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October 31, 1

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As requested.

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Attachments

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF VIRGINIA

RICHMOND DIVISION

DOUGLAS QUARLES and EPHRIAM BRIGGS, Plaintiffs,	)	
vs.	)	CIVIL ACTION NO. 4544
PHILIP MORRIS, INCORPORATED, a Virginia Corporation; LOCAL 203 of the TOBACCO WORKERS INTERNATIONAL UNION, an unincorporated association; WALLACE MERGLER, President of Local 203 of the Tobacco Workers International Union, Defendants.	)	

MOTION FOR LEAVE TO FILE AMICUS CURIAE

The United States Equal Employment Opportunity Commission moves this Honorable Court for leave to file the attached brief amicus curiae for the reasons stated thereof.

Respectfully submitted,

Kenneth F. Holbert,
Acting General Counsel

Russell Specter,
David R. Cashdan,
Attorneys

Equal Employment Opportunity Commission

September , 1967

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF VIRGINIA

RICHMOND DIVISION

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vs.	)	CIVIL ACTION NO. 4544
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BRIEF FOR THE UNITED STATES EQUAL EMPLOYMENT OPPORTUNITY COMMISSION AS AMICUS CURIAE

Statement of Interest

This case is before the Court on a complaint filed by Douglas Quarles on November 8, 1965, alleging that Philip Morris, Inc., Defendant employer, violated and continues to violate the rights of Complainant and the rights of members of Complainant's class (all Negro employees) to equal employment opportunities under Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e,

et. seq. On May 3, 1966, this Court granted the motion of Ephriam Briggs to intervene as Party Plaintiff on his own behalf and on the behalf of other Negroes similarly situated.

During the trial, important questions concerning the construction and administration of Title VII were raised. Since many of the questions involved in this case are before a court for the first time, this case is of great significance to the administration of Title VII and the work of the Commission, particularly the questions raised concerning the legality of the seniority and transfer provisions of the present collective bargaining agreement. The framing of an appropriate remedy under Section 706(g) and the relationship such relief bears to remedies available under Section 707 proceedings instituted by the Attorney General and the Commission's own conciliation procedures are also of prime interest to the Commission.

The Commission's discussion will be limited to the issues of construction, administration, or application of the Act and the relief available thereunder to the members of the class and will not deal with the merits of the Plaintiffs' individual cases. This discussion is intended to advise the Court in detail as to the Commission's interpretation of the applicable sections of Title VII of the Civil Rights Act of 1964. 1/

As the Commission is the agency charged by Congress with the interpretation and administration of Title VII, and since the Court's decision may significantly affect the manner in which the Commission performs its work, it is in the public interest that the Commission present its views with respect to the above-referred to issues before the Court. 2/

1/ Where necessary, the discussion will be supported by reference to particular examples contained in the record.

2/ C.f. Federal Rule 24. Chemical Workers Union vs. Planter's Mfg. Co., 259 F.Supp. 365 (ND Miss., 1966).

Statement of Case

On September 7, 1965, Quarles filed a charge with the Equal Employment Opportunity Commission, hereinafter referred to as EEOC, alleging that his request for transferto a truck driver's position was denied by Defendant employer because of his race. On October 20, 1965, the Commission, after conducting an investigation, found reasonable cause to believe that Defendant employer was violating Title VII by restricting Negro employees from transferring from the Pre-Fabrication Department, predominantly Negro, to the Warehouse, Shipping and Receiving Department where truck driver positions were located. The Commission also found that the present procedures for transferring from the Pre-Fabrication Department to other departments, in view of the past history of segregated departments at Defendant Company, constituted a discriminatory barrier based on race in violation of Title VII. Subsequently, on November 8, 1965, Quarles, having received notice from the Commission of his right to bring suit under Section 706(e), filed a complaint in this Court alleging that Defendant employer was in violation of Title VII by limiting Negroes to the department with lower paying jobs and fewer promotional opportunities, and barring them from transferring to other more desirable departments because of their race. Quarles requested appropriate injunctive relief from the Court, back pay and attorneys fees.

On September 16, 1965, Ephriam Briggs filed a charge with the Commission alleging discrimination in violation of Title VII. The Commission, on December 17, 1965, found reasonable cause to believe that the Defendant Company had discriminated against Negroes in violation of Title VII by paying Negroes lower rates for jobs on the same skill level as those generally reserved for white employees, as alleged by Briggs. Briggs then filed a Motion to Intervene in the instant proceeding which was granted on

May 8, 1966. Briggs complained that both Defendant employer and Local 203 of the Tobacco Workers International Union, Defendant Union herein, were maintaining discriminatory wage differentials, job classifications, and systems of seniority and transfer for reasons of race, and sought appropriate injunctive relief and attorneys fees.

Thereafter, this Court denied certain Motions to Dismiss the complaint, and a trial was held on May 2 and 3, 1967.

Statement of Facts

Defendant employer's Richmond facilities are organized into five departments--Stemmery, Pre-Fabrication, Fabrication, Warehouse, Shipping and Receiving, and Chewing Gum.[3] About 2,249 persons (1,886 white, and 543 Negroes) are employed at the Richmond operation. (See Plaintiff's Exhibit 11) Historically, assignment to departments at Philip Morris has been by race. (Defendant's Trial memorandum, p. 3., Trial Transcript p. 222-223.) Until 1963, but for a very few exceptions,[4] Negroes worked only in the Pre-Fabrication and Stemmery Departments and whites worked only in the other departments. Employees in the Stemmery and Pre-Fabrication Departments were represented by Local 209 of the Tobacco Workers, a Negro local, and the employees in the other departments were represented by Local 203 of the Tobacco Workers, the white local. The Locals merged in 1963 and now Local 203, (with all white officers) represents approximately 95% of the employees of the Defendant employer. (Trial Transcript p. 196)

3/ Trial Transcript, p. 197. The Chewing Gum Department is not involved in this suit. Employees of the Stemmery are only temporary employees.

4/ The record indicates that a few Negroes were assigned to the Fabrication Department in 1955, however it appears that this was an isolated instance relating to enforcement of an Executive Order. (Trial Transcript p. 222-223.) Although there were some Negroes in Warehouse, Shipping and

rication Department are classified as machine operator positions.

In terms of the physical location of the various departments, the Pre-Fabrication and Fabrication Departments are often on the same floor of the plant. Warehouse, Shipping and Receiving is the department where tobacco and manufactured cigarettes are stored to be later shipped to the market, and is normally located apart from the Pre-Fabrication and Fabrication Departments.

Under the seniority and transfer system in effect at Defendant employer's Richmond facilities, "an employee acquires seniority for purposes of promotion and protection from layoffs only within the department where he works. With certain limited exceptions, he may not transfer to any other department of the company".[7/]

While the collective bargaining agreement provides that promotions are based on seniority, merit and ability (Article 9, paragraph B, Collective Bargaining Agreement, 1965), Defendant employer's policy and practice is automatically to award promotions to employees with the most departmental seniority.[8/] Employees fill vacancies not necessarily by moving directly to the job ahead of them in the line of progression in the Fabrication Department, but to the next advantageous opening in the department.

Under the present agreement, the following methods of interdepartmental transfer are available to employees:

1. (Six Months Rule) Four employees in the Pre-Fabrication and two employees in Warehouse, Shipping and Receiving may transfer every six months to basic machine operator's jobs in the Fabrication Department where vacancies in such jobs occur. Employees transferring under this method are given department seniority in Fabrication equal to their employment date

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7/ See Defendant's Trial Memorandum, p. 3.

8/ Depositions 22-24, p. 126.

seniority. However, they do not retain any rights in their old department. 9/

2. (Notice of Intent) Employees in Pre-Fabrication, Stemmery, and Warehouse, Shipping and Receiving may transfer by this method to the Fabrication Department into the entry job of basic laborer. Pre-Fabrication employees (limited to one a month) may also use this method to transfer to the basic entry job in Warehouse, Shipping and Receiving. Employees transferring by this method do not carry over their past departmental seniority, rather their new department seniority is computed from the date of transfer. In the event of layoff, employees retain their former department seniority; however, they can not, of their own accord, transfer back to their old department and exercise their old rights. 10/

Statutory Setting

The following provisions of Title VII of the Civil Rights Act are pertinent to the disposition of this case:

Section 703(a), 42 U.S.C. 2000e-2(a) provides:

> It shall be an unlawful employment practice for an employer--
>
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
>
> (2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

Section 703(c), 42 U.S.C. 2000e-2(c) provides:

> It shall be an unlawful employment practice for a labor organization--

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9/ The six-months agreement originally was conceived in 1950 to allow white employees in the Warehouse, Shipping and Receiving Department to transfer to Fabrication. In 1961, the plan was altered so that two Negro employees could transfer to the Fabrication Department. On March 7, 1966, the plan was increased to four Pre-Fabrication employees and two Warehouse, Shipping and Receiving employees.

10/ This method was first agreed upon by the Defendants in 1963. In its original form, only Pre-Fabrication employees could (con't)

(1) to exclude or to expel from its membership or otherwise to discriminate against any individual because of his race, color, religion, sex, or national origin;

(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, color, religion, sex, or national origin; or

(3) to cause or attempt to cause an employer to discriminate against an individual in violation of this section.

Section 703(d), 42 U.S.C. 2000e-2(d) provides:

It shall be an unlawful employment practice for any employer, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs to discriminate against any individual because of his race, color, religion, sex, or national origin in admission to, or employment in, any program established to provide apprenticeship or other training.

Section 703(h), 42 U.S.C. 2000e-2(h) provides:

Notwithstanding any other provision of this title, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system, or a system which measures earnings by quantity or quality of production or to employees who work in different locations, provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin; . . .

Section 706(g), 42 U.S.C. 2000e-5(g) provides:

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, which may include reinstatement or hiring of employees, with or without back pay (payable

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10/ con't. use this method to transfer to Fabrication.

by the employer, employment agency, or labor organization, as the case may be, responsible for the unlawful employment practice) . . . .

Summary of Discussion

In the discussion which follows, the Commission will present its views with respect to the interpretation and application of Title VII of the Civil Rights Act of 1964 with respect to several of the principle issues which have been raised in this case.

1. Where discrimination flows from the application of seniority and transfer provisions of a collective bargaining agreement, such as in the instant case, it is not necessary to show that the contracting parties entertained a specific intent to discriminate in their adoption and enforcement of the agreement in order to establish a violation of the Act. Rather, all that the Act requires is that the foreseeable effect of the agreement is to deny Negro employees opportunities equal to those enjoyed by white employees because of their race.

2. The question of whether the seniority and transfer provisions of a collective bargaining agreement meet the requirements of Title VII cannot be determined solely on the basis of the language of the contract itself. Defendants' past practice of maintaining all-white and all-Negro departments has a continuing effect on the actual operation of the instant collective bargaining agreement. In the opinion of the Commission, the Court must examine the question of whether the present agreement conforms to the requirements of Title VII, against the background of past practices. There is nothing in the language of the Act or in the legislative history which precludes the Court from examining the legality of the contract in light of Defendants' past practices. Moreover, the fact that the seniority and transfer provisons may serve valid industrial purposes, will not shield Defendants from a finding of illegality where the agreement also acts as a "mask for racial discrimination". 11/

3. The legislative history of the Act and the provisions of Section 703(h) do not support the conclusion that the Court lacks authority under Title VII to provide full and complete relief to Negro employees denied promotional opportunities equal to those enjoyed by white employees. Defendants' interpretation of the legislative history and Section 703(h) to the effect

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11/ Trial Memorandum of Defendant Employer, p. 3.

that Congress intended to permit unions and employers to perpetuate past practices of discrimination through the device of a collective bargaining agreement, is inconsistent with the specific language of the Act, and the clear policy of the statute, and should be rejected.

4. Senicrity rights such as are involved in this case are not vested rights, but are merely expectancies created by the collective bargaining agreement. It is well settled that such seniority rights may be modified to conform to changes in economic conditions, manifestly, therefore, may and must be modified where the seniority system gives white employees a discriminatory advantage over incumbent Negro employees.

5. The Court should grant relief which will eliminate those vestiges of past racial discrimination which are incorporated in the present practices and collective bargaining agreement of the parties and which continue to deny Negro employees opportunities for promotion and advancement equal to the opportunities enjoyed by white employees.

Discussion

1. Proof of specific intent to discriminate is not required to establish a violation of Title VII of the Civil Rights Act of 1964.

It is conceded that until quite recently, Defendants' employees were segregated on the basis of race; Negro employees, because of their race, were placed in the Pre-Fabrication Department and were excluded from the other departments. As the vast bulk of the Negro employees are still in the Pre-Fabrication Department and the vast bulk of white employees are in the Fabrication Department, it is clear that these departments are more than neutral designations of different industrial operations; they also denominate the race of the employees who work in them. The record also establishes that greater opportunities for advancement, and more desirable, better paying jobs, have historically been and are today located in the previously all-white Fabrication Department.

Because the departmental designations here do, in fact, reflect the race of the employees, Defendants' assertion that departmental seniority is widely used in industry, in the present case, serves legitimate

industrial objectives will not suffice to shield the departmental seniority and transfer system, if that system also has the effect of denying Negro employees opportunities equal to those enjoyed by white employees.

Without doubt, the present seniority and transfer system inhibits the opportunities of Negro employees to obtain the more desirable, better paying jobs while not similarly affecting the opportunities of white employees. The more desirable, better paying jobs have historically been located in the previously all-white departments. White employees do not have to move from their present department to enjoy access to the more desirable jobs. Only Negro employees are compelled to transfer if they wish to gain access to such jobs. Thus, the inhibitions on movement between departments contained in the present seniority and transfer system, as a practical matter, operates against the interests of Negro employees while having little or no effect on any interests of the white employees.

These facts cannot effectively be disputed. However, Defendants have urged the Court to deny Plaintiffs relief on the claim that the Plaintiffs have failed to show that Defendants "intended" to discriminate against Negro employees because of their race. This claim does not withstand examination.

The Supreme Court has long held that the validity of an act must be "tested by its operation and effect". Near vs. Minnesota, 283 U.S. 697, (1931). In Griffin vs. Illinois, 351 U.S. 12, (1962), the Supreme Court stated: "A law [or as here, a seniority system] non-discriminatory on its face, may be grossly discriminatory in its operation".[12/] This principle has been

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12/ Accord. Harper vs. Virginia State Board of Elections, 383 U.S. 663 (1966); Douglas v. California, 372 U.S. 353 (1963).

applied by the Court with special vigor in determining validity of acts which result in the denial of equal rights to Negroes.[13]

The administrative and judicial interpretations of the National Labor Relations Act, upon which the provisions of Title VII are in a large measure patterned, follow this principle. Section 8(a)(3) of the N.L.R.A. prohibits an employer from discriminating with regard to hire, tenure, or terms and conditions of employment "to encourage or discourage" union membership.[14] In Erie Resister Co. vs. N.L.R.B., 373 U.S. 221, (1963), at issue was whether an employer discriminated within the meaning of that law by giving super-seniority to replacements for economic strikers.[15] The employer defended granting super-seniority to non-striking employees on the ground that its conduct was not intended to discirminate against the strikers but flowed from the necessity to keep its plant open during the strike. The N.L.R.B. found that the employer's conduct violated Section 8(a)(3) and the Supreme Court agreed, stating (373 U.S. at 229):[16]

> ....the employer may counter [a finding of discrimination] by claiming that his actions were taken in the pursuit of legitimate business ends and that his dominant purpose was not to discriminate or to invade union rights but to accomplish business objectives acceptable under the Act. Nevertheless,

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13/ Louisiana vs. United States, 380 U.S. 145, 154-155 (1965); Goss vs. Board of Education of Knoxville, 373 U.S. 683 (1963); Griffin vs. Illinois, 351 U.S. 12 (1962); Lane vs. Wilson, 307 U.S. 268, 275 (1939); Guinn vs. United States, 238 U.S. 347 (1915); Hawkins vs. North Carolina Dental Society, 355 F.2d 718, 723 (C.A. 4, 1966); Kemp vs. Beasley, 352 F.2d 14, 20-21 (C.A.8, 1965); United States vs. Logue, 344 F.2d 290 (C.A. 5, 1965); United States vs. Atkins, 323 F.2d 733, 742-43, 745 (C.A. 5, 1963); Ross vs. Dyer, 312 F.2d 191, 194, 196 (C.A. 5, 1963); Meredith vs. Fair, 298 F.2d 696, 305 F.2d 343, 351 (C.A. 5, 1962); United States vs. State of Louisiana, 225 F.Supp. 353, 393 (E.D. La. 1963), affirmed, 380 U.S. 145 (1965); Franklin vs. Parker, 223 F.Supp. 724 (M.D. Ala., 1963); United States vs. Penton, 212 F.Supp. 193, 199-200 (M.D. Ala. 1962), 236 F.Supp. 511 (M.D. Ala., 1964); (Sub nom United States vs. Parker); Hunt vs. Arnold, 172 F.Supp. 847 (N.D. Ga. 1959); Lefkowitz vs. Farrell, 9 R.R.L.R. 393, 400-401, affirmed, State Commission for Human Rights vs. (con't)

his conduct does speak for itself--it is discriminatory and it does discourage union membership and whatever the claimed overriding justification may be, it carries with it unavoidable consequences which the employer not only foresaw but which he must have intended. (Emphasis supplied)

2. The Court should examine the industrial context in which the seniority and transfer provisions of Defendants' agreement are applied, particularly Defendants' past practices of segregation of employees on the basis of race, to determine whether current enforcement and application of these provisons is contrary to the requirements of Title VII.

Defendants have claimed that this Court may not look to events occurring prior to the effective date of the Act (July 2, 1965)

13/ con't. Farrell, 252 N.Y.S. 2d 649, 652, 657 (1964); Connecticut Commission on Civil Rights vs. IBEW, Local No. 35, (cases no. 164-165, August 15, 1951), as discussed in 28 L.R.R.M. 98, 100, affirmed 140 Conn. 537 (1953).

14/ 29 U.S.C. Section 158(a)(3).

15/ It is well established that an employer has the right during an economic strike to hire replacements for strikers. N.L.R.B. vs. Mackay Radio and Telephone Co., 304 U.S. 333 (1938).

16/ See also, Radio Officers vs. Labor Board, 347 U.S. 17, 44, where the Supreme Court said: "This recognition that specific proof is unnecessary where employer conduct inherently encourages or discourages union membership is but an application of the common law rule that a man is held to intend the foreseeable consequences of his conduct. (Emphasis supplied.) Accord: Republic Aviation Corp. vs. N.L.R.B., 324 U.S. 793.

In the matter of Holland vs. Edwards, 307 N.Y. 38 (1954), which involved the enforcement of a New York Fair Employment Practices Commission order prohibiting discrimination in employment, the Court stated, (supra, at p. 45):

> One intent on violating the law against discrimination cannot be expected to declare or announce his purpose. Far more likely is that he will pursue his discriminatory practices in ways that are devious, by methods subtle and elusive--for we deal with an area in which "subtleties of conduct...play no small part."

Accord: State Commission for Human Rights vs. Farrell, 252 N.Y.S. 2d 649, 43 Misc. 2d 958 (1964).

to determine the validity of the present seniority and transfer agreement, but must restrict its view solely to the terms of the collective bargaining agreement itself. But as Defendants themselves are well aware, collective bargaining agreements must be read and understood in the context of the practices of the shop in which they are applied.[17] This is particularly true when it comes to the interpretation of seniority clauses, the operation of which, perforce, flows from past employment history. Thus, courts cannot and have not blinded themselves to the industrial realities in which seniority clauses are applied when the legality of such clauses are placed into issue, even where the historic events which shape the present industrial realities occurred during a period outside the regulatory reach of the statute. As the Supreme Court has said, it is permissable and often necessary to reach outside of the statutory period in the search for facts which "shed light on the true character" of events occurring during the statutory period. Local Lodge 1424 vs. N.L.R.B., 362 U.S. 411, 415 (1960).[18]

In Local Union No. 269, IBEW, 149 N.L.R.B. 768, enforced 357 F.2d 51 (C.A. 3, 1966), the respondent union maintained an exclusive hiring hall agreement with the employer which provided that applicants for employment who passed the journeyman's examination given by the respondent local and who had been employed for five years under a bargaining agreement between the union and the employer, would be referred prior to all other applicants. There was no contention that the contract, on its face, was unlawful. The record in that case showed, however, that, historically, the union had not referred non-members. Thus, only persons who were union members in the past could meet the five-year seniority

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17/ International Minerals and Chemical Corp., 36 LA 92 (1960); Elberta Crate and Box Co., 32 LA 228, (1959).

18/ Also see, Bradley Plumbing and Heating Co., vs. N.L.R.B., 48 L.R.R.M. 1162 (1961), enf'd 298 F.2d 427 (C.A. 7, 1962).

requirement. Under these circumstances, the N.L.F.B. found that the union's enforcement of the contract violated the federal prohibition against discrimination based on union membership. The Board said (149 N.L.R.B. at 773):

> It is evident that in the years preceding the adoption of the amendments to the 1962 contract, members of Respondent Union Local 269, for no reason other than their union membership, had been favored in work referrals. Therefore, when the respondent union and association adopted the 1962 amendments prescribing for the first time, five years employment under past contracts of Local 269, as requirements for assignment from the new priority group I, the inevitable consequence was to give to Local 269 members continued preference in referral. It is clear that only by virtue of their union membership were they given first opportunity to accumulate the necessary work experience to satisfy the requirements of priority referral from group I. To ignore this clear fact would, as the Trial Examiner observed, run counter to the simplest realities." (Emphasis supplied)

In affirming the N.L.R.B. decision, the Court of Appeals for the Third Circuit said, (357 F.2d at p. 55):

> Minus the history of Local 269's referral practices, the contract provisions regarding qualifications for referral priority are not necessarily evidence of discrimination. (f.n. omitted) Taking that history into account, however, it is clear that those provisions, when they are carried out will give preference to applicants who are members of Local 269 and other Locals of IBEW. (Emphasis supplied)

Before both the Board and the Court, the defendant union claimed, as Defendants here claim, that the contract was lawful on its fact and that any alleged discrimination occurred more than six months prior to the filing of the charge with the Board and was, therefore, outside the statute of limitations set forth in Section 10(b) of the Labor Act.[19/] Under these circumstances, the union argued, as Defendants here argue, the contract could not be attacked. The Board quickly disposed of the union's contention (and the Third Circuit concurred) pointing out that what was in issue was not the union's past conduct, but its present enforcement of the collective bargaining agreement, which viewed "against a

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19/ Section 10(b) reads in pertinent part:

> Provided...no complaint shall be issued based upon any unfair labor practice occurring more than six months

background" of past discrimination demonstrated the union's intent to give preference to union members.

There is an inescapable parallel between the union's argument in Local 269 to the effect that Section 10(b) of the Labor Act precluded an examination of the historical context in which the seniority clause of that contract was administered, and Defendants' argument here that Section 716 (which establishes July 2, 1965, as the effective date of the Act) precludes an examination into the historical context in which the seniority and transfer provisions of Defendants' present collective bargaining agreement are administered and enforced. Like Section 10(b), Section 716 of Title VII precludes holding unlawful events outside the ambit of the statute, but it does not create an impenetrable barrier, beyond which no court may look in order to "shed light on the true character" of events which are occurring at the present time.[20/]

Two recent Court decisions under Title VII support the view that events which occurred prior to July 2, 1965, may be used to "shed light on the true character" of present conduct. In EEOC v. Local 780, United Cement Masons', USDC, S.D. N.Y., May 9, 1967, No. 1439, the Court, pursuant to Section 710, 42 U.S.C.A. 2000e,

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20/ con't. prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made....(61 Stat. 146, 29 U.S.C.A. 160(b).

21/ Local 269, supra, 149 N.L.R.B. at 773.

of the Civil Rights Act enforced the Commission's Demand for Access to Evidence concerning events occurring prior to July 2, 1965, sought in the course of an investigation of alleged present discrimination. In Paul Vogler, Jr. vs. McCarty, Inc., and Local 53, (Asbestos Workers), USDC, E.D. Louisiana, New Orleans Division, No. 66-749, the Court, reviewing the current membership requirements of a traditionally all-white union that had been adopted prior to the effective date of the Act, found:

> In a traditionally all-white union such as Local 53, each of the requirements for membership--relationship to a member, recommendations by members, and majority vote of the membership--effectively denies to Negroes the opportunity to join the union without regard to race. 22/

"Taking the history into account," that Negroes have in the past been denied access to the better paying, more desirable departments and have, therefore, accumulated seniority only in previously all-Negro departments--it is clear that "the inevitable consequence" of the existing departmental and promotion system is to maintain for incumbent Negro employees the disadvantages they suffered under the old segregated system. Systemic ailments incorporating and preserving unequal competitve employment opportunities may not, we submit, remain sheltered from the prescriptions of Title VII.

> 3. The legislative history of Title VII and the provisions of Section 703(h) do not support the conclusion that the Court may not issue an order requiring that defendants eliminate their present discriminatory seniority and transfer system.

In view of the cases and principles presented in the foregoing portionsof this brief, it is the Commission's position that unless the specific provisions of Section 703(h) and the legislative history of the Act expressly compels a different

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22/ The suit was brought under both Section 706(e) and 707(a) of the Civil Rights Act of 1964.

conclusion, the Court should grant relief to incumbent Negro employees presently disadvantaged by a seniority system which incorporates and perpetuates the effects of past discrimination. For the Court to deny relief to such employees would not only be an injustice to such employees, but would also indicate that relief under Title VII is in large measure not available to the great number of Negro employees who, historically, have been employed under discriminatory seniority systems. More important, perhaps, than questions of justice or the efficacy of the Act in dealing with discrimination, we submit, is that an analysis of the legislative history of the Act and careful reading of Section 703(h) of the Act, reveal that seniority systems perpetuating the disparaties in the competitive expectancies of incumbent Negro employees working under such agreements are clearly within the remedial scope of Title VII.

Defendant employer urges the Court to accept a different view of Section 703(h), claiming the legislative history reflects the Congressional intent that Title VII does not affect pre-existing seniority rights nor require the changing of present seniority systems, not unlawful on their face. In support of this contention, Defendant Corporation relies primarily upon two statements appearing in the legislative history of the Act before the Senate: (1) a memorandum of Senators Clark and Case, the floor managers of the bill in the Senate, read into the Congressional Record on April 8, 1964, (110 Cong. Rec. 6992) and (2) a memorandum prepared by the Department of Justice read into the Congressional Record by Senator Clark (110 Cong. Rec. 6986).

The relevant portion of the joint memorandum of Senators Clark and Case states:

> Title VII would have no effect on established seniority rights. Its effect is prospective and not retrospective. Thus, for example, if a business has been discriminating in the past and

> as a result has an all-white working force, when the Title comes into effect, the employer's obligation would be simply to fill future vacancies on a nondiscriminatory basis. He would not be obliged--or indeed, permitted--to fire whites in order to hire Negroes, or to prefer Negroes for future vacancies, or, once Negroes are hired, to give them special seniority rights at the expense of the white workers hired earlier. (However, where waiting lists for employment or training are prior to the effective date of the Title, maintained on a discriminatory basis, the use of such lists after the Title takes effect may be held an unlawful subterfuge to accomplish discrimination.)

This statement was made prior to the drafting of Section 703(h), and a fair reading of it shows that Senators Clark and Case were addressing themselves only to situations in which the work force was historically "all-white". Read in this light, it becomes evident that the statement is concerned with the treatment of new Negro employees entering the bargaining unit after the effective date of the Act and not incumbent Negro employees, which is the problem now before the Court. No one is urging this Court to give newly-hired Negroes seniority advantages at the "expense of white workers hired earlier,"[23/] but only to eliminate the vestiges of racial discrimination practiced against Negroes who have been employed by Defendant employer for years.

This view of the memorandum is underscored by the Senators' parenthetical comment, which goes on to reinforce the Commission's interpretation of the Act. Thus, the Senators point out that where Negroes and whites were on segregated waiting lists

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23/ The Senators state that Title VII does not permit an employer "to prefer Negroes for future vacancies..." although it may be argued that this phrase by itself might refer to seniority issues relating to the promotion of incumbent Negro employees, such construction is difficult to support for two reasons: First, it is inconsistent with the premise that there was no group of incumbent Negroes in the hypothetical presented by the Senators; Second, the sentence in question is followed by the phrase--"or, once Negroes are hired..." (con't)

for employment or training prior to the effective date of the Act, whites could not, after the Act became effective, retain any advantages they might have gained as a result of a past practice of discrimination. In other words, persons who, because of race, had expectations of employment benefits prior to Title VII, were not to be permitted special opportunity with respect to such benefits with the enactment of Title VII. A seniority system may be viewed as expectations held by employees as to future advancement or future retention in the event of a layoff. Accordingly, under the Clark-Case Memorandum, seniority systems would not conform to the requirement of the Act where they retain a discriminatory advantage based upon race growing out of events ante-dating the effective date of the Act.

The Commission believes that a correct understanding of the memorandum is reflected in the recent Harvard Law Review Note, "Seniority, Discrimination, and the Incumbent Negro", supra (at p. 1271):

> The [Clark-Case] memorandum makes it clear that Title VII does not require that incumbent whites be fired so that Negroes may be hired or that their seniority rights be curtailed for the benefit of new Negro employees;....Congress did not at any point in the debate or related hearings, directly confront the problem of seniority systems in which discrimination had subordinated Negro workers to whites of equal or lesser tenure....(Emphasis supplied)

Defendant employer's reliance on the Justice Department memorandum, supra, is also misplaced. That memorandum, also written and put into the record prior to Section 703(h) coming before the Senate, was intended to rebut the arguments put forth

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23/ con't. which clearly indicates that the preceding phrase continues to pertain to a situation where no Negroes were previously employed on the work force and the hiring of new Negro employees.

by Senator Hill of Alabama in a speech he gave before the Senate on January 15, 1964, to the effect that Title VII required preferential treatment or discrimination in reverse.[24] In discussing the effect of Title VII on existing seniority rights, the Justice Department--as had Senators Clark and Case in their statement--limited its analysis to the "ordinary case...(where white employees' seniority was)...built up over a period during which Negroes were not hired..." (Emphasis supplied). In such case, "These seniority rights would not be set aside by the taking effect of Title VII." and as a result "any differences in treatment based on established seniority rights would not be based on race and would be forbidden by the Title." Thus, the Justice Department memorandum does little more than repeat the Clark-Case memorandum view that, where Negroes had not been previously employed by the company, an existing seniority system does not discriminate for reasons of race against Negroes coming into the work force for the first time.

Specific discussion of Section 703(h) was inserted in the legislative history by Senator Dirksen whose remarks merely restate the provisions of the Section, and, thus, shed no light on the interpretation to be given those provisions. Senator Humphrey, who also spoke of Section 703(h), did not find that this Section narrowed the effect of Title VII.[25]

Thus, there is little in the legislative history which may help the Court to interpret Section 703(h) and certainly nothing which compels the interpretation urged by Defendants. It is clear, however, that the provisions of a specific section of a statute should be interpreted to conform with the statute's

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24/ Senator Hill said:
> Nondiscrimination is no longer sufficient; preferential treatment is demanded. It is to preferential treatment, as embodied in this bill, that I most vigorously object. (110 Cong. Rec. 486.)

25/ 110 Cong. Record 12297, daily edition June 4, 1964.

over-all policy. (See N.L.R.B. vs. Fruit and Vegetable Packers and Warehousemen, Local 760, et al, 377 U.S. 58, 62-63 (1964). Surely, then, the term "bona fide" as it appears in Section 703(h) cannot be interpreted as sanctioning a system which serves to preserve or foster inequality of opportunity based upon considerations of race. With respect to the term "intention to discriminate," we have already seen that "intention" is not to be measured by an employer's or a union's subjective good faith. Rather the courts uniformly apply the objective test referred to by the Supreme Court in Erie Resistor, supra, i.e., whether the Negro employees were, in fact, disadvantaged by the seniority system, and whether such disadvantage was a foreseeable consequence of the system.

In sum, the Commission believes that Section 703(h) does not protect the present seniority and transfer system which perpetuates past practices of discrimination. On the contrary, the policy embodied in Title VII, consistent with the thrust of current judicial decision in the areas of education and voting rights, requires that the maintenance of such systems be enjoined by the Court.

4. Seniority "rights" such as those involved in the instant case are not vested or indefeasible, but are subject to modification by the will of the contracting parties, and surely must be modified where they are in conflict with the federal policy against discrimination in employment on the basis of race.

Defendants claim that a seniority provision occupies a unique sanctuary free from possible administrative or judicial alteration.[26/] This reflects a basic misunderstanding of the character of the so-called seniority rights which Defendants seek to protect. These rights, in fact, are no more than expectancies

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26/ Transcript pp. 213, 353.

derived from the collective bargaining agreement. They do not "vest" as do certain other legal rights. Rather, they are always subject to modification. See Armco Steel Corporation, 36 Lab. Arb. 981, 987, (1961); Cherryvale Zinc Co., Inc., 39 Lab. Arb. 789, 790 (1962), Humphrey vs. Moore, 375 U.S. 335 (1964), Pellicer vs. Brotherhood of Railway and Steamship Clerks, 217 F.2d 205 (5th Cir.) (1964), Gould, supra, and Harvard Law Review, supra.

Ever since the Supreme Court's decision in Steele vs. Louisville and Nashville Railroad Co.,[27] 323 U.S. 192 (1944), it has been clear that a union may not utilize race as a criteria for determining the rights, including seniority rights of employees under a collective bargaining contract. Title VII expands the principle of Steele, by imposing on employers as well as unions the duty not to rely upon race. Failure of a union and an employer to conform to this statutory duty in the formulation and administration of a seniority clause of a collective bargaining agreement calls for judicial action pursuant to Title VII to remedy the parties' non-compliance with the law, and to modify the collective bargaining agreement to cure its defects.[28] Defendants claim that Whitfield vs. United Steelworkers of America, 263 F.2d 546 (5th Cir. 1959); cert. den. 360 U.S. 902 (1960), which also involved an allegedly discriminatory seniority agreement, controls the instant case. However, Whitfield is clearly distinguishable from the present proceedings.

27/ Defendant employer would distinguish Steele, supra, on the ground that, in this case, there was no "hostile discrimination," and that the instant restrictive seniority and transfer system was "motivated entirely by considerations of efficiency." (Defendant employer's trial memorandum, p.3). This argument misses the mark, however, for as we have seen, it is not the Defendant's state of mind which is in issue under Title VII but the objective consequences of his conduct. See p. 13, supra.

28/ Manifestly, if seniority agreements can be altered to conform with changes in economic facts (Humphrey vs. Moore, supra), they can be altered to conform to the requirements of the federal policy on non-discrimination. See Hughes Tool Co. (con't)

In the first place, Whitfield did not confront the problem posed by this case, i.e., whether Negro employees are denied opportunities equal to those enjoyed by white employees. Rather, it turned on the question of whether the union in that case failed in its duty to fairly represent the Negro employees. That the union did not fail to perform its duty flows from the Court's finding of an industrial justification for the seniority system which the union and the employer incorporated in the collective bargaining agreement. Thus, the Court concluded it could not be said that the union's reason for executing and enforcing the agreement was based upon race. Here, the Court is not called upon to determine whether the union fairly represented the Negro employees; instead, it must determine whether Negro employees enjoyed opportunities equal to those enjoyed by white employees under the Defendants' seniority and transfer system.

In addition to the fact that Whitfield involved a legal principle different from that in this case, Whitfield is also distinguishable from the instant case on the facts. There, as noted above, the Court focused on the question of the qualifications of the Negro employees to perform work in the previously all-white department. After finding that in the historically white department job lines were technologically interrelated by skill, and that the jobs and skills in the Negro and white departments did not overlap, Judge Wisdom stated (at 263 F.2d 550):

> An employee without the proper training and with no proof of potential ability to rise higher cannot expect to start in the middle of the ladder, regardless of plant seniority. It would be unfair to the skilled, experienced and deserving employee to give a top or middle job to an unqualified employee. (Emphasis supplied.)

28/ con't

vs. N.L.R.B., 147 F.2d 69, 74 (CA 5), Syres vs. Oil Workers, Local 23, 350 U.S. 892 (1955), and Ford Motor Co. vs. Huffman, 345 U.S. 330 (1953).

The Commission agrees that the mere issuance of a Court order cannot automatically convey to Negro employees required skills not previously learned, but that is not in issue.[29] For here, unlike Whitfield, the departments at Defendant employer's Richmond operations do overlap. In some instances, employees holding jobs in one department perform work in several departments.[30]

29/ Further reflection on the decision in Whitfield reveals that a problem, not discussed by the Court and apparently not argued by the parties, lurks unresolved in the Fifth Circuit's disposition of the case. The Court in that case was dealing with a situation where previously racially segregated lines of promotion (i.e., groups of technologically related jobs arranged in a fashion whereby an employee progresses from the simpler to the more difficult job through a series of increasingly more complex jobs) are joined by tacking the previously all-Negro jobs on the bottom of the previously all-white line. In this kind of situation, the Court held that the Negro employees could not utilize seniority earned in the all-Negro line to leap frog the first, second, or third jobs in the previously all-white line. As we have seen, the Court reached this conclusion on the basis of its finding of fact that experience in the job immediately preceeding in the line of promotion was a necessary requisite to qualification for promotion to the succeeding step. The Court did not confront or resolve, however, the question of competition for promotion among employees on the same step in the line of promotion for an opportunity to obtain the next succeeding job. For example, let us assume that a Negro employee with many years of plant seniority earned in an all-Negro line is promoted to what had been the entry level in the previously all-white line and within a period of six months, becomes a fully qualified operator on that job. When an opening becomes available on the next job level, why should the now qualified Negro employee not have the opportunity to compete for that job on an equal basis with qualified white employees who may have less plant seniority?

In sum, we submit that while it is true that there may be in any industrial setting some greater or lesser correlation between seniority on the job and the acquisition of skills in the performance of that job as well as preparation for promotion to the next job, the actual relationship between seniority and job performance will vary a good deal. Where the job is complex, the time required to master it and prepare for promotion may be long. In less demanding work, the time required will be shorter. As skill is acquired, seniority on the job becomes less and less significant in terms of qualification for promotion, and, therefore, more and more an arbitrary method of ranking employees. Once the Negro employee becomes qualified for promotion, the fact that the white employees have more job seniority--acquired because of the past practice of segregation--should have little or no effect on the Negro employee's chances for promotion. When Whitfield is pushed to the point suggested by Defendants, the question of qualification very quickly becomes a matter of slight importance, and only the fact that Negroes were in the

(con't)

Also the record establishes that skills gained in entry level jobs in the Fabrication and Warehouse, Shipping and Receiving Departments do not provide training essential or related to the performance of jobs further up the line in that Department.[31] Furthermore, the record indicates that many jobs in the different departments entail the performance of identical skills. These facts suggest that, for example, there is great similarity between the tag meter tester in the Pre-Fabrication Department and the moisture tester in the Fabrication Department. Indeed, the lift operator's position in both the Pre-Fabrication Department and Warehouse, Shipping and Receiving Department are identical. The Whitfield decision cannot justify the preferences accorded to white employees in the Fabrication Department having less employment seniority than many incumbent Negroes in the Pre-Fabrication Department.

29/ con't.
past excluded from the department controls promotional opportunities for Negro employees.

30/ For example, while janitors and special messengers are assigned to the Pre-Fabrication Department and painters and air-conditioners are assigned to the Fabrication Department, all of these employees are utilized throughout the plant. Defendant employer concedes that these assignments are arbitrary and are carry-overs from the past history of segregated departments. (Trial Transcript pp. 380-386.)

31/ This is particularly true in the case of the initial machine operator's job in the Fabrication Department. Employees promoted to these jobs from within the Department on the basis of departmental seniority are not in any way prepared for the transition; they need considerable on-the-job training--two to five weeks of intense training and close supervision before they can operate the machine on their own. New operators cannot receive the top rate of pay for their position for six months after the promotion, and will not achieve efficient operation for close to a year. (See Trial Transcript, pp. 265-266, 283-284, 372-373, 358-359) Although there are unsupported and undetailed statements to the effect (see Trial Transcript, pp. 237-238) that it would and does take longer to train Negro employees transferring under the six-month rule to these operator's jobs, no where has it been demonstrated that given a year to obtain optimum efficiency, that persons transferring directly into the Fabrication Department on the basis of employment seniority haven't already and won't continue to become efficient operators

Finally, the lack of any necessary relationship between seniority and eligibility for promotion in the Fabrication Department is made apparent by Defendants' own transfer system. Under this system, a maximum of four employees every six months may transfer to the Fabrication Department without any loss of previously earned seniority. There is absolutely no evidence that employees transferring under the so-called six-month rule are in any way better qualified for work in the Fabrication Department than are employees who transfer under the notice of intent provisions of the agreement. (See pp. 6-7, supra) This, we submit, clearly demonstrates that the present system is not the product of an attempt to relate experience to promotional opportunity. Rather, it serves to limit the transfer of incumbent Negro employees between departments by creating, on the one hand, a very limited number of opportunities to transfer and retain previously earned seniority, and, on the other hand, an inhibition to using the notice of intent provision (which does not limit the number of eligible employees) by requiring the employees to pay the price of all previously earned seniority. 32/

Remedy

Section 706(g) provides that a court, upon a finding of violation, "may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include reinstatement or hiring of employees, with or without back pay (payable by the employer... or labor organization, as the case may be, responsible for the unlawful employment practice)."

32/ Employees desiring to transfer from the Pre-Fabrication Department to the Warehouse, Shipping and Receiving Department are similarly inhibited, and can only transfer at the expense of their previously earned seniority.

The unlawful employment practice with which this brief is concerned is the maintenance of a racially discriminatory promotion-transfer seniority system at the Richmond operation which restricts Negro employees to the Pre-Fabrication Department and prevents them from filling vacancies in the Fabrication Department and the Warehouse, Shipping and Receiving Department. Since this discrimination comes about through the departmental seniority and transfer provisions of the collective bargaining agreement, plainly the Court should enjoin the Company and the Union from giving further effect to such provisions. Eliminating the discriminatory contract provisions is only the first step. Section 706(g) also calls for affirmative relief which will insure that Negro employees, in fact as well as in theory, enjoy an opportunity for advancement equal to that enjoyed by their white fellow workers.

Based on its experience in scores of conciliations involving problems similar to those presented here, the Commission recognizes that the appropriate remedy must vindicate the rights of the employees who have been discriminated against in a manner which takes into account the employer's legitimate interest in orderly operation of the productive enterprise and the interest of the Union in an orderly seniority system. To the extent possible, consistent with the purposes and policies of Title VII, the remedy should follow the procedures of the existing system. In this case, the Commission does not propose moving incumbent white employees out of jobs they now hold and replacing them by older seniority Negro employees, although such "bumping" would grant to the Negro employee the job which he would have on the basis of his seniority but for his race. On the other hand, Negro employees

On the basis of the aforesaid considerations, the Commission proposes the following procedures for promotions:

> When a vacancy occurs in any job in any department, that vacancy is to be posted in all departments throughout the Richmond facility. The bidding employee with the greatest employment seniority, no matter what his department, is to receive the job, "provided the applicant's ability, merit and qualifications for the job are also given due consideration."

These procedures, we believe, would vindicate the rights of the Negro employees to bid on the more desirable jobs without the present racially discriminatory departmental limitation. At the same time, there would be minimal changes in the present seniority system; everything would remain the same except that the class of employees eligible to be considered for a vacancy would be expanded from the department to the entire installation and the basis for promotion would be employment seniority rather than departmental seniority. Nor should the industrial efficiency be seriously affected, for assuming that the successful bidders on Fabrication Department jobs would be Negro employees from Pre-Fabrication, there is nothing to indicate they would be less well equipped for these jobs than the white employees who presently move into them. Moreover, should the Company believe that the highest seniority bidder is not otherwise qualified, it would be able to pass over him on that ground.

When it comes to the problem of resistance to being "bumped" down or out in a layoff, the situation is somewhat different. Where a layoff occurs, as a practical matter, the employer has little or no option as to who shall be retained in their present position and who shall be bumped. Normally, the senior employees

can resist being bumped on the basis of their seniority alone. If employment seniority were to control, it is possible that a layoff could result in the retention of employees with little job experience but much employment seniority, while employees with less employment seniority but considerable job experience are bumped or laid off. It is a possibility, at least, that the employer could be left without sufficient experienced workers to operate the machines. The solution to this problem lies in what we have said earlier; supra p. 25, that time on the job becomes less and less significant once skills are acquired. Thus, while it may take six months to a year to become fully qualified on a given job, beyond that point there is little if any difference in the productivity of employees.

The Commission suggests that the Defendants be required to submit to the Court a list of all jobs above the entry level indicating the normal time required for an employee to become qualified on each of these jobs. Subject to the Court's examination and approval of time estimates submitted by Defendants, it may then be provided that an employee who is advanced to a job above the entry level may not utilize his employment seniority as a basis for resisting being bumped until he has completed serving the time stipulated as necessary to become a qualified operator. After the passage of that period, the employee will, of course, be entitled to use his full employment seniority to resist being bumped. The employee who is bumped down would be able to utilize his employment seniority in jobs which he is fully qualified to perform either in his old department or in his new department.

While admitting that on-the-job training is the most important part of preparing an employee for work on that job, the Company urges that Negro employees from the Pre-Fabrication Department lack certain basic knowledge and skill which are picked up

informally by employees who have worked on lower level jobs in the Fabrication Department. Assuming this may be true for some jobs, [34/] then the different opportunities to learn are but another result of the racially discriminatory department system. Therefore, where Negro employees, because of the past practice of restricting Negroes to the Pre-Fabrication Department, have been denied the opportunity to acquire skills necessary for the performance of the jobs located in the Fabrication and the Warehouse, Shipping and Receiving Departments, Defendants should be required to establish training programs for employees in the Pre-Fabrication Department. Where in the past training has been on-the-job training, the Defendant employer should be required to make such training available to white and Negro employees on an equal basis.

In addition to providing what pre on-the-job training is necessary to put the Negro employees in the same position as their fellow white employees with comparable employment seniority, it is also necessary to provide that Negro employees who have been relegated because of their race to the Pre-Fabrication Department do not suffer any loss of income upon transferring to the Fabrication Department or the Warehouse, Shipping and Receiving Department. Where Negro employees working in the Pre-Fabrication Department are earning a higher hourly rate than is paid for the beginning level jobs in the other departments, possible immediate

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34/ Experience under the six-month agreement seems to indicate that prior experience in the Fabrication Department is not relevant to learning the basic machine jobs. Company officials testified that Negro employees from Pre-Fabrication transferring under this agreement took longer to train on the machines than did the employees (white) coming through Fabrication. Not only is there no corroboration of this assertion but it is contrary to the specific testimony respecting the length of the training period for various operations which shows that there is no difference between the two groups.

loss of income to these employees inhibits them from seeking to transfer to the other departments where their long-range opportunities will be improved. Under these circumstances, it appears that some form of wage preservation should be required, such as the red circling of rates.

The Commission believes that the solution we have proposed here, i.e., employment seniority on an interdepartmental basis for promotions; employment seniority with the safety feature of a training period for layoffs, and necessary training and red-circling of rates of transferring employees, constitutes appropriate affirmative relief which will remedy the discrimination imposed on Negro employees by the racially based departmental system, and at the same time takes adequate account of the legitimate interests of the Defendants.[35/]

Conclusion

For all the reasons set forth above, the Commission respectfully submits that the Court should find the present

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35/ We believe that our proposals are in no way inconsistent with Plaintiff's proposals for a merger of seniority lists for promotional purposes. The Commission has found, based on experience in numerous conciliation efforts, that the term "merger" takes on different meaning in different setting; therefore, our proposals have been couched in more concrete and specific language.

Plaintiffs have sought other forms of relief not discussed herein. The Court should not view the Commission's failure to comment on these other matters as indicative of any disagreement with the Plaintiffs' position in these respects. Rather, the Commission has chosen to confine its discussion of the problem of relief to those matters which bear on the seniority and transfer system issue, which is the issue in this case which the Commission, in its administration of the Act, has acquired special expertise.

provisions of the seniority and transfer system are unlawful within the meaning of Title VII. Accordingly, the Court should order the Defendants to cease and desist from enforcing the provisions of the collective bargaining agreement in this respect and grant such other relief as set forth herein, as is necessary to eliminate discrimination practiced against Negro employees by Defendants.

Respectfully submitted,

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September , 1967 Equal Employment Opportunity Commission

CERTIFICATION OF SERVICE

I hereby certify that copies of the foregoing Brief for the United States Equal Employment Opportunity Commission as Amicus Curiae and Motion for Leave to File Brief Amicus Curiae have this day been served by air mail upon:

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