

1969 WL 91

United States District Court, N.D. Ohio, Eastern  
Division.

United States of America, Plaintiff

v.

International Brotherhood of Electrical Workers,  
Local 38 et al., Defendants.

Civil No. C 67-575

March 13, 1969

GREEN, D. J.

[Statement of Case]

\*1 On August 8, 1967 the United States instituted this action under Title VII of the Civil Rights Act of 1964, 42 U. S. C. § 2000e through 2000e-15, against the International Brotherhood of Electrical Workers, Local No. 38 (hereinafter referred to as Local 38) and its Electrical Joint Apprenticeship and Training Committee (hereinafter referred to as EJAC). The complaint alleges that the said defendants have engaged and are engaging in a pattern and practice of resistance to the full enjoyment by Negroes of their rights to equal employment opportunities.

As to the defendant Local 38, the complaint alleges discrimination in three major areas:

(1) *Journeyman Membership*

It is alleged that Local 38 has refused to admit Negroes to journeyman membership in the union.

(2) *Referral for Employment*

It is alleged that Local 38 has refused to refer Negroes for employment on the same basis as white applicants and has given discriminatory priority in work referrals to members of Local 38.

(3) *Contractor Affiliation*

It is alleged that Local 38 has refused to enter into collective bargaining agreements with Negro electrical contractors on the same terms and conditions offered to white electrical contractors.

As to the defendant EJAC the complaint alleges:

That EJAC has pursued a policy and practice of discrimination against Negro applicants for admission to the union's apprenticeship program because of their race.

The Civil Rights Act of 1964, 42 U. S. C. § 2000e-2(c), declares that it shall be an unlawful employment practice for a labor organization:

(1) to exclude . . . or otherwise to discriminate against, any individual because of his race . . .

(2) to limit, segregate, or classify its membership, or to classify or fail or refuse to refer for employment any individual, in any way which would deprive or tend to deprive any individual of employment opportunities or would limit such employment opportunities or otherwise adversely affect his status as an employee or as an applicant for employment, because of such individual's race . . .

The Act further declares, 42 U. S. C. § 2000e-2(d), that it shall be an unlawful employment practice for any joint labor-management committee controlling apprenticeship:

. . . to discriminate against any individual because of his race . . . in admission to or employment in, any program established to provide apprenticeship.

The authority of the United States to bring suit for alleged violations of the Act is derived from Section 707(a) thereof, 42 U. S. C. § 2000e-6(a):

Whenever the Attorney General has reasonable cause to believe that any person or group of persons is engaged in a pattern or practice of resistance to

the full enjoyment of any of the rights secured by this subchapter, and that the pattern or practice is of such a nature and is intended to deny the full exercise of rights herein described, the Attorney General may bring a civil action in the appropriate district court . . .

Section 706(g) of the Act, 42 U. S. C. § 2000e-5(g) provides that:

**\*2** If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate . . .

It would thus appear that in order to prevail in this action the United States has the burden of establishing that the defendants have intentionally engaged in, or are engaging in, actions as alleged in the complaint constituting a pattern or practice of racial discrimination.

As of this date, a substantial body of authority construing the provisions of the Civil Rights Act of 1964, here under consideration, has not yet developed. There are, however, certain principles which do appear from the decided cases and the legislative history of the Act. While the United States has cited many cases involving discrimination in voting rights, this court believes that, by reason of the distinctions in fact and law between such cases and the one at bar, the principles enunciated in the voting rights cases are relevant hereto only at their broadest general levels and cannot be determinative of precise factual issues herein.

The primary proposition agreed upon by the courts construing the Civil Rights Act, looking to the legislative history for guidance, is that the Act is prospective and only reaches discriminatory practices occurring after its

effective date of July 2, 1965. *Griggs v. Duke Power Co.*, No. C-210-G-66, Middle District N. Carolina, 9/30/68 [58 LC P 9163]; *Dobbins v. Local 212, IBEW*, [58 LC P 9158] 292 F. Supp. 413 (D. C. S. D. Ohio, 1968); *United States v. Local 189, United Papermakers and Paperworkers*, [57 LC P 9120] 282 F. Supp. 39 (D. C. E. D. La., 1968); *United States v. Sheet Metal Workers*, [57 LC P 9116] 280 F. Supp. 719 (D. C. E. D. Mo., 1968); *Quarles v. Phillip Morris, Inc.*, [57 LC P 9101] 279 F. Supp. 505 (D. C. E. D. Va., 1968). It further appears from these same authorities that pre-Act practices may be considered on the question of intent in determining whether post-Act practices are discriminatory.

[*Lack of Negro Members*]

Another point, which appears to be agreed upon by the decisions in which it has been considered, is that the simple absence of Negroes from a given group is not conclusive evidence of discrimination. *Dobbins v. Local 212, supra*, at 445-446; *United States v. Sheet Metal Workers, supra*, at p. 728. On the other hand, such a statistical demonstration coupled with a showing of specific acts of discrimination may be sufficient to make out a prima facie case. Thus, the plaintiff's argument that a presumption of discrimination arises from the fact that there are substantial numbers of qualified Negro electricians (a proposition supported by scant proof) and Negroes of apprenticeship age interested in becoming electricians (a proposition supported by no proof) in the Cleveland area is not supported by the law. While common sense certainly would lead one to assume that a relatively total absence of Negroes from a trade union was not a mere coincidence, such fact is not sufficient to make out a case for relief under the Civil Rights Act, without a further showing of actual discriminatory practices.

**\*3** With regard to the matter of proof of acts of discrimination, an alleged pattern or practice of discrimination cannot be based on isolated acts of discrimination, *United States v. Sheet Metal Workers, supra*, at p. 728. That question must be resolved on the totality of the alleged discriminatory activities of the defendant.

Although there is limited authority construing Title VII of the Civil Rights Act, the majority of such decisions recognize certain limitations as to the relief which is appropriate thereunder. While it may be premature to

discuss relief at this point, it is relevant in that it reflects on the scope of the Act and the Congressional intent behind it. The plaintiff urges that where discrimination is established negative relief is not sufficient and affirmative action is required, citing from the *Quarles* decision the statement that:

The act does not condone present differences that are the result of intention to discriminate before the effective date of the act . . . [57 LC P 9101] 279 F. Supp. 505, 518.

As to that statement, however, another court has taken the position that:

If the decision in *Quarles* may be interpreted to hold that present consequences of past discrimination are covered by the Act, this Court holds otherwise. *Griggs v. Duke Power Co.*, [58 LC P 9163] *supra*, p. .

[*Power of Court*]

It appears to this Court, from a survey of prior decisions, that while the courts have recognized the power under the Act to remedy effects of past discrimination, rather than simply to enjoin future discrimination, that power is subject to a definite restriction arising from the terms of the Act itself, 42 U. S. C. § 2000e-2(j).

Section 2000e-2(j), in pertinent part, provides that:

Nothing contained in this subchapter shall be interpreted to require any . . . labor organization, or joint labor-management committee . . . to grant preferential treatment to any individual or to any group because of the race, color . . . of such individual or group on account of any imbalance

which may exist with respect to the total number or percentage of persons of any race, color . . . referred or classified for employment by any . . . labor organization . . . or admitted to . . . any apprenticeship or other training program, in comparison with the total number or percentage of persons of such race, color . . . in any community . . . or other areas, or in the available work force in any community . . . or other area.

In construing Section 2000e-2(j) the court stated in the *Dobbins* case:

It is the Government's position that Title VII, upon becoming effective, required a union . . . to take affirmative action to relieve the present-day result of pre-Act discrimination. Stated otherwise, the Government claims that discriminatory actions in the past have a continuing direct impact on individual electricians, who, refused union membership or work in the past are reluctant to subject themselves to similar treatment now. Our conclusion is to the contrary, based on 2000e-2(j).

\*4 In our view affirmative post-Act action, directed toward a group to correct pre-Act discrimination against that group constitutes the granting of preferential treatment to that group and on that subject Congress has specifically stated that Title VII shall not be construed so as to require a labor union to grant preferential treatment to any group based on race or color. [58 LC P 9158] 292 F. Supp. 413, 444.

Accord: *United States v. H. K. Porter Co.*, 70 LRRM 2131, 2149 (D. C. N. D. Ala., 1968); *United States v. Sheet Metal Workers*, *supra*, [57 LC P 9116] at 729-730. It is this Court's conclusion that, while some affirmative relief may be appropriate under the Act, it must be carefully delineated so as to avoid transgressing the boundaries established by Section 2000e-2(j), and that the plaintiff's theory of law does not adhere to that fine line.

Finally, while Title VII of the Civil Rights Act affords a valuable tool in moving forward in the creation of an integrated society and overcoming social ills whose presence feeds the fires of discontent, its provisions should not be considered as a panacea for the effects of

lifetimes of deprivation nor applied in a vindictive manner against those who have inherited problems originating in another era. Neither the Attorney General nor the courts can overlook such considerations while seeking to implement the important and necessary objectives of the Act. A *caveat* in this regard is set forth in the *Sheet Metal Workers* opinion, wherein it was stated:

The Civil Rights Act of 1964 was not intended to penalize unions or others for their sins prior to the effective date of the Act. It is prospective only. Neither was it passed to destroy seniority rights in unions or in business. The Act specifically forbids a union or a business from giving preferential treatment to Negroes to correct an existing imbalance of whites. In order to be a violation of this Act, there must be an intentional pattern and practice of discrimination and not an isolated instance of discrimination. [57 LC P 9116] 280 F. Supp. 719, 730.

With this prefatory consideration of the dominant legal propositions involved in this action, the Court may now consider the merits of the Government's allegations. These questions will be taken up by the general categories previously noted herein, but not in the order of presentation set forth in plaintiff's complaint and brief.

### Contractor Affiliation

The Government contends that Local 38 has discriminated, and continues to discriminate, against Negro contractors in its policies and practices with respect to union affiliation. There is no doubt that union affiliation is beneficial to an electrical contractor, and that if discrimination were practiced in this regard it would call for remedial action.

While conceding that three Negro contractors were affiliated before the effective date of the Civil Rights Act of 1964, the plaintiff contends that their relations with the union were so tenuous that Local 38 officials cannot say

how many employees they have now or had at the time they affiliated. That argument is of no merit, for there is no evidence that the union officials maintained such data regarding white contractors.

\*5 Similarly, the recitation of the relative numbers and percentages of Negro and white union and non-union contractors is not conclusive without a showing of discrimination.

The plaintiff's evidence on contractor affiliation was offered through Paul Tiber, John Jackson, Robert Richardson, C. J. Callahan, Sol Sloan, Eddie Reese and Alvin Lewis. Messrs. Tiber, Sloan and Lewis are white, and Messrs. Jackson, Richardson, Reese and Callahan are Negro.

The testimony of Mr. Sloan, who was an electrical contractor during the years 1958 through 1962, is relied upon by plaintiff as demonstrating that he was denied union affiliation because he had only one employee, who was Negro. Plaintiff's exhibit 4 reflects that Mr. Sloan made many unsuccessful attempts to obtain union affiliation. That same exhibit, however, reflects the rejection of seven other applicants during the same period of time, three of whom were IBEW members, and the acceptance of only one application for affiliation. Presumably, the seven other rejected applicants were white and there is no evidence that they employed Negroes. On these facts, the Court does not believe that it can be said that the plaintiff has proved racial discrimination in the rejection of Mr. Sloan by Local 38.

The testimony of Mr. Jackson is not only pre-Act, but virtually irrelevant to this action. His statement that he was refused affiliation prior to 1958 places that occurrence too remote in time to be considered herein. His other testimony pertained to an incident that occurred in March, 1965. He testified that at that time he was working on a project on a Saturday morning, when he was approached by two men who said they were from the union and working on a building next door, but denied that they were Local 38 business agents. He stated that they told him he could not continue on his job because the union was working next door and he was not allowed to work next to union men. He replied that if he was not allowed to work he would like to join the union, asked the two men to vouch for him before the union, and gave the men his card. He stated that the men promised to follow through, but he was never contacted by the union. However, Mr. Jackson testified that following that visit he continued on to completion with his job without any

further interference. This testimony does not support the Government's contention that Mr. Jackson was given a "run-around" in an attempt to obtain union affiliation.

The plaintiff further contends that Local 38 has discriminated in failing to advise Negro contractors of the opportunity to become affiliated. Mr. Reese testified that in 1964 he came to the union seeking work, but was rejected, being advised that he was considered to be a contractor at the time. Mr. Richardson testified that in the spring of 1965 he was required to abandon a job because of his non-union status. Each of these parties stated that they were not offered the opportunity to obtain union affiliation. The deficiency in this pre-Act evidence is that there is no proof that the union officials offered affiliation to white contractors similarly situated.

\*6 Plaintiff's post-Act evidence is derived from Mr. Richardson and Mr. Callahan.

Mr. Richardson first appeared before the Local 38 Executive Board in 1960 seeking affiliation, and was rejected. In early 1968 he was on a project at St. John's College in Cleveland when a Local 38 business agent left word for him to call. He thereafter met with the Local 38 Business Manager, two other union representatives, the President of the prime contractor for the project, and two representatives of the Catholic Diocese. The matter of his affiliating with Local 38 was discussed, but he made no decision. Mr. Richardson eventually did affiliate with Local 38 in August, 1968, following several other meetings with Local 38's business manager. Although plaintiff suggests that this delay was attributable to the union and bears racial overtones, it is the Court's opinion that the record clearly establishes that Mr. Richardson was bargaining with the union during the interim regarding certain conditions of affiliation. Mr. Richardson lost one of the bargaining points, the possibility of not paying some of his men union scale, and won the other, his employees continuing to work without taking any IBEW union affiliation. Based on Mr. Richardson's entire testimony the Court finds no discriminatory action towards him after July 2, 1965.

The testimony of Mr. Callahan was offered to establish that Local 38 imposed different requirements for affiliation on Negroes than on whites.

He originally went before the Local 38 Executive Board in 1966. At that time he made no formal application for affiliation, but was advised that if he wished to do so he would have to exhibit two letters of credit from suppliers

and financial statements of his business and post a bond guaranteeing his ability to meet his payrolls. As to the amount of the bond, he stated that he was "not very clear on [it], but I believe it was in the neighborhood of \$15,000." Mr. Callahan's statement regarding his 1966 appearance was that:

I didn't make an application at that time. I went there seeking information to find out what it would take to become a union contractor.

He made no effort to follow up on that initial visit. In 1968, however, he was offered a job that required him to assure the prime contractor that his nonunion status would not create labor problems. He thereupon went to the union hall and spoke with the Local 38 Business Manager. At that meeting an appointment was made for Mr. Callahan to appear before the Executive Board in two weeks, at which meeting he was to bring in a financial statement and two letters of credit. He was also advised that he could begin his job without any fear of problems with the union, which he did. Mr. Callahan appeared before the Executive Board with the requested documents and was advised that if he could post a \$6,000 bond he would be accepted as an affiliated contractor, subject to a general membership vote for approval. He stated that he could post such a bond, and shortly thereafter was notified of his acceptance.

\*7 Plaintiff's Exhibit 31-C, being an excerpt from answers to interrogatories, lists the names of all persons affiliated as contractors with Local 38 after October 1, 1967. Mr. Callahan and three whites are named. As to the standards imposed for affiliation it is stated:

(1) For all contractors who signed the contract after May 1, 1968: payment of Wages and Welfare Bond \$1,000 per man up to ten men or \$10,000.

(2) For all others: \$6,000 payroll bond, Workmen's Compensation proof, bank statement regarding finances and letter of credentials from wholesale houses, city license.

The plaintiff offered no evidence that this interrogatory response was inaccurate as it pertained to the white contractors named therein. The plaintiff did show that Mr. Tiber and Mr. Lewis were granted pre-Act affiliation

without being required to post any bond. That evidence is not probative of the issue of whether discriminatory standards were imposed on Mr. Callahan in 1968. It thus appears that when Mr. Callahan affiliated the standards he was required to meet were precisely the same as those for white contractors.

The plaintiff contends, however, that the alleged \$15,000 bond requested in 1966 was a discriminatory device designed to insure that he would not make a formal application. In view of Mr. Callahan's admittedly hazy recollection on the question of the amount of the bond requested in 1966, and the fact that he thereafter did make a formal application for affiliation when his best interests were served by such action, the Court cannot accept that evidence as being proof of a pattern and practice of discrimination.

Finally, the Government contends that the fact that the decision on contractor affiliation is subject to the discretion of a vote of the Executive Board and general membership, even though there are specified standards for affiliation, is inherently discriminatory. While it is true that such a vote has the potential to be used as a discriminatory device, there is no evidence that it has been used as such since July 2, 1965. Absent such proof the inherent vice provides no basis for judicial intervention.

Although Local 38 may have discouraged Negro contractors from affiliating prior to July 2, 1965, it is the Court's conclusion that the plaintiff has failed to prove that Local 38 engaged in a pattern and practice of racial discrimination with regard to contractor affiliation after the effective date of the Civil Rights Act of 1964.

### **Journeyman Membership**

The plaintiff contends that Local 38 has discriminated in its policies with respect to admission of Negroes to journeyman membership status.

There are two avenues of securing journeyman membership in Local 38. The first is through apprenticeship. An applicant selected for apprenticeship becomes a member of Local 38 after being an apprentice for six months, and upon satisfactory completion of his four year apprenticeship becomes a journeyman member. The second route to membership is through the referral

system, a subject that will be considered in detail under its own heading. Basically speaking, however, an electrician who has been working for a given number of years under the jurisdiction of Local 38 through its referral system may take a journeyman wireman's exam to qualify for Group One rating in the referral system. If he successfully achieves Group One status he is entitled to apply for membership in the union, subject to acceptance by a vote of the general membership.

\*8 At the outset of its argument on this point the Government cites certain statistics as to the racial composition of Local 38's membership over a period of years. That table is as follows:

### **TABULAR OR GRAPHIC MATERIAL SET AT THIS POINT IS NOT DISPLAYABLE**

These statistics without further proof will not support a claim of discrimination under the Act, although standing alone they would certainly cause a reasonable man to question whether the union's admission policies had been equitable.

The plaintiff offered evidence which, although subject to attack by the defense as to its credibility, would be sufficient to support a finding that Negroes had sought direct membership in Local 38, both pre-Act and post-Act, and their requests were denied.

Local 38's refusal to accept those Negro applicants for direct membership does not support a finding of racial discrimination. All the evidence in this record, both testimonial and documentary, positively establishes that, with but one exception, in 1957 when 3 Negroes were granted direct membership,<sup>1</sup> Local 38 has not, during any relevant period, granted direct membership to anyone and has never granted direct membership to any white applicants. There is documentary proof that white members of other IBEW locals who have requested to be taken directly into Local 38 have been refused. Therefore, the refusal to grant such privileges to Negroes cannot, standing alone, be considered as a violation of Title VII.

The next aspects of the plaintiff's argument on this subject carry over to the two remaining areas of controversy, the referral and apprenticeship systems.

The Government contends that as the union has practiced discrimination in the past administration of its apprenticeship classes that all Negroes over apprenticeship age are forever excluded from membership

and that continued refusal to directly admit Negroes over apprenticeship age violates Section 703(c)(1) of the Act, 42 U. S. C. § 2000e-2(c). This argument is not correct, for it ignores the realities of the possibility of Negroes over apprenticeship age achieving membership through the referral system, see p. 45 & 85 *infra*.

On the subject of the possibility of achieving union membership through the referral system, the Government contends that this alternative method is meaningless, in that the required test has not been given since 1959. In that year 24 white men were tested for Group One qualification, and all failed.

While the fact that there has been no such test for several years is true, the failure to administer such a test cannot be considered discriminatory. It was not until the summer of 1967 that any substantial numbers of Negroes began to work under the jurisdiction of Local 38 through the referral system. The record reflects that at that time Mr. Richard Acton, the newly elected Business Manager of Local 38, had discussions with Mr. Richardson and also with individual Negroes applying for work indicating to them that there was the possibility of achieving union membership through the referral system. Mr. Acton further testified that he also discussed with Local 38's newly elected President, Mr. John G. Steele, the giving of the required test, and they determined to do so at a time when there were enough Negroes qualified to take the test under the existing standards so as to make it meaningful as a practical matter. Thereafter, the union leadership became so tied up in this litigation that they were unable to implement their determination to proceed with such a test. When the Government became apprised of the fact that Local 38 intended to proceed with the test after this trial had been concluded, a motion was filed by plaintiff to restrain the union from going forward, which motion was granted with leave to the union to reapply to the Court for permission to give the test. Such a request is now pending before the Court.

\*9 It would thus appear that the initial failure to administer the test for Group One status subsequent to July 2, 1965 could not have affected the employment opportunities of Negroes and that the fact that the test has not yet been given is not racially motivated. While the fact that there were not sufficient Negroes working under the auspices of Local 38 to make the granting of the examination meaningful may itself involve racial discrimination, that is not the question here under consideration and it will be dealt with in considering the referral system.

It is therefore this Court's conclusion that the plaintiff has failed to prove a pattern and practice of racial discrimination on the part of Local 38 by its refusal to directly admit Negroes to journeyman membership or its failure to date to administer the test for Group One which will open the door for an application to journeyman membership.

Were it not for the fact that the defendant union is pressing to go forward with the Group One test, the Court would issue an order requiring it to do so, for a continuing failure to administer such test would constitute a discriminatory practice remediable under Title VII. At this juncture, no such order is necessary.

In its proposals for relief under the heading of journeyman membership the plaintiff suggested certain variations in the collective bargaining procedures relative to the Group One test and the right of persons passing the exam to apply for journeyman membership in Local 38. Such alternative procedures constituted the entire relief sought by plaintiff in this area. The Court will retain jurisdiction over the pending motion by defendant Local 38 relative to the giving of the journeyman wireman's exam, and the Government's proposals as to the appropriate conditions to be applied thereto will be considered and resolved within the framework of that motion.

### Referral for Employment

Since about 1958 Local 38 has, pursuant to its collective bargaining agreement with the contractors, conducted a referral system. A contractor who needs an electrician contacts the union hall, and the union is then to refer an electrician who has applied for employment.

In order to become a part of the referral system an electrician must appear in person at the union hall and fill out a referral application showing his job qualification. The referral system is divided into four priority groups, and the applicant is classified in one of the groups according to his qualifications. Under the collective bargaining agreement Local 38 is to maintain an out-of-work list of all referral applicants for whom work is not available, and when there is a job available the men are to be referred from such list by group priority, or by date of application within groups. However, an applicant

for referral must reconfirm his availability for employment after sixty days in order to retain his priority.

Prior to May 1, 1968 the requirements for placement in the four referral groups were as follows:

*\*10 Group I.* Four years experience in the trade; pass an IBEW journeyman wireman's exam; one year's residence within the jurisdiction of Local 38; and four years experience under the collective bargaining agreement.

*Group II.* Four years experience in the trade; pass an IBEW journeyman wireman's exam.<sup>2</sup>

*Group III.* Four years experience in the trade; one year's residence within the jurisdiction of Local 38; four years experience under the collective bargaining agreement.

*Group IV.* Two years experience in the trade.

On May 1, 1968 the standards for Groups I, III and IV were revised so as to broaden them. For Group I the work experience requirement was lowered to one year in the last four years under the collective bargaining agreement. For Group III the work experience requirement was reduced to two years in the trade and six months in the last three years under the agreement. Group IV was revised to require only one year experience in the trade.

By virtue of the requirements of the apprenticeship program, all persons completing the program and thereby becoming members of Local 38 automatically satisfy the requirements of Group I. Although Group I classification is also achievable by passing a journeyman wireman's exam, Group I presently consists of Local 38 members only, in that no one passed the one such exam given in 1959.

There was, prior to July 2, 1965, a work group known as temporary 2-B helpers. This group, unlike the other referral groups, was not established under the collective bargaining agreement. It consisted of men with no prior electrical experience and essentially was composed of sons or close relatives of union members. The 2-B helpers were generally employed during the summer, although there is evidence that some 2-B workers were employed at other times. The 2-B classification was discontinued prior to the effective date of the Civil Rights Act. There is a conflict in the evidence as to the reason for the discontinuance of the 2-B category. The Government contends that it was terminated for racial reasons, and there is some testimony to support that view. The defense

witnesses testified that 2-B was dropped because it was no longer serving the purpose for which it had been created.

Although the 2-B category was formally discontinued as of June 1, 1965 plaintiff introduced documentary evidence indicating that thereafter Local 38 continued to refer men for work who did not have the requisite experience. Exhibits were introduced containing referrals of both white members of other unions and white non-union members whose referral applications, it is contended, did not reflect one year's experience as electricians. The Court has examined those exhibits, and finds that contained therein are referrals of unqualified whites, although not all the documentation therein supports the plaintiff's contention.

*\*11* William Hirsch, who was a union business agent up to July, 1967, admitted that if there was a demand for help that he could not meet with qualified electricians he would refer unexperienced persons. It appears that men so referred would be used to perform manual labor jobs.

Mr. Richard Acton testified that after he became Business Manager in 1967 he did not make any original referrals of inexperienced persons and adopted a requirement that applicants for referral have written proof of prior work experience to avoid anyone falsifying their qualifications in order to obtain referral, as this record shows had happened in the past. There is no evidence in the record that any unqualified referral applicant has secured employment since July, 1967.

This matter of the referral of unqualified whites has dual relevance to this entire question of the referral system.

As a part of the relief requested hereunder the plaintiff seeks an order requiring Local 38 to adopt procedures for the referral of persons with less than one year's prior experience as an electrician, and until such procedures are adopted to refer all Negro applicants over apprenticeship age with less than a year's experience in Group IV. This request will be considered hereinafter.

Plaintiff also relies on this evidence as proof of discrimination in the operation of the referral system, contending that at the time these white applicants were being referred for employment qualified Negro electricians were being refused the opportunity to work through the referral system.

There is evidence in the record to indicate that Local 38



had engaged in discrimination in the administration of the referral system. The record further indicates, however, that any discriminatory practices which existed in this area came to a complete stop as of July, 1967. At that time new leadership came into control of Local 38 as a result of an election held in June, 1967. The two principal officials who assumed office were Richard Acton as Business Manager and John Gilbert Steele as President. Mr. Acton replaced all the incumbent business agents, who work in the administration of the referral system, with his own appointees.

Plaintiff has alleged in its brief and has suggested throughout the Government's presentation that any change in policy by the defendant union is a direct outgrowth of the pendency of this litigation. The Government has noted that Mr. Acton and Mr. Steele, along with other persons who ran for union office with them on various slates, had previously held union positions. The record indicates, however, that the prior representation which these men had in the union's elected bodies was not such as to enable them to have a strong hand in formulating union policy. The Court was able to observe Mr. Acton and Mr. Steele as witnesses in this trial and evaluate their credibility. It is the Court's conclusion that their positive actions in moving this union forward in the field of racial integration reflect their own personal convictions and do not represent matters of expediency to develop a record for the courts. While it may be true that the Government's investigation of Local 38 was a motivating force, and the filing of this action coming, as it did, virtually on the eve of their election brought home to the new officers a full realization of the depth of the problem confronting the union, that does not require the conclusion that the officers' response thereto was not in good faith.

\*12 The relevant statistics are that Local 38 referred no Negro journeyman electricians between January 1, 1962 and July 2, 1965 and referred two Negroes between July 2, 1965 and May 31, 1967. One of the Negroes referred during the 1965-1967 period was a journeyman member of Local 38, Roger Freeman, and the circumstances of his becoming a member of the union will be discussed in considering the question of apprenticeship. The other party was referred in November, 1965 to work on the Federal Office Building being constructed in Cleveland, which project had a job requirement that minority groups be represented in the trade.

As documentary evidence of discrimination the plaintiff introduced into evidence a file secured from the union

records marked "Not Qualified." Contained in that file were referral applications of six Negroes: Theodore Pinkston, Dempsey Pugh, George Suddeth, Eddie Reese, William Edwards and Herbert Massey, bearing dates ranging from July, 1960 to June, 1967. The said applications, on their faces, would indicate that the applicants were qualified for referral at the time they requested employment. This would indicate that the applicants were discriminated against. The file also contained referral applications of four other persons not identified as Negro, thus raising at least a question as to whether the "Not Qualified" file represented racial discrimination.

While admitting that four of the six Negroes whose referral applications were in the "Not Qualified" file reapplied for referral after July, 1967 and obtained employment thereby, the Government criticizes the union for not contacting these men when the applications first came to the attention of the new union officers. If the Government's "affirmative action" theory represented controlling law there would be substance to that argument; as it does not, the union's passive attitude towards the "Not Qualified" file is no evidence of present, as distinguished from past, discrimination.

Messrs. Pinkston, Reese, Edwards and Massey appeared as plaintiff's witnesses at the trial.

Mr. Pinkston's testimony was all pre-Act. He testified that he was among a group of Negroes who took an exam for journeyman membership in 1957,<sup>3</sup> but that he was not admitted to membership in the union. He further testified that in 1960 and 1963 he visited the union hall seeking membership. On each of those occasions he did fill out a referral application and was advised that the union had members out of work at the time.

The testimony of Mr. Reese, Mr. Massey and Mr. Edwards is post-Act, although Mr. Reese did testify regarding three pre-Act rejections by the union.

The testimony of Mr. Reese and Mr. Edwards was comparable, in that each of these men related appearing at the union hall in June, 1967, just before the union election, seeking employment. Each stated that he was told that no work was then available, but that he should check back in July. The July date was after the officers who would be selected in the upcoming election were to be installed.

\*13 Mr. Massey went to the union hall in late 1965

seeking employment, and was told that none was available, and that there was no need for him to leave a referral application. In 1966 he again returned to the hall, filled out a referral application, and was told the union had no work available. While the defense attempted to justify this latter refusal on the basis that Mr. Massey was then employed and the union had a policy of only referring men who were out of work, the record does not support that contention.

It appears from the record that at the time these Negro journeyman electricians applied for referral there was full employment in the electrical industry in the geographic jurisdiction of Local 38, and even a shortage of help during certain of the relevant periods. It therefore follows that the failure of Local 38 to refer the men for employment was discriminatory.

The remaining question is whether such discrimination was part of a pattern and practice to deny equal employment opportunities to Negroes, or represented isolated acts of discrimination. Having considered the entire record, the Court has concluded that the acts of the union officials in control at that time reflected a racially discriminatory policy with regard to referral for employment.

[Remedy]

The next issue for the Court's consideration is the relief necessary and appropriate, to remedy the union's discriminatory practices which continued until July, 1967.

The Government contends that the record supports the conclusion that there are between 50 and 100 qualified Negro electricians in the Cleveland area, and a substantial number of these have been denied, and are being denied, the opportunity to secure employment through Local 38. This contention is based on an estimate given at trial by one of plaintiff's witnesses. As a part of the proposed relief on this subject, the Government suggests a general waiver of the requirements of experience under the collective bargaining agreement and taking of a journeyman wireman's exam as to Negroes, and classification in the referral system based on work experience alone. It is the Government's contention that only such action can overcome the effects of past discrimination.

If the record lent substantial support to the argument that the union's past actions have resulted in a large number of Negroes being prejudiced as far as their present opportunities for employment are concerned, the Court would have to give serious consideration to granting relief in the manner suggested by the Government.

Paul Tiber, a white electrical contractor who appeared as a plaintiff's witness, testified that in the spring of 1968 he needed minority representation on his crew to satisfy the requirements for proceeding with a federally funded project. He requested Local 38 to refer to him a Negro electrician, but there was none available, although by that time the union was freely referring Negroes. He then contacted the Ohio State Employment Service and several of the well known civil rights groups attempting to find a qualified Negro electrician. He met with no success until a civil rights organization, known as the Workers Defense League, referred a journeyman electrician to him.<sup>4</sup>

\*14 At the present time there are about 44 Negroes working on referral from Local 38. There is no evidence that as of this time any qualified Negro electrician has applied for referral and has been unable to secure employment.

These considerations weigh heavily against the Government's theory that there are presently many qualified Negro electricians being denied employment opportunities. As was said in the *Local 212* decision:

To make out a prima facie case for class purposes, as distinguished from individual purposes, the plaintiff has the burden of showing the existence of a significant number of members of the group possessing the basic skill in the particular trade involved. The plaintiffs have shown the existence of some members of the class who are skilled and who have applied and as to those it has established a case. We cannot assume and do not assume from that that there are other members of the group similarly qualified. [58 LC P 9158] 292 F. Supp. 413, 445-446.

The Court has intentionally cut off the discussion of the union's relationships with Negro referral applicants as of June, 1967 in order to illustrate the change in attitude accompanying the new leadership. That consideration is relevant to the issue of appropriate relief. The Court will now review the evidence on this subject subsequent to July 12, 1967, the date the new officers were installed.

Mr. Reese, Mr. Edwards and Mr. Massey each returned to Local 38 for referral in or after July, 1967, Mr. Reese and Mr. Massey directly and Mr. Edwards being sent to the union by a prospective employer he had contacted in response to a newspaper advertisement. In each instance, Mr. Acton, upon being advised that a prior referral application was on file, secured the earlier referral application and each of the men was immediately referred for employment. Mr. Massey was referred for employment a second time in 1967, on the same day he appeared at the union hall seeking work after having been discharged from his prior job.

Elmer Thompson, a Negro electrician, came to Local 38 in August, 1967. His visit there was only for the purpose of seeking membership. A business agent advised him he was not eligible for membership, and asked him if he wanted a job. Mr. Thompson replied that he was employed and did not want a job, only membership. Nevertheless, the business agent had him fill out a referral application, although he did state there was no work immediately available. In 1968 Mr. Thompson applied for a job with a union contractor and was told by the contractor that he would have to be referred through the union. He thereafter returned to Local 38, and was referred out for employment.

Willie E. Crook, a Negro journeyman electrician, was referred for employment by Local 38 in April, 1968. Although his recollection of the events leading to his referral indicates about a three-month lapse between his initial contact with the union and his referral, documentary evidence in the record indicates that the actual lapse of time was only about two weeks. On Mr. Crook's first visit to the union hall he had not written proof of his work experience. He was questioned about his qualifications, was told that he could be employed although there was no work then available, and that he should secure the necessary proof of work experience and return to the union hall. Mr. Crook took no steps to secure the requested proof, and did not return to the union hall. He was thereafter called by a union representative and was told that there was work available if he was still interested. Following that initiative by the union, Mr.

Crook secured the necessary papers for presentation to the union and was immediately referred to a union contractor.

**\*15** The two remaining fact witnesses whose testimony bears on the question of referral were Herman C. Tellis and John H. Williams, Jr., both Negro electricians. Their testimony is relied upon by plaintiff as the basis for an argument that Local 38 misinformed Negro applicants about the requirements and procedures for referral.

Mr. Tellis testified that in September, 1967 Mr. Massey, who was then working through the referral system, suggested to him that if he joined Local 1377 of the IBEW he might be able to obtain employment through Local 38. Local 1377 is a maintenance electricians' union for this geographic area. Mr. Tellis stated that he spoke to representatives of both Local 1377 and Local 38 and was told that in order to be referred he had to have proof of four years experience as an electrician. He was, however, unable to identify the person from Local 38 he claimed gave him such information. At that time the minimum requirement for referral was two years experience. Although Mr. Tellis could have proved two years work experience, he had previously worked out of the City of Cleveland, and he had to go to Chattanooga, Tennessee, to get the proof of four years experience. Consequently, there was some delay in his getting a letter showing four years prior experience, but after securing the same he was referred for employment by Local 38.

Mr. Williams testified that in late 1967 he visited the Local 1377 offices because he heard that they were hiring electricians. He stated that he was told that he needed proof of four years work experience, secured such proof, and was sent over to Local 38 which referred him directly to a job. There was no delay in Mr. Williams' securing employment, in that he did not have proof of any work experience when he first went to Local 1377. Mr. Williams did not testify that anyone from Local 38 told him that four years experience was needed for referral.

The defense witnesses testified that no one from Local 38 had been advising Negro applicants that four years, rather than two years, work experience were required for referral, and in view of the fact that Mr. Tellis could not identify the party he allegedly spoke to at Local 38, the defendant was unable to specifically answer that charge further.

It is this Court's opinion that this evidence is insufficient to warrant a finding of a pattern or practice of discrimination based thereon. Mr. Tellis' testimony

regarding his conversations with the unidentified Local 38 representative will not support such a finding. Assuming that the officers of Local 1377 did convey such information, responsibility for their actions cannot be laid at the door of Local 38, absent a showing that Local 38 caused them to intentionally misrepresent the true facts.

*[Relationship Between Unions]*

The relationship between Local 38 and Local 1377 is the foundation for an argument by plaintiff that at the present time Local 38 makes the job referral procedures more difficult for Negroes. It is the Government's contention that Local 38 follows a policy of requiring non-member referral applicants to join Local 1377, and that as to Negroes such practice is discriminatory.

\*16 There is no question that referral applicants are strongly urged to obtain membership in a IBEW local, and that each of the Negroes who testified for the plaintiff and whose employment has been discussed herein is a member of Local 1377, although it may be noted that the membership of Mr. Tellis and Mr. Williams in Local 1377 is not shown to have been at the instigation of any of the Local 38 officials. It further appears from the record, however, that many Negroes have been referred by Local 38 without taking membership in Local 1377. Mr. Callahan, a Negro electrical contractor, affiliated with Local 38 with an agreement that his employees would not be required to join any union. It further appears that other Negroes who eventually took membership in Local 1377 were originally referred by Local 38 as non-union men. Thus the facts do not support the Government's position.

There is no evidence in the record to support the Government's theory that membership in Local 1377 was a discriminatory device imposed upon Negroes to discourage them from seeking employment through Local 38. Plaintiff's own witnesses established that whites obtaining employment through referral from Local 38 were advised to first join Local 1377 before seeking referral. It appears to the Court that Local 38's primary concern is having all men working under its jurisdiction, Negro or white, be members of some union in order to avoid the problems inherent in having union and non-union labor working on the same project. The Government's argument that this policy of advocating union membership in Local 1377 is discriminatory, even though uniformly applied to all referral applicants, by

reason of the possible interpretation Negroes may place thereon, is without merit.

An argument is made by the Government that Local 38 has discriminated in referral in not informing qualified Negroes of the opportunity for referral, stating that in 1968 Kenneth Johnson applied for apprenticeship but should have been offered referral. The Government, in its brief, suggests that many applicants seeking work through the union do not understand the distinction between membership, apprenticeship and non-member referral. The Court, having heard Mr. Johnson's testimony, is of the firm belief that he knew what he wanted. The fact of the matter is that Mr. Johnson was employed at the time he inquired about apprenticeship. In any event, there is no evidence in the record that the union gave any different information to whites than it did to Negroes in this regard.

Another instance of an allegation of discrimination unsupported by a showing of a differentiation in treatment between Negroes and whites is the plaintiff's statement that the union has failed to adequately inform those Negroes now working under the referral system of its mechanics. If that is so, then it represents a general failure on the part of the union to fully advise all referral applicants, and while that practice may not necessarily be approved by the Court as good practice, it cannot be condemned as a violation of the Civil Rights Act.

\*17 Finally, while admitting that Local 38 has since July, 1967 referred a number of Negroes for employment, the Government contends that the union continues to follow policies which, although not discriminatory on their face, result in discrimination against Negroes because they perpetuate the effects of previous exclusion of Negroes. The evidence on this record supports a finding that since July, 1967 when the new union leadership took office there has not been a single instance of true intentional discrimination in the administration of the referral system. Mr. Acton testified that he has referred every qualified Negro electrician who applied for work, and the plaintiff has produced no evidence to rebut that testimony. There is other evidence in the record that the present union leadership has actively participated in programs designed to further integration of the craft unions, and to stimulate minority group interest in the electrical trade.

Mr. Wesley Toles, Associate Director of Community Relations of Case-Western Reserve University in Cleveland, testified that he and other persons interested in obtaining employment for minority groups had sent Negroes to Mr. Acton and that all who were qualified

were referred for employment. Mr. Toles is himself Negro and is conversant with the question of race in relation to the craft unions, having for many years held positions with various governmental agencies whose activities were related to that problem. He tendered the opinion that while in the past Local 38 had been considered a problem union, it no longer had such a reputation. While that opinion is certainly not binding on the Court nor controlling on the issues herein, it does bear some relevance to the issue of the present intent of the defendant union.

It appears to the Court that the only way in which the defendant union could improve its statistical record with regard to Negro referrals would be to solicit Negro electricians for employment, which the Civil Rights Act does not require, or to grant preferential treatment to Negro referral applicants, which the Civil Rights Act does not permit.

At the present time there are over forty Negro electricians working on referral from Local 38. Approximately one-third of that group, including every individual as to whom post-Act discrimination was shown, has been working under the referral system for a sufficient period of time to qualify for the proposed Group I journeyman wireman's exam. Although the plaintiff argues that Mr. Pinkston is still only eligible for referral in Group IV, the fact of the matter with regard to Mr. Pinkston is that any discrimination which was practiced against him was pre-Act and was related to journeyman membership, not referral.

Since approximately 1960 there has been full employment in the electrical trade in the geographic area under the jurisdiction of Local 38, to the point where Local 38 has, at times, been unable to meet all contractors' needs, and referral applicants have had their choice of jobs. The record indicates that this condition is not expected to change materially in the foreseeable future.

**\*18** Taking all of the post-Act evidence into consideration, the Court is of the opinion that the plaintiff's proposal regarding waiver of the collective bargaining agreement's experience requirements goes far beyond the limits of the order necessary to alleviate the effects of past discrimination. The legal predicate for that proposal by the Government is that a referral program which, though neutral on its face, continues the effects of prior discrimination must be considered as presently discriminatory, *Dobbins v. Local 212*, *supra*, [58 LC P 9158] p. 445.

The deficiency in that proposition is that it is not relevant to the record in this case. The effects of past discrimination have rather effectively been dissipated by the policies of the present union leadership. Each of the Negroes who was the subject of discrimination had advanced within the referral system to the point where the effects of the prior practice no longer affects his employment opportunities. As to other Negro electricians, as to whom specific discrimination has not been shown, the union's present referral policies coupled with actual economic conditions in the home building industry, make priority within the referral system an abstract consideration in relation to an individual's ability to obtain employment.

On this record, to grant the relief suggested by the Government would be very close to, if not an actual violation of 42 U. S. C. § 2000e-2(j) which prohibits preferential treatment to correct an existing imbalance. For example, if a white and Negro electrician each with over four years job experience, for the first time entered the referral system as of the effective date of the order the Negro would be placed in Group I and the white in Group IV. That would be true even though the Negro had never before thought of attempting to obtain employment through the union. The Court does not believe that the Government's proof in this case warrants such action. We are not dealing here with a situation comparable to discrimination within a seniority system in an industrial plant, such as was presented in *Quarles v. Phillip Morris*, [57 LC P 9101] 279 F. Supp. 505 (D. C. E. D. Va., 1968) and *United States v. Local 189*, [57 LC P 9120] 282 F. Supp. 39 (D. C. E. D. La., 1968). In those cases racial discrimination affected all members of an identifiable group, employees in a given plant or department, and waiver of certain requirements was necessary to overcome the demonstrable effects of that discrimination. In this case the record rebuts the conclusion that such a remedy is appropriate to overcome the proven effects of discrimination.

In conjunction with its proposal that certain of the collective bargaining agreement conditions for referral be waived as to Negroes, the Government seeks an order that Local 38 shall establish formal procedures for the referral of persons with less than one year of electrical experience and until such time as such procedures are formalized Negro applicants with less than one year's experience as an electrician and who are over the apprenticeship age shall be referred in Group IV. This Court should not require the union to establish a referral classification not

provided for by the collective bargaining agreement unless the record indicates that such action is necessary to overcome the effects of past discrimination. As the temporary 2-B classification, which referral category was similar to the group proposed by the Government, was discontinued prior to July 2, 1965, this Court cannot grant any relief based on its former existence. While there is evidence that some whites without the requisite experience for referral were given employment after July 2, 1965, such practice was stopped by the present leadership and the number of such referrals in relation to the total referrals during the relevant period is small. The Court does not believe that the potential discriminatory impact of that discontinued practice is significantly meaningful to warrant the far-reaching relief proposed by plaintiff. It appears to the Court that to grant the relief permitting referral of only Negroes with no electrical experience would be to create a favored class in order to correct an existing imbalance, which is prohibited by 42 U. S. C. § 2000e-2(j).

**\*19** The plaintiff has made other proposals regarding the relief hereunder. Certain of those are directed to a requirement that Local 38 strictly observe the collective bargaining agreement's conditions as to record keeping. There is no question that the union should comply with such requirements. Certain other proposals, however, would in effect make the United States a general supervisor of the collective bargaining process through which the referral program is formulated. The Court does not believe such an order is warranted in this case.

It is the Court's conclusion that the only relief necessary at this time, based upon the entire record, is a general order enjoining the defendant union from discriminating in the operation and administration of the referral system, and requiring observance of the terms of the collective bargaining agreement of May 1, 1968. Such an order is not to be construed as preventing Local 38 from continuing to recommend that referral applicants obtain membership in an IBEW local union, so long as that is not made a condition of referral.

### Apprenticeship

This is the only aspect of the case involving the activities of the EJAC, which is a joint union-contractor board responsible for the administration of the union's apprenticeship program. Although the total number of

persons appointed to serve on EJAC at any given time may vary, when it sits as an examining board for actual apprentice selection it is composed of six men, three from the union and three contractor representatives. In addition to the regular members of EJAC, there is also a Secretary to the committee, who is permitted a voice in its affairs, but who has no vote in the apprentice selection procedures.

In considering the plaintiff's contention that EJAC has discriminated in the selection of apprentices the evidence may be separated into three periods:

(1) Prior to 1965

(2) 1965-1966

(3) 1967 to present

The basis for this division is that the apprentice selection procedures were changed by EJAC in the years 1965 and 1967.

From the time of the establishment of the apprenticeship program until the summer of 1965 only two Negroes were selected as apprentices, one in 1963 and the other in 1964. The two Negroes who were selected were taken into the program after a civil rights protest regarding the absence of minority group representation in the crafts working on a Public Mall project in Cleveland and the intervention of the Cleveland Community Relations Board in the dispute. Following meetings with Mr. Ellsworth Harpole, Director of the Community Relations Board, the union agreed to immediately employ two Negroes on the project as temporary 2-B helpers and thereafter consider them for apprenticeship. Roger Freeman, previously mentioned in the discussion of referral, was one of the men employed as a temporary 2-B helper and subsequently was selected as an apprentice.

Having reviewed the record, the Court has concluded that there can be little doubt that prior to the effective date of Title VII the EJAC did discriminate in the selection of apprentices. Such discrimination was not on a strictly racial basis, although the result thereof was the exclusion of minority group members.

**\*20** Prior to 1965 EJAC had no regular standards for the selection of apprentices, utilizing factors shown in the candidates' applications and letters of reference. There was no fixed policy on the giving of tests or oral interviews to applicants.

It appears from the testimony of Mr. Aaron Caghan, who in late 1964 contacted the union regarding apprenticeship as Special Representative of the President's Committee for Equal Employment Opportunity, that the EJAC was, in effect, using a quota system in selecting apprentices. As with many other crafts during those years, nepotism was prevalent under that system.<sup>5</sup>

Although Mr. Caghan testified that the persons concerned with apprentice selection told him that they believed that their methods were reasonable and democratic, and that they hoped to increase the number of Negro apprentices in ensuing years, the Court finds that such selection procedures were discriminatory, and if they had continued past July 2, 1965 they would have been in violation of Title VII of the Civil Rights Act.

During his meetings with the union and EJAC representatives, Mr. Caghan advised them that their selection program was in violation of recently adopted Federal Regulations on the subject of Equal Employment Opportunities, 29 C. F. R. Part 30. The union officials indicated that they were not aware of that fact, and would endeavor to conform their selection procedures to the requirements of the regulations.

For the selection of its 1965 and 1966 apprenticeship classes, the EJAC adopted a testing procedure based on a 100-point scoring system. The test was divided into two 50-point segments, referred to in the plaintiff's presentation as non-oral and oral.

The non-oral portion of the test reflected scoring of the applicant's educational background, which was based on school transcripts, with a 30-point value, and the results of the applicant's performance on IQ and mechanical aptitude tests, with values of 10 points each. The administration and scoring of the two tests and evaluation of the applicant's educational background, were done by persons independent of the EJAC.

The 50-point portion of the test referred to as the oral examination was subdivided into two parts. Twenty points were allotted to the category of "mechanical tests suitable to trade by Joint Apprenticeship Committee," and 30 points to "oral interview," in which the factors of interest, appearance, ambition, physical potential, personality, and attitude were included.

Prior to beginning the oral examination, each member of the EJAC panel entered the applicant's non-oral grades on

a scoring sheet. The applicant was then examined and each interviewer would, without prior consultation, enter a grade for the two oral factors. An applicant's final grade would be the average of the total score awarded by all members of the panel.

\*21 That testing procedure was registered by EJAC with the appropriate governmental agencies pursuant to 29 C. F. R. 30, and was given approval thereunder.

Selection as an apprentice was not dependent on achieving any particular score on the test. Prior to selection of the class a determination was made by EJAC as to the number of apprentices to be selected, and the cut-off point was, therefore, the score of the lowest scoring candidate selected. That level would vary from class to class.

The plaintiff contends that the foregoing testing procedure was applied discriminatorily in the selection of the 1965 and 1966 apprenticeship classes.

Although the bulk of the evidence in support of that argument is statistical, there is one matter which rests on testimonial evidence. The Government contends that Negroes and whites were asked different questions on the oral side of the test. Having reviewed the testimony of the three apprentice applicants who testified on this matter, and of other witnesses who testified generally as to the nature of the oral side of the testing, the Court does not agree with the Government's conclusions based thereon.

While it is true that the testimony of the apprentice applicants indicates that they were not all asked the same questions or called upon to perform the same tasks, there were basic similarities in the interviews of all three. It does not appear that anything required of any of the applicants can be said to have been irrelevant to the purpose for which they were being examined. The EJAC had no fixed pattern for the oral side of the test, and, as it appears that in 1965 and 1966 many persons alternated on the six-man examining board, a variation in content of the exam might reasonably be related to a change in personnel. There is no evidence that the one white and two Negro apprentice applicants who appeared as witnesses were examined by comparably composed EJAC panels. It is, therefore, the Court's opinion that plaintiff has failed to prove an intent on the part of EJAC to practice racial discrimination by subjecting Negro apprentice applicants to a more stringent oral exam than that given whites.

The balance of the plaintiff's proof on this question is essentially statistical. It is the plaintiff's contention that the statistics demonstrate that in 1965 and 1966 Negro applicants were discriminated against, in that they were given unwarranted low scores on the oral side of the testing procedure, thereby resulting in their rejection as apprentices.

The first apprenticeship class to which the testing procedure under consideration was applied was in April, 1965. From that class 30 white applicants were selected as apprentices. Eight Negroes were tested and interviewed by EJAC, none of whom was selected.

The Government relies upon the pre-Act evidence pertaining to this class as proof of a pattern and practice of discrimination which it is contended extended beyond the critical July, 1965 date. It is the plaintiff's position that the fact that none of the rejected Negro applicants had an oral score over 33, whereas many white applicants, including some with non-oral scores comparable to the non-oral scores of the Negro applicants, received substantially higher oral scores, is proof of discriminatory grading.

\*22 The Court has considered all the documentary evidence available for that apprenticeship class, which is in an exhibit prepared by the plaintiff. The said exhibit contains the application form, portions of the independent IQ and mechanical aptitude test materials, the EJAC Secretary's apprentice evaluation form reflecting the applicant's average final grade, and one examiner's completed apprentice evaluation form, for each of 28 of the 30 white applicants selected and for the 8 Negro applicants rejected in the April, 1965 apprentice selection procedures.

It does appear from the said exhibit that the Negro applicants received lower total grades on the 50-point oral phase of the testing than did the successful white applicants. There are, however, two other factors which appear from the said exhibit that cannot be disregarded.

First, the scoring sheets reflect that as a group the evaluation of the educational background of the Negro candidates was not materially different from that of the successful white applicants. The performance of the Negro candidates, however, did vary significantly from that of most of the white candidates on the IQ and mechanical aptitude tests, the Negro group scoring much lower.

Second, the individual grading sheets for the Negro applicants reflects that on the 50-point oral side of the test the greatest down-grading was in the 20-point block relating to mechanical aptitude, and not in the 30-point oral interview block. The individual grading sheets contained in the exhibit reflect rather good grades for 4 of the 8 Negro applicants on the actual oral interview.

The following table reflects the data for the 8 Negro applicants. The IQ and mechanical aptitude test scores, based on a total possible score of 10 each, would be uniform as to all EJAC members, as they represent the recorded result of independent testing. The scores on the EJAC mechanical aptitude test and oral interview do not represent the applicant's average total scores for those factors, as that data is not contained in the record, but rather are the scores shown on the individual grading sheets contained in the plaintiff's exhibit:

TABULAR OR GRAPHIC MATERIAL SET AT THIS POINT IS NOT DISPLAYABLE

It appears to the Court from these results that there is at least a strong possibility of a direct correlation between achievement on the independent mechanical aptitude tests and the EJAC mechanical aptitude tests. That possibility is further supported by the fact that in most instances the successful white applicants reflect a positive correlation between the grades scored in both aptitude test categories.

Without having comparable documentation from among the rejected white applicants, the Court is without sufficient data to ascertain whether the scoring of the Negro candidates was materially different from that of whites who had truly comparable ratings on their non-oral performance. The non-oral scoring of the accepted white applicants is not, when considered in detail, sufficiently comparable to provide the foundation for such an analysis.

\*23 Consequently, although the data as to the 8 Negro applicants, and particularly applicants numbers 85 and 125, raise some question as to whether they were fairly scored on the 50-point oral phase of the testing procedures, the Court does not believe that the record is sufficient to support a finding that there was intentional discrimination in the selection of the April, 1965 apprenticeship class.

For the apprenticeship class selected in August, 1965, it is stipulated that 158 applications were originally filed, 11 from Negroes and 147 from whites. It is further stipulated



that 110 persons were tested and interviewed, 104 whites and 6 Negroes. Thirty-one apprentices were selected for the class, all of whom were white.

The evidence in the record pertaining to this class is somewhat different from that available as to the April, 1965 class. The stipulation contains the total non-oral and oral scores of all persons tested and interviewed. The plaintiff has also submitted an exhibit containing documentation as to all the successful white applicants and the 6 Negro applicants. That exhibit, however, only contains the summary sheet of the EJAC Secretary, which reflects the categorical point assignments on the non-oral side, but does not show any division of points between the two categories on the oral side.

The test data relevant to the Negro candidates which can be derived from this record is as follows:

TABULAR OR GRAPHIC MATERIAL SET AT THIS POINT IS NOT DISPLAYABLE

It thus appears that, with the exception of applicant No. 320, the Negro applicants performed very poorly on the independent mechanical aptitude test. The range of total non-oral scores for the 5 Negro applicants, other than No. 320, was from 24 through 32, with an average of 28.4. In the absence of proof of the details regarding the total oral score, the record does not establish in what category the Negro applicants were down-graded by the EJAC. However, if one assumes any degree of constancy between the scoring pattern as developed in the April, 1965 class and that for the August class, the logical conclusion is that the Negro applicants would have accumulated the majority of their total oral points on the 30-point oral interview block, with a low score in the 20-point mechanical aptitude factor.

From the statistical evidence available, it appears that the total oral grades of the six Negro applicants were, on the whole, lower than the total oral grades of white applicants and moved within a narrower range. It further appears that the oral grades received by the Negroes did not show the same upward movement from their non-oral grades as was the case with the majority of white applicants. However, approximately one-third of the white applicants had a pattern of scoring differential between non-oral and oral grades comparable to that of the Negro applicants. It further appears that the average non-oral score of all white applicants was higher than that of the Negroes, and that the average non-oral score of all the 31 white

applicants selected as apprentices was 36.9.

\*24 The statistics also indicate that there were 56 white applicants who scored between 26 and 32 non-oral points, the range of five of the six Negro applicants, and of that group 47 failed to qualify for apprenticeship. There were 25 white applicants who scored higher than 32 non-oral points who were rejected, including the son of the man then President of Local 38 and Chairman of EJAC.

While the Government relies on the comparison of the total oral scores given to the Negro candidates in relation to the total oral scores given white candidates as proof of discrimination, the Court cannot accept the same as being conclusive on the point. By reason of the fact that the record does not reflect the allocation of points between the aptitude test and oral interview factors on the oral side of the exam, the Court is unable to truly evaluate the significance of the Negro candidates' total oral scores. The plaintiff's theory would call upon the Court to accept the possibility that the Negro candidates were discriminatorily graded, and reject the possibility that the total oral scores were correlative to performance on the independent testing. It is also possible that the Negro applicants appeared before the same examiners who scored approximately one-third of the white applicants in the same pattern of relationship between non-oral and oral scores as is shown for the Negro group. It is the Court's opinion that so long as the record suggests different possible explanations for the grading of the Negro candidates it cannot be said that the Government has sustained its burden of proof.

Negro applicant No. 320 was the only one of the group who scored well on the non-oral test, receiving a total grade of 46, but he was only awarded 25 points on oral exam, thereby missing the cut-off point of 77 for the class. Standing alone, this would seem to indicate that there was discrimination practiced against him. The record, however, reflects that almost one-third of the white applicants who scored over 40 non-oral points missed selection as apprentices by reason of receiving low oral scores. This full picture weakens the Government's contention that the rejection of applicant No. 320 was for racial reasons.

The next apprenticeship class to which any Negroes applied for admission was in August, 1966. It is stipulated that of 220 original applications, 22 were Negroes, and that 125 whites and 14 Negroes were found qualified and continued on to be tested and interviewed. The same testing procedures in effect in 1965 were utilized for

selection of that class, and 60 apprentices were selected, one of whom was Negro.

The Court has carefully considered the documentary evidence in the record pertaining to the 1966 class, which is in the same form as for the August, 1965 class, and finds the same general pattern presented as was true for the two 1965 classes.

Of the 14 Negro applicants, one scored 2 out of the possible 10 points on the independent mechanical aptitude test, and the remainder scored no points. The groups average score on the IQ tests was approximately 6.3, and their average aggregate score for the two independent tests was approximately 6.4 out of a possible 20-point total. The successful white applicants, as a group, had substantially better performance levels on those tests.

**\*25** It appears from the statistics in evidence that the Negro group, as a whole, averaged lower on the oral side of the test than did the whites, as a group, and that, as a group, their oral scores moved within a narrower range both in point spread and in relation to non-oral scores, than did the scores of whites. It further appears, however, that their non-oral scores, as a group, were lower than those of the white applicants, as a group, the highest non-oral score achieved by a Negro being 36.

Although there were some white applicants who scored in the same non-oral range as the Negroes who were selected as apprentices, there was a greater number of whites who scored over 36 non-oral points who were rejected by reason of low oral scores. There were several whites with non-oral scores of 40 or over who were eliminated on the oral testing. As the cut-off point for the 1966 class was only a total grade of 70, such applicants necessarily received very low oral scores.

On this record, it appears that the Negro applicant who was selected achieved admission into the 1966 apprenticeship class in exactly the same manner as did several of the whites, by combining a good total oral score with an average non-oral performance.

The Court's overall conclusion pertaining to the 1966 apprenticeship class is essentially the same as with regard to the 1965 classes. While the general variations in grading between the Negro candidates, as a group, and the white candidates, as a group, might indicate that discrimination was practiced, the record permits of other reasonable alternative explanations for the failure of the Negroes to be taken into apprenticeship.

The major evidentiary deficiency in this record is the absence of evidence of the relationship between the oral scores of the Negro applicants in 1965 and 1966 and the oral scores of a significant number of white candidates who performed in a truly comparable manner on the non-oral tests. Although the Court has the total oral and non-oral scores for all applicants in the August, 1965 and August, 1966 classes, the detailed scoring is only available as to the Negro candidates and the successful white candidates, and as between those two groups there is not a sufficient identity of performance on the non-oral side of the tests, when considered in their details rather than as total grade, to make a meaningful comparison. If this record contained evidence that a significant number of whites received substantially higher oral grades than did the Negro applicants despite the fact that the two groups performed in a reasonably comparable fashion on the non-oral tests, that would provide evidence of discrimination. The Court has found no such proof in the record.

There is one other item of evidence relevant to the question of the performance of the apprentice applicants. Mr. Toles, of Case-Western Reserve, testified regarding a pre-apprenticeship program he was conducting at the university. In that program high school graduates are given a combination of on-the-job training and schooling to prepare them for apprenticeship tests in the trades. Mr. Toles testified that in interviewing Negro and white youths, coming from the same school backgrounds, he found the whites to be better informed as to what the various crafts, including the electricians, entailed and better motivated toward entering a particular craft.

**\*26** If this commentary by Mr. Toles is reflective of the circumstances of the EJAC apprenticeship interviews, it would provide a legitimate basis for a scoring differential between white and Negro candidates. This is not to say that an apprenticeship examining committee should disregard the realities of urban living, which many experts believe place minority groups in an unequal position with regard to their ability to acquire exposure to environmental influences which prepare them to compete on even terms with middle-class groups for a position in industry and the trades. This Court believes that testing procedures for such positions should, with the aid of experts in the field, be re-examined to take such considerations into account. The issue in this case, however, is not whether the EJAC procedures could have been more sociologically satisfactory, but rather whether the grading patterns in 1965 and 1966 disclose an intent to

discriminate.

Based on all the foregoing, it is the Court's conclusion that the plaintiff has failed to carry the burden of proving that the Local 38 EJAC engaged in an intentional pattern and practice of discrimination in the administration of the apprenticeship selection procedures in 1965 and 1966. The evidence raises some doubts and suspicions in that direction, but there are simply too many holes in the evidence for the Court to find other than that the plaintiff has established the possibility that Negroes were the subject of discrimination. It is the Court's opinion that the Civil Rights Act requires a stronger showing than that before the Court may find that the plaintiff has proved its case.

The testing procedures utilized in 1965 and 1966 were not carried forward into 1967. Following communication from a representative of the Department of Labor to the Ohio State Apprentice Council, which had approved the existing test, and the intervention of the Department of Justice in this matter, the EJAC adopted a plan for apprenticeship selection known as the national plan, or yellow book. The composition of the committee was also altered by the reduction of the number of persons who served thereon, so as to create greater uniformity in the examining panels, and the replacement of the incumbent union representatives by persons appointed by Mr. Steele, who was then President of Local 38 and as such served as EJAC Chairman. Mr. Steele had not previously served on EJAC.

The national plan had been developed a few years earlier, by the staff of National Joint Apprenticeship and Training Committee for the electrical construction industry. The NJAC is supported jointly by management and labor on a national basis, and is designed to promote and aid apprenticeship programs throughout the industry.

This plan had been determined to be consistent with 29 CFR Part 30 on a national basis by the U. S. Department of Labor on May 26, 1966, and on August 11, 1967 it was registered by the Bureau of Apprenticeship and Training, which is a bureau of the Department of Labor, for the Local 38 EJAC with the Ohio State Apprenticeship Council.

\*27 There is a dispute between the parties as to the derivation of the national plan, which has resulted in the filing of post-trial evidentiary material with the Court. It is the Court's opinion that the controversy on such issue has risen far beyond its relevance to this case. The

identity of those who participated in the formulation of the plan is not critical herein, for the testing procedure must rise or fall on its own merits. Suffice it to say that the Court believes that the persons who participated in the drafting of the procedures which culminated in the national plan have been shown to have professional competence in the field of apprenticeship selection.

The national plan testing procedures are contained in a booklet form. Four pages of the book represent the actual scoring sheets, and the balance of 17 pages written material (including cover pages) is basically instructional.

The first page of the rating form covers certain basic prerequisites, and is used to determine if the applicant is qualified to proceed to oral interview.

The second and third pages constitute what has been referred to as the objective side of the test. They start with an evaluation of math and science background, and the form provides for rating in six classifications ranging from no background to excellent background. Unlike the procedures under the 1965 test the applicant's educational background is not independently evaluated. Rather, preceding the oral interview each applicant's educational background data is presented to the examiners, and each examiner evaluates it himself. The next categories are aptitude tests and other required tests. EJAC did not administer any tests which fell in the other required tests category. As to aptitude tests, the Ohio State Employment Service administered a test known as B 317. The results, however, were transmitted to EJAC in terms of H, C and L. L. score represented low, and such persons were not called for oral interview. As to the H and C scores, the EJAC was advised that they were quite comparable, and thus would not give much guidance in differentiating between candidates.

Page three of the test contained a category for evaluation of general education, again with six scoring blocks ranging from poor to excellent background. It also contained two categories relating to aptitude or achievement tests, which are not utilized by the Local 38 EJAC, and an evaluation of physical factors. As to physical factors, each candidate was scored satisfactory unless his basic application, or the oral interview, disclosed a possible health deficiency which would affect his ability to perform as an electrician. In that case he would be referred to a physician for a further check-up or asked to produce additional medical evidence.

This is the extent of the objective side of the national plan

test procedure. It thus appears that the only portions of the objective test which would produce any meaningful difference in scoring among the applicants would be those evaluating the candidates' educational backgrounds.

**\*28** The fourth page of the test reflects the oral interview factors, and has been referred to as the subjective test. The factors evaluated on the subjective side are interest, attitude, and personal traits. Each of those has five possible scoring blocks. The personal traits category has an "unacceptable" block, and it was stated that a candidate could be eliminated from consideration on that basis. The evidence reflected, however, that such action was rare in the national experience under the plan.

Finally, there is the grade assignment for the applicant. That is done on a scale ranging numerically from 10 through 120 in ten-point intervals, with each interval carrying a letter grade. This final grade represents each interviewer's total assessment of the applicant, and does not represent an averaging of scores achieved in the several categories. These final grades, as well as the other scoring, are entered by the individual examiners on their separate sheets without mutual consultation. The evidence indicated that while some examiners would assign a number or letter grade in scoring the various categories, others would simply make a mark in the scoring box they considered applicable for that subject, and in a few instances no entry was made for a particular subject. The applicant's final grade was determined by averaging the individual scores awarded by the committee members.

The Government's attack upon the current selection procedures is not based on an attempt to demonstrate discrimination in actual apprentice selection, as was done for 1965 and 1966, but is rather predicated on the proposition that the procedures are essentially subjective and discretionary, and are inherently discriminatory. It is argued that:

It is of particular importance, then, in light of the EJAC's long history of racial discrimination to ensure that the current selection system is objective and reviewable. For in these circumstances a discretionary system constitutes an unlawful vehicle for further discrimination.

Before considering the plaintiff's arguments as to the inherent discriminatory nature of the national plan, the facts as to its actual performance should be considered.

In 1967, 343 original applications for apprenticeship were filed, 289 from whites and 54 from Negroes. Of those, 117 whites and 38 Negroes did not have the necessary requisites or did not appear for testing or interview. Of the 172 whites who were interviewed, 63 were selected as apprentices. Of the 16 Negroes who were interviewed, 4 were selected as apprentices.

There were three other Negroes admitted to the 1967 class in addition to those taken in through the normal procedures. After assuming office, Mr. Acton was informed of the Government's charge of discrimination in the operation of the apprenticeship program. At a meeting in July, 1967 the union agreed to offer a place in the next apprenticeship class to 13 Negroes whom the Government alleged had been the subject of discrimination in 1965 and 1966. Of that group, three accepted the offer, two declined, two failed to respond to the notice letter, one could not be located, and five were in military service. As to those in the military, the offer still remains open.

**\*29** In 1968, 670 original applications were filed, 607 by whites and 63 by Negroes. Of that group 367 whites and 24 Negroes were tested and interviewed. A class of 100 apprentices was selected, being constituted of 87 whites and 13 Negroes. Seven of the 12 Negroes who were unsuccessful in the 1967 test reapplied in 1968, and four achieved acceptance on that second attempt. It appears from a review of the documentary evidence of prior years that many whites who failed on a first try were also able to achieve a better result in a subsequent class.

These statistics, on their face, would indicate that the present system is operating free from discrimination. The Government contends, however, that such conclusion cannot be drawn in that the system is not subject to review and therefore it cannot be determined if there were additional Negro applicants who, although well qualified, were rejected. The plaintiff, however, has had access to all relevant documentary material for the 1967 class, and has not made any claim of specific discrimination based thereon. On the other hand, the expert witness for the defense on this subject of apprenticeship testified regarding a system of review which he developed, and stated that it had indicated the possibility of two instances of discrimination against Negro applicants, but that when he checked the detailed data regarding those applicants he

concluded that such was not the case.

There is no doubt that the national plan under which the EJAC is now operating has a substantial subjective element in it, and as such the label of "discretionary" attached to it by the plaintiff is not totally unreasonable. To say, however, that a test is discretionary does not automatically mean it is discriminatory. A degree of discretion is not, in and of itself a vice. It is the manner in which that discretion is exercised that is critical. There is testimony in this record by witnesses conversant with the problem, that Negro youths in this geographic area, as a group, are among those persons referred to by sociologists as culturally deprived, although they do not constitute the entirety of that segment of the populace and not all can be so categorized. As such they are at a general disadvantage in competing with suburban white youths on the basis of education and background. A testing procedure with a discretionary element can be used to penalize the culturally deprived for deficiencies which society has created, and thus further restrict their opportunities to join the mainstream of modern life. On the other hand, if such discretion is wisely exercised, one may acknowledge these realities of present urban conditions and make allowances therefor, thereby narrowing the built-in differential between individuals coming from unequal environments. On this record there is no evidence that the Local 38 EJAC has taken advantage of the discretionary aspects of the national plan to practice racial discrimination.

In summary, the plaintiff has shown a generally discriminatory approach to apprenticeship by EJAC prior to July 2, 1965. Although the evidence for the years 1965 and 1966 would support a strong suspicion of racial discrimination, the plaintiff has failed to prove an actual pattern and practice of discrimination continuing beyond July 2, 1965. Consequently, the plaintiff is not entitled to a finding in its favor, with a mandatory order directed to EJAC, on this subject matter.

**\*30** Notwithstanding this determination, the Court believes that during the course of the trial certain possible weaknesses in the national plan, and the manner in which it is utilized, came to light. The defense expert, who to a substantial degree authored the national plan, acknowledged that it had some deficiencies. Although the Court cannot enter a mandatory order requiring changes in the national plan as it is used by Local 38, in that plaintiff has not shown it to be a vehicle for discrimination, the Court recommends that the NJAC and Local 38 EJAC consider the ensuing commentary and

adopt such variations in their present procedures as may be warranted, seeking the advice and assistance of any agencies, public or private, that could aid in such an effort. This discussion is not intended to alter or detract from the Court's finding that the present system is adequate and appears to be functioning fairly. As agreed by both experts, there is no perfect method for apprenticeship selection, and any existing system is subject to improvement.

The first area which might be considered is the evaluation guidelines and standards set forth in the national plan. It appears that, at least as to the Local 38 EJAC, the interpretation of the standards has led to a variation in grading patterns between examiners. It should be stated, however, that while the examiners showed differing scoring patterns they maintained reasonable individual consistency and their patterns did not evidence any discrimination. It is the Court's opinion that a more uniform grading pattern might be achieved if the standards were revised to reflect a greater precision in directing the examiner to specific factors and attributes to be considered in candidate evaluation and providing more concrete suggestions as to appropriate scores based upon the factors disclosed by the application form, educational data, and interview. The Court is further of the opinion that if such a revision is made, the guidelines should convey to the examiner some guidance in evaluating an applicant from a culturally deprived environment.

Improved guidelines and standards will only be beneficial if they are reflected in the actual examination scoring. The record indicates that the scoring habits of individual examiners with regard to noting grades on each subject matter were not consistent, nor was there any uniformity with regard to the entry of written comment. The Court would therefore recommend that steps be taken to insure that each examiner note a score for each subject matter under some uniform system, that a written comment for each subject matter be noted reflective of the score, and that a general written summary be required in support of the final grade.

It is the Court's belief that if these steps are taken the question of reviewability of the national plan testing procedures will no longer exist. The Court is satisfied from the demonstration of the defense expert that it is presently possible to determine the existence of a pattern or practice of discrimination under the national plan on the part of an examining committee as a whole or any individual thereon, and that if such a pattern or practice were detected, individual test results could then be

checked for specific discrimination. The potential problem area is in the verification of actual individual discrimination. Plaintiff's expert testified that even at this time if the examiners were to follow the instructions and standards under the present plan a determination as to racial discrimination could be made. It follows that the more definite the guidelines are and the more closely they are adhered to, the more accurate a determination of the issue can be made.

\*31 Related to this matter of review is the question of internal appeals procedures. It appears that the right of appeal from an EJAC decision, provided for in the collective bargaining agreement, has not been utilized because the applicants have not been sufficiently advised of its existence. The Court would therefore recommend that the notice to rejected applicants be revised so as to reflect the applicant's grade, the minimum grade for admission, and specifically reciting the appellate rights available. It has also been suggested that a recording or transcript of the oral interviews should be preserved for presentation before the reviewing panel, and the Court believes that such suggestion warrants serious consideration.

One other step which could be taken in the direction of aiding apprenticeship examiners is instruction by NJAC representatives, who are available for consultation on all matters relating to apprenticeship. It appears to the Court that the prior instructional meetings between the NJAC representatives and the Local 38 EJAC were of short duration. The Court believes that the NJAC could undertake a program of intensive instruction for those local committees who wish to upgrade their selection procedures, with particular emphasis on the matter of evaluation of candidates from diverse backgrounds and the ways in which interview procedures can be varied to fully explore the actual qualifications of each candidate.

In making these recommendations, the Court has taken into consideration the testing procedures proposed by plaintiff in its suggestions as to the relief which would have been sought as to apprenticeship.

The plaintiff's primary thesis was that the element of discretion should be taken out of the testing procedures and virtually the entire selection process be dependent on "objective" factors, with a permissible maximum of 10% of the total grade allocated to oral interview.

A strictly objective test would focus squarely on an applicant's educational background. The plaintiff's own

expert testified that most minority group members come from a culturally deprived environment and their educational opportunities and experiences are inferior to persons of a middle-class background. It would thus seem logical that a selection procedure based on such considerations would inevitably diminish the possibility of an applicant from a disadvantaged segment of the community achieving admission into an apprenticeship program.

The Court has also considered the selection procedure described by plaintiff's expert, which he used in selecting persons for the position of bus dispatcher, which results in an applicant being rated as either unacceptable, acceptable or outstanding. While such a testing procedure may be perfectly satisfactory in dealing with a promotional system where job seniority can also be taken into account, it does not appear to be appropriate for apprentice selection. If there were more candidates achieving acceptable and outstanding ratings than there were apprenticeships to be filled, the class would have to be selected on a lottery basis.

### Conclusion

\*32 In the prosecution of this lawsuit, the plaintiff had the burden of proving an intentional pattern and practice of racial discrimination, extending beyond July 2, 1965, the effective date of the Civil Rights Act of 1964, on the part of the defendant Local 38 in the areas of journeyman membership, contractor affiliation and referral for employment, and by defendant EJAC in the area of apprentice selection.

As to journeyman membership, there was no proof of a violation of Title VII of the Civil Rights Act by the union's refusal to grant direct journeyman membership to Negroes, as no white person had ever been accorded that privilege. The tangential issue of achieving journeyman membership through the referral system is not probative of the claim of discrimination by the denial of applications for direct journeyman membership.

On the issue of contractor affiliation, there has been a failure of proof. Local 38 had three affiliated Negro contractors before July 2, 1965, and the plaintiff's claim that Negroes seeking affiliation thereafter were treated unequally with whites is not sustained by the evidence.

The plaintiff has carried its burden of proving that a pattern and practice of racial discrimination existed beyond July 2, 1965 as to referral for employment. The record further establishes, however, that such practices ended soon after the election of the officers who took charge of Local 38 in July, 1967. There is no evidence that any Negro electrician is, at the present time, unable to secure employment under the referral system by reason of racial discrimination. Each of the individuals who was the subject of actual discrimination after the Civil Rights Act became effective and who thereafter sought referral secured employment, and is now eligible to take a journeyman wireman's exam for classification in the highest priority group of the referral system, which classification carries with it the right to apply for union membership. This Court continues to retain jurisdiction over the question of the journeyman wireman's exam, and the right to apply for union membership attendant thereto, by virtue of the pending motion directed to that subject matter.

With regard to apprenticeship, the plaintiff has proved that EJAC selected apprentices in a discriminatory manner prior to July 2, 1965. The post-Act evidence, however, does not establish that EJAC engaged in an intentional pattern and practice of racial discrimination thereafter, although the record raises a suspicion that such may have been the case with regard to the 1965 and 1966 apprenticeship classes. As to those years, each of the

Negro applicants identified by the Government as having been discriminatorily rejected was offered the opportunity to become an apprentice by the new union leadership in 1967.

The Court will therefore enter an order enjoining the defendant union from discriminating in the operation and administration of the referral system, and from denying equal employment opportunities to all persons with regard to the referral system, and also requiring strict adherence to the collective bargaining agreement provisions relating to the referral system. The said order will also provide for retention of jurisdiction over defendant Local 38's motion of January 17, 1969 pertaining to the issue of the journeyman wireman's exam, and all issues pertinent thereto.

**\*33** This Memorandum is adopted as Findings of Fact and Conclusions of Law, in accordance with Rule 52 of the Federal Rules of Civil Procedure.

#### All Citations

Not Reported in F.Supp., 1969 WL 91, 70 L.R.R.M. (BNA) 3019, 1 Fair Empl.Prac.Cas. (BNA) 673, 1 Empl. Prac. Dec. P 9983

#### Footnotes

- <sup>1</sup> The union minutes relative to the admission of the 3 Negroes stated that such action was being taken by reason of a "mandate" issued by the International Union, its parent body, and the A. F. L.
- <sup>2</sup> Group II is a special category designed to accommodate members of other IBEW locals who are working temporarily within the geographic jurisdiction of Local 38.
- <sup>3</sup> That exam was given to approximately 6 Negro electricians as a qualifying test prior to the acceptance of the 3 Negroes into the union in 1957, as previously set forth herein.
- <sup>4</sup> Mr. Tiber testified that thereafter he had to discharge the man as incompetent. That testimony is un rebutted.

- <sup>5</sup> In the apprenticeship class selected in the fall of 1964 it appears that 22 of the 26 apprentices selected were related to members of Local 38.
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