

Draft - Mr. Finn

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

UNITED STATES OF AMERICA	)	
by RAMSEY CLARK,	)	
Attorney General,	)	
	)	
Plaintiff,	)	
	)	
v.	)	CIVIL ACTION
	)	NO. C 67-575
INTERNATIONAL BROTHERHOOD OF	)	
ELECTRICAL WORKERS, LOCAL NO. 38;	)	
ELECTRICAL JOINT APPRENTICESHIP	)	
AND TRAINING COMMITTEE,	)	
	)	
Defendants.	)	
	)	

MEMORANDUM OF THE UNITED STATES
IN OPPOSITION TO DEFENDANTS'
MOTION TO PROHIBIT INTERVIEWS
OF MEMBERS OF LOCAL 38

In a letter dated October 12, 1967, counsel for the defendants requested that the Department of Justice not interview without his consent and without his presence any of the following persons:

- "(1) Local 38 members or apprentices
- "(2) Local 38's present or former employees
- "(3) Present or former Apprenticeship Committee members or ad hoc interviewers of apprenticeship applicants or present or former employees
- "(4) Contractors and members of NECA, Cleveland Chapter, who are under collective bargaining agreements with defendant Local 38."

The United States responded to that request by a letter dated October 17, 1967. In that letter we agreed not to interview the current officers or managing agents of Local 38 and the Joint Apprenticeship Committee without first advising ^{defense counsel.} ~~him~~. But we did not ^caccede to his request that for purposes of interviewing the other persons listed we notify him and conduct the interview "in [his] office at times when [he was] able to be present." (Copies of both the October 12, 1967, and October 17, 1967, letters have been supplied to the Court.)

Defendants have now moved the Court to enter an order prohibiting us from interviewing persons who are members of defendant Local 38 and requesting that, with respect to such persons, our pre-trial preparation be confined to taking their deposition. In their motion, defendants do not contest our right to interview, without notice to defense counsel and without his being present, apprentices of Local 38 who are not yet members of the union, ^{1/} former or present employees of Local 38,

^{1/} The defendants' letter of October 12, 1967, referred to "Local 38 members or apprentices."

contractors and members of NECA under collective bargaining agreements with Local 38, ad hoc interviewers of apprenticeship applicants, or former or present employees of the Apprenticeship Committee -- all included in the original letter of October 12, 1967. Nor is there any basis for such a claim. Thus the only class of potential interviewees about which the parties have not been able to agree is persons who are members of Local 38. With respect to these persons defendants' claim is based on two grounds: first, these persons are "prospective witnesses" of defendants; and second, that these persons are "possible agents" of defendant Local 38. Both grounds are without merit.

1. "Prospective witnesses", Defendants do not cite, nor are we aware of any authority or reason for a general prohibition against confidential interviews by the plaintiff of persons simply because they might be called as witnesses for defendants, that is, they are persons referred to by defendants in their motion as "prospective witnesses." ^{2/} In fact, Canon 39

2/ With respect to this branch of their argument, defendants' sole claim is that if such interviews are conducted of prospective witnesses "before defendants decide to use them and interview them, an impossible burden" will be placed "on the defense." It is difficult to understand what "burden" defendants are referring to. But surely the "burden" apparently referred to, namely, of interviewing all persons we interview, is imposed by

of the American Bar Association Canons of Professional Ethics, dealing with such interviews by attorneys, specifically provides to the contrary:

A lawyer may properly interview any witness or prospective witness for the opposing side in any civil suit or criminal action without the consent of opposing counsel or party. (Emphasis added.)

Confidential interviews by a party and its agents are a traditional and essential means of investigation, and no limitations should be placed on such interviews simply because the persons are "prospective witnesses." Such interviews frequently produce information and evidence not possible in the context of a formal deposition, and it minimizes the use of formal depositions as part of the pre-trial preparation.

(footnote continued from preceding page)
defendants' trial preparation and could only be reduced if we were prohibited from interviewing any persons other than those the defendants decided to call as witnesses. This would mean that the United States could not conduct a major portion of its trial preparation until defense completed its trial preparation, and would place unprecedented and unthinkable limitations upon the ability of the United States to fully investigate the facts and prepare for trial.

2. "Possible Agents"

Canon 9 of the Canons of Professional Ethics of the American Bar Association provides:

A lawyer should not in any way communicate upon the subject of controversy with a party represented by counsel; much less should he undertake to negotiate or compromise the matter with him, but should deal only with his counsel.

principle

In recognition of this/~~principle~~, it is an established policy and practice of the Department of Justice not to interview a party to a litigation without first notifying counsel and giving him an opportunity to be present. The canon is designed to insure the adversary client the full protection of professional representation. The client will not -- even voluntarily -- be permitted to make compromising statements to an attorney trained and engaged to oppose him.

¶ With respect to parties to a law suit that are corporations or associations, this protection has been extended to the corporations or associations current officers or managing agents; those other persons who act for the legal entity and whose statements would be binding on the association or corporation. It was in recognition of this principle that we, in our letter of October 17, 1967, stated that we would not interview the current officers or agents of Local 38 or the Joint Apprenticeship Committee without first advising defense counsel. However, we believe that this principle has no application to persons who are

only present members of Local 38 -- without regard to whether they had held some office in the union in the past.

First, it should be noted that defendants do not claim that members of Local 38 are "agents" of the Local; instead, they claim no more than they are "possible agents." Secondly, the cases relied upon by the defendants, all pertaining to obligations of the Local under the National Labor Relations Act, are inapposite. It is quite possible that the local will be held responsible for acts of their rank and file members, and they will not be the types of "agents" whose statements would be considered the statements of the parties in the litigation. Third, the proper analogy is not to the cases cited by the defendants in their memorandum but instead those rules that have been established with regard to interviewing the employees of a corporate litigant. In formal opinion 117, the ABA Committee on Professional Ethics concluded that a plaintiff may properly interview employees of a corporate defendant who were witnesses to the incident upon which the suit was based.

[ABA Opinions on Professional Ethics, page 371 (1967 Ed.)] A similar conclusion has been reached by the Committee on Professional Ethics of the Association of the Bar of the City of New York. See Opinions No. 331 (February 28, 1935) and No. 613 (April 15, 1942).

Clearly, if corporate employees may properly be interviewed, the class of persons involved with a corporation or association who may be considered parties is not co-extensive with persons who may be "agents" of the party in some instances. Fourth, it should be recognized that in cases under Title VII of the Civil Rights Act of 1964, some of the union members may themselves have been subjects of the discriminatory conduct alleged in the complaint; for example, the few Negro members of the union may have experienced difficulties in obtaining job referrals on the same basis as white members. Such discrimination by a union against some of its members is specifically prohibited by the statute. 42 U.S.C. §2000e-2(c)(2). In a suit under Title VII, the Attorney General represents the interest of the United States and will seek to end racial discrimination against members as well as those persons who have been denied membership in Local 38. Fifth, Title VII of the Civil Rights Act specifically contemplates that members of a union will cooperate in investigations against their unions. Section 2000e-3(a) provides:

It shall be an unlawful employment practice . . . for a labor organization to discriminate against any member thereof or applicant for membership, because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter (Emphasis added.)

Indeed, it may be essential to obtain the cooperation of some rank and file members to enforce effectively the Act.

Finally, as we stated in our letter of October 17, 1967, the position urged by the defendants here has been specifically rejected in the only case that this matter has arisen previously. On October 9, 1967, in United States v. International Brotherhood of Electrical Workers, Local No. 212 (Cincinnati), C.A. No. 6473 (S.D. Ohio), a case brought under Title VII of the Civil Rights Act of 1964, the attorney for the defendant objected to the interviewing of apprentice members of the union by the Department of Justice without first seeking his permission. The Court stated that the Government need only seek the permission of the counsel for the defendant prior to interviewing officers and managing agents of the union. It did not require that permission first be obtained from the attorney with regard to the interviewing of members of the union.

We therefore submit the defendants' motion be denied. The mere fact that the members of Local 38 are "prospective witnesses" or "possible agents" as alleged by the defendants is no basis for prohibiting the Department of Justice from interviewing them in order to prepare fully for trial.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing memorandum of the United States has been mailed to Thurlow Smoot, Attorney for Defendants, 55 Public Square, Cleveland, Ohio, 41113, by placing a copy of the same in the United States mail, postage prepaid, on the third day of November, 1967.

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