

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

UNITED STATES OF AMERICA	:	
	:	Criminal
	:	
vs.	:	
	:	
STEVEN MCLAUGHLIN and	:	
NANCY ZEMO,	:	
	:	
Defendants.	:	No. 98-545
	:	

ORDER & MEMORANDUM

ORDER

And now, to wit, this 12th day of April, 2000, upon consideration of Defendant Nancy Zemo's Motion for a New Trial and/or in Arrest of Judgment (Doc. No. 129, filed October 5, 1999), Defendant Steven McLaughlin's Motion for a New Trial and/or in Arrest of Judgment (Doc. No. 130, filed October 6, 1999), and the Government's Response to Defendants' Motions for New Trial and Incorporated Memorandum of Law (Doc. No.132, filed November 22, 1999), for the reasons set forth in the accompanying Memorandum, it is **ORDERED** that:

1. Defendant Nancy Zemo's Motion for a New Trial and/or in Arrest of Judgment is **DENIED**; and

2. Defendant Steven McLaughlin's Motion for a New Trial and/or in Arrest of Judgment is **DENIED**.

MEMORANDUM

I. BACKGROUND

Defendant Steven McLaughlin was elected president of the American Postal Workers Union (“APWU”), Eastern Montgomery County Area Local Union 2233 (“Local 2233” or “EMCAL”) in November, 1991. He took office on January 9, 1992. Defendant Nancy Zemo (together with McLaughlin, “defendants”) was appointed Secretary/Treasurer of Local 2233 in April, 1992, after the elected Secretary/Treasurer resigned. Defendants served in their respective offices until January 9, 1995.

In 1997, the United States Department of Labor (“Department of Labor”) began an investigation into EMCAL’s finances in the years defendants were in office. The investigation focused on a number of expenditures that defendants authorized on behalf of EMCAL, and which the Department of Labor suspected to be improper. These expenditures fell into two broad categories: (1) American Express charges including hotel stays, automobile expenses, and computer-related expenses on an EMCAL American Express card (the “Amex charges”)¹; and, (2) five checks which were issued to McLaughlin at the end of his term of office, ostensibly to compensate him for unused annual leave and sick leave (“annual and sick leave payments”).

¹Many of the Amex charges involved stays in hotels by McLaughlin, both in and around Philadelphia (“local hotel stays”), and in Las Vegas, Nevada (“lodging expenditures”). A large number of additional charges involved maintenance, repairs, and other purchases for McLaughlin’s automobiles (“automobile expenditures”), a 1991 Pontiac 6000 (the “Pontiac”) driven by his wife, a 1989 Dodge Caravan (the “Caravan”), and a 1989 Ford Tempo (the “Tempo”), including the installation of a car stereo and the installation of a car motor.

A grand jury indicted defendants on October 8, 1998. The indictment charged defendants with conspiracy in violation of 18 U.S.C. § 371 (count 1); theft of union funds by using union funds to pay the Amex charges, in violation of 18 U.S.C. § 2 and 29 U.S.C. § 501(c) (counts 2-14)²; theft of union funds by authorizing and paying the annual and sick leave payments in violation of 18 U.S.C. § 2 and 29 U.S.C. § 501(c) (counts 15-19); willfully failing to maintain required records for the Department of Labor in violation of 18 U.S.C. § 2 and 29 U.S.C. §§ 436, 439(a) (count 20)³; and, knowingly failing to disclose a material fact on a Department of Labor annual financial form LM2 (“LM2 form”)⁴ in violation of 18 U.S.C. § 2 and 29 U.S.C. §§ 431, 439(a) (count 21).

On March 30, 1999, after a jury trial lasting twelve days, this Court declared a mistrial because the jury reported that it could not reach a unanimous verdict. On May 27, 1999, a grand jury handed down a superseding indictment against defendants (the “superseding indictment”). The superseding indictment included the same charges as in the original indictment, and one additional charge--in count 22 of the superseding indictment, McLaughlin was charged with making a false material declaration before the Court on March 24, 1999, in violation of 18 U.S.C. § 1623.

²Each of these counts stemmed from defendants’ use of EMCAL funds to pay monthly American Express statements.

³This count applied only to defendant Zemo.

⁴An LM2 form must be filed with the Department of Labor annually, stating, among other things, a union’s assets and liabilities at the beginning and end of the fiscal year, salary and other disbursements--including reimbursed expenses--paid to all officers and employees, and details of other disbursements made by the union. See 29 U.S.C. § 439.

On September 29, 1999, after an eleven day jury trial, McLaughlin was convicted on all 21 counts of the superseding indictment in which he was named. Zemo was convicted on counts one, four through nine, eleven through thirteen, fifteen through nineteen, twenty, and twenty-one, and acquitted on counts two, three, ten, and fourteen.

On October 5, 1999, Zemo filed a motion in arrest of judgment and, in the alternative, for a new trial, challenging her conviction on all counts on which she was convicted. On October 6, 1999, McLaughlin filed a motion in arrest of judgment and, in the alternative, for a new trial challenging his conviction on counts two, four, six, seven, eleven, thirteen, fourteen, and fifteen through nineteen. McLaughlin challenges only those counts that involved automobile expenditures and annual and sick leave payments. The government filed a memorandum in opposition to the motions on November 22, 1999.

II. ANALYSIS

Defendants, in their submissions, do not differentiate between their motions in arrest of judgment and their motions for a new trial, nor does the government in its response. However, because different standards are applicable to each motion, the Court will consider the motions separately.

A. Motion in arrest of judgment

Federal Rule of Criminal Procedure 34 provides that a court, on motion of a defendant, “shall arrest judgment if the indictment or information does not charge an offense or if the court was without jurisdiction of the offense charged.” Fed. R. Crim. P. 34. Defendants argue that the superseding indictment is invalid because it does not charge an offense; they do not challenge the jurisdiction of the Court. A motion in arrest of judgment on the ground advanced

by defendants must be based on a defect apparent on the face of the indictment itself, and not on the sufficiency of the evidence adduced at trial. See United States v. Sisson, 399 U.S. 267, 280-81 (1970); United States v. Diaz, No. Crim. 92-78, 1993 WL 85764, at *2 (E.D.Pa. March 25, 1993).

““In an indictment upon a statute, it is not sufficient to set forth the offense in the words of the statute, unless those words of themselves fully, directly, and expressly, without any uncertainty or ambiguity, set forth all the elements necessary to constitute the offence [sic] intended to be punished”” United States v. Knox Coal Co., 347 F.2d 33, 37 (3d Cir. 1965) (quoting United States v. Carl, 105 U.S. 611, 612 (1881)). ““Undoubtedly, the language of the statute may be used in the general description of an offense, but it must be accompanied with such a statement of the facts and circumstances as will inform the accused of the specific offense, coming under the general description, with which he is charged.”” Id. (quoting United States v. Hess, 124 U.S. 483, 487 (1888)).

In Diaz, the court set forth a number of factors to consider in determining whether an indictment is facially valid. An indictment must (1) set forth the approximate date or dates when the crimes occurred; (2) briefly describe the charged offenses; (3) set forth the statutory provisions the defendants allegedly violated; and, (4) track the language of the statutes, including the elements of each offense. See Diaz, 1993 WL 85764, at *2. The purpose of these requirements is to provide the defendants with adequate notice of the offenses with which they were charged. See id. For the reasons that follow, the Court concludes that the superseding indictment in this case sufficiently charged the offenses at issue and provided defendants with

adequate notice of the charges against them. Accordingly, the Court denies defendants' motions in arrest of judgment.

1. Annual and sick leave payments

At the end of his term as president of EMCAL, McLaughlin received five checks within ten days--three on December 21, 1995 and two more on December 30, 1995. By these checks, which both McLaughlin and Zemo had to approve, McLaughlin was paid a total of \$15,902, netting him a total of \$11,122.64 after taxes. McLaughlin claimed that these checks were issued to compensate him for his unused annual and sick leave time, as permitted under Article XIV, Sections 3.A.-3.C. of the EMCAL constitution.

Article XIV, Section 3.A. of the EMCAL constitution provides, "The President's unused sick/annual leave may either be carried forward for use in future years and/or reimbursed for said accumulated leave annually and/or upon leaving office." Article XIV, Section 3.B. of the EMCAL constitution provides, "The President may carry over accumulated annual leave not to exceed three hundred twenty (320) hours and/or to be reimbursed upon leaving office." Article XIV, Section 3.C. of the EMCAL constitution provides, "The President shall be reimbursed for no more than twenty-five per cent (25%) of accumulated sick leave upon leaving office."

Defendants argue that, because the superseding indictment charges them with embezzling \$15,902 in annual and sick leave payments, the superseding indictment is invalid on its face. Defendants contend, as they did at trial, that the EMCAL constitution is ambiguous with respect to the right of a union president to such payments. They argued at trial that one possible interpretation of these provisions of the constitution is that, because the EMCAL president could be reimbursed at the end of every year for his unused annual and sick leave, he could also be

reimbursed at the end of his term for all of that leave. In their motions, they argue that, at the very least, McLaughlin was entitled to 320 hours of annual leave (Article XIV, section 3.B.) and 25% of accumulated sick leave (Article XIV, Section 3.C.) upon leaving office. Under this interpretation, defendants calculate McLaughlin was entitled to receive a minimum of \$9,881.76,⁵ and that “[accordingly] petitioner [McLaughlin] cannot be guilty of stealing more than \$6020.24.” To support this point, defendants point to the testimony, at trial, of Kerry McEntee (“Agent McEntee”), the case agent for the Department of Labor. At trial, under cross-examination, Agent McEntee testified that, under one possible reading of the EMCAL constitution, the EMCAL president might have been entitled to \$9,881.76.

Defendants’ arguments do not address the issue the Court must consider in deciding the motions in arrest of judgment. In considering a motion in arrest of judgment, the Court looks only to the face of the superseding indictment, and not to the evidence adduced at trial. See Sisson, 399 U.S. at 280-81. Therefore, Agent McEntee’s testimony is irrelevant to the motions in arrest of judgment.

The superseding indictment is valid on its face with respect to the charges relating to the annual and sick leave payments. It specifies the federal statutes that defendants violated, 18 U.S.C. § 2 and 29 U.S.C. § 501(c), describes the crimes charged, states the approximate dates on which these violations occurred, and tracks the language of the statutes and the elements of

⁵Defendants arrive at this figure by multiplying the 320 hours that McLaughlin could carry forward under Section 3.B. of the Constitution by McLaughlin’s hourly pay rate of \$20.76. Defendants then add to this figure 25% of 78 hours of sick leave, or 19.5 hours multiplied by \$20.76, arriving at the total of \$9,881.76.

each offense. That is what the law requires. Thus, defendants' motions in arrest of judgment with respect to counts 15-19 of the superseding indictment are denied.

2. Amex charges

During his term as president, McLaughlin used EMCAL's American Express card for a number of purchases. These purchases included automobile expenditures, such as a new stereo, a rebuilt car motor, and a variety of maintenance expenses for the Pontiac, the Tempo, and the Caravan; numerous hotel stays in and around Philadelphia, Pennsylvania; hotel stays in Las Vegas, Nevada; and miscellaneous expenses such as a notebook computer, computer software, a portable printer, and luggage.

The counts of the superseding indictment relating to the Amex charges--counts 2-14--are valid on their face. They specify the federal statutes that defendants violated, 18 U.S.C. § 2 and 29 U.S.C. § 501(c), describe the crimes charged, state the approximate dates on which these violations occurred, and track the language of the statutes and the elements of each offense. That is what the law requires. Therefore, defendants' motions in arrest of judgment as to counts 2-14 of the superseding indictment are denied.

3. Conspiracy and reporting charges

Count one of the superseding indictment charges that defendants violated 18 U.S.C. § 371. Count twenty charges that Zemo violated 29 U.S.C. §§ 436, 439(a) and 18 U.S.C. § 2, and count twenty-one charges that defendants violated 29 U.S.C. §§431, 439(b) and 18 U.S.C. § 2. Only Zemo argues that the judgment of conviction on these counts must be arrested.

The counts of the superseding indictment relating to conspiracy and the reporting charges--counts one, twenty, and twenty-one--are valid on their face. They specify the federal statutes that defendants violated, describe the crimes charged, state the approximate dates on which these violations occurred, and track the language of the statutes and the elements of each offense. That is what the law requires. Therefore, Zemo's motion in arrest of judgment as to counts one, twenty and twenty-one of the superseding indictment is denied.

B. Motion for a new trial

Federal Rule of Criminal Procedure 33 allows a court, upon motion of a defendant, to "grant a new trial to that defendant if required in the interest of justice." Fed. R. Crim. P. 33. The decision to grant a new trial pursuant to Rule 33 lies within the sound discretion of the trial court. See United States v. Adams, 759 F.2d 1099, 1108 (3d Cir. 1985); United States v. Gonzalez, No. Crim. 92-517, 1993 WL 364711, at *9 (E.D.Pa. September 13, 1993). The motion can be granted on either of two grounds: (1) if the court, after weighing the evidence, determines that there has been a substantial miscarriage of justice, the court may grant a new trial; or, (2) if trial error had a substantial influence on the verdict, the court must grant a new trial. See Gov't of the Virgin Islands v. Bedford, 671 F.2d 758, 762 (3d Cir. 1982); United States v. Polidoro, No. Crim. 97-383-02, 1998 WL 634921, at *4 (E.D.Pa. Sept. 16, 1998); United States v. Fleming, 818 F. Supp. 845, 846 (E.D.Pa.), *aff'd*, 9 F.3d 1542 (3d Cir. 1993). With regard to the first of these grounds--that there has been a substantial miscarriage of justice--as long as a "rational trier of fact could have found the defendants guilty beyond a reasonable doubt and the convictions are supported by substantial evidence" the verdict will be sustained.

United States v. Gonzalez, 918 F.2d 1129, 1132 (3d Cir. 1990); United States v. Sokolow, Crim. No. 93-394-01, 1994 WL 613640, at *2 (E.D.Pa. Nov. 1, 1994).

In considering a motion for a new trial, the court is not required to view the evidence in the light most favorable to the government. See Diaz, 1993 WL 85764, at *3. Instead, the court may weigh the evidence and make its own determinations as to the credibility of the witnesses. See id. “If the court concludes that, despite the abstract sufficiency of the evidence to sustain the verdict, the evidence preponderates sufficiently heavily against the verdict that a serious miscarriage of justice may have occurred, it may set aside the verdict, grant a new trial, and submit the issues for determination for another jury.” United States v. Patrick, 985 F. Supp. 543, 551 (E.D.Pa. 1997) (quoting United States v. Lincoln, 630 F.2d 1313, 1319 (8th Cir. 1980)). Ultimately, the court must keep in mind that motions for a new trial are disfavored, and are viewed with great caution. See id. (citing United States v. Miller, 987 F.2d 1462, 1466 (10th Cir. 1993)); Government of the Virgin Islands v. Derricks, 810 F.2d 50, 55 (3d Cir. 1987).

1. Amex charges

Defendants were charged with embezzlement or conversion of union assets, inter alia, by means of the EMCAL American Express card, in violation of 29 U.S.C. § 501(c). To obtain a conviction for that crime, the government was required to prove beyond a reasonable doubt: (1) that EMCAL was a labor organization in an industry affecting interstate commerce; (2) that defendants were officers of EMCAL; (3) that defendants embezzled or stole the monies, funds, property or other assets of EMCAL; and, (4) that defendants acted unlawfully, willfully, and with fraudulent intent.

In each count of the superseding indictment in which defendants are charged with embezzlement by paying an Amex charge, defendants are charged with committing multiple acts of embezzlement. “When the government chooses to prosecute under an indictment advancing multiple theories, it must prove beyond a reasonable doubt at least one of the theories to the satisfaction of the entire jury. It cannot rely on a composite theory of guilty, producing twelve jurors who unanimously thought the defendant was guilty but who were not unanimous in their assessment of which act supported the verdict.” United States v. Beros, 833 F.2d 455, 462 (3d Cir. 1987). However, the government does not have to prove every theory charged in each count of the indictment to the satisfaction of all twelve jurors. See id.

In applying this rule, the Supreme Court has held “that a general jury verdict was valid so long as it was legally supportable on one of the submitted grounds--even though that gave no assurance that a valid ground, rather than an invalid one, was actually the basis for the jury’s action.” Griffin v. United States, 502 U.S. 46, 49 (1991). The Court in Griffin distinguished a general verdict that includes charges which are legally invalid, for either constitutional or statutory reasons, and therefore must be overturned, from a general verdict that includes charges which are factually unsupported. See id. at 54-56. In the latter situation, the Court held a general verdict need not be overturned as long as it is legally supported on one of the submitted grounds. See id. The Griffin Court went on to note the wide-ranging circumstances in which the rule applies, including, as in Griffin, “a general jury verdict under a single count charging the commission of an offense by two or more means.” Id. at 50.

In this case, as in Griffin, the superseding indictment charges defendants with the commission of an offense by two or more means, none of which are legally invalid for either

constitutional or statutory reasons. Thus, as long as one of the charges in each count of the superseding indictment is supported by the weight of the evidence, the conviction on that count will stand.

a. Automobile expenditures

Two provisions of the EMCAL constitution relate to the automobile expenditures. Article XIV, Section 3.D.1. provides that “[the] President shall be paid a car allowance at the prevailing Internal Revenue Code rate.” Article XIV, Section 3.D.2. of the EMCAL constitution provides: “The President shall be reimbursed for all expenses and/or reasonable and customary charges and/or necessary charges for repairs to his/her car while he/she is on Union business.”

Defendants contend that all of the automobile expenditures were authorized under Article XIV, Section 3.D.2. of the EMCAL constitution. This argument is based on defendants position that the EMCAL constitution permits reimbursement for reasonable and customary automobile expenses, and is not limited to emergency expenses. Because counts two, four, six, seven, eleven, thirteen, and fourteen include allegations of improper personal automobile expenditures, and the jury could have convicted them on that basis, defendants argue that they are entitled to a new trial on these counts.⁶

The government disputes defendants’ interpretation of these provisions of the EMCAL constitution. At trial, Agent McEntee testified that, although the EMCAL constitution refers to reasonable and necessary charges for automobile expenses while on union business, it does not authorize the payment of all automobile expenditures. Agent McEntee testified that, if

⁶Defendant Zemo was acquitted on counts two and fourteen and raises no challenge as to those counts.

defendants' interpretation of the EMCAL constitution was correct, Article XIV, Section 3.D.1., would allow the President to recover from EMCAL twice for his routine automobile expenses--once through reimbursement (Section 3.D.2.) and once through his car allowance (Section 3.D.1.).

The Court concludes that Article XIV, Sections 3.D.1. and 3.D.2. of the EMCAL constitution, when read together, are ambiguous. Under those circumstances, the resolution of the ambiguity in the EMCAL constitution is reserved to the jury. See United States v. Leigh, 515 F. Supp. 405, 418 (S.D.Ohio 1981). In Leigh, the court considered a motion for new trial and judgment of acquittal after the defendant had been convicted of mail fraud and conspiracy to commit mail fraud. See id. at 408. The question of whether the defendant had committed mail fraud turned on an interpretation of a contract between a joint venture and the State of Ohio. See id. at 409. The Leigh court found that the contract in question was ambiguous, and the defendant argued that because the court could not determine the meaning of the contract as a matter of law, "ipso facto the jury cannot determine the nature of the contract beyond a reasonable doubt." Id. at 418. However, the Leigh court rejected this argument, holding that its finding that the contract was ambiguous only applied to the face of the contract, and that the government then had a burden of proving the meaning of the contract to the jury beyond a reasonable doubt. See id.

This Court agrees with the analysis of the Leigh court. Article XIV, Sections 3.D.1. and 3.D.2. are ambiguous on their face. The government therefore had the burden of proving, beyond a reasonable doubt, the meaning of these provisions in order to establish that they were violated by defendants. The Court concludes that the government introduced sufficient

evidence at trial to support the charges that defendants violated the EMCAL constitution with respect to automobile expenditures.

Specifically, at trial the government relied on the testimony of Agent McEntee to interpret the EMCAL constitution. Agent McEntee testified that the reimbursement permitted by Section 3.D.1. would cover McLaughlin, as the EMCAL president, for routine wear and tear to his automobile while driving on union business. Under Agent McEntee's interpretation, such payments would account for EMCAL's share of routine maintenance expenses such as inspections while McLaughlin used his personal vehicles on union business. Given that he received such compensation, Agent McEntee testified that the drafters of the EMCAL constitution could not have intended to allow the president to use union funds to pay for such routine maintenance under Section 3.D.2. To do so would result in double payment for the same expense. Therefore, Agent McEntee testified that only emergency expenses incurred while on union business were covered by Section 3.D.2., and that the language "reasonable and customary expenses" referred to reasonable and customary expenses in an emergency.

The jury returned a general verdict as to counts two, four, six, seven eleven, thirteen and fourteen. Thus, there is no way to know whether the jury rejected or accepted defendants' interpretation of the EMCAL constitution. But that is of no legal significance because the jury was charged with resolving ambiguities in the language of the EMCAL constitution. Even if the jury's guilty verdicts on these counts were based solely on the automobile expenditures, the Court is satisfied that those verdicts should stand because the charges were supported by substantial evidence.

Additionally, in every count in which defendants were charged with automobile expenditures, they were also charged with other expenditures. For each of these counts, defendants, in their respective motions, present no argument that such spending was authorized by the EMCAL constitution. Thus, without the need for any further analysis, because defendants do not challenge all of the expenditures covered in each count, under Griffin, the verdict must stand because none of the expenditures charged were legally invalid and the Court concludes there was substantial evidence to support at least some of the expenditures charged in each count.

For instance, defendants were charged with lodging expenditures in local hotels (counts two, six, seven, eleven, thirteen, and fourteen). At trial, the evidence showed that McLaughlin often stayed in local hotels for periods of time ranging from one night to forty-two consecutive nights. Defendants argued that McLaughlin did so to give him a quiet, efficient place to work and to reduce his travel time to union hearings or meetings. However, the government introduced evidence that many of McLaughlin's hotel stays required him to travel as far, or farther, than he would have traveled from his home to the union hearing or meeting. The government also argued that, if McLaughlin wanted some place quiet to work, he could have gone to his office at the EMCAL union hall. This evidence supported the charge that these local hotel stays, paid for by EMCAL, were for defendants' benefit, not EMCAL's benefit.

Defendants were also charged with the purchase of a stereo system (count thirteen), the purchase and installation of a car stereo system in the Caravan (count fourteen), and the purchase of a variety of other, smaller items--for many of which the government introduced evidence at trial that the items were not found in the EMCAL office at the end of defendants' term of office (counts four, seven, eleven, thirteen, and fourteen). For each of these expenses, the

jury could have concluded--consistent with the evidence--that the purchase was for defendants' benefit rather than for EMCAL's benefit.

The Court concludes that the jury properly could have accepted the government's interpretation of the EMCAL constitution as it relates to automobile expenditures. The Court further concludes that, in every count in which defendants were charged with an automobile expenditure, they were also charged with at least one other unlawful expenditure that defendants do not challenge. Thus, pursuant to Griffin, the Court denies defendants' motions for new trial on counts two, four, six, seven, eleven, thirteen and fourteen.

b. Other Amex charges

In addition to moving for a new trial for the counts involving automobile expenditures, defendant Zemo moves for a new trial on the other counts involving Amex charges on which she was convicted--counts five, eight, nine, and twelve. However, Zemo makes no argument as to the authorization for the expenditures with which she was charged. The Court concludes that, for each of these counts, there was substantial evidence of at least one expense for which there was no benefit to EMCAL.

For instance, many of the counts which Zemo challenges (counts five, eight, and twelve) included charges for McLaughlin's local hotel stays. As discussed above, the government introduced substantial evidence at trial that the local hotel stays were for defendants' benefit, rather than for EMCAL's benefit.

In addition, Zemo challenges the jury's verdict on counts involving McLaughlin's purchase of a variety of items, including a notebook computer and portable computer printer (count eight), replacement batteries for the notebook computer (count nine), computer software

(count twelve), luggage (count twelve) and a variety of smaller items (counts five, nine, and twelve). The government presented evidence that none of those items were found in the EMCAL office at the end of defendants' term of office. That, coupled with the evidence of Zemo's role in payment of the Amex bills, constitutes substantial evidence that these purchases were made for defendants' benefit, rather than for EMCAL's benefit.

The Court concludes that the evidence at trial supported the jury's verdict for at least one charge in every count that Zemo challenges. Therefore, pursuant to Griffin, the Court denies Zemo's motion for new trial on counts five, eight, nine, and twelve.

2. Annual and sick leave payments

Defendants also moved for a new trial for counts fifteen through nineteen, the annual and sick leave payments. They argue that at the very least, based on the EMCAL constitution, McLaughlin was entitled to 320 hours of annual leave (Article XIV, section 3.B.) and 25% of accumulated sick leave (Article XIV, Section 3.C.) upon leaving office, and that therefore McLaughlin was entitled to receive a minimum of \$9,881.76. Accordingly, defendants argue that "petitioner [McLaughlin] cannot be guilty of stealing more than \$6020.24." To support this point, defendants point to the testimony, at trial, of Agent McEntee, the case agent for the Department of Labor. At trial, under cross-examination, Agent McEntee testified that, under one possible reading of the EMCAL constitution, the union president might have been entitled to \$9,881.76.

As discussed above, resolution of any ambiguities in the EMCAL constitution is a matter for the jury. See Leigh, 515 F. Supp. at 418. Moreover, defendants concede in their motions that McLaughlin stole \$6,020.24. The jury could have concluded, consistent with the

evidence, that defendants, using EMCAL funds, willfully paid McLaughlin more than he was owed. Furthermore, the amount that McLaughlin was owed, and, by implication, the amount defendants embezzled, is a proper issue for sentencing, see United States v. Seale, 20 F.3d 1279, 1287 (3d Cir. 1994), when the government must prove the amount that defendants embezzled by a preponderance of the evidence. See United States v. McLenton, 53 F.3d 584, 586 n.2 (3d Cir. 1995). Any claimed error in the amount of money embezzled does not entitle defendants to a new trial.

3. Conspiracy

Zemo has also moved for a new trial for her conviction on the conspiracy charge in count one of the superseding indictment. Count one charged a conspiracy in violation of 18 U.S.C. § 371. To establish a violation of that statute, the government had to prove beyond a reasonable doubt that (1) two or more persons entered into an unlawful agreement to commit a federal offense; (2) defendants' participation in the conspiracy was willful; and, (3) at some time during the existence of the conspiracy, one of the co-conspirators knowingly performed an overt act.

At trial, the government introduced evidence that defendants entered into an agreement to embezzle EMCAL funds, and that such participation was willful. Specifically, there was evidence that Zemo and McLaughlin were EMCAL officers, and that Zemo was a necessary party to the charged unlawful payments. In addition, the government presented evidence that Zemo was in a position to know that McLaughlin's purchases were not for EMCAL's benefit. Finally, the government presented evidence that Zemo received and maintained receipts for union expenses from EMCAL officers other than McLaughlin, but that

she did not do so for McLaughlin. There was, therefore, substantial evidence from which the jury could have concluded that there was an agreement between defendants, and that their participation in the conspiracy was willful. The Court has already concluded that the government adduced substantial evidence of overt acts in furtherance of the conspiracy. Therefore, Zemo's motion for a new trial on count one is denied.

4. Reporting charges

Finally, Zemo has moved for a new trial as to her convictions for the reporting charges in counts twenty and twenty-one of the superseding indictment.⁷ To prove a defendant guilty of violating 29 U.S.C. § 439(a), as charged in count Twenty of the superseding indictment, the government was required to establish beyond a reasonable doubt that (1) EMCAL was a labor organization engaged in an industry affecting commerce which was required to file reports concerning its financial operations with the Secretary of Labor; (2) Zemo, as secretary/treasurer of EMCAL, was responsible for maintaining records on the matters required to be reported which would provide in sufficient detail the necessary basic information and data from which the documents filed with the Department of Labor may be verified, explained or clarified, and checked for accuracy including vouchers, worksheets, receipts and applicable resolutions; (3) Zemo failed to keep such records during her term as secretary/treasurer; and, (4) Zemo acted willfully.

At trial, defendants stipulated that EMCAL was a labor organization engaged in commerce and governed by the required regulations. The government introduced evidence that

⁷Zemo was convicted on count twenty of the superseding indictment. McLaughlin and Zemo were convicted on count twenty-one of the superseding indictment. Only Zemo challenges the verdicts on these counts.

the EMCAL constitution required Zemo to maintain the records for the Department of Labor and that those records were incomplete—she only kept some of the Amex bills and did not maintain receipts for McLaughlin’s expenses. Finally, the government presented evidence that such conduct was willful, including evidence that Zemo maintained records for expenses of EMCAL members other than McLaughlin. The Court concludes that the government presented substantial evidence of Zemo’s guilt on count 20 of the superseding indictment, and, accordingly, denies Zemo’s motion for a new trial on that count.

To establish a violation of 29 U.S.C. § 439(b), as charged in count twenty-one of the superseding indictment, the government was required to prove beyond a reasonable doubt (1) that EMCAL was a labor organization engaged in an industry affecting commerce which was required to file annual financial reports with the Secretary of Labor and that the Department of Labor Form LM2 were reports required to be filed annually with the Secretary of Labor; (2) that the LM2 report filed for EMCAL for the year 1993 contained false statements or representations of material facts or failed to disclose material facts; and, (3) that defendants acted knowingly.

At trial, defendants stipulated that EMCAL was a labor organization engaged in commerce and required to file an annual LM2 report. The LM2 reports were required to detail all salaries and other payments to EMCAL members. See 29 U.S.C. § 439(b). The government introduced evidence that the LM2 reports that defendants filed failed to disclose material facts, including the automobile and local hotel expenditures. Finally, the government presented evidence that defendants’ acted knowingly, including evidence that Zemo failed to maintain records of McLaughlin’s expenses, but did so for other EMCAL members, and evidence that defendants attended union-run training sessions at which they learned how to maintain union

records and file LM2 forms, but that they failed to act in a manner consistent with such training. The Court concludes that the government presented substantial evidence of defendants' guilt on count 21 of the superseding indictment, and, accordingly, denies Zemo's motion for a new trial on that count.

V. CONCLUSION

Defendants' motions for a new trial and, in the alternative, in arrest of judgment, are denied as to all counts.

BY THE COURT:

JAN E. DUBOIS, J.