

DRAFT

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,           | ) |              |
|                                   | ) |              |
| Defendant.                        | ) |              |

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 <sup>g</sup>members of NECA, Cleveland Chapter, who are under collective bargaining agreements with defendant Local 38."

The United States <sup>g</sup>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. But we did not accede to counsel's request that for purposes of interviewing the other persons listed <sup>in his letter</sup> 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 <sup>without notice to defense counsel and without his being present</sup> prohibiting the Department of Justice from interviewing persons who are members of defendant Local 38 and <sup>requesting</sup> ~~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, former or present employees of Local 38, 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 <sup>Joint</sup> Apprenticeship Committee -- all included in the original letter of October 12, 1967. 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, that 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 prospective witnesses for defendants. In fact, Canon 39 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 of witnesses 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 <sup>They</sup> minimize the need of expensive and time-consuming formal depositions during pre-trial preparation.

2. "Possible Agents." The only exception to the ~~general availability of all witnesses for interviews by either side~~ is <sup>will respect to Canon 39, making all persons available for confidential interviews without regard to whether they are witnesses or prospective witnesses,</sup> ~~stated in Canon 9 of the Canons of Professional Ethics of the American Bar Association:~~

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 . . . .

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 party 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~~ <sup>policy has meant that the Department of Justice would</sup> ~~has been~~ extended to the corporation's or association's current officers or managing agents <sup>without giving notice to defense counsel and giving him an opportunity to be present at the interview,</sup> ~~who are those individuals who act for the legal entity in the lawsuit and who have authority to bind the association or corporation.~~

because the persons are "prospective witnesses." Such interviews frequently produce information and evidence not possible in the context of a formal deposition, and they minimize the need of expensive and time-consuming formal deposition during pre-trial preparation.

2. "Possible Agents" The only exception to the general rule reflected in Canon 39, making all persons unavailable for ~~confidential~~<sup>private</sup> interview, without regard to whether they are witnesses or prospective witnesses, is the rule reflected in Canon 9 of the Canons of Professional Ethics:

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. . . .

In recognition of this <sup>rule or</sup> 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. With respect to parties to a law suit that are corporations or associations, this policy has meant that the Department of Justice ~~would~~<sup>will</sup> not interview the corporation's or the association's current officers or managing agents without giving notice to defense counsel and giving

him an opportunity to be present at the interview. Accordingly, in our letter of October 17, 1967, we stated that we would not interview the current officers or managing agents of Local 38 or the Joint Apprenticeship Committee without first advising defense counsel and giving him an opportunity to be present at the interview. However, we believe that this policy has no applicability to persons who are only present members of Local 38, ~~without regard to whether they have held some office in the union in the past.~~

Defendants do not claim that the members of Local 38 are agents. Instead the limited claim is that they are "possible agents" and for that reason should, like the officers and managing agents of the union, be unavailable for <sup>private</sup> ~~confidential~~ interviews by the Department of Justice. Under any theory, the mere fact that a person is a "possible agent" should not make him unavailable for interviews with representatives of the Department of Justice without prior notification to defense counsel and without defense counsel being present at the interview. However, our position would be the same even if defendants claimed, not that the members of Local 38 were "possible agents" of the union,

but that they were actually "agents" of the union.

Not all agents of a corporation or association are

unavailable for <sup>private</sup> ~~confidential~~ interviews. Instead, <sup>for</sup> ~~this is true only~~ <sup>a corporation or association, the privileges of a party with respect to interviews extends only to the</sup> for officers and managing agents

of the association or corporation. For example,

in formal opinion 117, the <sup>American Bar Association</sup> ~~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 even though these employees are

"agents" for the corporation for some purposes.

ABA Opinions on Professional Ethics, page 371

(1967 Ed.) See also, Committee on Professional

Ethics of the Association of the Bar of the City

of New York, Opinions No. 331 (February 28, 1935)

and No. 613 (April 15, 1942), and ~~Drinker~~ <sup>Legal</sup>

Ethics (1953 Ed.), at p. 85.

The reason for distinguishing between

different types of "agents" of the corporation or

association derives from the ~~underlying~~ <sup>underlying Canon 4 and the limitations on private interviews</sup> rationale ~~of Canon 2:~~

to insure the party the full benefits

of professional representation, and to protect the

professional relationship between opposing attorneys

necessary to the orderly conduct of litigation.

The party is protected from <sup>making</sup> ~~invoking~~ any statements --

to the orderly conduct of litigation. The party is protected from making any statements -- however voluntarily -- that would compromise the law suit. With respect to corporations and associations, the need is to identify the class of persons that would generally have sufficient control over the legal entity at the time of the law suit so as to speak for it and bind it in the sense of controlling the litigation. For <sup>this</sup> ~~the~~ purpose, the focus should not be on the potential of the individual to create liability for the entity, but rather on the ability to acknowledge liability for the entity or on the control of the individual over the entity's position in the litigation. That is why the Department of Justice does not interview managing agents and officers of a corporation or an association which is a party in a law suit without notice to counsel. Concededly in some instances the power of particular officers to control the litigation for the entity is extremely limited; but there is a need that the group of persons ~~to~~ ~~be~~ unavailable for private interviews be identified with sufficient generality as to avoid particularized inquiries in each law suit as to the individuals' officers' or managing agents' <sup>or</sup> authority over the law suit.

for  
acts which the entity Local 38 will be held legally responsible. Accordingly, the cases relied upon by the defendants, all involving situations where a union is held responsible under the National Labor Relations Act for the acts and statements of its members, are in apposite. None of these cases hold that members, "agents" of the union for some purposes, are vested with the type of control over the union possessed by the officers or managing agents. The analogy should be <sup>drawn from the corporate context where</sup> made with the ~~employees~~ of a corporation <sup>are</sup> and their availability <sup>private</sup> for confidential interviews.

It should also be recognized that ~~in~~  
~~cases against unions 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 Local 38 may have experienced difficulties in obtaining job referrals on the same basis as white members and 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, therefore, the Attorney General, representing the interest of the United States, may seek to end racial discrimination against some of the very persons defendants would treat, for purposes of interviewing, the same as parties

defendants. Moreover, Title VII of the Civil Rights Act specifically contemplates <sup>not</sup> ~~cooperation~~ <sup>will cooperate</sup> by members of a union, 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, effective enforcement of the Act may require the cooperation of some <sup>at the</sup> ~~rank and file~~ members <sup>of the union.</sup>

Finally, as we stated in our letter of

October 17, 1967, the position urged by the defendants <sup>in their motion has already been judicially rejected.</sup> ~~here had been specifically rejected in the only~~  
~~case in which 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), <sup>also</sup> a case

brought under Title VII of the Civil Rights Act of

1964, the attorney for the defendant objected to the <sup>admission</sup> ~~Department of Justice conducting certain interviews~~ <sup>of apprentice members of the union by</sup>

~~the Department of Justice~~ without first seeking his

permission. <sup>In the course of a hearing in October 1967, the issue was raised and</sup> The Court stated that the ~~Government's~~

<sup>Department of Justice</sup> need only seek the permission of <sup>defense</sup> counsel prior to

interviewing officers and managing agents of the

union, <sup>but that</sup> ~~and not~~ for interviews of ~~rank and file~~ members.

~~no such permission was necessary.~~ (Transcript, p. 152)

interviewing officers and managing agents of the union, but that for interviews of members no such permission was necessary.

We therefore request the defendants' motion be denied. The mere fact that some of the members of Local 38 might be, as claimed by the defendants, "prospective witnesses" or "possible agents" is no basis for prohibiting the Department of Justice from privately interviewing them in order to prepare fully for trial. We emphasize that, contrary to the suggestion of defendants, it is the policy of the Department of Justice to fully explain to all interviewees the nature and purpose of <sup>an</sup> ~~these~~ interviews.

The purpose of the interviews in question ~~which~~ <sup>should be</sup> ~~is~~ <sup>in fact</sup> ~~to~~ <sup>from the members of Local 38</sup> to ascertain <sup>what</sup> ~~the~~ procedures and practices have been applied to <sup>them personally</sup> ~~members of Local 38~~ and to determine who would be best able to testify <sup>at trial</sup> on these procedures and practices so as to enable this Court to make the judgment <sup>in</sup> ~~in~~ light of all the evidence <sup>whether</sup> ~~whether~~ the defendants have engaged in a pattern or practice ~~of racial~~ discrimination <sup>on the basis of race</sup>.

Respectfully submitted,

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