1972 WL 296
United States District Court, N.D. Alabama, Southern Division.

Rush Pettway et al., Plaintiffs
v.
American Cast Iron Pipe Company, Defendant.

No. 66-315
|
November 21, 1972

Opinion

LYNNE, CH. J.

***1** The sluggish pace of this case through the court has not been the result of judicial inertia as the entries in the clerk's docket sheet will attest. Following the order on pretrial hearing, dated July 26, 1971, a full evidentiary hearing was commenced on October 11, 1971, and concluded on October 28, 1971.

Trial counsel were requested to file proposed findings of fact and briefs pursuant to a schedule fixed by the Court. Those of plaintiffs were to be filed before December, 1971, and those of defendant before December 31, 1971.

Thereafter the ill-starred course of this action was the result of a combination of factors, the chief of which was the very practical inability of a busy court reporter to furnish counsel with a transcript of the testimony. Thus, although he exercised extreme diligence, trial counsel for plaintiffs was unable to submit proposed findings of fact and his brief until March 10, 1972. By that time, trial counsel for defendant had become engulfed in state and federal court trials and, though repeatedly pressed by the Court, delayed the filing of his proposed findings of fact and brief until July 24, 1972, on the eve of the undersigned's departure on vacation.

After a careful review of the evidence, both documentary and testimonial, the Court makes and enters the following findings of fact, distilled from those proposed by the parties, and its own conclusions of law.

Findings of Fact

1. This action was instituted by the plaintiffs under the provisions of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.,* and 42 U.S.C. § 1981.

2. The plaintiffs are black employees of the defendant at its plant in Birmingham, Alabama. Defendant is an employer within the meaning of 42 U.S.C. § 2000e(b). The defendant as of August 12, 1971, employed 2,551 employees, of whom 927 were black and 1,624 were white.

3. The defendant, American Cast Iron Pipe Company (ACIPCO), is a corporation incorporated under the laws of the State of Georgia, with its principal place of business in the City of Birmingham, Alabama. The defendant is engaged in the production of cast iron and ductile iron pipe and fittings. It also produces steel tubes and castings of various alloys and shapes, values and hydrants, and other miscellaneous cast iron and steel products.

4. There has never been any recognized or certified labor organization which represented any of the employees of ACIPCO.

[*"Eagan Plan"*]

5. ACIPCO has operated under a novel plan of corporate management known as the "Eagan Plan" for over 45 years. The "Eagan Plan" is a plan of cooperative industrial management conceived and put into effect by John Joseph Eagan, the founder of ACIPCO. The details of Mr. Eagan's plan to effectuate his ideal of cooperative effort between labor and management were first presented to the employees of ACIPCO in March of 1922, and were ratified and accepted by the employees in an election held for that purpose. The plan called for the control of the policies and conduct of the business to be vested in a Board of Directors elected by the stockholders. The day to day management of the business was placed in the hands of a "Board of Management" composed of the corporate officers elected by the Board of Directors. The "Board of Management" also serves as the Executive Committee of the Board of Directors between the meetings of the Board of Directors, a committee common to most corporate

organizations. The distinguishing feature of the Eagan Plan is the "Board of Operatives" composed of non-supervisory personnel elected by the employees of the company. Since the creation of the Eagan Plan, an important function of the Board of Operatives has been to advise the Board of Management on matters affecting the employees' welfare and to provide a channel of communication between the management and the employees of the company. Under the Eagan Plan, the Board of Operatives also nominates two of its members to the stockholders for election to the Board of Directors of ACIPCO.

***2** 6. The death of Mr. Eagan on March 30, 1924, brought about a significant change in the legal status of the Board of Operatives. The codicil to Mr. Eagan's will bequeathed all of the outstanding common stock of ACIPCO to the members of the Board of Management and members of the Board of Operatives, jointly, and their successors in office on said boards, as trustees for the benefit of the employees and future employees of the company and their families. The codicil to Mr. Eagan's will clothed the members of the Board of Operatives with the capacity of joint stockholders and co-trustees of all of the outstanding common stock of ACIPCO. The defendant has no public stockholders.

7. Mr. Eagan established the following qualifications for election to membership on the Board of Operatives. Candidates had to be white men over 21 years of age, American citizens, and employed in a non-supervisory capacity for three or more full years. All employees, without regard to race, were eligible to vote in the Board of Operatives' elections.

[*Electoral Districts*]

8. The racial restriction on the qualification for election to the Board of Operatives was eliminated by order of this Court, following an evidentiary hearing, on January 21, 1970. The "Auxiliary Board" which consisted of 12 black employees elected by the black employees only and which had been operated for many years as an adjunct of the Board of Operatives for the benefit of black employees, was eliminated at this time. The Court required the defendant to examine the then existing electoral districts and to include in the plan required by the Court's order any recommendations needed to establish fair and proper electoral districts based on genuine geographical, operational, and functional grounds without discrimination against the employees of the company because of their race or color. The defendant submitted a plan which enlarged the number of electoral districts from five to twelve and provided for the election of one representative to the Board of Operatives from each district. After further evidentiary hearing, the Court found that the twelve electoral districts proposed by the defendant had been organized on the basis of genuine geographical, operational and functional grounds without any intention or purpose to gerrymander the districts because of racial considerations, and the Court thereupon approved the plan.

9. The black employees of the company have boycotted each election held subsequent to this Court's order of March 20, 1970, and consequently no blacks have been elected to membership on the Board of Operatives.

Rates of Pay and Benefits

10. The defendant over the years, in keeping with the intent of Mr. Eagan's codicil, has maintained the rates of pay for its jobs in line with, and generally somewhat higher, than the rates of pay paid by its competitors. Additionally, the company has provided employment benefits equal to, or greater than, those offered in the industry, e.g. vacations, holidays, a pension plan, life insurance, free medical service for employees, pensioners, and their families, hospitalization and surgical insurance with major medical coverage, and sickness and accident benefits.

***3** 11. The defendant since 1947 has maintained an "extra compensation plan" or bonus plan that permits the employees to share in the company's earnings. No earnings are distributed outside of the company. The plan provides that, after a deduction for taxes, an amount equal to 6% of the net worth of the company is set aside from net earnings and placed into a capital account for replacement of equipment and the maintenance and improvement of facilities. To the extent the company's earnings permit, an amount equal to 6% of the payroll is then set aside as a bonus fund. Any excess earnings are then divided between those two accounts on a 50-50 basis. The appropriate calculation is made each month during a three-month period and the total amount of money in the bonus fund at the end of a given quarter is distributed to all employees and pensioners based on their

earnings and pensions as a percentage of the total payroll and pension payments for that period.

Operations

12. The defendant's operations are organized into various departments. There are five primary production departments, each of which has separate and distinct operations from the other[s], and from the other departments of the company. The primary production departments consist of: (a) the Mono-cast Department containing three pipe shops for the production of cast iron and ductile iron pipe; (b) the Gray Iron Fittings Foundry which produces between 35,000 to 40,000 different accessories to complement the pipe produced in the pipe shops; (c) the Steel Foundry Department which produces steel tubes and castings of various alloys and shapes; (d) the Melting Department which melts all of the hot metal required by the Mono-cast Department, the Fittings Foundry and the Steel Foundry. The Melting Department also supervises the operations of the Brass Foundry and the Mag-coke Department; and (e) the Steel Pipe Foundry which produces steel pipe from steel skelp. All of these departments, with the exception of the Steel Pipe Foundry which is a small production unit with low turnover, have had substantial numbers of black employees over the years they have been in operation. The Machine Shop performs all of the machinery required on items produced in the Steel Foundry, in the Fittings Foundry and the Mono-cast Department, as well as producing replacement parts required in maintenance operations. The company also has service departments consisting principally of the General Yards Department, Central Stores, the Shipping Department, Electrical Department, Maintenance Department, Inspection Department and the Construction Department. These departments perform services in the receipt of raw material, the shipment of finished products and various maintenance functions in the defendant's operations. Of these departments, the General Yards, Shipping and Construction Departments have a substantial number of black employees. The Machine, Electrical, Maintenance and Inspection Departments consist principally of the higher skilled jobs and craft positions and have a relatively small turnover in personnel. Fewer blacks are found in these departments due to the lack of qualified black applicants.

Job Progression

***4** 13. Both black and white employees advance in pay according to a wage progression schedule by performing jobs within the fifteen pay groups on the basis of their qualifications and experience. The satisfactory performance of one job within a department qualifies the employee for advancement to the higher paying functionally related job. Qualified employees advance to higher rated jobs within their department on the basis of their length of continuous service within the department, the qualified employee with the longest department service being given the first opportunity to advance. The jobs in the lines of progression as practiced in each department are functionally related, one to the other, to afford training and experience to the incumbent necessary to advance and perform proficiently the higher rated jobs, and are functionally related to the performance of the department as a whole. Beginning June 1, 1971, vacancies within a department are posted for bid and are awarded to the qualified bidder with the longest department service.

14. Also commencing January 1, 1971, the defendant adopted a policy of permitting employees to bid on jobs on a plant-wide basis after the job had been posted for bids within the department for three days without the job being filled within the department, the successful bidder being determined among those qualified to perform the job on the basis of longest continuous service within the company. An employee, black or white who successfully bids on and fills a job in another department but who has not had the requisite training and experience to qualify him to perform such new job, acquires a seniority date in the new department as of the date he transfers. However, he is given one year's credit for rate progression purposes. A seniority policy based upon transfer of employees between departments into jobs using their company seniority would result in placing employees into jobs which they would not be qualified to fill without proper training and experience due to the distinct function and unrelated nature of the work performed in the different departments. In cases where an employee is transferred to a different department and he is qualified by training and experience to perform a job in the higher pay groups, he is given appropriate credit for his training and experience. This policy applies equally to black and white employees. An employee, black or white, who transfers to a different department, retains his company seniority for purposes of job placement in the event of a reduction in force.

15. In cases where an employee, black or white, is placed on a lower paying job on a temporary basis, he does not

drop into a lower pay group. Similarly, an employee, black or white, who temporarily relieves on a job in a higher pay group is not paid the rate of the job, but rather the rate he is receiving on the job from which he is temporarily transferred.

16. There are no jobs in defendant's plant that are limited exclusively to white employees, or to black employees. Promotions and job assignments are based on the qualifications and experience of each employee without regard to race.

***5** 17. When an employee, white or black, is permanently assigned to a job in the next higher pay group, he is placed on the new job and if he satisfactorily performs the new job during a 30-day trial period, he is awarded the new job rate. Where an employee, black or white, is permanently assigned to a job that is more than one pay group higher than his present job (e.g., from a job in pay group 5 to a job in pay group 8), the employee after a 30-day trial moves to the next higher pay group and proceeds to the next higher pay group at regular intervals until he reaches the job rate. As of October 1, 1971, there were 106 white and 76 black employees receiving rates of pay higher than the rate of pay for the job they are performing and 446 white and 168 black employees receiving rates of pay below the rate of pay for the job they are performing, the percentages of employees by race below rate, on rate, and over rate as of October 1, 1971, being as follows:

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Apprenticeship and Journeyman Programs

18. Both black and white employees of the defendant may also advance to a higher paying craft job through the company's apprenticeship and on-the-job training programs. These programs relate to training for the attainment of craft positions. Candidates for apprenticeship program are obtained from within the company, except in rare instances when the company requires a fully qualified journeyman, particularly one of a skill not included in the company's apprenticeship program, on short notice and a fully qualified applicant for the vacancy is sought for the job. Qualifications for entry into the apprenticeship program are as follows: (a) applicant must be 25 years of age if he has not had military service, and if he has had military service he may enter the program at 29 years of age; (b) a high school graduate or equivalent. Prior to March 31, 1971, the applicant was required to pass an aptitude test and score in the 50 percentile on the California Survey of Mental Maturity. Additionally, an applicant is first placed in the department involving the particular trade or craft for a period of six months to see if he can demonstrate some aptitude toward performing work relating to the particular trade involved, as well as to determine if the applicant enjoys and desires to have an apprenticeship in a particular trade or craft. An apprentice, provided he performs his work satisfactorily, can attain the craft rate after approximately 4 years. This program is open to both black and white employees without regard to race.

19. The defendant's on-the-job training program permits an employee, either black or white, who has had 3 years experience on a particular craft-related job to bid on the craft job. When an opening occurs, if selected, the employee will continue to be trained toward the craft until he has 6 years experience, and if sufficient progress has been made he is recommended by his departmental superintendent to the Apprentice Committee for the intermediate craft rate. After an additional year's experience, the employee is eligible for the craft rate. This program applies equally to black and white employees.

Testing

***6** 20. During the fall of 1955, the defendant employed the firm of Ernst & Ernst as management consultants to do a survey of the company's personnel program. This survey was done under the supervision of Mr. Hardin Walker, a psychologist and an employee of Ernst & Ernst. At Mr. Walker's suggestion and recommendation, all of the supervisory employees of the company, from management down through lead men, were given a general maturity and psychological test commencing in January, 1956. In August of 1956, a testing program was utilized for the selection of apprentices in the craft trades and applicants were given a general maturity and an aptitude test at the recommendation of Mr. Walker.

21. On September 1, 1956, Mr. Walker was employed by the defendant as its Industrial Relations Director. His primary duty was to establish a program of employee selection, training and promotion. By 1960, all white hires were required to take a screen test and make a score of 40

percentile or better to qualify for employment, as well as a high school education, or equivalent, and to pass a physical examination. No black employees or applicants for employment were given tests prior to 1964. Prior to 1964 the only requirement for black hires was that they pass a physical examination.

22. The defendant, as a government contractor, was required to comply with Executive Order 10925 with regard to equal employment opportunity. Executive Order 10925 preceded the passage of the 1964 Civil Rights Act. In connection with its compliance efforts with the Executive Order, the company received visits by representatives of the office of Federal Contract Compliance. Dr. Hugh Brimm, representing the Department of Army and the Office of Federal Contract Compliance, advised the defendant that it would have to treat black and white employees alike with respect to testing and other hiring qualifications. Dr. Brimm further advised that requiring tests of whites and not of blacks was discriminatory and the company would have to change its policy in that regard. In July of 1964, the defendant advised Dr. Brimm that it desired to maintain the high hiring standards the company had used in the past and was extending the white hiring requirements of a high school education, or equivalent, and a satisfactory score on the screen test to black hires. Dr. Brimm concurred in this approach and advised that the testing program proposed would be in compliance with the President's Executive Order.

23. In an effort to determine a more objective and scientific approach to promotions that would be fair to all employees, the defendant implemented a testing program for employees in December, 1964. Under the new testing program promotions would be based on an achievement level score of each employee on the California Survey of Mental Maturity Test. The defendant determined that the national norm of 50 percentile recommended by the publisher was too high for the jobs in its plant, and that the requirements of most of its jobs did not require a norm of that degree. The defendant in an effort to establish its own standards of norm selected 100 average performers among its employees to take the test to determine what achievement levels to assign to the various jobs in the 23 pay grades then in existence. Ninety-eight of the 100 employees selected took the test, of whom 75 were black and 23 were white. The achievement levels required for the 23 pay groups are reflected on defendant's Exhibit 15. The required achievement levels applied equally to black and white employees. The test was given to both black and white employees in the same room at the same time and under the same conditions. The same scoring system was applied to all employees who took the test.

***7** 24. The testing program was explained to all employees. Employees, both black and white, were entitled to be retested every 12 months so that they could improve themselves and their opportunities for advancement with the company. Employees were not required to take the test, but could take it on a voluntary basis. An employee who did not want to take the test could elect to continue on his existing job without a demotion in grade or pay and was assigned the achievement level for the job that he was presently performing. The testing program for promotion was reviewed by Dr. Brimm of the Office of Federal Contract Compliance, and he advised the company that it was a fair way to approach promotions and was one of the best systems he had seen in the companies that he had visited on compliance reviews. Dr. Brimm recommended the program to other government contractors in his area of responsibility.

25. The defendant, in an effort to provide its employees with an opportunity to improve their test scores conducted a night school program for black and white employees. The school was conducted on an integrated basis commencing in 1965 and 32 whites and 22 blacks attended for a total enrollment of 58, as compared with the previous year's enrollment of 134 blacks and 116 whites (250) when the classes were conducted on a segregated basis. In 1967, 134 whites and 12 blacks attended integrated classes; in 1968, 92 whites and 19 blacks attended; and in 1969, 109 whites and only 10 blacks attended. The defendant determined that the people who needed the most help through these classes were not being reached and the classes were discontinued. Instead, the defendant offered individual counseling and made arrangements with the International Correspondence School, whereby they could provide any individual with the kind of training he needed in a home study course. These home study courses were offered to black and white employees alike. Black employees who scored the required achievement level on the tests were promoted to the corresponding jobs commensurate with their achievement level.

26. On February 19, 1968, the wage rate progression schedule which contained 23 pay groups, together with their associated achievement level requirements, was modified to reduce the number of pay groups to 15, and to eliminate any achievement level requirement for jobs falling within pay groups 1 through 8. The reduction in

the number of pay groups was based upon discussions with other people in industry, and upon the fact that advancement within 23 pay groups provided very small increases in wages. The elimination of the testing requirements for the first 8 pay groups was based on the complaints of employees, both black and white, that they were having difficulty making the test scores required for the jobs in those pay groups and also on the determination by the company that the ability of an employee to perform jobs in those pay groups could be determined without undue detriment to the company by placing a man on the job to see if he could perform satisfactorily.

***8** 27. The defendant eliminated any test requirements for new hires in pay groups 1 through 8 on July 14, 1969, as well as the requirement of a high school education or equivalent. The defendant at that time was working with a local group in Birmingham which was interested in the employment of the hard core unemployed. The company felt that it would be in a better position to employ people among the hard core unemployed without the testing requirement for employment and without the high school education requirement. The defendant also felt that testing and educational requirements should be the same for all applicants, and therefore eliminated those requirements for all applicants.

28. The defendant eliminated all testing requirements for promotion or otherwise, on March 25, 1971, following the decision of the United States Supreme Court in the case of *Griggs v. Duke Power Company,* [5 EPD P 8017] 401 U.S. 424, 28 L.Ed.2d 158, 91 S. Ct. 849 (1971). The defendant no longer utilizes test scores of its employees in determining an employee's qualifications for promotion, or for any other purpose.

Good Faith Compliance and Voluntary Freezes

29. The defendant has made a good faith effort to comply with all federal laws and executive orders in providing equal employment opportunities to all of its employees, both black and white. Implementation of a testing program was done in an effort to insure hiring of qualified employees and to provide an objective and fair standard for promotion. The Government, through the Office of Federal Contract Compliance, expressly approved of the defendant's testing programs and recommended them to other government contractors. The testing program applied equally to black and white employees. White employees with long seniority who failed to score well on the test were passed over for promotions as well as black employees. Modifications and adjustments were made in the testing program between 1964 and March 31, 1971, to assist in hiring the hard core unemployed and to provide greater opportunity for advancement in the unskilled and semi-skilled jobs, and as developments in the law occurred.

30. During the period between July 5, 1965, and October 1, 1971, a substantial number of blacks were offered higher-paying jobs, but turned them down. During this period 554 blacks were offered and accepted promotions, while 573 blacks were offered promotions and declined them, and 76 blacks were demoted for inability to satisfactorily perform the jobs. A substantial number of black employees have also refused to bid on higher-paying jobs that were posted for bidding. Some black employees who failed to score well on the test exercised initiative to take further training with the defendant's assistance, and subsequently improved their test scores and advanced into higher paying jobs. The defendant, through utilization of its bidding system, has been trying to place blacks in higher-paying jobs, although the effort has resulted in increased costs, increased damage to equipment, and higher demotion rates for inability to perform the work.

***9** 31. Any award of back pay would penalize those black employees, as well as white employees, who strove to improve themselves and their job performance during the period in question. Due to the laudable and unique "extra compensation" plan whereby no earnings are paid outside the company and the employees, both black and white alike, share in the earnings of the defendant, any award of back pay would reduce the earnings of the company available for distribution to the employees, and would penalize all employees of the company. An award of back pay to black employees who were passed over for better jobs for lack of appropriate test score, when there were also white employees who were not promoted for the same reason, would be an inequitable and unconscionable result. An award of back pay to black employees who were passed over for better jobs for lack of appropriate test scores, when the job vacancy was awarded a black employee with the appropriate test score would likewise be an inequitable and unconscionable result, and unauthorized by Title VII since no racial overtone can be attributed by the selection of one black over another black.

32. The overall objective of the defendant during the

period in question has been to provide to its employees fair and equal employment opportunities consistent with the safe and efficient operation of its facilities and the general welfare of all its employees. The defendant's efforts throughout have been to comply with the law as it existed during the period when this very complex field of law was undergoing a constant process of change and development.

Relevant Statistics

33. The racial composition of the various departments as of January 1, 1963; January 27, 1965; September 19, 1969; and August 15, 1971, was as follows:

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34. The defendant does not maintain formal lines of progression in any of its departments. Pay groups or wage progression schedules govern the advancement of employees. At the present time there are 15 pay groups:

(a) Pay groups 1-8 are considered the skilled and semi-skilled jobs.

(b) Pay groups 9 and 10 are considered the more semi-skilled jobs.

(c) Pay group 11 includes the skilled, noncraft, technical and clerical jobs.

(d) Pay groups 12 and 13 are the craft and technical jobs.

(e) Pay group 14 includes the secondary supervisory jobs (leadmen).

(f) Pay group 15 includes the primary supervisory jobs (foremen).

35. Although there were and continue to be blacks in substantially all of the departments, the overwhelming majority of the black employees historically were and continue to be employed in the Pay Group 1-8 jobs in the various departments and particularly in the Mono-Cast 1, 2 and 3, and Foundry.

36. The number of hourly paid employees by race for the period 1965-1970, was as follows:

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37. During the 1964-1969 period, when ?? applicants were subject to the educational and testing standards, more whites than blacks were employed because a greater percentage of black applicants were unable to meet these requirements.

***10** 38. The number of all black jobs decreased through 1969 as the number of mixed jobs increased due to the movement of whites into lower paying black jobs. From 1963 through 1969, the number of all white jobs remained approximately constant. Promotions of blacks to the higher paying white jobs, for reasons suggested above, were not being accomplished.

The following chart shows racial staffing, 1963-1971:

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39. Pursuant to the January, 1971, policy on seniority, employees were not allowed to carry over their seniority to the department of transfer. That is to say, the defendant continued to maintain a departmental seniority procedure.

40. Out of approximately 50 lead men, only 3 have been black. The defendant has never had a black foreman.

Conclusions of Law

1. The Court has jurisdiction of this action and of the parties hereto.

2. The history of the testings, as they existed and were administered by defendant from July 2, 1965, to March 25, 1971, recorded in the findings of fact, supra, is convincing that they were not discriminatorily applied to defendant's black employees. Their adverse impact on the employment opportunities of blacks is equally clear. Judged by the standard established by *Griggs v. Duke Power Co.,* [5 EPD P 8017] 401 U.S. 424 (1971), they could not pass muster. On March 8, 1971, the defendant eliminated all testing, and since that date defendant has not utilized test scores for any purpose.

[No Injunction]

When a violation has been established or found by the Court and the defendant claims to have ceased the unlawful practice, the defendant has a very heavy burden of satisfying the Court that there is no reasonable expectation that the unlawful activity will be repeated. *Newman v. Piggie Park Enterprises,* [2 EPD P 9834] 390 U.S. 400; *Jenkins v. United Gas Corp.,* 400 F.2d 28 (5th Cir. 1968); *Oatis v. Crown Zellerbach,* [1 EPD P 9894] 398 F.2d 496 (5th Cir. 1968), and *Johnson v. Seaboard Coastline R.R. Co.,* 405 F.2d 645 (4th Cir. 1968). In view of the unique nature of this corporate defendant and its past efforts to comply fully with all federal statutes and orders proscribing racial discrimination, the Court concludes that it has met that heavy burden and that injunctive relief would be inappropriate.

[Effect of Statistics]

3. Understandably, plaintiffs rely heavily upon statistics to support an inference of invidious discrimination. But this is not a voter registration, jury selection, or school desegregation case. Thus the familiar platitude: "In the problem of racial discrimination, statistics often tell much, and courts listen," *Alabama v. U.S.,* 304 F.2d 583, 586 (5th Cir. 1962), is not an unmitigated evidentiary windfall. In the area of employment, with its complexities and variables, statistics must be analyzed with careful attention both to supportive and opposing facts.

Only three variables appear in the statistical data marshaled in behalf of plaintiffs. They are:

***11** (1) racial employee percentages;

(b) job group for pay purposes; and

(c) plant seniority.

A careful reading of the record in the case sub judice reveals the factual existence, nowhere embodied in the statistics, of the following variables:

(a) voluntary refusal of training opportunities which are prerequisite to promotion;

(b) voluntary refusal of promotions;

(c) lack of requisite qualifications;

(d) failure to request promotion;

(e) poor job performances which have defeated promotion or resulted in demotion;

(f) voluntary transfers to lower job classifications;

(g) availability or lack of job vacancies; and

(h) lack of motivation.

The Court concludes that, under the totality of the evidence before it, since 1963 jobs in defendant's plant have not been restricted according to race but rather have been open to qualified employees regardless of race as vacancies have occurred.

[Promotion and Transfer]

4. With respect to the promotion and transfer policy and practices of defendant, it is contended by plaintiffs that its system of departmental seniority is a per se violation of Title VII. This Court does not agree. In evaluating such system the Court has undertaken the two step analysis mandated by *U.S. v. Jacksonville,* [3 EPD P 8324] 451 F.2d 418 (5th Cir. 1971), and has probed the questions:

(a) Does the present seniority system perpetuate the effects of past discrimination stemming from the use of unvalidated testing practices?

(b) If so, is it required by business necessity?

The evidence persuades the Court to answer the first question in the negative. Black employees cannot be heard to complain that they were locked in a particular job when they were not qualified to perform a job in a higher pay group. The record is replete with evidence of black employees who have refused promotions, requested demotions, declined training opportunities, and failed or refused to bid on higher paying jobs, thus voluntarily freezing themselves in the lower paying ones. Moreover, the evidence is undisputed that test scores have played no part in promotions or transfers since March 8, 1971.

Alternatively, the second question, on this record, is deserving of an affirmative answer. The efficiency of

defendant's operations is not only promoted by, but it also requires, service in a lower job qualification as a condition to promotion to a higher, functionally related one.

5. Plaintiffs insist that when an employee transfers to a job in another line of progression or department which provides a lower rate of pay than his then permanent job classification and in which the highest paying job exceeds the rate of the job from which he transfers, he should continue to be paid the straight time hourly rate of pay he was receiving in his permanent position immediately prior to transfer, in the language of the shop referred to as the "red circle rate." Instead of red circling an employee's wages, upon transfer the defendant gives him a minimum credit of one thousand hours for his past service. This would seem to be a policy decision within the peculiar competence of management. That it has no discriminatory impact upon black employees is clear since it is even-handedly applied to whites.

[Apprenticeship and Journeyman Programs]

***12** 6. Defendant has practiced no invidious racial discrimination in the administration of its apprenticeship and journeyman programs.

[No Back Pay]

7. Alternatively, in the exercise of discretion, *LeBlanc v. So. Bell T. & T. Co.,* [4 EPD P 7832] 460 F.2d 1228 (5th Cir. 1972), and *Johnson v. Georgia Highway Express,* [2 EPD P 10,119] 417 F.2d 1122 (5th Cir. 1969), the Court declines to award back pay in view of the demonstrated good faith compliance by defendant with Title VII, *LeBlanc v. So. Bell T. & T. Co., supra,* and *Parham v. Southwestern Bell Telephone Co.,* [3 EPD P 8021] 433 F.2d 421 (8th Cir. 1970), and because such an award is not necessary to insure future compliance therewith. *Phelps Dodge Corp. v. NLRB,* 313 U.S. 177 (1941).

8. With respect to the constitution of and election to membership on defendant's Board of Operatives, the Court reaffirms its orders of January 21, 1970, and March 20, 1970.

9. Plaintiffs are entitled to recover a reasonable attorney's fee measured by services performed with reference to the foregoing orders.

10. Plaintiffs are not entitled to any other relief for which they pray.

All Citations

Not Reported in F.Supp., 1972 WL 296, 7 Fair Empl.Prac.Cas. (BNA) 1010, 8 Empl. Prac. Dec. P 9474