IN THE UNITED STATES DISTRICT COURT FOR THE

NORTHERN DISTRICT OF ALABAMA

SOUTHERN DIVISION

JAMES C. DENT, Plaintiff, v. ST. LOUIS-SAN FRANCISCO RAILWAY COMPANY, et al., Defendants. UNITED STATES EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, Intervenor	CIVIL ACTION NO. 66-65 MEMORANDUM IN OPPOSITION TO DEFENDANTS' MOTIONS TO DISMISS

I

STATEMENT

These motions present questions concerning the interpretation and administration of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq. The Equal Employment Opportunity Commission is an agency of the United States charged with administering Title VII. The EEOC, by the Attorney General of the United States, filed a motion to intervene in this action pursuant to Rule 24(b), F. R. Civ. P. which authorizes permissive intervention by a "federal . . . agency"

in cases in which "a party to an action relies for ground of claim or defense upon any statute . . . administered by a federal . . . agency." The court granted this motion on May 16, 1966.

On February 7, 1966, the plaintiff filed this class action seeking injunctive relief to restrain defendants from continuing alleged practices which deprive the plaintiff and others similarly situated of equal employment opportunities, as secured by 42 U.S.C. §§§ 1981, 1983, and 2000e et seq., without discrimination on the basis of race or color.

More particularly, the complaint alleges that plaintiff, James C. Dent, a Negro, has been employed by defendant St. Louis-San Francisco Railway Company (hereinafter referred to as the Company) for more than twenty-one years. Plaintiff in his employment with the Company has been classified as a "carman helper." As such he acquired knowledge and experience towards promotion to a full "carman." Carmen repair and maintain railroad cars. The Company eliminated the classification, "carman helper," to which plaintiff and other qualified Negroes belong and created the classification, "carman apprentice," hiring only white persons for this classification. The Company also maintains racially segregated locker rooms, rest rooms and bench room facilities.

The complaint further alleges the defendant Brotherhood of Railway Carmen of America (hereinafter referred to as the Union) maintain dual locals numbers 60 and 750 which are segregated by race; and that the Company has colluded with the white local to eliminate jobs of members of the Negro local.

On March 23, 1965, defendants Brotherhood of Railway Carmen of America and Local 60 of the Brotherhood of Railway Carmen of America filed a motion to dismiss, the sixth ground of which states that plaintiff failed to institute his action within the time allowed by law under 42 U.S.C. § 2000e-5(e) and the third ground of which states that plaintiff failed to exhaust administrative and contractual remedies.

On April 6, 1966, defendant St. Louis-San Francisco Railway Company filed a motion to dismiss, the second and third grounds of which state that plaintiff is barred by the statute of limitations prescribed in 42 U.S.C. § 2000e-5(e) and the sixth, seventh, and eighth grounds of which state that plaintiff failed to exhaust administrative and contractual remedies.

On April 13, 1966, defendant Company filed an amended motion to dismiss, the thirteenth ground of which states that plaintiff is barred by the statute of limitations prescribed in 42 U.S.C. § 2000e-5(e), not having filed his complaint within thirty days after the expiration of the sixty day period provided for the Commission to secure compliance, and the fourteenth ground of which states that the action is barred because the EEOC failed to complete the "methods of conference, conciliation, and persuasion" within the time prescribed by 42 U.S.C. § 2000e. On July 15, 1966 defendant Company filed another amended motion to dismiss, amending the fourteenth ground of its motion to dismiss by adding the words "or at any

time" in order to allege that the EEOC had not "at any time" engaged in "methods of conference, conciliation, and persuasion" prescribed by 42 U.S.C. § 2000e.

The pleaded facts material to the issues raised by these contentions are as follows:

1. On September 10, 1965, James C. Dent filed a sworn statement with the EEOC, charging the St. Louis-San Francisco Railway Company and the Brotherhood of Railway Carmen of America with violations of Title VII of the Civil Rights Act of 1964;

2. On October 8, 1965, copies of Mr. Dent's charges were served on the Company and the Brotherhood;

3. On December 8, 1965, Commissioner Holcomb of the EEOC issued a decision finding reasonable cause to believe the Company and the defendant unions were in violation of Title VII of the Civil Rights Act of 1964.

4. By letter dated January 5, 1966, the EEOC advised Mr. Dent that the EEOC had engaged in methods of conciliation but had been unable to conciliate the case and notified him of his right to bring a judicial action within the time prescribed by the Act.

II

Plaintiffs Need Not Exhaust Any Contractual or Administrative Remedies Prior to Seeking Enforcement of Rights Under Title VII.

Defendants have moved to dismiss upon the grounds, among others, that plaintiff must pursue whatever remedies are available to him under the bargaining agreement and the National Railroad Adjustment Act prior to seeking relief in this court, and impliedly with the Commission, under Title VII. The argument misconceives the exhaustion of remedies doctrine and would have the effect of delaying indefinitely all Title VII enforcement efforts.

Rights under Title VII are created by that statute and are dependent upon no other source of employee rights. They are distinct from whatever different rights may exist under the terms of a collective bargaining agreement or under other statutes such as the National Railroad Adjustment Act, 45 U.S.C. §152. The doctrine of prior exhaustion of remedies presupposes that the remedy sought in court is precisely the remedy which may be obtained through the alternative administrative procedure to which the courts must defer. See 3 Davis, Administrative Law §20.01 (1958). There are no alternative means for enforcing Title VII rights outside of the procedure before the EEOC already followed by the plaintiff, and this is true even if the bargaining agreement provides rights which to one degree or another parallel rights conferred upon the plaintiff independently of Title VII. But the defendants do not even assert

that the rights claimed and the relief sought in the present suit are in fact obtainable by the plaintiff under the bargaining agreement or before the Adjustment Board. They simply argue that because something might be available to him if he pursued those remedies, he must seek them before invoking his Title VII rights in this court. The contention is without legal foundation, and would reduce Title VII to a lifeless appendage to the body of federal labor law.

Defendants rely on Republic Steel Corp. v. Maddox, 379 U.S. 650 (1965), but this reliance is misplaced. The principle of exhaustion of contract remedies was applied in that case because the employee asserted contract rights and therefore had to follow the procedures for relief provided in the contract. But here plaintiff is asserting a statutory right and need only follow the procedures for relief provided in that statute.

Plaintiff seeks relief not available to him under the contract. For example, he seeks the end of segregation in the union. It is not appropriate to ask him to file a grievance against the Company because his Union is segregated. See Conley v. Gibson, supra. Plaintiff also seeks an injunction ending collusion between the Company and the Union and ending segregation of the Company's employee facilities, neither of which remedies are remotely available in the proposed alternative proceedings.

Defendants cite a number of cases which hold that employees must pursue their contractual remedies when asserting claims which involve the interpretation or application of a collective bargaining agreement.[1] They are unrelated to the present case. Plaintiff is not here suing on the contract between the defendants. He is suing under a federal statute. Neither the defendants nor arbitrators appointed by the defendants have jurisdiction to interpret or apply Title VII. United Steelworkers of America v. Enterprise Wheel & Car Corp., 363 U.S. 593, 597 (1964). In Enterprise the Court stated:

> [A]n arbitrator is confined to interpretation and application of the collective bargaining agreement; he does not sit to dispense his own brand of industrial justice. He may of course look for guidance from many sources, yet his award is legitimate only so long as it draws its essence from the collective bargaining agreement.

Relief sought under Title VII by private parties must be sought through the EEOC[2] and the Federal courts.[3] There is no other appropriate forum and, therefore, no requirement that a plaintiff seek relief in another forum. If the contract between the defendants becomes involved at all in this case, the involvement will only be peripheral. In fashioning relief, some terms of the contract may be rendered void by implication. But it will not be the interpretation of these terms which will

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1/ Company's Brief, pp. 57-60; Union's Brief, pp. 3, 4, 6, 7.

2/ 42 U.S.C. §§ 2000e-4, -5, -12; Hall v. Werthan Bag Corp.; 251 F. Supp. 184 (M. D. Tenn. 1966)

3/ §§ 706(f) and (g) 42 U.S.C. §§2000e-5(f), (g).

be in issue; it will be their essential validity in light of existing federal legislation, and that issue is for the Court. Brotherhood of Railroad Trainmen v. Howard, 343 U.S. 768 (1952).

The defendants appear to be asserting that the existence of private contractual remedies deprives a party of his right to seek relief under a federal statute. But this is clearly not the law. As the Fifth Circuit recently observed, where the same course of conduct violates a federal statute and also breaches a contract, "dual or parallel" prosecution is both possible and desirable for complete relief. United Steelworkers v. American Int'l. Alum. Co., 334 F.2d 147, 152 (5th cir. 1964), cert. denied, 379 U.S. 991 (1965). The Court was considering a possible conflict between a proceeding under the National Labor Relations Act and a suit on a private contract before the district.court. The Fifth Circuit cited with approval NLRB v. Central Ill. Pub. Serv. Co., 324 F.2d 916 (7th Cir. 1963) and Local 702, IBEW v. Central Ill. Pub. Serv. Co. 324 F.2d 920 (7th Cir. 1963), companion cases which upheld the right of the plaintiff to enforce both his statutory and contractual rights in separate forums even though proof of both the violation and the breach might involve the same set of facts. The Seventh Circuit there enforced an NLRB award based on a violation of the National Labor Relations Act and also affirmed the district court's jurisdiction to determine a breach of contract suit based on the same set of facts. Here plaintiff has not pursued his contract rights, if any, but instead has pursued his separate and different statutory

rights. Certainly his decision not to pursue his contract rights, cannot be interposed as a bar to his right to have his statutory rights determined. See also Carey v. Westinghouse Elec. Corp., 375 U.S. 261, 269-72 (1964).

The same is true regarding the purported remedy under the National Railroad Adjustment Act. The Supreme Court has repeatedly held that where Negroes sue a union or a union in collusion with a railroad to enjoin the acts and practices of eliminating jobs held by Negroes, the latter may enforce the union's duty of fair representation in the federal courts and need not resort to the National Railway Adjustment Board. Steele v. Louisville & N.R.R., 323 U.S. 192, 206 (1944; Tunstall v. Brotherhood of Locomotive Firemen, 210 (1944); Graham v. Brotherhood of Locomotive Firemen, 338 U.S. 232 (1949); Brotherhood of Railroad Trainmen v. Howard, 343 U.S. 768 (1952); Conley v. Gibson, 355 U.S. 41 (1957).

In the Steele case the Court stated:

> [W]e cannot say that there is an administrative remedy available to petitioner or that resort to such proceedings in order to secure a possible administrative remedy, which is withheld or denied, is prerequisite to relief in equity. Further, since § 3, First (c) permits the national labor organizations chosen by the majority of the crafts to "prescribe the rules under which the labor members of the Adjustment Board shall be selected" and to "select such members and designate the division on which each member shall serve," the Negro firemen would be required to appear before a group which is in large part chosen by the respondents against whom their real complaint is made. In addition § 3 Second provides that a carrier and a class or craft of employees, "all acting through their representatives, selected in accordance with the provisions of this Act," may agree to the establishment for the purpose of adjusting disputes of the type which may be brought before the Adjustment

> Board. In this way the carrier and the representative against whom the Negro firemen have complained have power to supersede entirely the Adjustment Board's procedure and to create a tribunal of their own selection to interpret and apply the agreements now complained of to which they are the only parties. We cannot say that a hearing, if available, before either of these tribunals would constitute an adequate administrative remedy.

Furthermore, the plaintiff could not obtain complete relief before the National Railroad Adjustment Board. The Board can only interpret the contract and award damages. Steele v. Louisville & N.R.R., supra. But here, the contract will be, at most, only incidentally involved in resolving this suit. Plaintiff requires injunctive relief. "Appropriate relief" if plaintiff's allegations are proved, includes consolidation of the segregated union locals and integration by the Company of its employee facilities.

Although defendants obscure the point, it is the Commission's jurisdiction over this case and not the Court's which is ultimately in issue here. An aggrieved party must file a civil action within thirty days after notification that the Commission has been unable to obtain voluntary compliance with Title VII.[4/] This extremely short period in which to file suit does not permit any effort to exhaust grievance machinery prior to the filing of the complaint. The thirty days must be used by the charging party to retain counsel and have a complaint drafted.

4/ 42 U.S.C. § 2000e-5(e).

If the doctrine of exhaustion of private remedies is at all relevant to a proceeding under Title VII, defendants' argument is that exhaustion must precede the filing a charge with the Commission. It is clear, however, from a careful reading of the statute that Congress did not require exhaustion of alternative remedies prior to filing a Title VII charge.

Congress very explicitly stated what remedies an aggrieved party must pursue prior to filing a charge with the Commission. In those jurisdictions which have a state fair employment practices agency, no charge may be filed with the federal Commission prior to filing a charge with the state agency.[5/] A charging party must file with the federal Commission within ninety days after the alleged unlawful practice occurred. In a jurisdiction having a state fair employment practices agency, the charging party is granted 210 days in which to file with the federal Commission.[6/] This extended statute of limitations permits the charging party to pursue his state remedy without losing his rights under the federal statute. Had Congress wanted aggrieved parties to pursue other administrative or private remedies prior to filing a charge with the EEOC, Congress would have made this precondition explicit and would have provided an appropriate statute of limitations.

Furthermore, Congress does not require that even state remedies be exhausted. Section 2000e-5(b) permits the complaining party to file a charge with the EEOC upon the expiration of sixty days following the filing of a charge with a state agency, whether or not the proceedings

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5/ 42 U.S.C. § 2000e-5(b).

6/ 42 U.S.C. § 2000e-5(d).

under state law have been terminated. By contending that private remedies must be exhausted, the defendants are attempting to give private agreements greater dignity than state laws. In light of the very elaborate procedures providing for limited state deferrals, it cannot be assumed from Congressional silence that Congress intended private remedies be exhausted. Furthermore, in another recent statute, Congress has been explicit when it desired the exhaustion of private remedies.[7]

The Company further argues that because section 706(f) is not identical with 42 U.S.C. 2000a-6(a) [§ 207(a) of the Civil Rights Act of 1964],[8] Congress must have intended that private and alternative administrative remedies must precede Title VII actions.[9] The reason for the absence in section 706(f) of a specific provision exempting plaintiffs from the requirement of exhausting administrative remedies is that there is indeed an administrative remedy which plaintiffs pursuing their Title VII rights must exhaust. They must file a charge with the Equal Employment Opportunity Commission or a comparable state agency. When they have done so, they have done all that is required of them as a pre-condition for asserting their statutory rights under Title VII.

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[7] 29 U.S.C. § 411(a)(5); Labor Management Reporting and Disclosure Act of 1959 § 101(a)(4).

[8] § 207(a), part of Title II, the public accommodations Section of the Act, provides that:

> . . . the District Courts of the United States shall have jurisdiction of proceedings instituted pursuant to this Title and shall exercise the same without regard to whether the aggrieved party shall have exhausted any administrative or other remedies that may be provided by law.

[9] Company's Brief, pp. 62, 62.

III

CONCILIATION IS NOT A PREREQUISITE TO FILING A COMPLAINT UNDER TITLE VII

In paragraph 14 of the defendant Company's motion to dismiss, as amended, the defendant asserts that sections 706(a) and (e) of Title VII requires that the Commission seek by methods of "conference, conciliation, and persuasion" to resolve cases arising under this title, and that the utilization of such methods is a prerequisite to the institution of suit under Title VII. In this case, defendant claims the Commission failed to attempt methods of conciliation following the Commission's finding of reasonable cause that the defendants are discriminating, and therefore, plaintiff does not have a perfected right of action.

There is nothing in the language of section 706(a) or (e) which even suggests that the plaintiff here is barred from maintaining an action under Title VII because of the Commission's conduct upon receipt of this complaint.

A. Section 706(e) does not require that the Commission actually enter into or exhaust conciliation efforts as a prerequisite to a private law suit under Title VII.

The statute merely says that if

> ". . . the Commission has been unable to obtain voluntary compliance with this title, the Commission shall so notify the person aggrieved and a civil action may, within 30 days thereafter, be brought against the respondent named in the charge."

Sec. 706(e); 42 U.S.C. § 2000e-5(e).

There is no requirement preparatory to the filing of a private suit as the defendant suggests, that the Commission have entered into conciliation efforts with the Company. The condition is simply that "the Commission has been unable to obtain voluntary compliance" within the sixty-day period. Here the reason for that inability was the Commission's caseload which prevented it from dealing completely with the complaint in the statutory sixty-day period. In other cases it might decide that it had no basis for entering into conciliation efforts. In either situation, the statute leaves it up to the complainant to proceed on his own in court, if that is his choice.

The common sense of section 706(e) is that the Commission be afforded an opportunity to examine a grievance under Title VII before it is taken to court to determine if it has merit and to resolve it informally if it can. The aggrieved party has the single obligation of following that procedure and submitting his claim to the Commission. If the Commission, having been afforded the opportunity to investigate and conciliate, does not accomplish both within sixty days, the complainant upon notice from the Commission may, if he chooses, go to court. At the same time the Commission may continue to investigate and initiate conciliation efforts, as it has done in this case.

The one court to rule on this issue has held that the conciliation procedures of Title VII exist for the benefit of the party charged but need not be followed as a condition precedent to a private civil action seeking to vindicate rights guaranteed by Title VII. Hall v. Werthan Bag Corp., 251 F. Supp. 184 (M.D. Tenn. 1966). Thus a plaintiff suing on a Title VII claim need only plead the receipt of statutory notice and the filing of a law suit within 30 days of receipt of such notice. Congress could not have intended that the plaintiff plead and prove the efficacy of the Commission's conciliation efforts. The plaintiff is not in privity with the Commission and cannot be held responsible for its actions (or inactions.) He has no knowledge of the Commission's internal procedures nor can he control the volume of the complaints it receives, the size of its staff, or the persuasiveness of its employees.

The Company concedes that considerations of fairness impell an interpretation of Title VII that would permit a complaining party to bring a law suit despite the fact that the Commission has not found reasonable cause to believe discrimination exists.[10/] Where reasonable cause is not found no conciliation effort would take place because of the lack of a positive finding.[11/] Yet the company takes the position

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10/ Company's Brief, p. 20.

11/ 42 U.S.C. 2000e-5(a) § 706(a);

that once reasonable cause is found, plaintiff can be completely divested of his right to bring a law suit by the Commission's failure to exhaust conciliation efforts. In other words, plaintiffs having weak cases must be heard, but plaintiffs having strong cases must be dismissed because of circumstances beyond their control. This thesis is simply not in accord with our traditional theories of fundamental fairness.

B. The Defendant's Position Is Not Supported by The Legislative History of Title VII.

The House-passed bill, discussed in the Company's brief,[12/] contained enforcement procedures quite different from the procedures contained in the Dirksen-Mansfield compromise which was introduced in the Senate on May 26, 1964, and passed on June 19, 1964. The House-passed bill set up a fair employment practices commission which had the authority to institute a civil action. The Commission under the House version performed both the conciliation and enforcement functions. The private party was not authorized to institute his own suit, except in situations where the commission declined to bring suit, and even then, only with the permission of at least one commissioner.

The statute which the Court is asked to constue provides different procedures. The Commission has no enforcement powers and serves merely as a conciliation service. The burden of enforcement is shifted from the Commission to the "person aggrieved," who must

12/ Id. pp. 3-5, 11-15, 22-26, 28-33.

bring his own law suit in order to vindicate his rights. The only limit to his right to institute a civil action is the necessity of awaiting notification from the Commission that it "has been unable to obtain voluntary compliance with this title, . . ."[13/]

Under the Senate passed version the enforcing party has no control over the conciliation process. However, the very same amendment which bifurcated the conciliation and enforcement functions provided the Court with authority to stay proceedings pending conciliation efforts.[14/]

Section 706(e) provides that: "Upon request, the court may, in its discretion, stay further proceedings for not more than sixty days pending the termination of state or local proceedings described in subsection (b) or the efforts of the Commission to obtain voluntary compliance." Thus, Congress recognized that, because of the severance between the conciliation and enforcement functions, law suits might be filed in which conciliation remains a possibility; and Congress provided the Court with a procedure with which to resolve this problem. Under the House passed version this provision was not necessary. It was reasonable to require that no law suit be filed by the Commission prior to its conciliation efforts. It would be

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13/ 42 U.S.C. 2000e-5(e); 706(e), (See Footnote 1 for text).

14/ 110 Cong. Record 11933 (May 26, 1964).

unreasonable to permit dismissal of an aggrieved party's suit under the existing law where the Commission fails to conciliate, and thus the need for the stay provision becomes clear.

Our conclusion follows that of one of the principal spokesmen for Title VII, Senator Javits, who stated:

> "The fatal defect of the amendment is that the provision it would amend is not the key to the courtroom door, because the Commission does not have to find that the complaint is a valid one before the complainant individually can sue or before the Attorney General can bring a suit to establish a pattern or practice of discrimination. The Commission may find the claim invalid; yet the complainant still can sue, and so may the Attorney General, if he finds reasonable cause for doing so. In short, the Commission does not hold the key to the courtroom door. The only thing this title gives the Commission is time in which to find that there has been a violation and time in which to seek conciliation.
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> "Mr. President, this provision gives the Commission time in which to find that there exists in the area involved a pattern or practice, and it also gives the Commission time to notify the complainant whether it has or has not been successful in bringing about conciliation.
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> * * *
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> "But, Mr. President, that is not a condition precedent to the action of taking a defendant into court. A complainant has an absolute right to go into court, and this provision does not affect that right at all." 110 Cong. Record 14191 (June 17, 1964); Hall v. Werthan Bag Corp., 251 F. Supp. 184 (M.D. Tenn. 1966).

Thus it is quite clear that Congress did not intend the unjust result for which defendants contend, that a victim of discrimination should lose his day in court because of a circumstance over which he has no control. Congress provided for the very situation which is before the court when it enacted section 706(e), vesting authority in the Court to stay Title VII proceedings pending conciliation. It preserves both the rights of the aggrieved party and the benefits of conciliation.

C. Defendants Have Suffered No Injury By the Failure of the Commission to Conciliate Within Sixty Days After It Received the Complaint.

The defendants allege that they have been damaged by the Commission's alleged failure to exhaust conciliation methods prior to the filing of the law suit. It is inappropriate to raise this issue in a motion to dismiss the complaint. This is simply not an element of plaintiff's case. Congress could hardly have intended that a private party must plead and prove the Commission's efforts to conciliate since Congress did not give private parties the authority to direct these efforts. Dismissal in this circumstance would be egregiously unfair to the plaintiff, who has done all he is required to do under a statute of substantial procedural complexity.

IV

The Complaint Was Timely Filed

In paragraph 6 of defendant Unions' motion to dismiss the complaint and paragraph 13 of the Company's motion, defendants urge the Court to dismiss the complaint on the ground that plaintiff failed to institute the present proceeding within the time prescribed by Section 706(e) of the Act.

Section 706(e) provides:

> If within thirty days after a charge is filed with the Commission or within thirty days after expiration of any period of reference under subsection (c)(except that in either case such period may be extended to not more than sixty days upon a determination by the Commission that further efforts to secure voluntary compliance are warranted), the Commission has been unable to obtain voluntary compliance with this title, the Commission shall so notify the person aggrieved and a civil action may, within thirty days thereafter, be brought against the respondent named in the charge (1) by the person claiming to be aggrieved ....

The facts pertinent to this issue are not disputed. Plaintiff filed his charge with the Commission on September 10, 1965. A copy of the charge was served on defendants on October 8, 1965. Thereafter, following an investigation, on December 8, 1965, a Commissioner issued his Decision finding reasonable cause to believe defendants were in violation of Title VII of the Act. On January 5, 1966, A. W. Blumrosen, Chief of Conciliation, mailed a notice to the plaintiff that the Commission had been unable to conciliate the case and advised plaintiff of his right to bring an action under Section 706(e) of the Act. On February 7, 1966, plaintiff filed his complaint in this Court.

Defendants apparently contend that the 30-day time period within which a charging party must bring suit begins to run at the conclusion of the 60-day period initially allotted the Commission for purposes of investigation and conciliation. That is, the statute requires, according to this reading, that any action brought under Title VII of the Act shall be instituted within 90 days of the filing of the charge with the Commission, or, on the facts of this case, on or before December 10, 1965.

But defendants' construction of Section 706(e) is contrary to the plain language of the Act. As set forth above, Section 706(e) provides that upon the Commission's failure to obtain voluntary compliance, "the Commission shall so notify the person aggrieved and a civil action may, within thirty days thereafter, be brought ...." Thus, the 30-day period in which an action may be commenced follows upon receipt of notice that the case has not been conciliated, [15/] and not

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15/ Senator Humphrey, paraphrasing this provision of Title VII, made this construction crystal clear. He said,

> if the Commission has not been able to achieve voluntary compliance within 30 days--this period may be extended by the Commission to 60 days--the Commission must so notify the person aggrieved, who then may within 30 days bring his own suit in Federal court for enforcement of his rights.

110 Cong. Rec. 12722 (June 4, 1964).

automatically on the expiration of the 60 days following the filing of the charge. Allowing three days from dispatch to receipt of the Commission's notice, in accordance with Federal Rule of Civil Procedure 6(e), the complaint was timely filed on February 7, 1966, within thirty days of receipt of notification on January 8, 1966, from the Commission.[16/]

This construction, which we submit is the only one permitted by a fair reading of the statutory language, fully accords with the enforcement scheme of Title VII.

16/ Wilson v. Shamrock Amusement Corp., 221 F.2d 687 (C.A. 9, 1955), involving the timeliness of an appeal in a bankruptcy proceeding, is relevant to the question of how to compute the time within which actions under 42 U.S.C. §2000e-5(e) must be commenced after the EEOC has mailed the statutory notice. In that case the court construed 11 U.S.C. §48a, which provides:

> Appeals under this title to the United States courts of appeals shall be taken within thirty days after written notice to the aggrieved party of the entry of the judgment, order or decree complained of, proof of which notice shall be filed within five days after service or, if such notice be not served and filed, then within forty days from such entry.

The judgment was entered February 17, 1955, notice thereof was served by mail on that date, and an appeal was taken on March 21, 1955. A motion was made to dismiss the appeal on the ground that it was filed 32 rather than 30 days after the entry of the judgment from which the appeal was taken. The court denied this motion, holding that by virtue of Rule 6(e) the time for taking the appeal, where notice of the entry of the judgment appealed from is served by mail contemporaneously with its entry, is extended from 30 to 33 days. So here, where the Commission mailed its notice on January 5, 1966, the time for instituting an action under 42 U.S.C. §2000e-5(e) began to run from three days thereafter, that is, from January 8, 1966, and the instant action was timely commenced within thirty days on February 7, 1966.

The equal employment opportunity title generally and Section 706 in particular are "designed to give a discriminator opportunity to respond to persuasion rather than coercion." Hall v. Werthan Bag Corp., 251 F. Supp. 184 (M.D. Tenn. 1966). To fulfill this statutory purpose the Commission has adopted the practice of exhausting the full 60 days provided by the Act for investigation and conciliation before notifying an aggrieved party of his right to sue. Thereafter, routine administrative procedures prior to notification, and sometimes final efforts to secure voluntary compliance, may consume two weeks or more depending on the size of the Commission's docket. It is clear that such delay may, as in the instant case, consume the full 30-day period during which defendants claim the instant proceeding should have been instituted. For this delay on the part of the Commission to deprive a charging party of his right to bring suit obviously would be contrary to the intent of Congress. 17/

Moreover, effective implementation of the statutory policy favoring "persuasion rather than coercion" would not be possible if the Commission were required to curtail the period of investigation and conciliation to allow sufficient time within the sixty-day period to complete clerical and administrative functions attendant upon notification to the aggrieved party of his right to bring suit. Thus, both

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17/ See Hall v. Werthan Bag Corp., supra.

the language of Section 706(e) and the policy considerations which underlie that Section compel the conclusion that the 30-day period during which an aggrieved party may bring an action commences with that person's receipt of the Commission's notice that the case has not been conciliated.

Further, the Commission's failure to issue its notice of the right to sue, within 90 days following filing of the charge, cannot bar the plaintiff from asserting his rights under the Act. An aggrieved party cannot be penalized by delay on the part of the Commission in whose hands rests exclusive control of the formal notification prescribed by Section 706(e) as a precondition for filing a Title VII action.

It is well settled that a litigant's time for instituting an action, when the right to sue is contingent upon notice from a federal agency, does not begin to run while the litigant awaits such notification. See Northern Metal Co. v. United States, 350 F.2d 833 (C.A. 3, 1965). Applied to the facts of the instant case, this rule does not impinge upon the policy of repose, designed to protect defendants, implicit in the Act's statute of limitations, for the defendants after October 8, 1965, were aware that the plaintiff was actively pursuing his Title VII remedy. See Burnett v. New York Central R.R. Co., 380 U.S. 424 (1965).

Since plaintiff commenced this proceeding within 30 days after receipt of notice from the Commission, and notwithstanding the Commission's failure to notify plaintiff of his right of action within 90 days following filing of the charge, the timeliness objection must fall. See Hall v. Werthan Bag, supra.

Respectfully submitted,

CHARLES T. DUNCAN,
General Counsel,
Equal Employment
Opportunity Commission,
Of Counsel.

JOHN DOAR,
Assistant Attorney General

MACON T. WEAVER,
United States Attorney

GERALD P. CHOPPIN,
LAWRENCE J. ROSS,
Attorneys,
Department of Justice,
Washington, D. C. 20530

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Memorandum in Opposition to Defendants Motions to Dismiss have this day been served by air mail upon:

Oscar W. Adams Jr., Esq.,
1630 4th Avenue, North
Birmingham, Alabama, counsel for
plaintiff;

Jerome A. Cooper Esq.,
Cooper, Mitch, Johnston and Crawford, Esq.,
1025 Bank for Savings Building, Birmingham,
Alabama, counsel for defendants Brotherhood of Railway Carmen of America and
Local 60, Birmingham, Alabama;

William F. Gardner, Esq.,
Cabaniss, Johnston, Gardner and Clark Esq.,
901 First National Building,
Birmingham, Alabama, counsel for the
defendants St. Louis-San Francisco
Railroad Company;

Paul R. Moody, Esq.,
St. Louis-San Francisco Railroad
906 Olive Street, St. Louis,
Missouri 63101, counsel for the
defendants, St. Louis-San Francisco
Railroad Company;

Defendant Clyde Vineyard
Iron City Lodge #60 Iron Workers Union
East Thomas Yards, Birmingham, Alabama;

Alfred Feinberg, Esq.,
Jack Greenberg and Leroy Clark, Esq.,
10 Columbus Circle, New York, New York 10019,
counsel for plaintiff;

Mulholland, Hickey and Lyman, Esq.,
741 National Bank Building, Toledo, Ohio,
counsel for defendant Brotherhood of
Railroad Carmen of America; and

Defendant Clarence Mann,
Carmen's Building 4929 Main Street,
Kansas City, Missouri 64112

This 21st day of August 1966.

/s/
LAWRENCE J. ROSS,
Attorney