a jury trial is lost.

Third, a trial on the papers can result in problems in creating a record. Reliance on depositions and other documents in a trial on the papers leaves open the question of when and how objections will be made and decided. In a normal trial, a court reporter immediately records all objections and rulings. If, in a trial on the papers, the parties intend for the court to rule on objections to deposition questions or to documents, the record could become difficult to perfect and preserve. If significant objections to the paper record are expected, a paper trial would not be in order. An agreed record makes for the best type of trial on the papers.

## Procedures

The court may not institute a trial on the papers on its own motion. When faced with cross-motions for summary judgment, the court must remain faithful to the summary judgment standards and procedures. Summary judgment is proper only when the evidence shows "that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law "[12] Cross-motions for summary judgment do not change the standard.[13]

The court should remain alert for parties who are considering filing cross-motions for summary judgment. At status or scheduling conferences, the court should regularly inquire as to the parties' intentions regarding settlement, trial, or possible dispositive motions. If the parties raise the prospect of cross-motions for summary judgment, the court should raise the trial on the papers alternative and ask the parties to consider whether it has utility for the case. Review of the advantages and disadvantages may cause parties to opt for a trial on the papers. This discussion should take place before a motion for summary judgment is filed.

Parties must consent to a trial on the papers and waive their right to a jury trial. However, the filing of cross-motions for summary judgment is not sufficient to demonstrate the consent of the parties. As one commentator has observed

> [C]ourts sometimes are faced with cross-motions for summary judgment. The fact that both parties simultaneously are arguing that there is no genuine issue of fact, however, does not establish that a trial is unnecessary thereby empowering the court to enter judgment as it sees fit. ... In short, the mere fact that both parties seek summary judgment does not constitute a waiver of a full trial or the right to have the case presented to a jury [14]

If the parties desire to proceed with a trial on the papers, the parties should clearly stipulate on the record, preferably in writing, that they have foregone their right to a full trial.[15] Such waiver must be explicit.[16] In addition, consent may also be shown by acquiescence in a procedure of "submission on the merits of the claim of plaintiff," where the parties agree to try a case "upon affidavits, admissions and agreed documents."[17] The court should make clear to the parties that the decision will be rendered under Federal Rule of Civil Procedure 52(a) rather than Rule 56, and the court will be deciding fact questions, if any. This will avoid a later complaint by the losing party that although it believed that it was entitled to prevail as a matter of law, it did not expect the court to make factual determinations.

Finally, following the consent of the parties and after moving to a trial on the papers, the court is required to enter findings and conclusions in accordance with Federal Rule of Civil Procedure 52(a) ("In all actions tried upon the facts without a jury ..., the court shall find the facts specially and state separately its conclusions of law thereon .."). Therefore, in proceeding with a trial on the papers, the parties should be requested to submit proposed findings of fact with page references to the record and conclusions of law These submissions along with a closing argument should be sufficient to decide the case.

## *Types of Cases in Which a Trial on the Papers Should Be Considered*

Trials with live witnesses should not be discouraged. However, when the parties are contemplating cross-motions for summary judgment, there are several types of cases in which it would benefit courts, parties, and attorneys to consider trials on the papers.

### Administrative Review

A trial on the papers is appropriate in cases involving administrative proceedings in which the court undertakes a *de novo* review. In such cases, there has been an administrative hearing that has produced a complete record. As a result, the district court decides the case based on the administrative record For example, cases under the Individuals with Disabilities Education Act (IDEA) fall into this category [18] In cases under the IDEA, the district court makes a preponderance-of-the-evidence determination based on the administrative record and other evidence it may receive A trial on the papers is appropriate in this type of administrative review if the parties elect not to call live witnesses However, a trial on the papers should not be used after cross-motions for summary judgment in administrative cases but *instead of* cross-motions for summary judgment.

### Avoiding Expense of Trial With Live Witnesses

The second category of cases in which a trial on the papers may be beneficial includes cases in which the parties seek to hold down trial expenses. For instance, the dollar amount at stake may be so little that it would be far outweighed by the expense of trial. A trial on the papers would give parties a viable option to present their case. For instance, in *Barlow v Evans*, the plaintiff brought a case as a class action.[19] At issue was the legality under the Truth in Lending Act of a $500 loan one plaintiff obtained from the defendant pawnbroker and secured by the plaintiff's 12-year-old car. With $500 at issue in the case, it may not have been financially beneficial for the plaintiff to fund a trial. The parties brought cross-motions for summary judgment which were granted in part and denied in part on the grounds that there were material fact questions to be decided by the jury Because such a small amount was at stake and there was the possibility that the class would not be certified, it could possibly have benefitted the parties financially if the court could have quickly brought the case to final resolution with a trial on the papers. A trial on the papers provides parties with an opportunity to receive a decision on the merits when cost considerations may otherwise prevent a trial with live witnesses.

**A trial on the papers is appropriate in cases involving administrative proceedings in which the court undertakes a *de novo* review.**

**A trial on the papers provides parties with an opportunity to receive a decision on the merits when cost considerations may otherwise prevent a trial with live witnesses.**

### Legal Issues Predominate

A trial on the papers may also make sense in cases in which legal issues predominate. A good example of this type of case is *Schlytter v Baker*, which involved the legality of a statute [20] The court re-emphasized the general rule requiring the denial of cross-motions for summary judgment if a genuine factual dispute exists regarding a material issue. However, the court went on to state that the fact of cross-motions may be probative of the nonexistence of a factual dispute when, as here, they demonstrate a basic agreement concerning what legal theories and material facts are dispositive Because both parties were arguing over the constitutionality of a statute on its face, the issue was primarily legal. When legal issues predominate, the time and expense of a jury trial can be avoided A trial on the papers enables the parties to obtain a

prompt decision on the disputed question of law

Where legal issues predominate, a limited trial on a disputed factual issue can be conducted in conjunction with a trial on the papers. The parties can agree to limit the live testimony while submitting the remainder of their case on the papers This is preferable to cross-motions for summary judgment because it avoids a possible nondecision.

## *Increasing the Use of Trials on the Papers*

Although a trial on the papers is recognized, it is infrequently used. How can lawyers and judges be encouraged to consider the procedure as an alternative to cross-motions for summary judgment, or in other appropriate circumstances? Courts and attorneys must be open to the procedure. Openness requires increased awareness of the procedure and an understanding of its advantages and disadvantages. The Federal Rules of Civil Procedure should be amended to deal explicitly with a trial on the papers. As it stands, Rule 52 states that "[i]n all actions tried upon the facts without a jury . . the court shall find the facts specially and state separately its conclusions of law thereon. .." The rule also goes on to state that "[f]indings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous. ..." Thus, Rule 52(a) contemplates a bench trial based only on documentary evidence. However, further clarification would be helpful Judges and lawyers would then be informed that this option is consistent with and sanctioned by the Federal Rules of Civil Procedure. That information will result in fewer cross-motions for summary judgment.

## *Conclusion*

Cross-motions for summary judgment can lead to a tremendous waste when they are denied. A trial on the papers is a useful alternative. It offers the advantage of a final decision at less cost. Courts should encourage the use of trial on the papers in appropriate cases to avoid the problems inherent in cross-motions for summary judgment The Federal Rules of Civil Procedure should be amended to clarify and encourage this practice. ■

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*Judge Morton Denlow is a U.S magistrate judge in the Northern District of Illinois. Judge Denlow expresses his thanks to his current law clerk, Faith E. Bugel, J D. Northwestern University Law School, 1998, for her valuable assistance in preparing this article.*

***Endnotes***

[1]N.D. Ill. Gen. R. 12(M) and 12(N).

[2]*See, e g , Berkshire Life Ins. Co. v. Owens*, 910 F Supp. 132 (S.D N.Y. 1996), *Ehrlich v Nynex Corp* , 949 F Supp. 213 (S.D.N.Y. 1996); *Gerrish Corp v. Aetna Casualty and Surety Co* , 949 F. Supp 236 (D Vt 1996); *Gonnuscio v Seahrand Shipping Ltd* , 968 F. Supp. 524 (D. Or. 1997); *The Rouse Co. v Federal Insurance Co.*, 991 F Supp 460 (D. Md. 1998).

[3]*See, e g., NBASE Communications Inc. v American Nat'l Bank & Trust*, 8 F. Supp. 2d 1071, 1078 (N.D. Ill. 1998).

[4]835 F. Supp. 1093 (N.D Ind 1993).

[5]*See Nielsen v. Western Elec. Co.*, 603 F.2d 741, 743 (8th Cir. 1979).

[6]*See Acuff-Rose Music Inc. v Jostens Inc.*, 155 F.3d 140, 142 (2d Cir. 1998); *May v. Evansville-Vanderburgh Sch. Corp.*, 787 F.2d 1105, 1115-16 (7th Cir. 1986); *Nielsen v. Western Elec. Co.*, 603 F 2d 741, 742 (8th Cir. 1979) (not a full trial on the papers because a witness was called); *Starsky v. Williams*, 512 F.2d 109, 112-13 (9th Cir. 1975).

[7]10A Charles Alan Wright et al., Federal Practice and Procedure § 2720 (3d ed. 1998) (footnotes omitted). *See also* William W. Schwarzer, et al., The Analysis and Decision of Summary Judgment Motions 39-40 (1991) ("A court may determine that a full trial would add nothing to the paper record and, after proper notice, decide a case on that record, making a decision on a trial without witnesses rather than on summary judgment.")

[8]787 F 2d 1105, 1115 (7th Cir. 1986).

[9]*See, e g., Huntzinger v. Hastings Mut. Ins. Co.*, 143 F.3d 302, 306 (7th Cir 1998).

[10]*See, e g., Ford Motor Company v. United States*, 157 F 3d 849 (Fed. Cir. 1998); *Glass v. Dachel*, 2 F.3d 733 (7th Cir 1993).

[11]*But see Banque Franco-Hellenique de Commerce v. Christophides*, 106 F.3d 22 (2d Cir. 1997)

[12]Fed. R. Civ. P 56(c)

[13]*Huntzinger*, 143 F.3d at 306-07. *See also Taft Broad. Co. v. United States*, 929 F.2d 240, 248 (6th Cir. 1991)

[14]10A Charles Alan Wright et al., Federal Practice and Procedure § 2720 (3d ed. 1998). *See also Miller v. LeSea Broadcasting Inc.*, 87 F.3d 224, 230 (7th Cir. 1996).

[15]*Acuff-Rose Music Inc. v. Jostens Inc* , 155 F.3d 140, 142-3 (2nd Cir. 1998). *See also Market Street Assoc. Ltd. Partnership v. Frey*, 941 F.2d 588, 590 (7th Cir. 1991).

[16]*Miller*, 87 F.3d at 230.

[17]*Gillespie v. Norris*, 231 F.2d 881, 883-84 (9th Cir. 1956).

[18]*See, e g , Heather S. v. Wisconsin*, 125 F.3d 1045, 1052 (7th Cir. 1997). *See also Board of Educ. of Oak Park v Illinois State Bd. of Educ.*, 21 F. Supp. 2d 862, 868 (N D. Ill. 1998).

[19]992 F. Supp. 1299 (M.D Alabama 1997).

[20]580 F.2d 848, 849 (5th Cir. 1978).

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## Feature Articles



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## Departments



## Columns

United States Court of Appeals,
Second Circuit.

**ACUFF-ROSE MUSIC, INC., Plaintiff-Appellant,**
**v.**
**JOSTENS, INC., Defendant-Appellee.**

**Docket No. 98-7135.**

Argued Aug. 13, 1998.
Decided Sept. 4, 1998

Holder of copyright for song "You've Got to Stand for Something" brought infringement action against seller of class rings, which used advertising slogan "If you don't stand for something, you'll fall for anything " The United States District Court for the Southern District of New York, Denny Chin, J., 988 F.Supp. 289, granted judgment in favor of ring seller, and copyright holder appealed The Court of Appeals, Calabresi, Circuit Judge, held that. (1) copyright holder waived right to full trial in favor of summary bench trial, and (2) phrase "You've got to stand for something, or you'll fall for anything" lacked originality and was not protected by song's copyright

Affirmed

West Headnotes

**[1] Federal Civil Procedure ⚿2251**
170Ak2251

Plaintiff sufficiently waived its right to full trial, such that district court could resolve case through bench trial on the record rather than deciding summary judgment motions, where, at conclusion of summary judgment hearing, both parties expressly endorsed court's clear statement that it would draw inferences and make findings of fact, and plaintiff failed to object to, or request clarification of, court's assertion, in its opinion, that parties had authorized court to proceed with summary bench trial. Fed Rules Civ Proc.Rules 52(a), 56, 28 U.S.C.A.

**[2] Federal Civil Procedure ⚿2251**
170Ak2251

A district court may decide a case by summary bench trial upon stipulation of the parties as long as the parties have willingly forgone their right to a full trial, but district court's decision to proceed by way of bench trial rather than summary judgment must be made clear to the parties before the court can proceed to decide triable issues of fact, especially when all the parties have argued that the case can and should be resolved by summary judgment. Fed.Rules Civ.Proc.Rules 52(a), 56, 28 U.S.C A.

**[3] Copyrights and Intellectual Property ⚿8**
99k8

Phrase "You've got to stand for something, or you'll fall for anything," in copyrighted song, lacked originality and was therefore not protected by copyright, in view of evidence that prior usage of phrase was sufficiently widespread as to make it exceedingly unlikely that purported author of phrase had, in fact, independently created the phrase.

**[4] Copyrights and Intellectual Property ⚿12(1)**
99k12(1)

To qualify for copyright protection, a work must be original to the author

**[5] Copyrights and Intellectual Property ⚿12(1)**
99k12(1)

"Original," as the term is used in copyright, means only that the work was independently created by the author, as opposed to copied from other works, and that it possesses at least some minimal degree of creativity; originality does not signify novelty, as work may be original even though it closely resembles other works so long as the similarity is fortuitous, not the result of copying

**[6] Copyrights and Intellectual Property ⚿53(1)**
99k53(1)

If a copyrighted work that is independently created by a party is copied by another party, there is an infringement of the copyright, regardless of whether other independent, and legitimate, uses of the same material exist.

***141** Robert C Osterberg, Abelman, Frayne &

Schwab, New York, New York, for Plaintiff-Appellant.

Carole L. Fern, Berlack, Israel & Lieberman, New York, New York (David C. Forsberg & Karna A Berg, Briggs & Morgan, St. Paul, Minnesota, on the brief), for Defendant-Appellee

Before: CALABRESI, CABRANES, and STRAUB, Circuit Judges

CALABRESI, Circuit Judge:

Plaintiff-Appellant Acuff-Rose Music Inc. ("Acuff-Rose") appeals from a judgment of the United States District Court for the Southern District of New York (Denny Chin, Judge ) dismissing Acuff-Rose's copyright infringement suit against Defendant-Appellee Jostens, Inc ("Jostens") The district court held that the phrase at issue, which Jostens copied from a song to which Acuff-Rose held the copyright, lacked the requisite originality to be protected by copyright law See Acuff-Rose Music, Inc. v. Jostens, Inc., 988 F.Supp. 289 (S D N Y 1997). We affirm.

## I. BACKGROUND

Acuff-Rose, a music publishing company, owns the copyright to a country music song, You've Got to Stand for Something, that repeatedly features the lyrics, "You've got to stand for something or you'll fall for anything." Country singer Aaron Tippin recorded the song in 1990. You've Got to Stand for Something peaked in popularity in February 1991, when it was the fifth-best- selling country music song in the United States. Although the initial copyright for the song listed Tippin and Buddy Brock as the only authors of the lyrics, in 1996 Acuff-Rose amended its copyright to list Brock's father, William Brock, as an additional author. According to Acuff-Rose (and William Brock), William Brock independently created the sentence, "You've got to stand for something, or you'll fall for anything."

In December 1992, Jostens, a custom ring manufacturer, launched a nationwide advertising campaign for its school class rings The campaign prominently featured the slogan "If you don't stand for something, you'll fall for anything." Sometimes the slogan was preceded by the introduction, "The song says it best."

In September 1994, Acuff-Rose sent a letter to Jostens demanding that it cease using the phrase in its advertising. Jostens refused, claiming that the slogan was "noncopyrightable."

Acuff-Rose subsequently brought suit in federal district court, alleging that Jostens had infringed Acuff-Rose's copyright. At the close of discovery, Acuff-Rose and Jostens both moved for summary judgment During oral argument on the motions, the district court voiced its opinion that triable issues of fact, in particular the issue of whether Jostens copied the lyric lines from the Acuff-Rose song, precluded summary judgment. When both parties insisted, instead, that there was no need for a trial and that the case could be decided based on the papers that had been submitted, the district judge agreed to "go ahead and in essence conduct a trial on the record that's before me."

***142** Finding as a matter of fact (1) that Jostens had copied the lyrics from the Acuff-Rose song, see Acuff-Rose Music, 988 F Supp at 294; but (2) that the lyrics were not original and therefore were not protected by copyright, see id at 296, the district court decided in favor of Jostens. On appeal, Acuff-Rose contests the district court's decision that the lyrics are not original and argues that the district court improperly resolved factual issues at summary judgment

## II. DISCUSSION

### A. Resolution by Summary Bench Trial

[1] Before considering the substantive issue of copyright law involved in this appeal, we address the district court's decision to resolve this case by a summary bench trial. [FN1]

> FN1 Although Acuff-Rose does not explicitly appeal this determination, we read Acuff-Rose's insistence (1) that we should review this case as if it had been decided on summary judgment, and (2) that the district court was not entitled to decide the case as a summary bench trial under Federal Rule of Civil Procedure 52(a), as sufficiently raising the issue on appeal

At oral argument on Acuff-Rose's and Jostens' summary judgment motions, the court expressed its belief that the question of whether Jostens copied the

lyric lines from Acuff-Rose's song was "a fair issue for trial." But both parties maintained that there was no need for a trial and that the case should be decided without one. When the court then asked whether "the parties agree that I should go ahead and in essence conduct a trial on the record that's before me," Acuff-Rose's counsel responded, "I see no issue for trial at all in the record on any issue." At the end of the hearing, the court again returned to the procedural issue It expressly stated that it did not want the parties to change their minds later and asked them to agree "that what [you] want is for me .. based on this record to draw the inferences, to make findings of fact and conclusions of law in lieu of taking live testimony " To this, Acuff-Rose's counsel replied, "That is plaintiff's position," and Jostens' lawyer added, "It's defendant's position, your Honor "

Subsequently, in its decision for Jostens, the district court expressly stated that it was deciding the case under Rule 52(a), "on the record submitted on the summary judgment motions, without a formal trial " See Acuff-Rose Music, 988 F Supp. at 290 The order of judgment that the court issued five days later, however, referred only to the parties' summary judgment motions and made no mention of a bench trial

Other circuits have held that, if the parties so stipulate, a court may conduct a bench trial based on the record compiled in summary judgment proceedings See Market Street Associates Ltd. Partnership v. Frey, 941 F.2d 588, 590 (7th Cir 1991); May v Evansville-Vanderburgh Sch Corp., 787 F.2d 1105, 1115-16 (7th Cir 1986); Lac Courte Oreilles Band v. Voigt, 700 F 2d 341, 349 (7th Cir.1983); Nielsen v. Western Elec. Co., 603 F 2d 741, 743 (8th Cir.1979); Starsky v. Williams, 512 F.2d 109, 112-13 (9th Cir.1975); see also William W Schwarzer et al , The Analysis and Decision of Summary Judgment Motions 39-40 (1991) ("A court may determine that a full trial would add nothing to the paper record and, after proper notice, decide a case on that record, making a decision on a 'trial without witnesses' rather than on summary judgment.") And although the practice has never been explicitly authorized by this Court, we have on prior occasions noted its use without raising objection See, e.g., Infinity Broadcast Corp. v Kirkwood, 150 F.3d 104, 106 (2d Cir.1998), Banque Franco-Hellenique de Commerce Int'l et Maritime v. Christophides, 106 F 3d 22, 24 (2d Cir.1997).

Courts endorsing the practice have uniformly emphasized, however, that the parties must clearly waive their right to a full trial. See, e.g , Miller v LeSea Broadcasting, Inc., 87 F.3d 224, 230 (7th Cir 1996) ("It is true that Miller told Judge Gordon that he was willing to waive a trial and have the case decided on the summary judgment papers, and that LeSea said that it thought the case could be disposed of that way. But this was not an explicit waiver of LeSea's right to a trial . .")

[2] We today adopt the position of our sister circuits that a district court may decide a case by summary bench trial upon ***143** stipulation of the parties as long as the parties have willingly forgone their right to a full trial But in doing so, we underscore that a district court's decision to proceed under Rule 52(a) rather than Rule 56 must be made clear to the parties before the court can proceed to decide triable issues of fact. This is especially important when all the parties have argued that the case can and should be resolved by summary judgment. In such situations, the possibility of confusion between a summary bench trial and summary judgment is particularly acute because the parties are incorrectly arguing that no issues of fact exist in the case

Acuff-Rose contends that it never waived its right to a full trial and that the district court therefore erred in deciding the case based on findings of fact as well as law. Much of the exchange at the summary judgment hearing as to whether the court should proceed and decide the case on the record before it was ambiguous. And the inconsistency between the court's references to Rule 52(a) in its opinion and the wording of the order of judgment exacerbated this ambiguity Nevertheless, at the conclusion of the summary judgment hearing, both Acuff-Rose and Jostens expressly endorsed the court's clear statement that it would "draw inferences . [and] make findings of fact " Moreover, Acuff-Rose failed to object to (or even to request a clarification of) the court's assertion, in its opinion, that the parties had authorized the court to proceed with a summary bench trial under Rule 52(a) Accordingly, we hold that Acuff-Rose waived its right to a full trial and allowed the court to decide the case based on findings of fact as well

as law

B. Copyrightability

[3] The remainder of Acuff-Rose's appeal can be dealt with summarily. The district court held that the sentence, "You've got to stand for something, or you'll fall for anything," lacks originality and was therefore not protected by Acuff-Rose's copyright of the song. See Acuff-Rose Music, 988 F.Supp at 296. We hold that the district court's conclusion was supported by the record before the court

[4][5] "The sine qua non of copyright is originality. To qualify for copyright protection, a work must be original to the author. Original, as the term is used in copyright, means only that the work was independently created by the author (as opposed to copied from other works), and that it possesses at least some minimal degree of creativity " Feist Publications, Inc v. Rural Tel. Serv. Co , 499 U.S. 340, 345, 111 S.Ct. 1282, 113 L.Ed.2d 358 (1991) (citation omitted). "Originality does not signify novelty; a work may be original even though it closely resembles other works so long as the similarity is fortuitous, not the result of copying." Id.

[6] If a copyrighted work that is independently created by a party is copied by another party, there is an infringement of the copyright, regardless of whether other independent, and legitimate, uses of the same material exist See id. at 346, 111 S Ct. 1282 (noting that if "two poets, each ignorant of the other, compose identical poems [then n]either work is novel, yet both are original and, hence, copyrightable"), Alfred Bell & Co. v. Catalda Fine Arts, 191 F.2d 99, 103 (2d Cir.1951) ("[T]he doctrine of anticipation . does not apply to copyrights. The 'author' is entitled to a copyright if he independently contrived a work completely identical with what went before...."), Sheldon v. Metro-Goldwyn Pictures Corp , 81 F.2d 49, 53 (2d Cir.1936) (L Hand, J.) ("[I]t makes no difference how far the [copyrighted work] was anticipated by works in the public demesne which the plaintiffs did not use "), aff'd, 309 U S 390, 60 S Ct 681, 84 L.Ed. 825 (1940)

To counter Acuff-Rose's claim of originality, Jostens submitted to the district court documentation of numerous uses of the saying at issue that predate the Acuff-Rose song It cited sources ascribing the origin of the phrase (or of close variants) to a variety of sources, including the Bible, Abraham Lincoln, Martin Luther King, Malcolm X, Ginger Rogers, and a chaplain of the U.S. Senate, and others that simply refer to it as an "old saying." Moreover, in 1985, popular songwriter and singer John Cougar Mellencamp recorded an album that included a song called You've Got to Stand for Somethin', ***144** featuring the lyrics, "You've got to stand for somethin'/Or you're gonna fall for anything."

Referring to these prior uses of the saying, the district court decided that the phrase "enjoyed a robust existence in the public domain long before Tippin employed it for his song's title and in the key lyrics." See Acuff-Rose Music, 988 F.Supp. at 294 It therefore concluded that the lines in Acuff-Rose's song lacked the requisite originality to warrant protection, in effect finding that, given the widespread popular usage of the phrase, William Brock most likely did not independently create the lyric lines of Acuff-Rose's song

Acuff-Rose contends that the record before the district court is insufficient to warrant a determination that William Brock did not come up with the phrase entirely on his own. To support its argument of independent creation, Acuff- Rose had proffered to the district court: (1) a letter, dated July 2, 1996, from William Brock to Buddy Brock in which William asserts that "the lyric lines, 'YOU'VE GOT TO STAND FOR SOMETHING OR YOU'LL FALL FOR ANYTHING' are original with me"; and (2) a supplemental copyright registration, filed by Acuff-Rose on June 20, 1996, adding William Brock as an author to the song. Both of these constitute some evidence that Brock thought he had come up with the words on his own But the district court reasonably concluded that the prior usage of the saying was sufficiently widespread as to make it exceedingly unlikely--whatever Brock believed--that Brock had, in fact, independently created the phrase

As the parties waived their right to a trial that would have allowed them to create a more fully developed record, they authorized the court to make factual inferences based on the limited record before it Since the inferences and conclusions that the court drew from that record are entirely reasonable, we must accept its finding that Brock's use of the

phrase was not original And, without independent creation, the lyric lines are not protected by copyright Accordingly, Acuff-Rose's infringement claim fails.

C. Fair Use and Damages Measures

Acuff-Rose raises two additional arguments on appeal. (1) that Jostens' use of the lyric lines in its advertising campaign does not constitute a fair use; [FN2] and (2) that a reasonable license fee is a proper measure of actual damages resulting from a copyright infringement Both of these issues were matters of dispute in the proceedings below but were rendered moot by the district court's determination that Jostens had not improperly appropriated the lyric lines Because we affirm the district court's holding, we need not reach either issue.

FN2. The doctrine of "fair use" allows the appropriation of a copyrighted work without consent under certain circumstances The doctrine is codified at 17 U S.C. § 107, which provides that "the fair use of a copyrighted work, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright."

For these reasons, we affirm the judgment of the district court

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United States Court of Appeals,
Seventh Circuit.

**Mary MAY, Plaintiff-Appellant,**
**v.**
**EVANSVILLE-VANDERBURGH SCHOOL CORP., et al., Defendants-Appellees.**

**No. 85-2234.**

Argued Feb 14, 1986.
Decided April 1, 1986
Rehearing and Rehearing En Banc Denied May 28, 1986

Teacher brought suit against school board, its members and superintendent of school district, seeking to enjoin ban on religious meetings The United States District Court for the Southern District of Indiana, 615 F Supp. 761, Gene E Brooks, J., granted defendants' motion for summary judgment, and teacher appealed The Court of Appeals, Posner, Circuit Judge, held that. (1) teacher had no right, under First Amendment's free speech clause to hold prayer meetings on school property before school opened and students arrived, and (2) district court's finding that school authorities had consistently applied a policy prohibiting use of school facilities for religious activity, despite teachers' contention that school authorities had made school a "public forum" by allowing meetings on any subject except religion, was not clearly erroneous

Affirmed

West Headnotes

**[1] Constitutional Law ⚖82(5)**
92k82(5)

First Amendment [U.S.C.A. Const Amend. 1] restricts only state action, and not private action.

**[2] Constitutional Law ⚖90.1(7.1)**
92k90.1(7.1)
(Formerly 92k90 1(7))

Workplace is for working and not, unless employer consents, for holding meetings at which employees can discuss matters of great importance to themselves, perhaps to society as a whole, but not to employer U S.C.A Const.Amend 1

**[3] Constitutional Law ⚖90.1(7.3)**
92k90 1(7 3)

Teacher had no right, under First Amendment's free speech clause [U S C A. Const.Amend 1], to hold prayer meetings with other teachers on school property before school opened and students arrived

**[4] Constitutional Law ⚖90.1(4)**
92k90.1(4)

Power of government to limit expression in traditional facilities for expression of ideas and opinions, such as streets, parks and the mails, is closely confined. U S C.A Const Amend. 1

**[5] Constitutional Law ⚖90.1(4)**
92k90.1(4)

Government's authority to prevent public expression of ideas and opinions on public property not intended to be a forum is almost complete, and fails only when government tries to suppress particular point of view. U S.C A. Const.Amend 1

**[6] Constitutional Law ⚖90.1(4)**
92k90.1(4)

Government can regulate content in nonpublic forum; it just cannot encourage or discourage particular viewpoint, slant, or opinion on some matter of public concern. U.S.C.A. Const.Amend. 1

**[7] Constitutional Law ⚖90.1(4)**
92k90 1(4)

Although speaker may be excluded from nonpublic forum if he wishes to address topic not encompassed within purpose of forum, or if he is not member of class of speakers for whose especial benefit forum was created, government violates First Amendment [U S.C.A. Const.Amend 1] when it denies access to speaker solely to suppress point of view he espouses on otherwise includable subject

**[8] Constitutional Law ⚖90.1(4)**
92k90 1(4)

Nonpublic forum does not loose its character as such merely because outsiders are occasionally invited to speak. U.S.C.A Const.Amend. 1.

**[9] Constitutional Law ⚖90.1(1.4)**
92k90.1(1.4)

College classroom, and a fortiori an elementary school classroom, does not become public forum because guest lecturer from outside is invited to talk to class. U S.C A. Const.Amend. 1

**[10] Constitutional Law ⚖90.1(4)**
92k90.1(4)

Military base does not become public forum merely because civilian speakers are occasionally invited to the base U.S C.A. Const Amend 1

**[11] Federal Civil Procedure ⚖2559**
170Ak2559

By moving for summary judgment, a party does not waive his right to argue that if motion is denied case must be tried.

**[12] Federal Courts ⚖855.1**
170Bk855.1
(Formerly 170Bk855)

District court's finding that school authorities had consistently applied a policy prohibiting use of school facilities for religious activity, despite teacher's contention that school authorities had made school a "public forum" by allowing meetings on any subject except religion, was not clearly erroneous. U.S.C.A Const.Amend 1

**[13] Constitutional Law ⚖90.1(1.4)**
92k90.1(1.4)

Since school was not traditional public forum like street or parks, teacher challenging policy of forbidding prayer meetings on school property before school opened and students arrived had to show that school officials made school a public forum; it would not be enough to show that they had no crystallized, articulate policy against its being open to the public. U S C A Const Amend. 1.

**[14] Constitutional Law ⚖90.1(4)**
92k90 1(4)

Government does not create public forum by inaction or by permitting limited discourse, but only by intentionally opening nonjudicial forum for public discourse U.S.C.A Const Amend. 1

**[15] Constitutional Law ⚖90.1(1.4)**
92k90 1(1.4)

School is not presumed to be public forum. U.S.C.A Const.Amend 1.

**[16] Constitutional Law ⚖90.1(1.4)**
92k90.1(1.4)

Fact that school had never been used for meetings not related to school business created presumption that it was not public forum. U S.C.A Const Amend. 1.

**[17] Constitutional Law ⚖90.1(7.2)**
92k90 1(7.2)

**[17] Constitutional Law ⚖90.1(7.3)**
92k90.1(7.3)

Free speech clause of First Amendment [U.S.C.A Const.Amend 1 ] does not give teachers and other public employees a broad right to hold meetings on their employers' premises.

***1107** Thomas S. Neuberger, Wilmington, Del., for plaintiff-appellant.

Robert P. Musgrave, II, Kightlinger, Young, Gray & DeTrude, Jeffrey R Frank, Frank & Collins, Evansville, Ind., for defendants-appellees.

David J Emmert, amicus curiae, for Indiana School Boards Ass'n.

Marc D Stern, Lois C Waldman, Ronald A. Krauss, New York City, Geoffrey Stone, Sylvia M. Neil, Chicago, Ill , amicus curiae, for American Jewish Congress

Before POSNER, FLAUM, and EASTERBROOK, Circuit Judges.

POSNER, Circuit Judge

Harper Elementary School (kindergarten through fifth grade) is a public school in southern Indiana with about 350 students and 30 teachers (including teachers' aides). Early in 1981 Mary May and two other teachers--all three evangelical Christians--began meeting every Tuesday morning at the school to pray, sing hymns, and discuss the Bible Four or five other teachers later joined the group. The meetings were held between 7 25 and 7 45 a.m , before the school day began and before the teachers were required to report to their duty stations Students were not allowed in the building this early and apparently were unaware of the meetings In fact even the school administration didn't find out about the meetings until 1983, when a new principal started a teachers' newsletter and Mrs. May asked him to include a notice of the meetings in it He not only refused but after consulting with his supervisors ordered the meetings to stop, and was backed up in this decision by the school board.

Mrs May has sued the board, its members, and the superintendent of the school district under section 1 of the Civil Rights Act of 1871, now 42 U.S.C. § 1983, seeking to enjoin the ban on religious meetings and to recover $300,000 in damages. The only ground she has pressed is that the ban violates her constitutional right of free speech. Although freedom to express one's religious convictions (as distinct from freedom to debate religious doctrine, which was not the object of Mrs May's meetings) might seem to nestle more comfortably within the First Amendment's free exercise of religion clause than its free speech clause, the Supreme Court has held that restrictions on devotional speech are actionable under the free speech clause. Widmar v Vincent, 454 U.S 263, 269 and n 6, 102 S Ct 269, 274 and n 6, 70 L Ed.2d 440 (1981) Mrs May makes no free exercise claim

After some discovery, both sides moved for summary judgment The district judge granted the defendants' motion and dismissed the complaint, finding that, "Although no written policy is evident, it appears from the record that the school board and the superintendent of schools had consistently applied a policy prohibiting use of school facilities for religious activity. At all times pertinent to this complaint, no religious meetings occurred on school property, at least to the knowledge of school administrators, and no meetings of teachers occurred at Harper School except for those necessary to the operation and management of the school ... If other teacher groups were permitted to meet on a variety of religious and non-religious subjects in the kind of formalized way Mrs May's group met, there might be an argument that a public forum, or at least a limited public forum, existed in this case and that the exclusion of Mrs. May's group was some denial of constitutional rights. The record reveals no such scenario " 615 F Supp 761, 763-64 (S.D Ind.1985)

Mrs. May makes two arguments on appeal. The first is that as an employee of the school she has a right to exercise free speech on school premises provided she *1108 does not disrupt the school's activities, since the religious meetings took place before school began and the students neither participated in the meetings nor (so far as anyone knows) were even aware of them, there was no disruption Her second argument is that even if the school authorities could have forbidden meetings not directly related to school business, they didn't do so. By allowing meetings on any subject except religion, they made the school a "public forum" between the time when it opened for teachers and the time the teachers had to report to their duty stations, and they could not arbitrarily exclude one subject of speech--religion--from the forum. To this the defendants reply that even if they created a public forum (which they deny), they were justified in excluding religious discussion from it, because to allow it would have violated the establishment clause of the First Amendment

Mrs May's first argument asks us to recognize a public employee's right to use his (or her) employer's premises for meetings on topics of public importance such as religion or politics. Her reply brief summarizes the nature and scope of the right contended for· "In essence, Plaintiff's theory is as follows Regardless of the existence of a public forum, a teacher legitimately in the work place has an absolute right [by virtue of the free speech clause, the only constitutional provision on which she relies] to engage in free time religious speech and worship unless such speech materially and substantially interferes with a school's ability to fulfill its tasks. This right derives from the worker's status, as a public employee in a free society, which permits her to use leisure time as she

chooses while properly in the work place." Mrs. May grounds this right in the principle that public employees have rights of free speech to the extent compatible with the effective performance of their jobs, see, e g , Pickering v Board of Education, 391 U S 563, 88 S.Ct 1731, 20 L Ed 2d 811 (1968); Knapp v Whitaker, 757 F 2d 827 (7th Cir 1985)--a principle that would indeed prevent the school authorities from forbidding Mrs. May to advocate, in her own time and in other places, political or religious opinions of which they disapproved, unless they could show that such advocacy prevented her from doing her job But these cases do not address the question whether a public employer must allow its employees to use its premises for meetings, whether before or during or after work, on matters personal to the employees and unrelated to the employer's business Piarowski v. Illinois Community College Dist. 515, 759 F.2d 625, 629 (7th Cir.1985) The plaintiff in Pickering was a teacher who was fired for mailing a letter to a newspaper criticizing school officials for their handling of the school district's finances In Connick v. Myers, 461 U.S. 138, 103 S.Ct 1684, 75 L Ed 2d 708 (1983), the questionnaire for which the plaintiff was fired was probably circulated on the employer's premises but nothing is made of this in the opinions; the employer's defense (so far as relevant here) was that circulating the questionnaire was insubordinate and therefore disruptive. Our recent case of Baz v. Walters, 782 F 2d 701, 708 (7th Cir 1986), is similar

Mrs. May certainly could not command the school board to keep the Harper School open at night free of charge so that she could hold prayer meetings or any other sort of meeting there without having to pay rent. If she had such a right it would mean that public employees had much greater rights of free speech than the rest of the community They would have the guaranteed free use of their employers' premises for their speeches and meetings while private employees would have access for such purposes neither to those premises nor to their own employers' premises, except in the unlikely event that a private employer voluntarily permitted employees to use his premises for meetings unrelated to their work for him. This case is less extreme than our hypothetical case, however, because Mrs May is not asking that the school be opened earlier or closed later The school has to be open to teachers before the students are allowed into the building, to make sure that all the teachers are at their duty stations when the students arrive. The premises are not fully utilized ***1109** during this interval and all Mrs May wants to do is to take up some of the slack, as it were, by using for prayer, hymns, and religious discussion a classroom or other room (most of the meetings occurred in the guidance counselor's office) not otherwise used during this time for anything at all The marginal cost of her use is (she might argue) zero.

But the objection to forcing an employer to allow his premises to be used for meetings by employees has deeper roots than the marginal costs in electricity or maintenance that such use might impose There is a potential distortion of the market in ideas if public employees are given greater rights of free expression than private employees by having a right of free access to their employers' premises for meeting purposes; and although the practical significance of such access may be small in this case as we shall see, it could be great in other cases. There is also a potential distortion of the market in ideas if employers are involuntarily identified with particular views by being compelled to sponsor meetings at which those views are advocated.

[1] Regarding the first point, we acknowledge that cases such as Pickering and Connick give public employees greater rights of free speech than private employees have, but this is not just for the formalistic reason, which would be as applicable to the present case as to those cases, that the First Amendment restricts only state action, and not private action. The behavior of public enterprises is a political question, political speech has been placed at the top of the hierarchy of speech protected by the First Amendment; and since the employees of public enterprises have insights and information about the conduct of the enterprise that the private citizen lacks, they have a distinctive contribution to make to political speech Consistently with this analysis, the public employee's right of free speech has been limited to subjects of public concern See, e.g., Connick v Meyers, supra, 461 U S. at 145, 103 S Ct. at 1689. Mrs. May might have a distinctive contribution to make to the public discussion of the policies or management of the public schools of Evansville if her group were discussing those subjects, but instead its meetings are devoted to matters unrelated to the

schools. Anyway the First Amendment right of a public employee to criticize his employer has not been thought to include a right to commandeer the employer's premises as a soapbox for his criticisms.

The costs in frayed public relations of entangling a public enterprise in controversies sparked by its employees' use of its property as a site for speeches and meetings provide a distinct ground for doubting the existence of the broad right that Mrs May claims In upholding the right of a school board to bar a student organization from using the school's athletic field to hold a "peace fair," which the board resisted because it wanted to keep "the 'podium of politics off school grounds,' " the Third Circuit held recently that the "desire to avoid potentially disruptive political controversy and to maintain the appearance of neutrality is sufficient justification for excluding speakers from a nonpublic forum " Student Coalition for Peace v Lower Merion School Dist , 776 F.2d 431, 437 (3d Cir.1985), citing Lehman v. City of Shaker Heights, 418 U.S. 298, 304, 94 S Ct. 2714, 2717, 41 L.Ed 2d 770 (1974) (plurality opinion). Cf Greer v. Spock, 424 U.S. 828, 839, 96 S Ct 1211, 1218, 47 L Ed.2d 505 (1976). This language describes the present case as well And even if the school authorities could maintain the appearance of their own neutrality--could quiet the suspicions of parents and taxpayers--we can easily imagine the destruction of the school's peaceful atmosphere as fundamentalists and atheists, conservatives and radicals, pro- abortionists and anti-abortionists form into groups and hold meetings at the school before school opens and after school closes and during lunch breaks, coffee breaks, and free periods This is not the American tradition in public elementary education, and is not the First Amendment's command

[2] It is for the foregoing reasons and not because we hold property rights to be sacred (and anyway it is public not private ***1110** property that the plaintiff wishes to conscript) that we have concluded that the controlling principle in this case should be that the workplace is for working and not, unless the employer consents, for holding meetings at which employees can discuss matters of great importance to themselves, perhaps to society as a whole, but not to the employer.

Of course no one in this country works every minute of the workday and no employer tries to prevent his employees from engaging in private conversations during the workday--conversations that may touch on political or religious matters--as long as the conversations do not interfere with the employees' work. If a public employer made a quixotic effort to prevent all conversations that did not relate directly to work, or (as is more likely) tried to forbid conversation on just one topic, as in Texas State Teachers Ass'n v Garland Independent School Dist , 777 F 2d 1046, 1053-55 (5th Cir.1985), the First Amendment might be violated. Id , see also Los Angeles Teachers Union, Local 1021 v Los Angeles City Bd. of Education, 71 Cal 2d 551, 78 Cal.Rptr. 723, 455 P.2d 827 (1969). The curtailment of free speech would be slight, perhaps, but the justifications would be even slighter, in particular there could be no argument that the employer was being involuntarily associated with the employees' opinions, a danger in the present case But as this last observation underscores, a private conversation has a different significance from a regularly scheduled group meeting devoted to a particular subject. Not only is it more difficult for a school administration to monitor private conversations, but they do not create the same danger of injecting the school into undesired controversy on matters remote from its educational mission. A public employer does not, by permitting its employees to use their lunch breaks or coffee breaks or other down time during the workday to talk to each other, turn over its premises to the employees for organized and scheduled meetings on topics unrelated to work Just because like other workers they can converse on varied topics during slack periods of work or breaks between work, public employees do not obtain squatters' rights to take over the employer's property and turn it into Hyde Park corner or town hall. Mrs May does not argue that private citizens of southern Indiana have a constitutional right to hold meetings in Harper Elementary School between 7:25 and 7 45 a.m. every Tuesday or any Tuesday, and we have trouble understanding why she should have such a right just by virtue of being employed there. Civil servants are a protected class by virtue of decisions such as Pickering, but they are not yet a privileged class

Admittedly there is no sharp line between a private conversation and a group meeting, and there is a question on which side this case falls. Mrs. May's group has no name, no charter, no bylaws, no

affiliation with an established organization, and only six or seven members, and went undiscovered for almost three years. The group started with three members: what if it had started with two and stayed there? What if it had met in an unused office during the lunch break? What if two Roman Catholic teachers recite the Angelus every noon in unison? (We assume in all of these examples that the students are unaware of these activities, so that objections based on the establishment clause of the First Amendment are minimized ) But these are not entirely apt analogies. Before it tried to go public, Mrs. May's group already comprised almost 25 percent of the school's teaching staff, many a local bargaining unit has only seven members, yet is a group with jural status, see, e g., NLRB v. Res-Care, Inc., 705 F.2d 1461, 1469 (7th Cir 1983), and notices of private conversations do not appear in newsletters. The long line of constitutional decisions dealing with permit requirements for holding meetings of various sorts in public parks (see citations in Shuttlesworth v. City of Birmingham, 394 U S 147, 151 n. 2, 89 S.Ct. 935, 938 n. 2, 22 L Ed.2d 162 (1969)) reflects the fact that a "meeting" is an intelligible concept, a criterion of legal regulation, and a thing distinct from a private *1111 conversation In any event Mrs. May makes no issue of the definition of a meeting or a group She does not want her group to be limited to seven members; that is why she wanted to put an announcement in the newsletter. Her briefs describe these gatherings as group meetings, an appropriate if not inevitable characterization. The defendants were entitled to treat them as such, and to forbid them without also trying to forbid private conversations about religion, and private prayers, on school premises.

We are reluctant in any event to create a new constitutional right on the basis of the nine pages of argument devoted to this subject in Mrs May's main brief She makes no effort to show that entitling public employees to use the workplace for meetings is necessary to plug a hole in the First Amendment's expansive protections of free speech There are other places where six or seven teachers can meet weekly to discuss religion, beginning with the teachers' homes. Instead of getting to school as early as they do they can meet at one of those homes before going to school. If this would extend their commuting time too much (which would depend on where their homes are located in relation to the school and each other, a matter on which the record is silent), they can meet in the afternoon after school lets out, or in the evening, or on weekends True, since they have to be in school anyway, the school is the most convenient location for their meetings; driving time and expense are minimized And although there is a drawback, in that the choice of this location limits participation to persons who happen to work at this particular (and not large) school, it cannot be too serious, for the alternative locations are open to Mrs May's group, which by forgoing them has revealed its preference for the school Nevertheless the overall advantage to the group of holding these meetings in the school, and the resulting increment in free speech, may well be less than the costs to the school of allowing its premises to be used for meetings unrelated to school business

The issue, we repeat, is not the incremental costs of electricity and maintenance, these we assume are zero. It is the controversies and distractions in which the school could become enmeshed if it allowed its teachers to hold meetings unrelated to work. Evangelical prayer meetings may or may not be controversial in the Evansville area; the record contains nothing on the question. We can think of a lot of meetings, though, that would engender intense controversy A meeting of the Ku Klux Klan, for example (later we shall cite a case where school authorities were forced to allow a meeting of the Ku Klux Klan to be held at the school because they had allowed meetings of other groups to be held there); or of a group advocating special legal protections for homosexuals, or of advocates or opponents of abortion, or communism, or racism, or nudism. Since the Harper School has only 30 teachers, the opportunities for controversy are inherently limited if the meetings are limited to employees, but they are not negligible, and they suggest that the benefits to the employer from forbidding employees to hold meetings on the employer's premises to discuss matters unrelated to work may be significant.

We do not mean to suggest that the district judge made a finding that the costs of these meetings would outweigh the benefits, or that we have made such a finding. We are merely trying to explain our reluctance to adopt a novel principle of law that would require public employers to turn their premises over to employees for meetings on subjects unrelated to the employer's business. The plaintiff

has not made a case for such an expansion in First Amendment rights The costs to the employer seem high and the benefits to the interests protected by the First Amendment modest In these uncertain circumstances we are reluctant to intervene, particularly in a decision of local school authorities In today's contentious atmosphere the administration of a public school is difficult enough without a federal court's telling school administrators that in addition to running a *1112 school they must provide a forum for their employees to hold meetings on the political, social, and religious issues of the day

We are particularly disinclined to intervene given Mrs May's failure not only to offer argument beyond a mechanical extrapolation from the Pickering lines of cases but also to offer any evidence in the district court that preventing her group from meeting on property owned by the school district will significantly reduce freedom of speech because of the lack of an alternative forum. We do not mean "evidence" just in the sense of characteristic trial- type evidence that must be attested and is subject to cross-examination We mean anything that might be pertinent to deciding what the rule of law should be Mrs. May has offered nothing. As we shall see, she does not want a trial at which she might make a factual showing of the need for constitutional protection in this case She has rested her case on the analogy to Pickering

[3] Tinker v. Des Moines Independent School Dist , 393 U.S. 503, 89 S Ct. 733, 21 L.Ed 2d 731 (1969), does not close the gap. The public school students who were held in that case to have a constitutional right to wear armbands in school protesting the Vietnam War were not employees and were not seeking to hold meetings on public property They were in the school under the compulsion of the school law and retained their rights of free speech to the extent compatible with the needs of school discipline--as do other involuntary guests of the government, such as prison inmates. See, e.g., Procunier v. Martinez, 416 U S. 396, 412-14, 94 S.Ct 1800, 1810-11, 40 L.Ed 2d 224 (1974) Public school teachers, too, we may assume without having to decide, have some rights to express themselves in the classroom, though not because they are there under compulsion, for of course they are not Academic freedom, we may assume, is not exclusively a prerogative of the academic institution, though obviously a school has considerable authority over what teachers teach, a point well illustrated by Solmitz v. Maine School Administrative Dist. No. 59, 495 A.2d 812 (Me.1985). But the only issue of academic freedom in this case is the right of a public school to operate without interference from the federal courts. See Piarowski v. Illinois Community College Dist. 515, supra, 759 F 2d at 629, and cases cited there. Teachers do not exercise academic freedom when they meet before school opens for a prayer meeting from which students are carefully excluded. They pursue in this setting personal ends unrelated to their role as teachers They may have limited First Amendment rights but not by virtue of being teachers, and those rights do not include the use of school premises for unauthorized meetings unrelated to teaching. Friedman v Union Free School Dist No. 1, 314 F Supp 223 (E.D N Y.1970), suggests a broader right for teachers than we are prepared to endorse, but even there the "speech" held to be protected (the circulation of union literature) was more closely related to teaching than anything here

Mrs May's second argument for reversing the district judge is that even if the school had no duty to allow teachers to hold meetings on school premises, it could not once it decided to allow meetings to be held on subjects unrelated to school business forbid only religious meetings. This might seem to be an argument about religious freedom but, surprisingly, it is not. Mrs. May does not argue that the prohibition of religious meetings in the school violated her right to exercise her religion freely. She does not argue that her religious beliefs require that she hold these prayer sessions on school premises or that the defendants are trying to discourage evangelical Christianity in particular or religious observance in general She pitches her claim entirely on the free speech clause of the First Amendment She argues that having permitted other groups to use the school for the expression of ideas the defendants cannot single out one type of expression--religious expression--and ban it She cites Widmar v Vincent, supra, where a university allowed more than 100 student groups to use campus facilities to *1113 propagate their ideas, but forbade student religious groups to do so, and the Supreme Court held that having made the campus a public forum the university could not exclude religious speech from it To the argument that the exclusion

was not arbitrary because allowing student religious groups to use campus facilities would violate the establishment clause, the Court answered that it would not violate it, and the defense therefore failed. We may assume without having to decide that it would fail here too; that a prayer meeting held before school opens and unknown to the students is not an establishment of religion

[4] The reference in the Widmar opinion to public forum may suggest that it is important whether the Harper School is a public forum, but we are not at all sure of this. Not only is there a question whether the public forum doctrine is intended to apply to purely internal gatherings (for Mrs May apparently does not wish to invite anyone to join her prayer group who is not an employee of the school); Mrs. May's specific contention--that the school discriminates arbitrarily against one type of speech, religious speech--would if true establish an abridgment of free speech however one classifies the Harper School along the range of public-private forum. And range it is There are public forums and there are public forums. See, e.g., Cornelius v NAACP Legal Defense & Educational Fund, Inc., 473 U.S. 788, 105 S.Ct 3439, 3449-51, 87 L.Ed 2d 567 (1985). There are the streets and the parks and the mails--traditional public facilities for the expression of ideas and opinions-- and the power of the government to limit expression in these facilities is closely confined. There are also the so-called limited public forums, such as the municipally owned theater in Southeastern Promotions, Ltd. v Conrad, 420 U S 546, 555, 95 S.Ct 1239, 1245, 43 L Ed 2d 448 (1975), which was not a traditional public forum, because it is not traditional for municipalities to operate theaters; but having decided to create a public forum for theatrical presentations the municipality could not subject the theater to the type of censorship that had long been considered improper in public regulation of private theaters

[5][6][7][8][9][10] Finally, there is public property not intended to be a forum for the public expression of ideas and opinions Here the government's authority to prevent such expression is almost complete and fails only when the government tries to suppress a particular point of view Thus the government can regulate content in a nonpublic forum (see, e.g., Lehman v City of Shaker Heights, supra, upholding a ban on political advertisements in the cars of a public transit system), as it could not do in the theater in the Southeastern Promotions case. It just cannot encourage or discourage a particular viewpoint, slant, or opinion on some matter of public concern "Although a speaker may be excluded from a nonpublic forum if he wishes to address a topic not encompassed within the purpose of the forum, or if he is not a member of the class of speakers for whose especial benefit the forum was created, the Government violates the First Amendment when it denies access to a speaker solely to suppress the point of view he espouses on an otherwise includible subject " Cornelius v. NAACP Legal Defense & Educational Fund, Inc., supra, 105 S Ct at 3451 (citations omitted). A non- public forum is not necessarily a place of silence; it may still be a forum, as the term implies; it just is not a place generally open to the public It does not lose its character as a nonpublic forum merely because outsiders are occasionally invited to speak A college classroom (and a fortiori an elementary school classroom) does not become a public forum because a guest lecturer from the outside is invited to talk to the class See, e.g , Piarowski v Illinois Community College Dist. 515, supra, 759 F.2d at 629 A military base does not become a public forum merely because civilian speakers are occasionally invited to the base, and in Greer v Spock, supra, the Supreme Court held that the authorities could forbid political speechmaking at the base

*1114 Harper Elementary School is not a public forum. The public is not invited to use its facilities as a soapbox. The public is not invited in, period, which distinguishes this case from New York City Unemployed & Welfare Council v. Brezenoff, 677 F.2d 232 (2d Cir.1982), where the waiting rooms in welfare offices were given a very limited status as public forums. Teachers, of course, express ideas and opinions as part of their teaching, but that is just the sort of thing that does not turn a government building into a public forum. There is plenty of debate and discussion in the White House mess or, we suppose, the CIA's headquarters, but neither of these are public forums of either the traditional or newfangled variety. See NAACP Legal Defense & Educational Fund, Inc v. Devine, 727 F.2d 1247, 1272 (D.C Cir.1984) (dissenting opinion), rev'd sub nom. Cornelius v NAACP Legal Defense & Educational Fund, Inc., supra Teachers may have

rights of free expression in the classroom, and students too, but not by virtue of the doctrine of public forums (a distinction made clear in Texas State Teachers Ass'n v. Garland Independent School Dist., supra, 777 F.2d at 1050-54) The school is not open to the public

The rules governing public and nonpublic forums strike a balance between the interest in free speech and the countervailing interest in the efficient operation of government. In the traditional public forum the first interest is paramount, and in the nonpublic forum the second This reinforces our earlier conclusion that public employees do not have a general right to commandeer the premises where they work for meetings devoted to the discussion of matters unrelated to their work. But even in a non-public forum, the government's interest in interfering with the free market in ideas through discriminatory restrictions on particular points of view (such as the religious) is slight, and the potential injury to this important market significant

And yet we might, taking off from Minnesota State Bd. for Community Colleges v Knight, 465 U.S. 271, 104 S.Ct. 1058, 79 L.Ed 2d 299 (1984), question the relevance of any sort of "forum" analysis to a case where government employees are seeking to use government premises for the communication of ideas and opinions to each other only, so that the public at large is not involved But that will not be necessary We shall assume without having to decide that Mrs May has a cause of action if the defendants, while not obligated to allow teachers or anyone else to use school premises for meetings, in fact allowed the premises to be used for any meetings by teachers except prayer meetings This would be a restriction discriminating against a particular point of view and would therefore flunk the test we quoted from Cornelius, provided that the defendants have no defense based on the establishment clause, and we shall assume they do not. The case would be just like Knights of the Ku Klux Klan v East Baton Rouge Parish School Bd , 578 F 2d 1122 (5th Cir.1978) A school allowed outside organizations to use school facilities for meetings during hours when school wasn't in session, but drew the line at the Ku Klux Klan. This was a "selective denial of a dedicated public forum to a group because of its ideas or membership policies," id at 1128, and was forbidden. We must decide whether this is a similar case; we must therefore decide whether as Mrs. May says only religious meetings were forbidden, or as the defendants say all meetings were forbidden, with immaterial exceptions such as meetings related to the business of the school.

Neither the Harper School nor the school district has a written policy regulating the use of school facilities for meetings unrelated to school business. And no attempt is made to prevent teachers from having informal discussions before or after school or during lunch or free periods on any subject they wish, whether or not related to school business. Every Friday morning before school opens there is a staff social gathering at which doughnuts and coffee are served to any teachers who attend, and they can talk about anything they want while eating and drinking The collective bargaining agreement between the teachers' ***1115** union and the school district allows teachers to discuss labor relations on school premises. The school has been host to meetings of the P T A. (which of course is school related), the boy scouts, the girl scouts, "fine arts groups" not further defined, and "booster" clubs, which raise money for school athletic teams and thus are also school- related. The school is used as a polling place on election day A religious group was permitted to use another school in the district for a time after its church burned down Apparently no religious or political group other than Mrs. May's group had ever tried to hold a meeting at the Harper School, although student religious groups (one athletic--the record does not reveal the nature of the other) have twice been refused permission to use other school premises in the district The school district has in fact an unwritten policy against allowing religious groups to meet on school premises whether or not they are school-related; the case of the church whose building had burned down was regarded as exceptional. The motivation for the policy is a desire to keep church and state firmly apart. No policy of forbidding nonreligious groups to use school property for meetings has been formulated, but on the other hand no such group (unless school-related) has ever been allowed to hold meetings at the school.

If Mrs May were arguing that the district judge should not have granted summary judgment for the defendants, because there is a genuine issue of material fact on the question whether they are discriminating against religious speech, we might

agree and reverse See Fed R.Civ P 56 The defendants have neither a formal policy of forbidding teachers to use school premises for meetings to discuss matters unrelated to the school nor a track record, consisting of refusals to allow such meetings, from which a policy could be inferred. The alleged policy may be an afterthought designed to rationalize a decision wholly motivated by a view (which may well be erroneous) that allowing religious meetings on school premises would violate the establishment clause even though the meetings were held before school opened and there was no student participation in or even (it appears) student knowledge of them What the defendants would have done if confronted by a request from the same teachers to be allowed to hold meetings of the local chapter of the Americans for Democratic Action or the Young Americans for Freedom is not the sort of issue normally determined on summary judgment The sole attestation of a policy against opening school premises to meetings of nonreligious as well as religious groups came in the school superintendent's affidavit--filed three months after he had testified in his deposition only to a policy against allowing religious meetings to be held, and discordant with his deputy's testimony that the deputy knew of no policy applicable to organized activities of nonreligious groups Moreover, Mrs. May never completed her discovery and she objected to discovery being cut off when it was

[11] But that Mrs. May may have succeeded in creating a genuine issue of material fact is irrelevant to this appeal, for she has waived her right to a trial and consented to the entry of judgment on the record made in the summary judgment proceedings. The fact that both sides moved for summary judgment is not the basis of our conclusion By moving for summary judgment a party does not waive his right to argue that if the motion is denied the case must be tried. See 10A Wright, Miller & Kane, Federal Practice and Procedure § 2720 (2d ed 1983), 6 Moore's Federal Practice ¶ 56 13 (2d ed. 1985) But sometimes both parties move for summary judgment because they do not want to bear the expense of trial but instead want the trial judge to treat the record of the summary judgment proceeding as if it were the trial record In effect the judge is asked to decide the case as if there had been a bench trial in which the evidence was the depositions and other materials gathered in pretrial discovery. Cf Schlytter v. Baker, 580 F 2d 848 (5th Cir 1978); 10A Wright, Miller & Kane, supra, § 2720, at pp. 26-27, 6 Moore's Federal Practice, supra, ¶ 56.13, ***1116** at p 56-347 Apparently that is what happened here. Mrs. May's opening brief does not contend that there is a genuine issue of material fact warranting trial, it contends that we should grant summary judgment for her. This is not an alternative contention, with a trial as the backup request, it is the only thing she asks us to do (except for a remand to assess damages and formulate the injunctive decree) Her reply brief is even more explicit, it "prays that this Court enter an Order (a) reversing the judgment below, (b) granting Summary Judgment in favor of Plaintiff on the issue of liability, (c) directing that appropriate injunctive relief issue forthwith, and (d) remanding the case to the trial court for appropriate proceedings on the issue of damages."

Having no desire to trap Mrs. May in inartful pleadings we pursued at argument the question whether she was waiving any contention that the case should not have been resolved on summary judgment Her lawyer was emphatic in stating that his client did not want a trial. That sounds like waiver to us He said it in his opening argument and then, in rebuttal, having had a chance to ponder the question during the appellees' argument, said it again. He said it would be pointless to send the case back for a trial He said it would just give the defendants a chance to polish their story that they were carrying out a nondiscriminatory policy when they told Mrs May to stop her meetings.

So the issue for us is not whether there is a genuine issue of material fact concerning the defendants' policy toward the use of school premises for meetings unrelated to school business, it is whether the district court's findings concerning that policy are clearly erroneous. A preliminary question is whether those findings are clear enough to review. This is often a problem when a summary judgment proceeding, to which the requirement in Fed R.Civ.P 52(a) that the judge make findings of fact and conclusions of law does not apply, is converted into a bench trial, to which the requirement does apply. The judge made no explicit finding that the defendants have a policy of forbidding all meetings on subjects unrelated to school business; the only explicit finding is that "the school board and the superintendent of schools had

consistently applied a policy prohibiting use of school facilities for religious activity " 615 F Supp at 763 (emphasis added) The judge went on to find that no other meetings of teachers had occurred at the Harper School that were not related to the operation of the school, but this is consistent with no other teachers' having wanted to have such meetings and is not a determination as to what the school would have done if other teachers had tried to hold such meetings.

[12] However, elsewhere in the passage that we quoted earlier, the district judge said, "If other teachers groups were permitted to meet ."--and indicated that they were not permitted by concluding, "The record reveals no such scenario." Id. at 764. All this is less clear than we would like, but since Mrs. May does not ask us to remand the case for further findings, we are entitled to draw reasonable inferences as to the judge's findings, and we infer that the judge indeed found that other groups would not have been permitted to meet, with the exceptions noted earlier. And this finding cannot be set aside as clearly erroneous. The fact that stands out from all others is that the Harper School, in contrast to the public schools involved in the East Baton Rouge case or in Country Hills Christian Church v. Unified School Dist. No. 512, 560 F.Supp. 1207, 1214 (D.Kan.1983), has never been used for meetings unrelated to the business of the school. Mrs. May asks us to speculate on the counterfactual proposition that if teachers belonging to a nonreligious group such as the Democratic Party or Planned Parenthood or the Committee on the Present Danger had asked to hold a meeting in the school, they would have been allowed to do so She had the burden of proving this and failed to carry it. She argues that political subdivisions were permitted to use school facilities, but so far as appears this just means that the Harper *1117 School was used as a polling place on election day. Especially since political meetings are forbidden at polling places, one cannot argue that by allowing the school to be used for polling, the defendants made it a public forum for political and religious discussion She says that teachers were allowed to meet to discuss any subject but religion, but what the record actually shows is that no effort was made to monitor teachers' conversations in corridors, at lunch, and before and after school As the deputy superintendent of schools testified, "I'm not aware of any organized activities in terms of gathering teachers together to discuss economics or politics All of the questions you've asked previously along that line, I've responded in terms of teacher one, two, talking with each other in the halls or in the office or in one of the teacher's classrooms; but I know of no organized efforts along those lines." As we said earlier, there is a difference between informal conversations on the one hand, and regular meetings of an organized group for a purpose specified in advance, on the other. Only in a totalitarian society is an encounter between two employees at the water cooler deemed a meeting if the conversation happens to turn to politics or religion By permitting such encounters a public employer does not dedicate its premises to the holding of regularly scheduled meetings on matters unrelated to school business.

The absence of a formal policy does not prove the absence of a policy. It would not be likely to occur to the principal of a small elementary school that political or religious groups would ask to use the school for meetings and that he ought to have some policy readied for the occasion Apparently none ever had before Mrs. May's group The school district is larger, of course. We are told that it has 35 school buildings But apparently until the activities of Mrs. May's group came to light no group had asked to hold meetings unrelated to school matters in any of the buildings. Two religious youth groups had asked to use a high school and had been turned down; these would have been school-related--a significant distinction, as we are about to see. A church whose building had burned down was allowed to use another school in the district for religious services, but this was so plainly an emergency situation that no need to formulate a general policy was felt. Few administrators deal with problems before they arise, their motto is, sufficient unto the day is the evil thereof. It would hardly occur to the average school administrator to think that when he allowed the girl scouts to use school premises he should be thinking what to do when the Ku Klux Klan asked to use those premises for its cookie sale, on penalty of having to pay damages if he thought wrong.

The strongest support for Mrs. May's position is the fact that the defendants were fearful of violating the establishment clause. Their concern, which may well have rested on an exaggerated view of the scope of the establishment clause, led them to deny

the use of school premises to two religious groups one of which, at least, was school-related. This refusal might create interesting questions in a suit by such a group, modeled on the suit in Widmar, but that is not this suit, the fact that the record reveals a definite policy against religious meetings does not answer the question whether the defendants created a forum for speech and denied just religious groups access to it, and the weight of the evidence suggests not. The Harper School was not used for meetings unrelated to school business, assuming as we do that it is possible to distinguish private conversations from meetings and that the gatherings of Mrs May's group were--as she acknowledges--meetings There is no hint that any of the defendants is hostile toward religion in general or evangelical Christianity in particular, and on this record it would be speculation to find that they would have allowed Mrs. May to hold her meetings if only her subject matter had been politics rather than religion The fact that the school district allowed a church to use a school building suggests if anything a partiality toward religion (though the church may have paid rent--the record is unclear ***1118** on this point) If so this would make it all the less likely that a political group would have fared better than Mrs. May's religious group if it had wanted to hold regular meetings in the Harper School. Maybe if it had been not a political or religious group but a cooking or exercise class the defendants would have reacted differently, but a school is not a public forum for teachers to express themselves on matters unrelated to school business just because it has a gym or a kitchen. The issue is whether the defendants would have allowed groups interested in discussing matters unrelated to the educational mission of the Harper School to use school premises for regular meetings, and balked only at religion; and on this narrow issue the district judge was entitled to find that the plaintiff had not carried her burden of proof on a sparse record which however she does not want an opportunity to expand

[13][14][15][16] We emphasize that since a school is not a traditional public forum like the streets or parks, the plaintiff had to show that the officials in charge of it made it a public forum. It would not be enough to show that they had no crystallized, articulate policy against its being open to the public. "The government does not create a public forum by inaction or by permitting limited discourse, but only by intentionally opening a non-traditional forum for public discourse " Cornelius v NAACP Legal Defense & Educational Fund, Inc., supra, 105 S Ct. at 3449. A school is not presumed to be a public forum, see, e.g., Perry Education Ass'n v. Perry Local Educators' Ass'n, 460 U S 37, 46, 103 S.Ct. 948, 955, 74 L Ed.2d 794 (1983)--and the fact that this school had never in fact been used for meetings not related to school business created, indeed, the opposite presumption

[17] The plaintiff is the master of his (in this case her) case. She has staked her all on persuading us to hold that the free speech clause of the First Amendment gives teachers and other public employees a broad right to hold meetings on their employers' premises. We do not think the free speech clause confers such a right and we are sure that the plaintiff has abandoned any effort to get a trial on the issue whether her employer singled out religious discussion for exclusion from what was otherwise an open forum for teachers to express themselves It is possible that the defendants are discriminating against religious speech--that they would have allowed nonreligious groups to meet to discuss matters unrelated to school business--but this record does not prove it and Mrs. May has declined the opportunity to compile a fuller record. We cannot review her litigating strategy. The judgment for the defendants is

AFFIRMED

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United States Court of Appeals,
Ninth Circuit

**Morris J. STARSKY, Plaintiff-Appellee**
**v.**
**Jack R. WILLIAMS et al., Defendants-Appellants.**

**No. 73-1520.**

Feb. 26, 1975.

Action was brought to challenge termination of plaintiff professor's services at state university seeking both an injunction and damages under the Civil Rights Act The United States District Court for the District of Arizona, C. A. Muecke, J., 353 F.Supp. 900, granted plaintiff's motion for summary judgment and an appeal was taken The Court of Appeals, Duniway, Circuit Judge, held that under the unique circumstances it was determined that the parties had in effect submitted case for trial on agreed statement of facts so that Court of Appeals would apply the clearly erroneous rule in reviewing findings, but that the interests of proper adjudication required the resolution of confusion surrounding the issue of whether sabbatical agreement constituted a bar to claim and case would be remanded for decision on the limited questions of whether the regents had waived the defense based on agreement and if not whether by accepting the agreement the plaintiff had relinquished his claims arising from his termination.

Affirmed in part, reversed in part and remanded.

West Headnotes

**[1] Federal Civil Procedure ⚖2534**
170Ak2534

**[1] Federal Courts ⚖854**
170Bk854
(Formerly 106k406.3(9))

Although parties to action for reinstatement of professor at university made cross motions for summary judgment, under the unique circumstances of case, including the fact that parties agreed that all the underlying material facts were reflected by the written record before the court, parties had, in effect, submitted case to court for trial on an agreed statement of facts embodied in a limited written record so that district judge was free to decide all factual issues relating to reinstatement thereby authorizing Court of Appeals to apply the clearly erroneous rule in reviewing judge's findings. 42 U.S.C A §§ 1981-1985; Fed Rules Civ.Proc. rule 52(a), 28 U.S C A., U.S Dist Ct.Rules D.Ariz., Rule 11(h).

**[2] Federal Civil Procedure ⚖2534**
170Ak2534

Mere fact that parties make cross motions for summary judgment does not necessarily mean that there are no disputed issues of material fact and does not necessarily permit judge to render judgment in favor of one side or the other.

**[3] Federal Courts ⚖943.1**
170Bk943.1
(Formerly 170Bk943, 106k406.9(10))

Although sabbatical agreement seemed to establish prima facie a contractual settlement which would bar action of former university professor for reinstatement, in view of fact that the defendant regents did not present the issue of agreement as a bar as effectively as they should and did not secure a ruling on it, the interests of proper adjudication required remanding case for decision on the limited question of whether regents had waived such defense and, if not, whether former professor had relinquished his claims.

***110** Alan M. Kyman, Phoenix, Ariz , for plaintiff-appellee.

Howard P. Leibow, Sp. Asst Atty. Gen. (argued) Phoenix, Ariz., Nicholas Udall, and Robert O. Lesher, Tucson, Ariz , for defendants-appellants.

Before BROWNING and DUNIWAY, Circuit Judges, and WOLLENBERG,[FN*] District Judge

FN* The Honorable Albert C Wollenberg, United States District Judge for the Northern District of California, sitting by designation.

OPINION

DUNIWAY, Circuit Judge.

The Arizona Board of Regents and its members appeal from a judgment ordering the regents to reinstate Morris J Starsky as an assistant professor of philosophy at Arizona State University. Starsky brought this action for an injunction and damages under the Civil Rights Act, 42 U.S.C. ss 1981-1985, alleging that the Board's decision not to renew his yearly contract violated his first amendment rights The trial court held that the regents improperly predicated the decision not to renew on constitutionally protected speech Starsky v Williams, D.Ariz., 1972, 353 F Supp. 900 We affirm in part, reverse in part, and remand on a limited issue

In January 1970, Professor Starsky cancelled a regularly scheduled class at Arizona State to attend a rally at the University of Arizona, where he was one of several speakers protesting the arrest of certain University of Arizona students. Shortly thereafter, the regents instituted disciplinary proceedings against Starsky for his participation in this and seven other incidents involving allegedly unprofessional conduct. These incidents are described in the opinion of the district court and need not be rehearsed here Although Arizona State University does not have a formal tenure system, Starsky had attained "stability of employment," which entitled him to a hearing before a decision not to renew his contract of employment. This he received before the faculty Committee on Academic Freedom and Tenure.[FN1]

> FN1 Starsky raised no due process challenge to the fairness or adequacy of this hearing, rather he based his constitutional claims solely on his first amendment rights. This appeal thus presents issues different from those in our recent decision in Burdeau v Trustee of the California State Colleges, 9 Cir , 1974, 507 F 2d 770

After taking extensive testimony, totalling nearly 1200 pages of transcript, the faculty Committee made detailed findings regarding the eight specific incidents and concluded that, although the Committee did not condone all of Starsky's conduct, the incidents did not warrant dismissal The university president forwarded these conclusions to the Board of Regents and recommended sanctions short of dismissal Nonetheless, on June 10, 1970, the Board, as it had power to do, decided not to renew Starsky's yearly contract and thus terminated his employment In making this decision, the regents relied on all eight incidents without assigning particular significance to any of them

In this action, after both parties had moved for summary judgment on Starsky's claim for reinstatement, the trial judge proceeded to decide the merits of the claim on the basis of a written record. On the merits, the judge found ***111** that the evidence did not support some of the factual findings of the Board and held that, of the eight incidents for which Starsky was discharged, six involved constitutionally protected speech under applicable Supreme Court precedents, one involved unprotected speech, and one involved conduct other than speech (cancelling a class) and was therefore unprotected. Applying the clearly erroneous rule, for reasons hereafter stated, we sustain the district judge's findings of fact, which were based on his exhaustive review of the evidence. Furthermore, we agree with his careful application of the law to each of the eight incidents.

Faced with a melange of reasons for the discharge, several based on constitutionally protected activity and therefore not valid grounds for dismissal under Perry v. Sindermann, 1972, 408 U.S. 593, 596-98, 92 S.Ct. 2694, 33 L Ed.2d 570, the judge concluded that Starsky's termination was predicated primarily or substantially on protected activity. Accordingly, the judge entered judgment for Starsky, ordering him reinstated, but reserving all issues relating to damages We affirm Judge Muecke's decision on this issue for the reasons stated in his careful opinion. We need not decide whether Judge Mueckle might have applied a less stringent test that would invalidate a discharge if based in part, even though not primarily or substantially, upon protected activity On that question we express no opinion But for a procedural anomaly, we would affirm the judgment in its entirety.

This appeal raises two procedural issues, one of which requires further proceedings in the district court. They are: (1) whether it was proper for the district judge to enter judgment for Starsky on what the parties characterized as cross-motions for summary judgment, and (2) whether Starsky's claims are foreclosed by a contractual settlement.

1. Judgment on cross-motions for summary judgment

(1) The regents attack the judgment on the merits by arguing that summary judgment is improper because the trial court resolved genuinely disputed issues of material fact. Although we do not agree with the regents that some issues that they identify were genuinely disputed, we assume arguendo that the judge did resolve at least one disputed material issue, namely, what was the regents' primary reason for discharging Starsky. Nonetheless, we do not reverse the judgment, for we agree with the trial judge that, under circumstances unique to this case, the parties had in effect submitted this case to the court for trial on an agreed statement of facts embodied in a limited written record The judge therefore was free to decide all issues relating to Starsky's right to reinstatement and, in so deciding, to resolve factual issues. See Southwest Forest Industries, Inc. v. Westinghouse Electric Corp , 9 Cir , 1970, 422 F 2d 1013, 1015-18, cert. denied, 400 U.S. 902, 91 S Ct. 138, 27 L Ed.2d 138 This is why we apply the "clearly erroneous" rule, Fed R Civ.P. 52(a) in reviewing the judge's findings

The judge made every effort to maneuver this case into a posture that would permit expeditious resolution of the threshold constitutional issues determinative of Starsky's claim to reinstatement To that end, during a hearing on defendants' motion to dismiss in the early stages of the litigation, the judge entreated the parties to take advantage of discovery and encouraged them to expedite a decision of the merits of the reinstatement claim without a full trial, suggesting by way of example that summary judgment might be appropriate. Several months later the regents moved for summary judgment, relying on the pleadings, various affidavits, minutes of the meetings of the Board of Regents, and the transcript and exhibits from the hearing before the faculty Committee on Academic Freedom and Tenure.

As required by Local Rule 11(h) of the District of Arizona, the regents submitted a statement of material facts on which they relied for their motion After one faltering attempt to rely on a mere series of citations to the administrative transcript, Starsky also submitted ***112** his statement of material facts His principal ground for opposing summary judgment was that he alleged a conspiracy among the regents to punish him for his unpopular views and that questions of motive ought not to be resolved on summary judgment. The regents nonetheless maintained that the summary judgment procedure was proper.

At the hearing on the motion, upon persistent inquiry from the court, both parties made it clear that they relied on the written record before the court and that all the relevant facts on the issue of reinstatement were contained in that written record. Once again the judge urged the parties to make use of discovery to ensure that the record before the court was complete. Starsky followed the judge's suggestion by propounding interrogatories to each of the individual defendants, who included the regents and the university president The answers to the interrogatories revealed no additional documents or information with which Starsky desired to supplement the record.

The judge then ordered a preliminary pretrial conference, suggesting that the case could be adjudicated either by cross-motions for summary judgment or by trial to the court. Although there is no record of the pretrial conference before us, a later order reveals that Starsky agreed to file a cross-motion for summary judgment and that the parties considered the case ripe for adjudication on the merits

Starsky then moved for summary judgment on the theory that his first amendment rights had been infringed In response, the regents made no objection to Starsky's assertion that there were no factual disputes Rather, the regents argued the merits of their legal theory that the presence of one valid ground for dismissal, notwithstanding the regents' concomitant consideration of constitutionally invalid grounds, validated their action, and further argued that the court should grant their own motion for summary judgment. The regents never suggested that were material factual disputes which precluded granting Starsky's motion. There was no oral argument on Starsky's motion

Even after taking the cross-motions under submission, the judge made two specific requests for additional documents to shed light on the deliberations of, and materials considered by, the regents.[FN2] The regents produced the requested documents.

FN2 On July 18, 1972, the court issued the

> following Order as a preface to a request for additional documents
>
> Both parties having moved for summary judgment and having submitted statements of fact under Local Rule 11(h), and no party having in any way contradicted the material evidentiary facts as recited in the opposing party's 11(h) statement, or recited any materially factual matter which would preclude summary judgment to the other side, and all parties appearing to rely upon the transcript of the hearing before the committee of academic freedom and tenure, and the other exhibits on file in this matter, it appears to this Court that the posture of the case at this point would permit a final adjudication on the merits on the issue of liability only (footnote omitted) based upon all of the documentary evidence on the file, there being no further evidence to be presented by the parties

(2) We are mindful that the mere fact that the parties make cross-motions for summary judgment does not necessarily mean that there are no disputed issues of material fact and does not necessarily permit the judge to render judgment in favor of one side or the other. 6 J. Moore, Federal Practice P 56 13 (1965) However, in this case, the parties in fact agreed that all of the underlying material facts were those reflected by the written record before the court Given the unique procedural history of the litigation, which was drawn out over two and one-half years, the court was justified in concluding that the parties had in effect and in substance agreed to a trial of the reinstatement claim on the written record. In the words of the district judge

> This Court issued an order on July 18, 1972 stating that this case is ready for final judgment on the merits on *113 the issue of liability. The parties were given additional time to file any further pertinent documents Additional documents were filed, and neither party took issue with this Court's characterization of the posture of the case. This Court, therefore, can now decide this case on the issue of liability Should the plaintiff prevail, the issues of damages would be tried later.
>
> Throughout the proceedings to date, neither side has suggested the existence of any additional evidence pertinent to the issue of liability Although we are dealing with cross-motions for summary judgment, the case in view of the foregoing is now in the posture of an agreed statement of facts

353 F.Supp. at 904 (emphasis added) The comments of the judge, and of defendants' counsel, at a hearing on a proposed form of judgment, reveal that the parties understood the foregoing to be a fair statement of the posture of the case We agree that it is.

That the parties and the court referred to the case as being submitted on cross-motions for summary judgment is therefore not controlling We have on other occasions, in cases nominally submitted on motions for summary judgment, held that the parties had stipulated to what was in effect a trial to the court on an agreed written record. Southwest Forest Industries, Inc v Westinghouse Electric Corp , 9 Cir., 1970, 422 F.2d 1013, 1017-18, Gillespie v. Norris, 9 Cir , 1956, 231 F.2d 881. In Gillespie we said·

> Now, while summary judgment cannot be granted where there are questions of fact to be disposed of, even by consent of all concerned, there is no reason why parties cannot agree to try a case upon affidavits, admissions and agreed documents. In effect, that is what was done here. No objection whatever was made at the time of submission that there were questions of fact which could not be decided upon the evidence before the trial court.

231 F 2d at 883-84. We drew the same conclusion in Southwest Forest Industries. We draw the same conclusion here The court properly decided the merits of the reinstatement claim.

2. The purported contractual settlement.

Somewhat belatedly, the regents have raised the argument that Starsky and the university entered a contractual settlement, or an accord and satisfaction, which bars this action.[FN3] The regents base this argument on a terminal sabbatical agreement offered by the regents and accepted by Starsky not long after the inception of the lawsuit.

> FN3 The parties have variously denominated this legal theory as an "accord and satisfaction" or as a "contractual settlement" of a claim For purposes of this appeal we perceive a distinction between the terms and adopt the latter for convenience

When the Board of Regents decided on June 10, 1970, not to renew Starsky's contract, they adopted the following resolution to effect the termination

> It is therefore the judgment of the Board that the interests of education in the State of Arizona require that Dr Starsky no longer be permitted to

teach on the campuses under the jurisdiction of this Board. The decision of this Board shall be carried out in the following manner:

1 That Doctor Starsky, having applied for sabbatical leave, be given the opportunity to take a terminal sabbatical leave for the full academic year, 1970-71, for which he is qualified in terms of years of service, and for which he will be paid the usual rate of 60% of his regular salary, with the full understanding that (a) he will absent himself from the Arizona State University campus during this period of sabbatical leave; and (b) his contract will not be renewed at the close of the 1970-71 academic year, and neither will he be required to return to Arizona State University for a period of time following such leave.

*114 2 That if Doctor Starsky does not choose to accept the foregoing arrangement, his contractual relationship with Arizona State University be terminated as of the end of the 1969-70 academic year, and he be tendered no new contract for further services at Arizona State University.

On July 28, 1970, Starsky, who had filed his first complaint in this lawsuit before the regents formally decided not to renew his contract, signed and submitted an application for sabbatical leave. As part of the standard form, that application contains the following statement: "I have read and will comply with the provisions of the Sabbatical Leave Policy of the Board of Regents." Typed in immediately after this statement, and immediately above Starsky's signature, is the following additional statement: "It is also understood that this leave, if granted, will be subject to action taken by the Board of Regents, June 10, 1970." This application was approved by various university officials on July 29 and 30.

(3) On July 27, 1970, Starsky had filed his first amended complaint in this action. The striking proximity of events and the ambiguous language of the sabbatical application make us wonder why the parties did not mention the pending lawsuit in the agreement. The regents now urge us to hold, as a matter of law, that Starsky's claim is barred by the putative settlement reflected by the sabbatical agreement. This we decline to do because the record indicates that the court below did not rule on the issue and because there appear to be material issues of fact. Although the sabbatical agreement seems to us to establish, prima facie, a contractual settlement that would bar this action, we cannot ignore the fact that the regents did not present this issue as effectively as they should have to the trial judge and therefore failed to secure a ruling on it. Moreover, the fact that this action was pending, but is not mentioned in the papers relied on by the regents, raises doubt as to the parties' intentions.

To explain how the seemingly critical issue of the purported contractual settlement languished in the proceedings below requires a brief recapitulation of the events revealed by the record. The regents first raised the alleged settlement as an affirmative defense to this action in a motion to dismiss, to which they attached certified copies of the June 10 minutes and the terminal sabbatical agreement executed by Starsky. The motion was filed October 19, 1970, in response to Starsky's amended complaint, which had been filed July 27, 1970. The judge did not rule on this aspect of the motion, apparently because Starsky elected to file a second amended complaint on May 10, 1971. A third amended complaint was filed on June 17, 1971. As required by Fed.R.Civ.P. 8(c), the regents' answer, filed on July 28, 1971, clearly pleaded the agreement as an affirmative defense of accord and satisfaction.

However, when the regents moved for summary judgment, they failed to raise the settlement issue specifically as a ground for summary judgment. Neither their motion, the attached affidavits, nor the supporting memorandum made any reference to the putative contractual settlement. In fact, the way in which the regents submitted their motion for summary judgment may have misled the judge. Even though the regents had already submitted a certified copy of the minutes of June 10, 1970, meeting of the Board of Regents with the earlier motion to dismiss of October 19, 1970, the regents attached another certified copy of those minutes, along with the minutes of two other meetings, to their motion for summary judgment. But the regents did not provide another copy of the sabbatical agreement, or refer to it in any way. The only copy of that agreement in the entire record before us, which we understand to be the entire record of the proceedings below, is the one attached to the October 19, 1970, motion to dismiss. Because the subsequent motion for summary judgment made no explicit reference to affidavits not attached thereto, we would not expect the parties or the *115 court to

have referred back to the motion to dismiss, which had been filed months earlier, and which had fallen into limbo because the complaint had been twice amended thereafter.

Arguably, therefore, the regents might be deemed to have abandoned the issue Indeed, we think they came perilously close to doing so. At the oral argument on the regents' motion for summary judgment, their counsel stated only as a factual matter, in passing, that Starsky had been granted a terminal sabbatical leave, and gave no hint that the regents relied on it in any way as a contractual settlement barring the lawsuit.

At the same oral argument, Starsky's counsel raised a question about missing minutes of certain Board meetings that were held before the decision to terminate Starsky. To allay any potential claims that the record did not contain all the relevant facts, the judge instructed Starsky to discover by conventional means whether there were any additional records of pertinent Board meetings Starsky then submitted interrogatories to each of the regents and to the university president asking whether they had discussed Starsky's case at meetings other than those summarized by the minutes then in the record The regents responded with sworn written answers which revealed no other pertinent meetings before the June 10, 1970, decision to terminate Starsky

However, the answers of four regents [FN4] made reference to a meeting on July 11, 1970, at which the regents considered Starsky's terminal sabbatical The answer of one of the regents, Dunseath, reveals that the Board expressly considered the effect on the pending lawsuit of Starsky's acceptance of the terminal leave [FN5] If that answer completely and accurately reports the negotiations between the parties, it seems very likely that, by accepting the terminal sabbatical leave, Starsky relinquished his claims against the university, both for damages and for reinstatement Furthermore, the answer refers to highly relevant writings, a letter from Starsky's attorney to the president of the university and the minutes of the July 11, 1970, Board meeting, which we suspect still exist but were not placed in the record before the district court There may also be further correspondence between the university president and Starsky's attorney

FN4 Messrs Singer, Dunseath, Paris, and Sharber.

FN5 Question 8 of the interrogatory directed to each regent asked:

Was the subject of the non-renewal of Professor Starsky's employment contract and the granting of a terminal sabbatical leave ever discussed at any meeting of the Board which you attended?

For each occasion give the date, time and place of meeting and other participants, whether Regents or not

Regent Dunseath answered in part

I did not attend or take in the meeting of the Board of Regents on June 10, 1970, at which meeting the Board decided that the interests of education in the State of Arizona require that Dr. Starsky no longer be permitted to teach on the campuses under the jurisdiction of the Board

The Board of Regents, at the same meeting, gave Dr Starsky a choice (reciting the two choices set out in the regents' resolution quoted above )

I attended a meeting of the Board of Regents on July 11, 1970, at which meeting President Newburn reported that he had received a letter from Mr Alan M. Kyman as attorney for Dr Starsky wherein Mr Kyman stated that Professor Starsky would not accept the Regents' conditional offer of a sabbatical and was willing to accept an unconditional sabbatical designated "terminal" with the understanding it was not in full or partial settlement of any claim he may have arising out of the termination of his employment and did not constitute a waiver or settlement of any of his legal rights The Board, after discussion, decided not to change the choices given Dr. Starsky on June 10, 1970, and instructed President Newburn to advise Dr Starsky that it maintained and had reaffirmed its position as to such choices

We note that, although regent Dunseath's answer is illuminating on the settlement question, it was figuratively buried in nearly two hundred pages of repetitive interrogatories. Neither party directed the court's attention to these answers, for the apparent purpose of the *116 interrogatories was to uncover other pertinent documents supporting plaintiff's claim in its merits. Neither party thereafter moved to supplement the record with additional material. However, twice the judge did direct the regents to supply specific documents to which the moving papers made reference None related to the purported settlement of the lawsuit

Suffice it to say that from the filing of the regents' motion to dismiss on October 19, 1970, until after

the judge first filed his opinion on December 26, 1972, except for the answer of July 28, 1971, the record reveals no instance where any party raised the so-called accord and satisfaction or contractual settlement issue Like the answers to interrogatories, the pertinent papers, filed with the motion to dismiss, were buried in several hundred pages of papers in the clerk's files

The judge's thorough 70-page opinion granting Starsky reinstatement alludes neither to Starsky's acceptance of the terminal sabbatical nor to the contractual settlement argument. After the initial filing of the opinion, the judge withheld entry of judgment for a short time to permit emendation of any clerical errors in the opinion and judgment and to allow the Board to meet to consider its response to the adverse judgment

On January 22, 1973, the regents submitted a memorandum addressing the proposed form of judgment and attempting to resuscitate the dormant contractual settlement issue.[FN6] In his response, Starsky argued that the matter raised was immaterial.[FN7] At the January 26, 1973, hearing on the proposed form of judgment, the judge prefaced the argument with a brief explanation of his opinion. In his view, the terminal sabbatical agreement was relevant only to the question of whether Starsky would be entitled to money damages, a question the parties and court had agreed to reserve for a subsequent trial Therefore the judge felt it unnecessary to rule on the purported settlement at that time. [FN8] Counsel for the regents then made another attempt to argue that the sabbatical agreement barred even the injunctive action for reinstatement [FN9] To *117 this argument, the judge responded by asking whether there was a disputed issue as to whether Starsky was improperly coerced into signing the sabbatical agreement.[FN10] It is clear that the trial court never ruled on the question of the alleged settlement

FN6. The regents (defendants') memorandum argued as follows The Defendants at the earliest outset of litigation submitted for the determination of the Court a position of nonliability based upon Plaintiff's acceptance of a terminal sabbatical leave and his written statement that it was accepted subject to the Order of the Board of Regents terminating his employment June 10, 1970 The Court's Opinion and Order Dated December 26, 1972, does not discuss or determine this issue, and it is urged that the Court now rule on this issue for guidance of counsel

FN7 Starsky argued
5 The Court does not have to make findings of fact and conclusions of law on immaterial issues
The Court did not have to make any discussion regarding the issues of alleged nonliability based upon the acceptance of a terminal sabbatical leave, because this is immaterial. The fact that a party has raised an issue, be he a Plaintiff or Defendant, is no guarantee or assurance of materiality to the ultimate decision of the Court If immaterial, it need not enter into the Court's findings or opinion or judgment Sonken- Galamba Corp v Atchison, T & S. F. Ry Co , 34 F Supp 15 (D C , W.D Missouri, W.D.), 1940, at Page 16 Gulf King Shrimp Company v Writz, 5 Cir 1969, 407 F 2d 508, at pages 515 & 516

FN8 On the contractual settlement issue the judge said:
The other aspect of this matter having to do with the sabbatical leave issue and his taking money for part of his salary, or half of it, whatever it was, seems to me to go to the issue of damages and the question of mitigation and the question of how much he received and the question if, in fact, he is entitled to any damages or whatever may be argued, and I don't see how it applies at all to the case here, since I have found as a fact, and I have concluded as a matter of law, as is made pretty clear in my 70- page opinion, that he was fired in violation of his right of free speech and in violation of his due-process rights, so I think that it is-I think the other aspect may have to do with whether or not-what kind of damages should be given to him, and so forth and so on, and I don't know that I have to rule on every possible issue that is presented in the case, if-so long as I rule on the basic issue of the matter of his discharge

FN9 Mr Leibow, for the regents, apparently admitting that it was the first time since the motion to dismiss (or actually the answer) that he had raised the point, argued as follows
With respect to the issue of the sabbatical leave which was mentioned in the-and urged in the initial motion to dismiss, it was the position of defendants at that time, and still is, that there is an element, a legal element in the position taken that does not give rise to damages and that defendant (sic plaintiff) had an election to accept sabbatical leave on the terms stated that this would be a terminal leave, he did so, and that by reason of his action he may now not (sic) complain that the actions of the regents were wrongful, in that he has accepted

compensation

FN10 The following discussion ensued.
THE COURT· Do you think, at the very least, there is an issue of his signing or agreeing to a contract with a gun to his head, so to speak, coercion?
MR LEIBOW Absolutely there is an issue as to that It has not been explored, however
THE COURT Really, by anybody
MR LEIBOW No
THE COURT Until the judgment appeared to be one that-which is what always happens in summary judgment When you think you have the parties agree there are no remaining issues as to fact and then the party that loses always discovers an issue
MR LEIBOW We are not claiming, Your Honor, that there are any additional facts We are maintaining and submitting to the Court that the document, which is self-explanatory, plaintiff's own statement which was added to the form, that he would accept this as his terminal leave, has not been refuted by the plaintiff
THE COURT Well, obviously, as to why he signed that document is not an agreed statement of act. If it is, tell it to me We will make it-I will consider whether it should be part of the record or not.
MR LEIBOW I should think there would certainly not be an agreed statement of fact
The Court You just said there was no fact issue
MR LEIBOW There is no issue that this document was not, in fact, signed and-
THE COURT· It doesn't cover the problem, though, we were just discussing
MR LEIBOW: It does not, that is true, Your Honor, it does not cover the problem

The judge might have taken the position that the regents' reliance on the alleged contractual settlement came too late, and that therefore this defense was waived But he did not do that. As we read the transcript, the judge felt that the circumstances surrounding the execution of the agreement could not properly be presented or adjudicated on the basis of the written record then before him, and that the sabbatical agreement bore only on the damages question. We agree with the first proposition but disagree with the second

If the objective intention of the regents,[FN11] as communicated by them to Starsky in the negotiations which apparently took place, was that the terminal sabbatical was offered in full satisfaction of Starsky's claims, and conditioned on their release, and if Starsky, knowing this, signed the agreement and thus accepted the regents' offer, then the agreement would bar the entire action, both the injunctive claim for reinstatement and the claim for damages. Although in light of the minimal efforts of counsel to present the issue for adjudication we think that the court's failure to rule on it was understandable, we also think that, absent a waiver, it was error. In the interests of proper adjudication, we think it best to resolve the confusion by remanding the case to the district court for a decision on the limited questions (1) whether the regents waived the defense based on the terminal sabbatical agreement, and (2) if they did not, whether, by accepting the terminal sabbatical agreement, Starsky relinquished his claims against the university arising from his termination Cf Murdick's Inc v National Surety Corp , 1971, 143 U S.App.D.C. 39, 442 F 2d 761, 762.

FN11 By "objective intention" we mean that the intention of each party that was communicated to the other A subjective intention of one party, never communicated to the other, either orally or in writing, would be of no significance What counts is the intention or interpretation of the agreement that each party communicated to the other

***118** In remanding, we intimate no opinion on the merits of the question of waiver or of the question of the contractual settlement issue. As to the latter, the parties should be free to adduce before the trial court any evidence pertinent to the objective intention of the parties as to the effect of the terminal sabbatical agreement If there is written evidence of communications by Starsky's attorney to the regents, of the deliberations of the regents on the matter, and of communication by or for them to Starsky or his attorney, we would expect the parties to provide that illuminating evidence. If testimony on the subject is available, that, too, would be material. See Mudrick's, supra In referring to the evidence that might be produced, we express no opinion as to whether any or all of it must be excluded under the parol evidence rule. That question, too, is one for the trial court in the first instance

We remand this case to the district court with instructions to determine the questions outlined above If the court finds that there was no waiver

and that the agreement was in fact a binding settlement, the court should vacate the injunction, deny all relief requested by Starsky, and enter judgment for the defendants If the court finds that the defense was waived or that there was no contractual settlement, and because we affirm the court's decision that the discharge was invalid, the court should continue the injunction in effect and should proceed to an appropriate determination of the issue of damages. We decline to reach the damages questions. In the interest of avoiding repeated appeals, we suggest that the court consider deciding both the questions outlined above, even though the court may find that there was a waiver of the defense.

If there is a later appeal, the appealing party may, on motion, incorporate the present record and briefs on this appeal as part of the record and briefs on that new appeal. Only the new record developed on remand need be forwarded to this court, and the parties need file only limited briefs, addressing the remaining issues relating to the settlement and its effect.

Affirmed in part, reversed in part, and remanded.

END OF DOCUMENT

64 F 3d 28
64 USLW 2208, 150 L R R M (BNA) 2202, 130 Lab.Cas. P 11,405
**(Cite as: 64 F.3d 28)**

United States Court of Appeals,
First Circuit.

UNITED PAPERWORKERS INTERNATIONAL UNION, LOCAL 14, AFL-CIO-CLC, et al ,
Plaintiffs-Appellants,
v
INTERNATIONAL PAPER COMPANY,
Defendant-Appellee

No. 95-1075

Heard June 9, 1995.
Decided Sept. 7, 1995

Labor unions sued employer paper mill to enforce recall agreement, which set forth terms and procedures under which former economic strikers would be recalled to employment. The United States District Court for the District of Maine, D Brock Hornby, J , 1994 WL 778307, ruled that recall agreement became unenforceable upon unions' decertification, and it entered summary judgment for paper mill Unions appealed. The Court of Appeals, Torruella, Chief Judge, held that district court reasonably inferred that recall agreement was not intended by parties to survive decertification

Affirmed.

West Headnotes

[1] Federal Civil Procedure k2544

Party seeking summary judgment must make preliminary showing that no genuine issue of material fact exists, and, once this showing is made, nonmovant must point to specific facts demonstrating that there is trialworthy issue. Fed.Rules Civ.Proc.Rule 56(c), 28 U.S.C.A.

[2] Federal Civil Procedure k2470 1

For summary judgment purposes, "genuine issue" exists when evidence relevant to it, viewed in light most flattering to nonmoving party, is sufficiently open-ended to permit rational fact finder to resolve issue in favor of either side. Fed.Rules Civ Proc.Rule 56(c), 28 U S C A

[3] Federal Courts k754 1

Because summary judgment standard requires trial court to make legal determination rather than to engage in fact-finding, appellate review is plenary Fed.Rules Civ Proc.Rule 56(c), 28 U S C A

[4] Federal Civil Procedure k2470.2

In nonjury case, when basic dispute between parties concerns only factual inferences that one might draw from more basic facts to which parties have agreed, and where neither party has sought to introduce additional factual evidence or asked to present witnesses, parties are, in effect, submitting their dispute to court as "case stated," and district court is then freed from usual constraints that attend adjudication of summary judgment motions, and may engage in certain amount of fact-finding, including drawing of inferences. Fed.Rules Civ.Proc.Rule 56(c), 28 U.S C A.

[5] Federal Courts k843

In nonjury case, when basic dispute between parties concerns only factual inferences that one might draw from more basic facts to which parties have agreed, and where neither party has sought to introduce additional factual evidence or asked to present witnesses, appellate court may assume that parties considered matter to have been submitted to district court ready for decision on merits, and standard for appellate review consequently shifts from de novo review to clear-error review, so that district court's factual inferences should be set aside only if they are clearly erroneous. Fed.Rules Civ.Proc Rule 56(c), 28 U.S.C.A

[6] Federal Civil Procedure k2534

[6] Federal Courts k766

[6] Federal Courts k776

Mere fact that parties move simultaneously for summary judgment does not automatically change

district court's analysis or render customary standard of appellate review obsolete; rather, nisi prius court must consider each motion separately, drawing inferences against each movant in turn, and court of appeals must engage in de novo review, except in nonjury case under special circumstances in which basic dispute between parties concerns only factual inferences that one might draw from more basic facts to which parties have agreed, and where neither party has sought to introduce additional factual evidence or asked to present witnesses Fed.Rules Civ Proc Rule 56(c), 28 U S C.A

[7] Federal Courts k776

[7] Federal Courts k843

Parties submitted their case to district court as case stated, thus requiring Court of Appeals to apply more deferential clear-error standard of review in examining inferences drawn by district court, although still subjecting district court's legal conclusions to de novo review; parties cross-moved for summary judgment, both agreed that there was no dispute over basic facts of case and neither indicated any intent to present additional evidence or evidence or request jury trial, and only dispute in case stemmed from inferences that parties claimed had to be drawn from those basic facts, or, in other words, what legal significance should be ascribed to those facts. Fed.Rules Civ.Proc.Rule 56(c), 28 U S.C A

[8] Labor Relations k261

District court reasonably inferred that recall agreement between unions and paper mill, concerning recall rights for economic strikers, was not intended by parties to survive unions' decertification, based on district court's finding that recall contract contemplated "ongoing relationship" between parties and was tied directly to collective bargaining agreement which itself became unenforceable upon decertification, and court's conclusion that absence of expiration date in agreement supported inference that it was not intended to survive decertification, decertification petition was pending throughout parties' negotiations, but unions did not bargain for any provision allowing recall agreement to survive their possible decertification Labor Management Relations Act, 1947, § 301(a), 29 U.S.C A § 185(a)

*29 Jeffrey Neil Young, with whom McTeague, Higbee, Libner, MacAdam, Case & Watson, Topsham, ME, was on brief, for appellants

Jane B Jacobs, with whom Andrew E. Zelman and Klein, Zelman, Briton, Rothermel & Dichter, L.L.P., New York City, were on brief, for appellee.

Before TORRUELLA, Chief Judge, CAMPBELL, Senior Circuit Judge, and CYR, Circuit Judge.

TORRUELLA, Chief Judge.

The plaintiff-appellants, United Paperworkers International Union, Local 14, AFL-CIO, and International Brotherhood of Firemen and Oilers, Local 246, AFL-CIO (the "Unions"), appeal the district court's decision on summary judgment in favor of International Paper Company (the "Company"), ruling that a recall agreement between the Unions and the Company became unenforceable upon the Unions' decertification For the following reasons, we affirm

*30 BACKGROUND

The Unions and the Company agree that there are no material facts in dispute. The Company owns and operates a paper mill in Jay, Maine known as the Androscoggin Mill (the "Mill"). Between 1965 and March 1993, employees at the Mill were represented for purposes of collective bargaining by the Unions. Throughout that time, the Unions and the Company have been parties to a series of collective bargaining agreements setting forth the terms and conditions of employment at the Mill In June 1987, when the Company and the Unions could not reach an accord over a succeeding collective bargaining agreement, members of the Unions engaged in an economic strike. The Company hired replacement workers during the strike.

In October of 1987, the Company laid off 151 striking employees (the "Employees"). All but three of these Employees had recall rights for twelve months after layoff [FN1] The twelve month period in which the Employees were eligible for recall expired before the parties began strike settlement negotiations

FN1. The other three employees resigned in 1989 pursuant to a pension offer negotiated by the Unions. Therefore, these three employees are not at issue in this case.

On November 16, 1987, certain Mill employees petitioned the National Labor Relations Board (the "NLRB") to hold a decertification election to determine whether the Mill employees desired continued representation by the Unions. The actual election was delayed for over a year.

On October 9, 1988, the Unions ended their strike and made an unconditional offer to return to work. Between October 18 and October 26, 1988, the Unions and the Company negotiated and executed an agreement setting forth terms and procedures under which former strikers would be recalled as replacement workers left and their positions became available During negotiations, the Unions raised the issue of the 151 Employees who had been laid off in October 1987 and whose recall rights had technically expired. The final recall agreement provided, with limited exceptions, that the 151 laid off Employees would be among the employees recalled under the agreement

In April 1989, at the Unions' request, portions of the recall agreement were renegotiated and amended to include lists setting forth the order in which employees were to be recalled. The 151 laid off Employees were included on these lists. Both the October 1988 agreement and the April 1989 amended agreement were silent as to its duration or termination The decertification petition was pending throughout the negotiations

In July 1989, the NLRB conducted a decertification election at the Mill. Of the employees eligible to vote, 616 voted for decertification, and 361 voted against. After investigating and holding a hearing on the Unions' challenge to the election, the NLRB issued a decision upholding the election results and dismissing the Unions' objections. The Unions thus became decertified as of March 30, 1993 Both parties acknowledge that upon decertification, the then- existing collective bargaining agreement, which would otherwise have been effective until September 30, 1993, became null and void.

In August 1993, the Company advised the Unions and several of the 151 laid off Employees that as a result of the Unions' decertification, the Employees no longer had recall rights The Unions thereafter filed this action in the United States District Court for the District of Maine, contending that the recall agreement, unlike the collective bargaining agreement, survived the Unions' decertification and thus remained binding on the Company.

Following cross-motions for summary judgment, the district court issued its decision on December 1, 1994 The district court found that there was no indication in the recall agreement itself that the parties intended it to survive decertification, despite the fact that the decertification petition had been filed and was pending during the negotiation of the agreement. The court explained that because the recall agreement establishes rights for a category of represented employees, and explicitly specifies that its terms are to prevail if there is any conflict with "other provisions of the labor *31 agreement," the recall agreement is "tied directly to the collective bargaining agreement," such that it contemplates "ongoing union involvement " Because the recall agreement would affect the Company's negotiations with a new union seeking to represent a majority of employees, and would "perpetuate a limited portion of the elements ordinarily covered by a collective bargaining agreement," the recall agreement cannot be said to be independent of the collective bargaining agreement. Therefore, the court reasoned, the recall agreement did not survive decertification. Accordingly, the court granted summary judgment in the Company's favor

## DISCUSSION

### A. Standards of Review

[1][2][3] In general, summary judgment is proper only if no genuine issue of material fact exists and the movant is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(c). Therefore, a party seeking summary judgment must make a preliminary showing that no genuine issue of material fact exists. Once this showing is made, the non-movant must point to specific facts demonstrating that there is a trialworthy issue. National Amusements, Inc v. Town of Dedham, 43 F.3d 731, 735 (1st Cir 1995) An issue is "genuine" when the evidence relevant to it, viewed in the light most flattering to the non-moving party, is "sufficiently open-ended to permit a rational factfinder to resolve the issue in favor of either side." Id (citation omitted) Because the summary judgment standard requires the trial court to make a legal determination rather than to engage in factfinding, appellate review is plenary. Equal Employment Opportunity Comm'n v. Steamship Clerks Union 1066, 48 F 3d 594, 602 (1st Cir 1995).

[4] This standard is the norm Having stated it, however, we must note that under our precedent, in certain, somewhat unusual cases, this standard does

not apply In a nonjury case, when the basic dispute between the parties concerns only the factual inferences that one might draw from the more basic facts to which the parties have agreed, and where neither party has sought to introduce additional factual evidence or asked to present witnesses, the parties are, in effect, submitting their dispute to the court as a "case stated " Steamship Clerks, 48 F 3d at 603 (citing Federacion De Empleados Del Tribunal Gen De Justicia v. Torres, 747 F.2d 35, 36 (1st Cir 1984) (Breyer, J.)). The district court is then "freed from the usual constraints that attend the adjudication of summary judgment motions," and may engage in a certain amount of factfinding, including the drawing of inferences. Id.

[5] By the same token, the appellate court may assume that the parties considered the matter to have been submitted to the district court as a case ready for decision on the merits Id. The standard for appellate review consequently shifts from de novo review to clear-error review, that is, the district court's factual inferences should be set aside only if they are clearly erroneous. Id. (citing United States v. Ven-Fuel, Inc , 758 F 2d 741, 744 n. 1 (1st Cir 1985))

[6][7] In the instant case, the parties cross-moved for summary judgment, yet both agreed that there was no dispute over the basic facts of the case. [FN2] Nor did either party give any indication that it intended to present additional evidence or witnesses, or request a jury trial The only dispute in the case stems from the inferences that the parties claim must be drawn from those basic facts--what legal significance should be ascribed to those facts In effect, therefore, the parties submitted their case to the district court as a case stated See Steamship Clerks, 48 F 3d at 603 (holding same in virtually identical procedural circumstances). ***32** Similarly, the parties both state in their appeal briefs and during oral argument that they agree upon the basic material facts of the case. Accordingly, we are bound to apply the more deferential clear-error standard of review when examining the inferences drawn by the district court Id. The district court's legal conclusions nevertheless engender de novo review. Id. (citing McCarthy v. Azure, 22 F.3d 351, 354 (1st Cir 1994)).

> FN2 Of course, the mere fact that the parties moved simultaneously for summary judgment does not automatically change the district court's analysis or render the customary standard of appellate review obsolete. Unless the special circumstances described here are present, "the nisi prius court must consider each motion separately, drawing inferences against each movant in turn, and the court of appeals must engage in de novo review " Steamship Clerks, 48 F.3d at 603 n. 8 (citing El Dia, Inc. v. Hernandez Colon, 963 F 2d 488, 492 n. 4 (1st Cir.1992); Griggs- Ryan v. Smith, 904 F.2d 112, 115 (1st Cir.1990)).

B. The District Court's Decision

The Unions' primary contention on appeal is that the district court erred as a matter of law, and that its ruling is contrary to the Supreme Court's decision in Retail Clerks Internat'l Ass'n Local 128 v. Lion Dry Goods, 369 U.S. 17, 82 S.Ct. 541, 7 L.Ed.2d 503 (1962). Specifically, the Unions argue that the Lion Dry Goods decision compels the legal conclusion that the recall agreement in the instant case is an enforceable contract. We think that the Unions' argument ascribes too much to the Lion Dry Goods case and too little to the district court's decision here.

In addressing the issue of whether the recall agreement survived the Unions' decertification, the district court began by noting that "decertification ends the enforceability of any collective bargaining agreement," and observing that both parties concede that the Company is no longer obliged to negotiate or bargain with the Unions or to honor the terms and conditions of the previous collective bargaining agreements Going on to discuss the issue of the recall agreement's continued viability, the court explained:

> [The recall agreement was] [d]rafted at a time when the Unions were still certified as majority bargaining representatives, [and] it requires that the Unions receive a copy of any recall notice sent to unreinstated strikers. The recall contract establishes rights for this category of represented employees and affects their seniority. Indeed, it specifies that its terms are to prevail if there is any conflict with "the other provisions of the labor agreement".... Thus, the recall agreement is tied directly to the collective bargaining agreement· it supersedes or amends any conflicting portions of the collective bargaining agreement; it affects seniority rights under the collective bargaining agreement; and its notice requirement contemplates ongoing union involvement To say

that this contract survives, then, would affect any negotiations with a new union that might seek to represent a majority of International Paper employees and in the meantime would perpetuate a limited portion of the elements ordinarily covered by a collective bargaining agreement . The conclusion is therefore unavoidable that this recall and seniority contract does not survive decertification

I do not need to decide whether a company and a union can ever make an agreement that will be enforceable after a decertification Here, there is no indication in the recall agreement that the parties intended it to survive decertification.... I conclude that on the undisputed record the recall agreement became unenforceable upon decertification of the Unions.

(Emphasis added) (footnotes omitted). In a footnote to this discussion, the district court noted that Lion Dry Goods "suggests that contracts with minority unions may be enforceable, but the only matter actually decided there was that jurisdiction existed under § 301 [of the LMRA]."

We agree with the district court that Lion Dry Goods is not dispositive of the issue in the instant case Our reading of that case indicates that the Supreme Court was only addressing the narrow issue of whether a strike settlement agreement between a minority union and an employer constitutes a "contract" as that term is employed in § 301(a) of the LMRA, 29 U S.C. § 185(a) Lion Dry Goods, 369 U S at 27, 82 S.Ct. at 547-48 Reasoning that the language, purpose, and legislative history of the statute do not support the exclusion of such agreements from the purview of § 301(a), id. at 26-28, 82 S.Ct. at 547-48, the Court held that claims for alleged violations of such agreements are "cognizable" under § 301(a). Id. at 29-30, 82 S.Ct. at 548-49 [FN3]

> FN3. In so holding, the Court rejected arguments that the language of § 301 contemplated only those contracts between employers and unions representing a majority of employees, explaining that the language and history of the statute did not support such a narrow construction. Id. at 28-29, 82 S Ct at 548-49

*33 The parties in the instant case disagree over the scope of the Court's holding in Lion Dry Goods; the Company contends that it is merely a grant of jurisdiction, while the Unions contend that it stands for the proposition that contracts between unions and employers remain enforceable even after the union has lost its majority representative status

We need not resolve this dispute, however Even assuming arguendo that Lion Dry Goods holds, as the Unions claim, that contracts between unions and employers are enforceable after decertification, it cannot by any stretch be said to require that all such contracts must be enforced regardless of the intentions of the parties to the contract. Indeed, the district court did not hold that recall agreements were as a general matter unenforceable after decertification. It merely analyzed the agreement before it, and inferred from the undisputed facts that the agreement had not been intended to survive decertification The Lion Dry Goods case, regardless of the scope of its holding, is therefore inapposite, and the Unions' reliance on it misplaced [FN4]

> FN4. Contrary to the Unions' arguments, the district court's decision did not hinge on the fact that the Unions no longer had majority representative status. Rather, the court explained that because it found that the recall agreement, by its very terms, was "tied directly" to the unenforceable collective bargaining agreement, it had not been intended to survive the Unions' decertification. In other words, the court's decision rested not on the status of the Unions, but upon indicia of the parties' intentions in negotiating the agreement.
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> We also reject the Unions' arguments that the district court's concern that the recall agreement would affect a successor union's ability to represent Company employees is "ill-founded" in light of the Lion Dry Goods case. The parties in Lion Dry Goods explicitly agreed that their contract would have effect even after the Union lost its majority representative status, 369 U.S. at 22-23, 82 S.Ct. at 545-46, a crucial fact markedly absent in the instant case

Having disposed of this argument, we are left only with the Unions' contentions that the district court drew impermissible inferences in concluding, based on the undisputed factual record before it, that the parties did not intend the recall agreement to survive decertification. As we explained supra, however,

we review these inferences only for clear error. After carefully examining the record, we can discern no such clear error on the part of the district court.

[8] The Unions challenge the district court's finding that the recall agreement contemplated an "ongoing relationship" between the parties and therefore could not have been intended to remain in effect after the Unions' decertification The Unions concede that the provisions cited by the district court are characterized accurately; the Unions urge, however, that "it could just as equally be said" that the agreement was intended to survive decertification The Unions offer no facts or evidence in support of this argument, nor do they claim that this actually was the parties' intent. They also do not indicate how the district court's inference was unreasonable or erroneous, they merely claim that the opposite conclusion could have been made in interpreting the agreement We think that the district court's inferences based on the undisputed record were well-supported and reasonable We certainly cannot say that they rise to the level of clear error, so we must reject the Unions' argument on this score.

Similarly, we are not persuaded by the Unions' argument that the district court erred in concluding that the absence of an expiration date in the agreement, among other indicia, supported the inference that it was not intended to survive decertification We agree that the absence of an expiration date could be interpreted to mean that the parties intended the agreement to remain in effect until all employees' recall rights were exhausted, regardless of the Unions' representative status. We do not see, however, nor do the Unions point to, any reason that the district court's conclusion to the contrary was unreasonable. The decertification petition was pending throughout the parties' negotiations, and neither party could have accurately predicted when it would take place. Certainly, if the Unions had intended for the *34 recall agreement to survive their possible decertification, they could have bargained for such a provision. We think that the absence of such a provision or expiration date, under these circumstances, just as reasonably supports the inference that the parties had not intended the agreement to survive. We therefore find no error in the district court's conclusion to this effect.

CONCLUSION

Finding no clear error, we affirm

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COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
OF THE
JUDICIAL CONFERENCE OF THE UNITED STATES
WASHINGTON, D.C. 20544



August 14, 2000

Honorable Morton Denlow
United States District Court
for the Northern District of Illinois
219 South Dearborn Street
Chicago, Illinois 60604

Dear Judge Denlow:

Thank you for your suggestion to amend the rules to provide procedures for a "summary bench trial." A copy of your letter was sent to the chair and reporter of the Advisory Committee on Civil Rules for their consideration.

We welcome your suggestion and appreciate your interest in the rulemaking process.

Sincerely,

Peter G. McCabe
Secretary

cc: Honorable Paul V. Niemeyer
Honorable David F. Levi
Professor Edward H. Cooper