

IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

UNITED STATES OF AMERICA,)	
)	
Plaintiff,)	
)	
vs.)	CIVIL ACTION
)	
SHEET METAL WORKERS' INTERNATIONAL)	No. 66 C 58 (2)
ASSOCIATION, AFL-CIO, LOCAL UNION NO. 36;)	
and LOCAL NO. 1, INTERNATIONAL BROTHERHOOD)	
OF ELECTRICAL WORKERS, AFL-CIO,)	
)	
Defendants)	

MEMORANDUM OF DEFENDANT SHEET METAL WORKERS LOCAL 36

IN SUPPORT OF ITS PROPOSED FINDINGS OF FACT

AND CONCLUSIONS OF LAW

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I. Introduction

This action was initiated by the United States Department of Justice on February 4, 1966. The complaint^{1/} seeks relief against defendant Sheet Metal Workers' International Association, AFL-CIO, Local Union No. 36 (hereafter referred to as "Local 36") for alleged violation of Section 707 of Title VII of the Civil Rights Act of 1964 (42 U.S.C. 2000e through 2000e-15). Section 707 (a) provides in part as follows:

"Section 707.(a) Whenever the Attorney General has reasonable cause to believe that any person or group of persons is engaged in a pattern of practice of resistance to the full enjoyment of any of the rights secured by this title, and that the pattern or practice is of such a nature and is intended to deny the full exercise of the rights herein described, the Attorney General may bring a civil action in the appropriate district court of the United States....."

(emphasis supplied)

^{1/} Claim 1 of the Complaint was dismissed by the Court on July 26, 1966. The trial proceeded on Claim 2 of the Complaint.

The trial on the merits of Claim 2 was held in St. Louis, Missouri, on June 15th, 16th, 19th and 20th, 1967. At the close of the trial, the Court permitted plaintiff and defendants (Local 36 and Local No. 1, International Brotherhood of Electrical Workers, AFL-CIO) to submit proposed findings of fact and conclusions of law, and a supporting brief.

II. Summary of the Evidence

The pleadings, depositions, interrogatories, exhibits, records, and transcript of the trial of this case have been quite extensive. Therefore, before setting forth and discussing the tremendous array of facts that have been assembled and presented to the Court, Local 36 would like to briefly comment on the totality of the evidence and lack of evidence that was adduced.

This suit was brought under Section 707 of the Civil Rights Act, which provides that the Attorney General may bring the cause of action whenever he has reasonable cause to believe that a person or group of persons is engaged in a pattern or practice of resistance of any of the rights secured by Title VII, and that the pattern or practice is intended to deny the full exercise of such rights. Assuming that plaintiff introduced all of the evidence that it had before the complaint was filed, and all of the evidence that it gathered from February, 1966 through the trial on June 20, 1967, it is apparent that plaintiff's pattern or practice of resistance suit against Local 36 consists of two telephone inquiries by Clarence Lee and Vernon Wells in April, 1967, a hiring hall arrangement that isn't even in existence and won't be until January 1, 1968, and the fact that on February 4, 1966, there was only one (1) Negro member or apprentice in Local 36.

In the absence of facts, plaintiff has resorted to arguing statistics, made conclusions without factual foundation, and is sitting in judgment concerning the affirmative actions that Local 36 have taken in the past which is over and above any legal requirement required of Local 36 or any labor organization under the statute.

The simple conclusion is that there is no evidence of any Negro ever being rejected, turned down or discriminated as to membership or hiring hall referral by Local 36; nor is there any evidence that any Negro was ever discriminated against by the Sheet Metal Workers Joint Apprenticeship Committee. Instead, as set forth below, the evidence establishes that Local 36 sought to sign a contract with the only Negro sheet metal contractor in the Midwest Contractors Association and to organize the Negro sheet metal workers of said contractor, but in each case was turned down. Local 36 was willing to sign a contract with Wells and Lee Sheet Metal Company, and to take Wells and Lee in as members, but was turned down. Furthermore, the Joint Apprenticeship Committee aggressively sought to get Negro applicants for the Sheet Metal Apprenticeship Program, but in two years only 12 Negroes applied, and of this group only 2 Negroes bothered to show up for the tests Both of those who showed up were ultimately taken into the Program.

In answer to interrogatories directed toward defendant, it was established that no complaints had been filed against Local 36 with the Department of Justice, the Equal Employment Opportunity Commission, and the Office of Federal Contract Compliance. Furthermore, it was stipulated that no charges had been filed against Local 36 under Section 296.010 of the Missouri Statutes or under Ordinance 51512 of the City of St. Louis.

There is no evidence that any Negro ever applied at the hall to become a member of Local 36.

There is no evidence that any Negro ever applied for referrals out of the non-exclusive out-of-work referral system.

There is no evidence that any Negro ever applied to take the journeyman test.

There is evidence that the Sheet Metal Worker Apprenticeship Program under the Joint Apprenticeship Committee has been in compliance with Title 29 PART 30 Non-discrimination from February, 1965 to the present time.

There is evidence that all of the 12 Negroes that applied for the Apprenticeship Program since July 2, 1965 were assigned testing dates, but that only 2 Negroes appeared to take the tests. Both of the Negroes that took the tests were then interviewed and are now Sheet Metal Apprentices.

There is evidence that starting in May, 1965, and continuing to the present time, the Joint Apprenticeship Committee has distributed information about the apprenticeship program to metropolitan high schools of the Greater St. Louis area, initiated a news article for the Post-Dispatch (February, 1966) about the program, and has cooperated fully and completely with the United States Department of Labor Apprentice Information Center.

There is evidence that Local 36 sought to enter into negotiations with the only Negro sheet metal contractor (Kennedy and Sons Sheet Metal Shop) affiliated with the Midwest Contractors Association, and that Local 36 also sought to organize, without success, the Negro employees of said contractor who were members of Local 99, CIU. These efforts were made in December, 1966, which, under the contract bar rulings of the National Labor Relations Board^{2/} was the only time that such efforts could be made because of the contract between the Midwest Contractors Association and Local 99, Congress of Independent Unions.

III. EVIDENCE

Local 36 is a labor organization representing sheet metal workers in the construction industry in the City of St. Louis and the following 44 counties in the Eastern half of the State of Missouri: Adair, Bollinger,

^{2/} Even plaintiff recognizes the time restrictions concerning organization and recognition as it states in its proposed Remedy, Paragraph III (b) that "As to persons working under a CIU collective bargaining agreement, the invitations /to become members/ shall be made at such time as may be consistent with the National Labor Relations Act." The contract bar rules are set forth in Deluxe Metal Furniture Co., 121 NLRB 995 and Leonard Wholesale Meats, 136 NLRB 1000.

Butler, Cape Girardeau, Clark, Crawford, Dent, Dunklin, Franklin, Gasconade, Iron, Jefferson, Knox, Lewis, Lincoln, Macon, Madison, Maries, Marion, Monroe, Mississippi, Montgomery, New Madrid, Osage, Pemiscot, Perry, Pike, Phelps, Pulaski, Putnam, Ralls, Schuyler, Scotland, Scott, Shelby, Stoddard, St. Charles, St. Francois, St. Genevieve, St. Louis, Sullivan, Warren, Washington, and Wayne. Local 36 exists for the purpose of bargaining with employers concerning wages, hours and other terms and conditions of employment of its members (Stip. No. 4, paragraph 1).

On July 2, 1965, Local 36 had approximately 1175 journeyman members (Stip. No. 4, para. 10). On February 4, 1966, Local 36 had approximately 1,250 journeyman members (Stip. No. 4, para. 11). On April 15, 1967, Local 36 had approximately 1,275 journeyman members (Stip. No. 4, para. 12). The membership of Local 36 is engaged in the construction industry, doing work on sheet metal which is 10 gauge or lighter (Tr. pp. 468, 476, 477). Local 36 has only two classifications, journeyman and apprentices. Some of the journeymen are qualified in all phases of sheet metal work, whereas others specialize in one phase of the work. Various areas of specialization include welding, layout work, architectural sheet metal work, and field erection work (Dep. of Zimmermann, pp 9,10).

Local 36 elects its officers which include a president, vice-president, recording secretary, financial secretary-treasurer, business manager, business representatives, two members of the executive board, and three trustees (Tr. pp. 468). Local 36 is affiliated with the Sheet Metal Workers' International Association, AFL-CIO. Copies of the 1962 and 1966 Constitution and Ritual of the International Union were attached as Attachments A and B respectively to Stipulation No. 4. The 1958 Constitution and Ritual of the International Union was introduced as Plaintiff Exhibit No. 15. The By-Laws and Working Rules of Local 36 was attached as Attachment C to Stipulation No. 4 and also introduced as Plaintiff Exhibit No. 17.

Local 36 negotiates with sheet metal contractors concerning the wages, hours and terms and conditions of employment of its members. In the 1963

negotiations a number of sheet metal contractors were represented in the negotiations by the Sheet Metal and Air Conditioning Contractors Association of St. Louis, Missouri, an organization composed of contractors and subcontractors which employ persons engaged in the sheet metal industry. The standard form of union contract negotiated for the 1963 - 1966 period was attached as Attachment D to Stipulation No. 4. In 1965 and 1966, Local 36 was certified by the National Labor Relations Board in 95 shops on an individual shop basis. Local 36 then withdrew from multi-employer bargaining with the Sheet Metal and Air Conditioning Contractors Association of St. Louis, Missouri, and all of the 1966 negotiations were done on an individual sheet metal contractor basis (Stip. No. 4, para. 4). The standard form of union contract negotiated in 1966 was attached as Attachment E to Stipulation No. 4. As of April 15, 1967, Local 36 had approximately 150 agreements with sheet metal contractors in the City of St. Louis and the aforementioned 44 counties in the State of Missouri (Stip. No. 4, para. 3).

a. Local 36's Referral System

Local 36 presently has a non-exclusive referral system (Tr. pp 469). The referral system has been in effect for a number of years, and was negotiated between Local 36 and the sheet metal contractors (Tr. pp 469). Any person looking for work, union or non-union, can sign up for the referral system. The applicant completes an out-of-work card on which he puts his name, address, telephone number, Social Security number, and any specific skills that he might have relating to the sheet metal trade. The card is stamped with a time clock and the applicant is placed on the out-of-work list based on the date and time that he signed up (Tr. pp 469, 470).

The sheet metal contractors call the union hall for help. If the contractor wants a man with a special skill, the top man on the list,

whether union or non-union, with that skill is sent out (Tr. pp 470). The contractor under the past and present contracts, can request a person by name, whether he is at the top of the list or not. If the contractor does not ask for a person by name or seeks somebody with a special skill, then the top man on the out-of-work list is referred to the contractor. The contractor has the right under the contract to reject a person sent to him through the referral system, and to request another person (1963 contract, ARTICLE IV of Addendum; 1966 contract, ARTICLE IV).

There are no conditions or requirements that a person must fulfill before he can sign up on the out-of-work list (Tr. pp 470). There are no tests or referral fees (Tr. pp 471). After a person has signed up for the out-of-work list, he can contact contractors by telephone and letter, and seek to have the contractor call the hall and request him from the out-of-work list (Tr. pp 470).

There is no evidence that any Negro was ever discriminated against by the Local 36 referral system.

There are non-Union men on Local 36's out-of-work list, and they are given the same priority as the Local 36 members (Zimmermann's deposition, pp 25,26). Non-Union sheet metal workers who have been referred out by Local 36 are not replaced by Local 36 members when the latter persons are laid off because the job they are on is completed (Zimmermann's deposition, pp 26, 27).

Local 36 and the sheet metal contractors negotiated a revised referral system in 1966 which is not yet in existence and which doesn't take effect until January 1, 1968 (1966 contract, ARTICLE IV). The revised referral system provides for four basic groups. Group I - 4 years experience in the sheet metal construction industry, residents of the geographical area, passed a journeyman's examination, and have been employed under a collective bargaining agreement between the parties for a period of at least one year in the last four years; Group II - 4 years experience in the sheet metal construction industry and passed a journeyman's examination; Group III - 1 year experience in the sheet metal

construction industry; and Group IV - summer employment for High School Graduates, registered applicants on the Apprentice Training List, and college students (1966 contract ARTICLE IV). The contract provides that all referrals shall be made "without discrimination against such applicants by reason of membership or non-membership in the union, race, creed, religion, color, national origin, sex or ancestry, and such referral shall not be affected in any way by rules, regulations, by-laws, constitutional provisions, or any other aspect or obligation of Union membership policies or requirements." (1966 contract, ARTICLE IV, Section 2-B-3).

b. Sheet Metal Workers' Apprenticeship Program

Local 36 participates with sheet metal contractors in a joint sheet metal worker apprenticeship program (Tr. pp 426). Article XII of the contracts (such as the 1963 and 1966 contracts) provides for the establishment of a Joint Apprentice Committee which shall formulate and make operative the rules and regulations governing eligibility, registration, education, transfer, wages, hours, working conditions of duly qualified apprentices, and the operation of the apprentice system (1963 and 1966 contracts, ARTICLE XII, Section 1).

The Joint Apprentice Committee is composed of six (6) members; three (3) selected by sheet metal contractors, and three (3) selected by the Union. John Meyer, a sheet metal contractor, is the present Chairman of the Joint Apprentice Committee; and, Ed Schultz, a sheet metal journeyman, is the present Secretary of the Committee (Tr. pp 425, 426). Neither the Union or the sheet metal contractors dominate or control the Joint Apprentice Committee (Tr. pp 427).

Until the latter part of 1964, sheet metal contractors selected all of the apprentices, and referred the applicants to the Joint Apprentice Committee for routine approval and registration (Schultz deposition, 10/19/66, pp 42, 43).

In early 1964, the Joint Apprentice Committee was notified by the U.S. Department of Labor, Bureau of Apprenticeship and Training, that new regulations were issued by the Secretary of Labor and published in the Federal Register (28 F.R. 11313) which required that all apprenticeship programs registered by the Bureau of Apprenticeship and Training provide equal opportunity for the acceptance and training of all qualified applicants (Defendant Exhibit No. O). The Regulation referred to was Title 29 - LABOR, Part 30 Nondiscrimination in Apprenticeship and Training. The Joint Apprentice Committee during calendar year 1964 worked on the revision of its apprenticeship program, and on December 21, 1964, submitted to the Department of Labor proposed qualification and selection procedures for apprentice applicants to the Sheet Metal Workers Apprenticeship Program (Plaintiff Ex. No. 18).

Hugh C. Murphy, Administrator, Bureau of Apprenticeship and Training, U.S. Department of Labor, notified the Joint Apprentice Committee on January 22, 1965, that the amended qualifications and selection procedures incorporated the basic standards of apprenticeship recommended by the Federal Committee on Apprenticeship (Defendant Ex. No. P, Plaintiff Ex. No. 18). On February 18, 1965, C.E. Rutledge, Apprenticeship Representative, U.S. Department of Labor, informed the Joint Apprentice Committee that their Sheet Metal Workers Apprenticeship Program was submitted to the National Office for program review pursuant to Title 29, CFR-Part 30, and it was found to be in compliance with this regulation (Defendant Exhibit No. Q).

There is no evidence that the Bureau of Apprenticeship and Training, U.S. Department of Labor, has found any fault with the Sheet Metal Workers Apprenticeship Program from its original compliance in February, 1965, to the present time. Title 29, PART 30.12 provides for a complaint procedure if an applicant or apprentice believes he has been discriminated against on the basis of race, creed, color, national origin, sex or occupationally irrelevant physical requirements; yet, there is no evidence of any applicant or apprentice filing a complaint against this apprenticeship program.

Applicants for the sheet metal apprenticeship program must be between the ages of 17 and 23 (up to 25 if a veteran), and have a high school diploma or its equivalent (Tr. pp 427). Applications are accepted on the 3rd Monday night of every month, at which time a member of the Joint Apprentice Committee discusses the benefits of the trade to the applicants and answers questions about the application and the apprenticeship program (Tr. pp 457, 458). All applicants that submit applications and meet the basic qualifications are assigned testing dates (Tr. pp 428). There is no charge for filing an application and taking the test (Tr. pp 428). Each man that is assigned a testing date, is given a sheet of paper stating the date, time and location of the tests, and is asked to sign a form that he will appear to take the tests (Tr. pp 428).

The tests are given by DeCoursey Testing Laboratory, an independent testing company (Tr. pp 428). The tests include questions on verbal reasoning, mathematics, numerical and abstract reasoning, mechanics, language usage, grammar and spelling, and finger dexterity (Tr. pp 429). There is a maximum score of 100 points on the tests. There is no passing or failing grade.

All men who take the tests are assigned an interview before all members of the Joint Apprentice Committee (Tr. pp 430). Each member of the Joint Apprentice Committee scores the interview independently of the other members, and at the conclusion of the interview the results are averaged (Tr. pp 430, 431). The interview consists of questions concerning working experience, military service, group activities, interest in trade, attitude and technical knowledge relating to the trade (Plaintiff Ex. 18, page 3). Points are given for particular courses taken during school, and these points are then combined with the average score of the interviews, with a maximum total of 100 points being possible. The points obtained on the tests are then added to the interview and education points (maximum of 200), and all applicants with a combined score of 80 points out of 200 are notified in writing that they are acceptable for training (Tr. pp 432). Men with less than 80 points are notified that they have not been accepted.

The applicants are then slotted on an "acceptable for training" list according to their combined point score. Men with higher scores are placed higher on the list than those with lower scores, even though they took the tests or applied at a later date (Schultz deposition 10/19/66, page 32). When a contractor wants an apprentice, he contacts the Joint Apprentice Committee and the top applicant on the "acceptable for training" list is assigned to that contractor (Schultz deposition, 12/14/66, page 31). The apprentice then begins a four year (8000 hour) apprenticeship which includes attending O'Fallon Technical High School for four hours per week (Tr. pp 443). Edward Schultz is the sheet metal apprentice instructor at O'Fallon Technical High School and is employed by and paid by the St. Louis Board of Education (Tr pp 442, 443).

Upon completion of their apprenticeship, the apprentices pay an initiation fee of 100 times the journeyman hourly rate that was in existence at the date they started their apprenticeship (Tr. pp 434). The initiation fees of apprentices who became members during the period June, 1965 to August, 1966, are shown on Plaintiff Ex. 11A (see also Plaintiff Ex. 11 A with additions of defendant noted in red).

On May 28, 1965, the Joint Apprentice Committee sent a letter with a form summarizing the amended qualifications and procedures to twenty-eight (28) public schools in St. Louis and St. Louis County, the Missouri State Employment Service, the St. Louis Council on Human Relations, the Archdiocesan School offices, O'Fallon Technical High School, and the Ranken School of Mechanical Trades (Defendant Exhibit No. R, tr. pp 439). The letter indicated that applications will be taken throughout the year, and that persons may apply at the Union office any time between 9 AM and 4 PM, Monday through Friday. Persons that applied at the Union office were directed to appear and make out the application on the 3rd Monday night of the month (Tr. pp 448, 449).

In February, 1966, representatives of the Union and the Joint Apprentice Committee contacted the St. Louis Post Dispatch in order to publicize the Sheet Metal Worker Apprenticeship Program (Tr. pp 440). A reporter visited the apprenticeship classes at O'Fallon Technical High

School, and was given information about the program and how persons could apply for the program. A one-fourth (1/4) page article and picture appeared in the Sunday, February 20, 1966, edition of the St. Louis Post-Dispatch (Defendant Exhibit No. S). The article expressly pointed out that there was one Negro in the third year of the program, and that the program was "color blind".

On April 13, 1967, the Joint Apprentice Committee sent out another letter with a summary of the qualifications and procedures to approximately eighty-four (84) schools, agencies and organizations (Defendant Exhibit No. T, tr. pp 441, 442).

The Sheet Metal Worker Joint Apprentice Committee has also cooperated with the Apprenticeship Information Center, which is associated with the U.S. Department of Labor and operated out of the Missouri Division of Employment Security (Tr. pp 163, 164, 443). The purpose of the Apprenticeship Information Center is to gather information about various apprenticeship programs and to disseminate this information to schools, business organizations, minority organizations and other interested persons (Tr. pp 391). The Apprenticeship Information Center was formally opened on December 17, 1965, and Fact Sheet No. 1 (which included pertinent data about the Sheet Metal Worker Apprenticeship Program) was mailed out on January 10, 1966 to approximately 185 schools, companies, governmental agencies, minority groups, and interested persons (Defendant Exhibit No. E). Organizations included in the distribution were CORE, ACTION, Urban League, NAACP, Human Development Corporation, Work Experience Project, St. Louis Council on Human Relations, Rehabilitation Center of Greater St. Louis, Union-Sarah District Sub-Station, Kinloch Out-Station, and Yeatman Out-Station. Fact Sheet No. 2 included information about the sheet metal worker apprenticeship program and was mailed to the aforementioned list on March 11, 1966. Another Fact Sheet was mailed out on November 3, 1966. Additional informational bulletins were mailed out on November 3, 1966 (Bulletin No. 7) and April 6, 1967 (Bulletin No. 12) (Defendant Exhibit No. E).

The Apprenticeship Information Center sent news releases to forty-six (46) newspapers (Post-Dispatch, Globe-Democrat, suburban and neighborhood, religious, labor and ethnic groups), fifteen (15) radio stations, and five (5) television stations concerning the Sheet Metal Workers Apprenticeship Program, and other apprenticeship programs (Defendant Exhibit No. F). News releases involving the sheet metal workers went out on January 17, 1966, March 2, 1966, April 14, 1966, April 7, 1967, May 3, 1967 and June 15, 1967 (Defendant Exhibit No. F). The Negro press was included in the distribution (The Crusader, St. Louis American, St. Louis Argus, and St. Louis Defender) as well as radio stations that direct their programming to the Negro community (KATZ and KXLW). Articles appeared in the St. Louis Argus (January 25, 1966), Globe-Democrat (January 20, 1966), and St. Louis Post-Dispatch (January 23, 1966) stating that persons interested in apprentice training in various trades, including sheet metal worker, should contact the Apprenticeship Information Center (Defendant Exhibit No. G).

The Apprenticeship Information Center has also prepared a Sheet Metal Worker Occupation Guide which was incorporated in an Apprenticeship Training Book and distributed to organizations and persons (Defendant Exhibit I-2). News releases were made about the availability of the aforesaid book (Globe-Democrat, May 4, 1967, Defendant Exhibit No. F).

It was stipulated by the parties that there were 99 apprentices in the sheet metal workers apprenticeship program as of July 2, 1965; 110 apprentices as of February 4, 1966; and 116 apprentices as of April 15, 1967 (Stip. No. 4, para. 10, 11 and 12).

In the period from July 2, 1965 to the date of the trial in June, 1967, approximately 18 - 20 Negroes inquired at the Union Hall about the sheet metal workers apprenticeship program (Tr. pp 459). Of this group, about 12 Negroes filled out the application forms and were assigned testing dates like all other applicants (Tr. pp. 459). These applicants also signed a form stating that they would appear for the tests (Tr. pp. 459, 460). Only two (2) Negroes actually appeared and took the tests. Both

of these applicants were then assigned interview dates, and were subsequently interviewed by the Joint Apprentice Committee (Tr. pp 460). Each of the Negro applicants who took the tests and were interviewed by the Committee, had test and interview combined scores higher than 80 and were placed on the "acceptable for training" list. Gilbert Holmes began his apprenticeship training on January 9, 1967, and Daniel L. Crousley began his apprenticeship training on May 1, 1967 (Stip. No. 4, para. 13, Tr. pp. 46). A third Negro, Dorris Strong, had been accepted into the sheet metal workers apprenticeship program on July 16, 1963 (Stip. No. 4, para. 13).

Questionnaires requesting relationship by blood or marriage to members or former member or apprentice of Local 36 were sent by plaintiff to 77 persons who were admitted to the apprenticeship program during the period July 2, 1965 through January 25, 1967. Sixty-four (64) answers were received, in which 41 apprentices answered that they were "white and not related", 22 answered that they were "white and related by blood or marriage" and one stated that he was a Negro who was not related (Stip. No. 4, second part, para. 18-b).

Approximately 66% of the apprentices were not related by blood or marriage, and 34% were related by blood or marriage.

Twenty-four persons (in the period 7/2/65 - 1/25/67) were rejected for failing to receive a combined total of 80 points on the tests and interview. Of the 16 persons who returned their questionnaires, 7 stated that they were "white and not related" and 9 were "white and related" (Stip. No. 4, para. 18-d). 56% of those who were rejected for failing to receive the minimum score of 80 out of 200 points were white and related by blood or marriage; 44% of those rejected were white and not related.

Henry Spitzmiller, called by plaintiff, testified that he had been rejected for failing to receive the minimum number of points (Tr. pp 225). Spitzmiller stated that he had a father, brother and cousin in Local 36, and that his father had been on the Executive Board

for 6 years and his brother was presently on the Executive Board (Tr. pp 225, 226). Spitzmiller testified that he applied like all other applicants, took the test at De Coursey Testing Laboratory, and then was interviewed by the Joint Apprentice Committee (Tr. pp 226, 227). Spitzmiller said that he received his rejection letter in the mail following his interview (Tr. 227).

All three of the apprentices that were called by plaintiff testified that they applied for the program and were assigned a testing date; took the test at DeCoursey Testing Laboratory; and subsequently were interviewed by the Joint Apprentice Committee (Tr. pp 208, 209, 214, 215, 219, 220).

There was no evidence that any person received any special or favored treatment to get into the sheet metal workers apprenticeship program; nor is there any evidence that any person was discriminated against. This includes both white and Negro applicants; and applicants who were either related by blood or marriage to a member or former member or apprentice of Local 36, or not related by blood or marriage.

c. Membership in Local 36

Local 36 acquires its journeymen members through the apprenticeship program, by direct application of interested persons, and as an outgrowth of organizational campaigns. Apprentices apply for journeymen status upon completion of their apprenticeship training (Plaintiff Exhibit No. 11). The initiation fee for apprentices is 100 times the journeyman hourly rate that was in force when they were accepted as an apprentice (Tr. pp 434). Apprentices do not take a test upon completion of their apprenticeship program. All members pay the same dues (Tr. pp. 488).

Persons who apply directly to Local 36 for journeyman status are given an examination. Such persons first fill out an application which requests a detailed breakdown of the applicants sheet metal experience

(Plaintiff Exhibit No. 14), and are then assigned a testing date. The examination is given by Edward Schultz at O'Fallon Technical High School (Tr. pp 443, 444). Schultz instructs the apprentices at O'Fallon Technical High School, and the examination is worked into his schedule (Tr. pp 454). The examination consists of three sets of written questions, the Purdue Sheet Metal Test, a layout problem and a welding test (Tr. pp 444). Upon completion, Schultz notifies the Business Agent as to the persons qualifications on all aspects of the trade and in certain areas (Tr. pp 444, 455). Schultz notes the scores on the test sheets and sometimes adds comments as to why the person is or is not qualified 3/.

Applicants who pass the examination are told to see William Boyd, Financial Secretary-Treasurer (Tr. pp 446). The applicant fills out the official application form for the Sheet Metal Workers' International Association (Plaintiff Exhibit No. 11) and pays the initiation dues of one hundred times the current journeyman rate (Tr. pp 472). Persons who were initiated into Local 36 during the period June, 1965 to August, 1966, and the total initiation fee paid, are listed on Plaintiff Exhibit 11 A. Of the 95 persons initiated into Local 36 during the aforesaid period, 20 were former apprentices, 43 paid an initiation fee of 100 times the journeyman rate, and 32 paid an initiation fee of \$50 to \$150.

There is no vote of the membership or the Executive Board on an applicant (Tr. pp 480). The applicant is not required to get any sponsors or persons to "vouch" for him (Tr. pp 480). The space on the application form for Vouchers is routinely and automatically filled in by members of the Executive Board (Tr. pp 479, 480).

3/ Plaintiff Exhibit No. 14 A (with additions of defendant Local 36 in red ink) includes comments that were made by Schultz who gave the examination. The comments explain the examiner's views as to why he felt the person was or was not qualified in the sheet metal trade. For instance, Larry T. Haywood failed and Schultz wrote on his application: "Cannot layout or weld, no experience". Elwood D. Palmer's application had the following comment: "Was able to pass welding test; good welder; working for Lyon". Other comments are set forth on the aforementioned Exhibit.

There was no evidence that any Negro applied for membership in Local 36 during the period July 2, 1965 to the date of the trial (Stipulation No. 4, para. 16). Nor has any Negro applied to take the Journeyman Test (Tr. pp 445, 446).

Of the 104 persons who became Journeyman members of Local 36 during the period July 2, 1965 through January 25, 1967, 90 persons answered the questionnaire. Of these 90 persons, 10 [11%] were related by blood or marriage to members or former members or applicants of Local 36. 80 persons or 88% were not related by blood or marriage (Stipulation No. 4, para. 18-a).

The Sheet Metal Workers' International Association has a policy of organizing the "unorganized" (Tr. pp 472, 473). The purpose of such organizational campaigns is to bring the people up to decent wage levels (Tr. pp 473). Local 36 has engaged and continues to engage in a practice of organizing non-union sheet metal employees in its jurisdictional area (Stipulation No. 4, para. 17). Local 36 charges an initiation fee of between \$50 to \$150 during an organizational campaign, depending upon the location of the shop (Tr. pp 473, 485).^{4/} During this organizational period, the applicants are not required to take a test (Tr. pp 473). Once a shop is organized, new persons that come into Local 36 are required to pay the regular initiation fee of 100 times the journeyman rate (Tr. pp 474).

Shops organized after July 1, 1966 were and are required to post a cash or surety bond in the amount of \$2,000 for a period of one year to insure that payments are made to the Welfare, Pension, Vacation, and other funds (Tr. pp 475, Plaintiff Exhibit 21, 1966 contract, Article VIII, Section 17). Old contractors who become delinquent in payments to the aforementioned trust funds also must post a cash or surety bond in the amount of \$2,000 (Tr. pp 476).

^{4/} Of the 32 who paid initiation fees of \$50 to \$150 in the period 6/65 - 8/66, 6 were from Wentzville, 5 from Hannibal, 3 from O'Fallon, 3 from Troy, 2 from Jackson, 2 from Louisiana, 2 from Warrenton, 2 from Lesterville, 1 from New London, 1 from St. Louis, 1 from Arnold, 1 from Florissant, 1 from Shrewsbury, and 1 from St. Charles, and 1 from Cape Girardeau, Missouri.

Contractors affiliated with the Midwest Contractors Association had a contract with Local 99, Congress of Independent Unions for the period June 15, 1965 through March 1, 1967 (Defendant Exhibit B, Tr. pp 161). In December, 1966, representatives of the St. Louis Construction & Building Trades Council, AFL-CIO, and representatives of the Midwest Contractors Association met to discuss the signing of contracts by contractor members of the Association and AFL-CIO unions affiliated with Building & Construction Trades Council (Tr. pp 78, 79, 157, 158). Eugene Zimmermann, then Business Manager of Local 36, was at the aforementioned meeting. Zimmermann also called Arthur Kennedy, Sr. personally after the meeting concerning taking members into Local 36 (Tr. pp 163). Kennedy, owner of Kennedy & Sons Sheet Metal Shop testified that Zimmermann was very cooperative (Tr. pp 163). Kennedy testified further that he believed that the racial problem was behind and that the problem was an economic problem -- the payment of the hourly wages that the AFL-CIO union members get (Tr. 159, 160). After the meeting in December, 1966, Arthur Hunn, President of the Bldg. & Constr. Trades Council, collected wage rates and fringe benefit information from the affiliated local unions, and sent the information to Kennedy (Tr. pp 158).

At the next meeting of the Midwest Contractors Association, the members voted to break off negotiations between the Association and the AFL-CIO local unions (Tr. pp 81, 159). Nothing further was done by the Midwest Contractors Association after December, 1966.

Kennedy testified further that in December, 1966, representatives of Local 36 contacted his five employees at his shop and left application forms for the men to sign (Tr. pp 160-162). Kennedy's employees, who are members of Local 99, C.I.U., did not fill out the forms, nor did they mail or take the forms to Local 36 (Tr. pp 162).

Kennedy and Sons Sheet Metal Shop is the only Negro sheet metal contractor associated with the Midwest Contractors Association (Tr. pp 478).

The sheet metal workers that Local 36 sought to organize in December, 1966 were Negroes (Tr. pp 153). The Midwest Contractors Association and Local 99, CIU contract for the period June 15, 1965 - March 1, 1967 covers the sheet metal work performed by the employees of Kennedy and Sons (Tr. pp 161).

Clarence Lee and Vernon Wells testified about their background and their telephone conversations with persons at Local 36. Both Lee and Wells testified that they are Negroes who have full-time jobs at McDonnell Aircraft Corporation (Tr. pp 267, 519). Both testified that they are partners in the Wells & Lee Sheet Metal Heating Service, an independent sheet metal company (Tr. pp 256, 515).

Lee testified that in the summer of 1965 he telephoned Local 36's hall and asked someone (he didn't know whom he spoke to) about joining the Union. He was informed that someone would return the call, but no one did (Tr. pp 258, 259). Lee testified further that in April, 1967, he called Local 36's hall and spoke to Gene Zimmermann. He testified that he told Zimmermann that his firm was interested in bidding on a job at the Kinloch Elementary School and they were interested in joining the Union (Tr. pp 271). Lee testified that Zimmermann told him that the initiation fee was \$500 per man, that it was necessary for contractors to post a thousand dollar bond, and that if he would come into the office of the Union that the Union would proceed toward taking them [Lee and Wells] into the Union (Tr. pp 263, 266, 271, 496). Lee said that Zimmermann told him the reason for the bond was that some of the shops were failing to pay the men their vacation money (Tr. pp 272).

Lee testified that he did not go to the Union office; he "just more or less let things ride." (Tr. pp 265). In response to a question from the Court, Lee stated that he did not file a written application, nor had he ever made a formal or informal application to Local 36 (Tr. pp 265). Lee stated that subsequently he joined Local 99, CIU (Tr. 265, 266, 271, 274, 497).

Lee testified further that Zimmermann in his telephone conversation stated that he would sign a contract with Wells & Lee Sheet Metal Shop

(Tr. pp 496). Lee also stated that the conversation was concluded with Lee's statement that he would contact Zimmermann later on about the matter involved in their conversation (Tr. pp 497). Lee admitted that he did not contact Zimmermann (Tr. pp 497).

Zimmermann had passed away prior to the trial of the case, and prior to plaintiff's notification to defendant that Lee was a prospective witness.

Vernon Wells testified that he was a partner of Clarence Lee, and that in April, 1967, he placed a call to Local 36's office. He stated that he spoke to a man who answered the telephone, but who did not identify himself (Tr. pp 516). Wells testified that he asked the man if "they" are taking Negroes in the Union, and the reply was that it would cost him \$2,000 (Tr. pp 517). Wells stated that nothing else was said in the conversation, as both persons hung up (Tr. pp 518). Wells testified that he had not gone to or called the Union hall either prior to or following the aforementioned telephone call (Tr. pp 520).

Wells stated that he had informed the attorneys for the plaintiff about the above telephone conversation before the trial began on June 15, 1967 (Tr. pp. 519). Wells was not called by plaintiff during its case-in-chief; instead, he was called after the plaintiff had rested its case (Tr. pp 285) and after defendant Local 36 had rested its case (Tr. pp 504). Nor was Wells listed on any of the lists of witnesses which plaintiff supplied Local 36 prior to the trial.

d. Additional Background Information

In addition to the aforesaid testimony and exhibits, plaintiff introduced into evidence the application forms submitted by persons to the Union from 7/2/65 through 7/21/66 (Plaintiff Exhibit 11); photocopies of minutes of weekly and special meetings of the Executive Board from January, 1950 through August, 1966 (Plaintiff Exhibit 12, A, B, C,

D, E, F and G); photocopies of minutes of weekly and special meetings of the membership (Plaintiff Exhibit No. 13 A, B, C, D, E, F and G); dues cards for journeyman members (Plaintiff Exhibit No. 20 A,B,C,D,F, and G); and tabulation of applications for Sheet Metal Apprenticeship Program from May, 1965 to March 21, 1966 (Plaintiff Exhibit No. 24 A).

The parties stipulated that since 1961, the State of Missouri has had a statute prohibiting discrimination against Negroes by Unions, original Section 296.010 et seq., R.S.Mo., Supp. 1961, and that no charge has been filed against Local 36 under this Statute alleging racial discrimination (Stip. No. 4, para 20). The parties stipulated further that since November 29, 1962 the City of St. Louis has had an Ordinance prohibiting discrimination against Negroes by Unions (Ordinance No. 51512), and that no charge has been filed against Local 36 under this Ordinance alleging racial discrimination (Stip. No. 4, para 22).

The following questions and answers were read into the record by Local 36 (Tr. pp 491):

Interrogatory Directed to the Attorney General

24. Please state whether any individual alleged to have been discriminated against and named in answer to the foregoing Interrogatories has filed a complaint with the United States government or any agency or department thereof concerning such alleged discrimination?

ANSWER: No such complaints have been received by the Department of Justice, the Equal Employment Opportunity Commission, or the Office of Federal Contract Compliance.

Interrogatory Directed to the Equal Employment Opportunity Commission

1. From the date the Equal Employment Opportunity Commission began operation to February 4, 1966 (the date the instant suit was filed), how many complaints, if any, were filed with the Commission alleging violations of Title VII of the Civil Rights Act of 1964 by Defendants in the geographical area encompassing the following Missouri counties: Pike, Montgomery, Gasconade, Jefferson, Crawford, Franklin, Warren, Washington, Lincoln St. Charles, St. Louis, Pulaski, Phelps and the City of St. Louis?

ANSWER: None.

The Court reserved ruling on Local 36's Motion to Dismiss (Tr. pp.297).

IV. DISCUSSION

On February 4, 1966, plaintiff filed a complaint under Section 707 of the Civil Rights Act of 1964 (42 U.S.C.2000c -6) against Local 36, and other defendants, alleging that Local 36 is engaged in a pattern or practice of resistance to the full enjoyment of any of the rights secured by Title VII, and that pattern or practice is of such a nature and is intended to deny the full exercise of the rights described in the Act. Following the filing of the suit, plaintiff engaged in extensive discovery proceedings. Thousands of records, cards, test, minutes, and other documents for the period from 1950 to 1966 were copied from the files of Local 36 and the Sheet Metal Workers Apprenticeship Program. Depositions were taken by plaintiff, and attorneys and FBI agents from the Department of Justice talked to many of the journeymen and apprentices affiliated with Local 36. The trial in this case, which was initially scheduled for the fall of 1966, was continued at the request of plaintiff so that it could request that hundreds of questionnaires be mailed out to members, apprentices and apprentice applicants to ascertain the relationship by blood or marriage that these persons have with members, former members and apprentices of Local 36.

Yet, notwithstanding the extensive investigation and discovery, and the legal requirement in Section 707 that plaintiff must have had reasonable cause to believe that Local 36 was engaged in a pattern or practice of resistance before it could file this suit, plaintiff did not produce any evidence that a single Negro has ever been excluded from membership in Local 36. There was no evidence that any Negro has ever applied for membership in Local 36. There was no evidence that any Negro ever applied for the referral system. There was no evidence that any Negro was ever excluded from the Sheet Metal Worker Apprenticeship Program. Instead, the evidence showed that those Negroes who took the tests and interviews

were admitted into the Apprenticeship Program. In fact, in analyzing plaintiff's Brief, it is important to note that two of the three main points argued by plaintiff didn't even exist as of February 4, 1966; to-wit, the amended referral system that goes into effect on January 1, 1968, and the Wells-Lee telephone conversations in April, 1967. The third point, "statistical presumptions", will be discussed later in this section.

Section 707 was inserted in the Civil Rights Act to permit the United States Government to initiate legal action where there are significant cases of discrimination; and where the defendant is engaged in resistance to the full enjoyment of the rights secured by the Act and is intending to deny such rights^{5/}. Single, insignificant, and isolated acts of discrimination do not justify a finding of a pattern or practice under Section 707^{6/}. Section 707, in fact, requires that the Attorney General of the United States sign a "pattern or practice" complaint^{7/}. The statutory requirement of proving pattern or practice of resistance with intent to deny the rights secured by the Act are cited, along with the legislative history, in order to place this case in the proper perspective. This case is not a charge filed by some individual or group and processed by the Equal Employment Opportunity Commission. It is a broad accusation that this defendant is engaged in a pattern or practice of resistance with intent to deny rights secured by the Act, and which has resulted in thousands of hours being spent by plaintiff, defendant, witnesses and this Court in the processing of this case.

^{5/} Senator Humphrey, 110 Cong. Rec. 12295, 12296 (June 4, 1964)

^{6/} Senator Humphrey, 110 Cong. Rec. 13776 (June 18, 1964)

^{7/} 42 USC 2000e-6(a)

What concerns Local 36 is that plaintiff, in its efforts to justify the time, effort, and expenditures for filing this suit against Local 36, has made incredible conclusions without supporting facts; has sought to establish principles of law and proof which would find that most unions and employers are guilty of not only racial discrimination, but also sex, national origin, and religious discrimination; and has magnified far out of proportion incidents such as the questionable Wells-Lee telephone conversations in April, 1967^{8/}.

There is no legal necessity that charges and complaints be filed with the EEOC against a defendant before a "pattern or practice suit" can be filed against a defendant. However, it is significant, when considering the totality of the evidence, to know whether Local 36 has engaged in actions which have resulted in discrimination charges filed against it in other forums. Interrogatories and stipulations establish that there has never been a charge or complaint filed by any person with the Department of Justice, the Equal Employment Opportunity Commission, or the Office of Federal Contract Compliance, charging Local 36 with racial discrimination. Nor has any person filed any complaints or charges against Local 36 alleging racial discrimination under Section 296.010 of the Missouri Statutes, or under Ordinance 51512 of the City of St. Louis. Instead, without any notice or warning, and without any attempt to discuss or perhaps conciliate, plaintiff filed the "pattern or practice" suit against Local 36 on February 4, 1966.

It is to be noted that even in the main case cited by plaintiff, Vogler, et al v. McCarty, et al (66-749) and U.S. v. Int'l Assoc. of Heat and Frost Insulators and Asbestos Workers, Local 53 (66-833),

8/ It is undisputed that Zimmermann offered to sign a contract with the Wells and Lee Heating Service, and to take them in as members. What is disputed, are the terms of the contract and the initiation fee involved. But, as stated, there is no dispute concerning the fact that they were offered a contract and membership and were to contact the Union further in these regards, but did not do so.

consolidated cases, --- F. Supp. --- (E.D. La., 1967), the Section 707 complaint was filed only after the Equal Employment Opportunity Commission had completed a thorough investigation, and after failing in its attempts to conciliate the matter, had then referred the case to the Acting Attorney General. There was no investigation by the Equal Employment Opportunity Commission or conciliation in the instant case. 9 /

Plaintiff states at the beginning of its Brief (page 2) that four of the original defendants had been dismissed without prejudice. Plaintiff states further that three of the defendants were dismissed on the basis of voluntary programs they agreed to adopt, and then plaintiff summarizes the programs in footnote (2) on page 2 of its Brief using words and phrases of its choosing. Defendant Local 36 questions the propriety of this inclusion because there is no evidence in the record in this area; and plaintiff made no attempt to state, much less summarize, the many organizational and operational differences that exist between the aforementioned defendants and Local 36. Furthermore, plaintiff completely ignores the fact that counsel for plaintiff and defendant reached agreement on the terms of a voluntary program; after which plaintiff insisted that the program be approved by the Union (which it was). Plaintiff then submitted the agreement to the Attorney General's office in Washington, D. C., where the program was rejected and additional requirements added. It should also be noted that the record establishes that Local 36, both before and after the filing of the law suit, has been engaged in many of the activities recited in the voluntary programs, plus some not mentioned.

9 / The Courts presently hold that conciliation is a necessary part of EEOC and State charges, and a condition precedent to a Section 706 suit. Mickel v. South Carolina State Employment, -- F.2d -- (4th Cir., May 3, 1967); Stebbins v. Nationwide Mutual Insurance Co., -- F.2d -- (4th Cir., August 29, 1967); and Dent v. St. Louis - San Francisco Ry. Co., 265 F. Supp. 56 (N.D. Ala., March 10, 1967).

There is one significant point that should be mentioned at this time since it goes hand-in-hand with the fact that there have been no charges filed by any person or group against Local 36 alleging racial discrimination. The point is that there is no evidence of any Negro, in the past, and at the present time who has ever applied to become a member of Local 36 or use the referral system. This fact alone distinguishes the instant case from the union - racial discrimination cases cited by plaintiff in its brief¹⁰ /.

Perhaps there are Negroes in the jurisdictional area covered by Local 36 who want to become members of Local 36, but there is no evidence of that fact in the records.¹¹ / The evidence establishes that Kennedy & Sons Sheet Metal Shop was not interested in signing a contract with Local 36, and its employees were not interested in becoming members of Local 36. Wells & Lee Heating Service was offered a contract with Local 36 which was at least the same as (and from Lee's testimony better than) the contracts offered to other sheet metal contractors but Wells and Lee were not interested. Wells and Lee were also offered membership in Local 36, but turned it down and became members of Local 99, CIU. The employees of Kennedy & Sons are also members of Local 99, CIU. Other than these two shops, there was no evidence in the record of any Negro sheet metal contractors or sheet metal workers in the jurisdiction of Local 36.

¹⁰ / Vogler v. McCarty, supra; Lefkowitz v. Sheetmetal Workers Local 28 & Farrell, 9 R.R.L.R. 393 (N.Y. Comm. on Human Rights, 1964), aff'd 42 Misc. 2d 958, 252 N.Y.S. 2d 649 (Sup.Ct.N.Y., 1964); Connecticut Comm. v. IBEW Local 35, 28 LRRM 98, aff'd 102 A. 2d 366 (1953).

¹¹ / Nor is there any evidence or testimony as to why the Negroes didn't apply.

Perhaps the most incredible aspect of this case, is that plaintiff not only ignores the aforesaid lack of evidence, but states conclusions which do not have any factual foundation in the record. For instance, let us discuss the "conclusions" which plaintiff sets forth in its Brief^{12/}.

(a) Plaintiff states that Local 36 has a policy of organizing white shops while openly refusing to organize Negro shops. The evidence established that Local 36 sought to sign contracts with Kennedy & Sons Sheet Metal Shop and with Wells and Lee Heating Service; and that Local 36 was willing to take all of the Negro sheet metal employees of said employers into the Union. There is no evidence that Local 36 ever refused to organize a single Negro sheet metal shop.

(b) Plaintiff states that Local 36 rejected qualified Negro applicants for employment and for membership. There is no evidence that any Negro, qualified or unqualified, ever signed up for the non-exclusive referral system or ever applied for membership into Local 36. Thus, it is difficult to see how Local 36 could have rejected applicants who never applied.

^{12/} (Pages 56 and 57 of plaintiff's Brief) "But the evidence in this case fully explains how it came to be that these defendants are essentially white unions. The evidence reflects that both unions have long had a policy of excluding Negroes from membership and apprenticeship on account of race. This exclusion has been effected in many ways, including the policy of organizing white shops while openly refusing to organize Negro shops; rejecting qualified Negro applicants for employment and for membership; forcing non-member Negroes out of construction jobs; giving job referral preferences to their own members over non-member Negroes; giving preference to friends and relatives of members in considering applications for apprenticeship or journey-men opportunities; and racial assignments of those few Negroes who get referred to jobs."

(c) Plaintiff states that Local 36 forced non-member Negroes out of construction jobs. There was no evidence that Local 36 ever forced a single non-member Negro sheet metal worker out of any job. [The Arch matter involving the Labor Management Relations Act, as amended, did not involve sheet metal work. Furthermore, the non-AFL-CIO plumbers involved in the dispute were not forced out of their jobs.]

(d) Plaintiff states that Local 36 gives job referral preferences to their own members over non-member Negroes. The evidence established that no Negroes ever signed up for the Local 36 non-exclusive referral system. Furthermore, the referral system operates the same for union and non-union members alike.

(e) Plaintiff states that Local 36 gives preference to friends and relatives of members in considering applications for apprenticeship and membership. The evidence established that no Negro has applied for membership in Local 36. Further, the evidence established that Negroes who applied for the Sheet Metal Worker Apprenticeship Program were assigned testing dates like all other applicants. Both Negroes who took the tests were subsequently interviewed and assigned out as apprentices. It is also interesting to note that 56% of those men who were rejected for failing to have a combined point total of 80 points on the tests and interviews were related by blood or marriage to a member or former member or apprentice of Local 36. Rejected applicants included at least four sons of present members.

(f) Plaintiff states that Local 36 has failed to inform Negroes of apprenticeship or journeymen opportunities. The record is replete with ways in which information concerning the Sheet Metal Worker Apprenticeship Program is disseminated to the white and Negro communities. Further, the evidence established that Local 36 has sought to organize Negro and white sheet metal shops.

(g) Finally, plaintiff states that Local 36 has made racial assignments of those few Negroes who get referred to jobs. Since no Negro has signed up on the non-exclusive referral system, there have been no Negroes referred to jobs. Consequently, there have been no racial assignments as stated by plaintiff.

Plaintiff in its Brief also charges Local 36 with excluding Negroes (pp 21), nepotistic policies (pp 25), refusing to bargain with Negro contractors (pp 16), and controlling and dominating the sheet metal apprenticeship Program (pp 13). However, there is no evidence to support these rank conclusions. In the same vein, plaintiff says that Negroes have not been passing through Local 36's hiring hall because they are not members of Local 36 (pp 15). Yet, the evidence clearly established that the present referral system and the one in existence for a number of years, provides that union and non-union have equal usage of the non-exclusive referral system. Non-union sheet metal workers are referred out without any charge, without any conditions, without any test, and without fear of being bumped by a laid-off Local 36 member. The fact that after 8 days the non-union sheet metal worker who has been referred must join the Union has absolutely nothing to do with his prior registration. In fact, it is ironic that plaintiff complains about such a clause, since here is an ideal way for a non-union sheet metal worker (white or Negro) to become a member of Local 36.

What plaintiff overlooks or ignores in this "pattern or practice" suit are the following salient points;

- There is no evidence that any Negro, either prior to 7/2/65 or since that date, ever applied for membership in Local 36;
- There is no evidence that any Negro, either prior to 7/2/65 or since that date, ever sought to utilize the non-exclusive referral system that had been established between Local 36 and various sheet metal contractors;

- There is no evidence that any Negro, either prior to 7/2/65 or since that date, has ever been discriminated against by the Joint Apprenticeship Committee and/or the Local 36 members of said Committee;

- There is evidence that the Joint Apprenticeship Committee has aggressively disseminated information on its own and through the Apprentice Information Center to inform the white and Negro communities of the Sheet Metal Worker Apprenticeship Program and the procedures for becoming apprentices. The evidence established that some Negroes did inquire of the program and applied for same, but of 10-12 Negroes that signed up to take the tests and stated they would appear, only 2 Negroes (since 7/2/65) showed up and took the tests. Both of these persons subsequently were interviewed and after being placed on the "available for training" list were assigned out to (white) sheet metal contractors as apprentices.

- There is evidence that in December, 1966, Local 36 sought to sign contracts with the sheet metal contractors affiliated with the Midwest Contractors Association, including Kennedy & Sons Sheet Metal Shop the only Negro sheet metal contractor. However, the evidence established that the contractors were not interested in signing contracts with Local 36 and broke off negotiations. Arthur Kennedy stated that the 30-day period in December, 1966 was the "soft period" and under the contract bar rules of the National Labor Relations Board was the only time from June 15, 1965 (prior to the effective date of the Civil Rights Act of 1964) to the trial that negotiations could be attempted by Local 36.

- There is evidence that Local 36 sought to organize the Negro employees of Kennedy & Sons Sheet Metal Shop in December, 1966, but the Negro sheet metal workers were not interested in becoming members of Local 36.

- There is no evidence that any person, white or Negro, has filed any complaints or charges against Local 36 alleging racial discrimination under Section 296.010 of the Missouri Statutes, or under Ordinance 51512 of the City of St. Louis. Nor is there any evidence that any person, white or Negro, has filed any complaints or charges against Local 36 with the Department of Justice, the Equal Opportunity Commission, or the Office of Federal Contract compliance.

a. "Statistics"

In the face of a record that is devoid of evidence of racial discrimination on the part of Local 36 and its officers and representatives, plaintiff has concocted a theory that statistics such as the racial composition of Local 36, by itself, will "raise a strong presumption, if not conclusive one, of a pattern of discrimination"^{13/}. Local 36 submits that there is no foundation for plaintiff's argument in either the express language of Title VII, the legislative history of the Civil Rights Act, case law, or in logic. It is to be noted that plaintiff did not cite either the Act or the legislative history in support of its legal theory.

Furthermore, it appears to Local 36 that plaintiff has retracted somewhat from the broad assertion that it made in its Pre-Trial Submission; but the difference may be more imaginary than real. In plaintiff's Pre-Trial Submission it unequivocally argued that in an area where Negroes make up an appreciable percentage of the adult population, that if the evidence shows that a union effectively controls employment in that area and said union is exclusively or almost exclusively white, that a "prima facie case of discrimination on account of race in violation of Section 703(c) and (d) is made out and

^{13/} Page 56 of plaintiff's Brief.

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the burden of proving non discrimination shifts to the defendant labor organization".¹⁴ / If this legal principle were valid, then all plaintiff has to do to make out a prima facie case of discrimination on account of race or color or religion or sex or national origin, is to establish that the union (or employer) effectively controls employment in an area where Negroes or women or Catholics or Germans make up an appreciable percentage of the adult population and said union is exclusively or almost exclusively white or male or Protestants or Italians. To argue that racial or religious or national origin or sex compositions of an organization make out prima facie cases of discrimination with the burden of proving nondiscrimination shifting to that organization is not only absurd but highlights the lack of evidence adduced by plaintiff. If qualifications, voluntary application, skills, education, interest, physical dexterity, etc. are irrelevant factors, and statistics of racial composition alone can establish prima facie cases of discrimination with the burden of proving non-discrimination shifting to Local 36; then Local 36 is engaged in a pattern or practice of resistance to women with intent to deny their rights since the evidence established that all of the journeymen and apprentices of Local 36 are men and Local 36 did not meet the burden of proving non-discrimination as to women.

Perhaps plaintiff in its Reply Brief will argue that it never intended the statistical inference principle to apply to sex discrimination, religious discrimination, etc., but Local 36 submits that plaintiff can not restrict a legal proposition to only those areas it chooses, ignoring all other ramifications.

As stated earlier, plaintiff in its Proposed Conclusions of Law backed away from the broad legal principle enunciated in its Pre-Trial Submission. Plaintiff's statistical argument is contained in three

¹⁴ / Pages 20 and 21 of plaintiff's Pre-Trial Submission.

statements in its post-trial Brief^{15/} :

"In determining whether there has been racial discrimination, statistics often tell much and courts listen."

* * *

"Where Negroes have been almost totally excluded from membership as in the defendant unions, a prima facie case is made of deliberate discrimination against Negroes."

* * *

"Since the defendants in this case are labor unions and affirmatively recruit and organize employees to bring into union membership, these statistics are particularly meaningful."

The first and third statements are quite innocuous and hardly "conclusions of law". It was for statements such as these that Local 36 offered into evidence the "Study of Minority Group Employment in the Federal Government, 1966".^{16/} While Local 36 is in no way suggesting or inferring that the Federal Government practices racial discrimination; if as plaintiff argues that "statistics often tell much and courts listen", then let us check the Negro employment statistics for the Wage Board in the pay range of \$8,000 and over which is a pay range comparable to a journeyman sheet metal worker. In the Federal Government as a whole in 1966, there were 2.9% Negroes in the aforesaid pay range (page 7 of defendant Exhibit No. N) and in the Department of Justice in 1966 there were only 0.5% Negroes under the Wage Board in the pay range of \$8,000 and over (page 18 of defendant Exhibit No. N). These figures are quite a bit lower than the percent of Negroes in the United States as a whole, and in Washington, D. C. in particular. Yet, such figures do not make out prima facie cases of discrimination on the part of the Federal Government and the Justice Department. Local 36 submits that there are many reasons and factors, such as qualifications, interest, voluntary application, education, physical dexterity, aptitude, etc. other than discrimination, which bring about a racial composition in a particular labor organization, company or government.

^{15/} Page A 13 of plaintiff's Appendix.

^{16/} Defendant Exhibit No. N.

The second statement set forth above rests upon evidence being adduced by plaintiff that defendant excluded or almost totally excluded Negroes from membership. Local 36 believes that this statement is quite different from the broad legal principle set forth in plaintiff's Pre-Trial Submission, since here plaintiff recognizes that it must produce evidence of exclusion, and that statistics of racial composition do not establish prima facie cases of discrimination with the burden of proving non-discrimination shifting to defendant.

Perhaps the fallacy of plaintiff's "statistical argument" can best be illustrated by an application of the evidence adduced in this case to several statements set forth in plaintiff's Brief. Plaintiff in its Brief stated that racial composition alone established that the organizing efforts of Local 36 embraced whites and excluded Negroes 17 /. Yet the evidence established that there were only two Negro sheet metal shops, and that Local 36 sought unsuccessfully to sign a contract with Kennedy & Sons Sheet Metal Shop and to organize the Negro sheet metal employees of said shop. Statistics don't reflect when companies and sheet metal workers reject the organizing efforts of unions. Similarly, with regard to the second shop where the partners contacted Local 36, the Negro sheet metal persons rejected an offer to sign a contract with Local 36 and also declined membership in Local 36. Plaintiff in its Brief goes on to state that the recruitment of apprentices by Local 36 has brought white persons but not Negroes into the Union. While plaintiff should properly direct its comments to the Joint Apprenticeship Committee; nonetheless, the evidence established that about 18-20 Negroes inquired of the Apprenticeship Program; 10 - 12 Negroes signed certificates that they would take the tests, but only two Negroes appeared and took the tests (and subsequently became apprentices). Local 36 submits that racial composition statistics do not establish either presumptions of racial discrimination or racial discrimination itself.

What amazes this defendant is that the Justice Department in its first "pattern or practice" case under Section 707 has felt it necessary to ignore the statutory language of Title VII, and to attempt to concoct such a revolutionary legal argument that statistics of racial composition of a union, when compared to the racial composition of a community, can establish a prima facie case of discrimination with the burden of proving non-discrimination shifting to the defendant. Plaintiff supported its legal argument by citing some jury, school, voter registration and hospital desegregation cases in footnote 49^{18/}. Notably missing from plaintiff's supporting material are any references to the Civil Rights Act of 1964 and its legislative history.

The obvious explanation for plaintiff's lack of citation from the Act and the legislative history is the fact that the Act and the history clearly reject plaintiff's statistical argument. Section 703 (j) of the Civil Rights Act of 1964^{19/} provides that preferential treatment is not to be granted because of a statistical imbalance which exists with respect to the total number or percentage of persons of any race, color, religion, sex or national origin:

"(j) Nothing contained in this title shall be interpreted to require any employer, employment agency, labor organization, or joint labor-management committee subject to this title to grant preferential treatment to any individual or to any group because of the race, color, religion, sex, or national origin of such individual or group on account of an imbalance which may exist with respect to the total number or percentage of persons of any race, color, religion, sex, or national origin employed by any employer, referred or classified for employment by any employment agency or labor organization, admitted to membership or classified by any labor organization, or admitted to, or employed in, any apprenticeship or other training program, in comparison with the total number or percentage of persons of such race, color, religion, sex, or national origin in any community, State, section, or other area, or in the available work force in any community, State, section, or other area". (emphasis supplied)

18 / Page 56 of plaintiff's Brief.

19 / 42 U.S.C. 2000e - 2 (j).

At the request of Senator Clark of Pennsylvania, the Justice Department prepared a Statement in reply to arguments of Senator Hill of Alabama with respect to seniority, union representation, and racial quota. The Justice Department's Statement was printed in the Congressional Record, page 6986, on April 8, 1964. The Justice Department stated:

"Finally, it has been asserted Title VII would impose a requirement for 'racial balance.' This is incorrect. There is no provision, either in title VII or in any other part of this bill, that requires or authorizes any Federal agency or Federal Court to require preferential treatment for any individual or any group for the purpose of achieving racial balance. No employer is required to hire an individual because that individual is a Negro. No employer is required to maintain any ratio of Negroes to whites, Jews to Gentiles, Italians to English, or women to men. The same is true of labor organizations. On the contrary, any deliberate attempt to maintain a given balance would almost certainly run afoul of title VII because it would involve a failure or refusal to hire some individual because of his race, color, religion, sex, or national origin. What title VII seeks to accomplish, what the civil rights bill seeks to accomplish is equal treatment for all." (emphasis supplied)

If "racial balances" are not required, and if attempts to maintain a balance or ratio of Negroes to whites would run afoul of Title VII; how then can plaintiff, by the very same Justice Department, now argue that racial composition of Negroes to whites can make out a prima facie case of racial discrimination? Other comments in the legislative history of the Act refute plaintiff's statistical argument. Senator Dirksen stated^{20/}:

"New subsection (j) provides that this title does not require preferential treatment be given any individual or group on account of an imbalance which may exist with respect to the total number or percentage of persons of any race, color, religion, sex, or national origin employed, in comparison with the total number or percentage of such persons in that or any other area."

^{20/} Senator Dirksen, 110 Cong. Rec. 12381-5 (June 5, 1964).

Senator Humphrey issued "A Concise Explanation of the Civil Rights Act of 1964" on July 2, 1964, the date the Act was signed, in which it is stated^{21/}:

"The title does not provide that any preferential treatment in employment shall be given to Negroes or to any other persons or groups. It does not provide that any quota systems may be established to maintain racial balance in employment. In fact, the title prohibits preferential treatment for any particular group".

Thus, plaintiff's statistical argument was clearly rejected by Congress. It is also important to note that plaintiff's argument would place Local 36 and other unions and employers in almost hopeless positions. On the one hand, statistical imbalance as to race, color, religion, national origin and sex would make out prima facie cases of discrimination; yet, if said union or employer attempted to give preferential treatment to "remedy" the imbalance it would be engaged in discrimination under Title VII.

b. The Wells and Lee Telephone Conversations

Clarence Lee testified that he spoke to the former Business Manager, Eugene Zimmermann, in April, 1967, and that Zimmermann offered to sign a contract with Wells & Lee Heating Service, and to take the partners into Local 36. Lee said that he was to contact Zimmermann, but that he didn't talk to or contact Zimmermann or any officer, agent or representative of Local 36 after the initial telephone conversation. Thus, there is no dispute that Wells and Lee could have a contract with Local 36 and the partners could be members of Local 36.

^{21/} Senator Humphrey, 110 Cong. Rec. 15333-34 (July 2, 1964).

The only dispute concerns the terms of the contract and membership that were discussed over the telephone. It is to be recalled that Lee was to contact Zimmermann further in connection with matters discussed over the telephone; but Lee decided to "more or less let things ride". Plaintiff argues first that Wells and Lee didn't want a contract; they wanted membership. But, the fact remains that all contractors sign contracts with Local 36 even though the sheet metal workers and the owner also join the Union. Thus, it was standard procedure for Zimmermann to offer to sign a contract with Wells & Lee Heating Service. In fact, the standard contract signed by Local 36 would include the posting of a \$2,000 cash or surety bond to insure payment of vacation and other Trust Fund monies; not the \$1,000 stated by Mr. Lee. Under the 1966 - 1969 contract, all new contractors, and all old contractors who become delinquent, must post such a bond for one year to insure payment of the fringe benefits.

Lee testified that Zimmermann stated that the initiation fee would be \$500 per man. (Zimmermann was not living as of the time of trial; nor was he living when plaintiff first informed Local 36 that it intended to call Clarence Lee as a witness.) Plaintiff argues that since Local 36 has been charging from \$50 to \$150 for initiation fees, that Local 36 discriminated against Lee, a Negro, when it informed him that the initiation fee would be \$500. It is true that in organizational campaigns Local 36 has charged from \$50 to \$150 for initiation fees. Thereafter, any new employees of said contractor pay the basic initiation fee of 100 times the journeyman rate. It is equally true that the initiation fee of persons who apply "at the door" at Local 36, and not pursuant to an organizational campaign, is 100 times the journeyman rate. This figure would have been \$531 in April, 1967. It is apparent that the parties can argue whether Lee's call to Zimmermann became "organizational" in concept, or whether it was the typical case of a person applying at Local 36 and being told that the initiation fee

would be 100 times the journeyman rate. We do know, however, that Zimmermann offered to take Lee and Wells into the Union, and that Lee was to contact Zimmermann further, but did not do so.

The testimony of Wells is fragmentary. He does not know to whom he spoke, and the only figure he was told was \$2,000. Whether this referred to the \$2,000 bond, or just some arbitrary figure, is not known. Local 36 believes that plaintiff had great misgivings about this testimony, because counsel for plaintiff had interviewed Wells before the trial started; yet, Wells (as distinguished from Lee) was not called during plaintiff's case-in-chief. Furthermore, Wells wasn't even listed on plaintiff's list of witnesses.

Of importance in evaluating the dispute concerning "terms" expressed to Wells and Lee, are Local 36's actions in connection with Kennedy & Sons Sheet Metal Shop. Local 36 aggressively sought to sign a contract with Kennedy & Sons and the other sheet metal contractors of the Midwest Contractors Association in December, 1966; but these contractors turned Local 36 down. Kennedy admitted that Zimmermann was very co-operative in his conversations with him, and that Zimmermann even made a telephone call to Kennedy in addition to the meeting between representatives of the Midwest Contractors Association and the AFL-CIO Building & Construction Trades Council of St. Louis. Furthermore, Local 36 went to the Negro sheet metal employees of Kennedy & Sons and sought to sign them up, but the men were not interested in Local 36. Thus, it hardly seems logical that Zimmermann and Local 36 would take the aforesaid actions concerning Kennedy & Sons Sheet Metal Shop and be willing to sign a contract with Wells & Lee plus take them into membership; and then discourage such membership by abrupt action on the telephone as stated by Wells.

Plaintiff argues that Local 36 made no attempt to sign a contract with Kennedy & Sons Sheet Metal Shop until after the instant suit was filed. But the fact remains that under the contract bar rules of the National Labor Relations Board, Leonard Wholesale Meats, 136 NLRB 1000 and Deluxe Metal Furniture Co., 121 NLRB 995, the only lawful time for a labor organization to seek to sign a contract is the period beginning 90 days prior to the expiration date of the existing contract (6/15/65 - 3/1/67) and continuing to the 60th day prior to the expiration date. The 30-day "soft" period was December, 1966, and Local 36 made the attempt to sign contracts with Kennedy & Sons and the other sheet metal contractors at that time.

While there is no evidence that Local 36 sought to sign a contract with Kennedy & Sons prior to 7/2/65 or prior to 6/15/65, it is equally true that there is no evidence that Kennedy & Sons ever sought to sign a contract with Local 36 prior to those dates. Furthermore, there is no evidence that Local 36 ever took any action, picketing or otherwise, to put pressure on Kennedy & Sons or Wells & Lee to force either or both of them off any job.

c. Local 36's Referral System

Plaintiff's complaint as to Local 36's referral system is not with the current referral system, nor the referral system that was in effect when the suit was filed. Plaintiff objects to certain provisions of the amended referral system that goes into effect on January 1, 1968.

The current referral system has been in effect for a number of years. This system is a non-exclusive referral system, and any person -- union and non-union, white and Negro, etc. -- can register for the out-of-work list. There is no filing fee and no test is required. Once registered on the out-of-work list, the applicant's name remains on the list until

a sheet metal contractor requests the person by name or special skill, or his name has risen to the top of the list and he is sent out when a contractor requests a sheet metal worker.

There is no evidence that any Negro at any time ever applied to use the referral system. Furthermore, there is no evidence that any Local 36 member ever received favored or special treatment in the use of the referral system; nor is there any evidence that any relative or friend of a Local 36 member or apprentice received any favored or special treatment.

The only conclusion from these facts is that Local 36's referral system has not discriminated against any person at any time.

As stated above, plaintiff objects to several provisions in the amended referral system that goes into effect on January 1, 1968. Plaintiff's objections concern the 1 year seniority provision, the 4 years experience in the industry, and the limited preference given to sheet metal workers who are 55 years or more of age. All of these objections are theoretical objections, since the amended referral system has never been in operation and consequently there can be no charge that Local 36 is administering the amended referral system in a discriminatory manner. The fact that Local 36's amended referral system has never been in operation distinguishes it from Local 269, IBEW, 149 NLRB 768, enforced, NLRB v. Local 269, IBEW, 357 F.2d 51 (3rd Cir., 1966) cited by plaintiff in its Brief-^{22/}. The objection in Local 269, IBEW, supra, was the manner in which the system was administered or operated; not the system itself. The Court of Appeals stated (l.c. 55):

"Minus the history of Local 269's referral practices, the contract provisions regarding qualifications for referral priority are not necessarily evidence of discrimination." (emphasis supplied)

^{22 /} Pages 59 and 59a of plaintiff's Brief.

Local 36's amended referral system which goes into effect on January 1, 1968, is a lawful hiring hall, expressly authorized by Section 8(f) of the Labor Management Relations Act, as amended, 1959, 29 U.S.C. 158:

"8(f) It shall not be an unfair labor practice under subsection (a) and (b) of this section for an employer engaged primarily in the building and construction industry to make an agreement covering employees engaged (or who, upon their employment, will be engaged) in the building and construction industry with a labor organization of which building and construction employers are members (not established, maintained, or assisted by any action defined in section 8(a) of this Act as an unfair labor practice) because (4) such agreement specifies minimum training or experience qualifications for employment or provides for priority in opportunities for employment based upon length of service with such employer, in the industry or in the particular geographical area:" (emphasis supplied)

The Supreme Court of the United States has rejected the argument that hiring halls are discriminatory per se, and has held that they are lawful. Local 357, Int'l Brotherhood of Teamsters, etc. v. NLRB, 365 U.S. 667 (1961) and Local 100, United Association v. Borden, 373 U.S. 690 (1963). Furthermore, the National Labor Relations Board has held that hiring halls or referral systems which incorporate seniority and experience requirements (similar to those in Local 36's amended referral system) are lawful. Local #42, Int'l Association of Heat and Frost Insulators, etc., 164 NLRB No. 123; Local 367, IBEW, 134 NLRB No. 21.

Plaintiff's primary objection to Local 36's amended referral system that goes into effect on January 1, 1968, is the seniority requirement that to be in Group I, a person must have worked at least one year out of the last four years under the collective bargaining agreements. Plaintiff's statement that Local 36 has "made it virtually impossible

for Negroes to work for a year under a collective bargaining agreement"
23 / is simply not true. For a number of years, and at the present time, it is just as easy for Negroes and white non-union members to use the referral system as it is for Local 36 members. Had Kennedy & Sons Sheet Metal Shop signed a contract with Local 36 in December, 1966, or had the Negro employees of said Shop joined Local 36 at that time when Local 36 gave them application blanks, these Negro sheet metal workers would have had as much "seniority" by January 1, 1968 as Local 36 members who have been in the Union for 30 or 40 years. But, these men were not interested in becoming members of Local 36. Furthermore, there have been many opportunities for Negro and white non-union sheet metal workers to have applied for and used the referral system to obtain the one years experience during the 2 to 2 1/2 year period following the effective date of the Act.

Plaintiff's attack upon the seniority and related provisions in Local 36's amended referral system, if upheld by this Court would nullify Section 8(f)(4) of the Labor Management Relations Act, as amended; and would knock out similar provisions contained in hiring hall provisions of thousands of contracts around the country. This result would necessarily follow from such a holding since the record in this case establishes that no Negro has ever applied to use the present or the amended referral system; the amended referral system is not yet in existence and has never been operated; and there is not one shred of evidence that any person, white or Negro has ever been discriminated against or given favored treatment under the present referral system.

When the sheet metal contractors and Local 36 negotiated the contracts which include the amended referral system that goes into effect on January 1, 1968, they incorporated the following express language in the

Article of the contracts dealing with the referral system^{24/} :

"3. The Union shall refer applicants for employment without discrimination against such applicants by reason of membership or non-membership in the union, race, creed, religion, color, national origin, sex or ancestry, and such referral shall not be affected in any way by rules, regulations, bylaws, constitutional provisions, or any other aspect or obligation of Union membership policies or requirements."

Thus, when plaintiff attacks the amended referral system, which has never been in operation, it ignores or greatly minimizes the aforementioned express provisions of the amended referral system. Yet, the Supreme Court in Local 357, Int'l Brotherhood of Teamsters, supra, has previously rejected an attempt by a party to infer discrimination from the face of an instrument which expressly provides that there will be no discrimination (l.c. 365 U.S. 675):

"But surely discrimination cannot be inferred from the face of the instrument when the instrument specifically provides that there will be no discrimination against 'casual employees' because of the presence or absence of union membership." (emphasis supplied)

The Supreme Court went on to state (l.c. 365 U.S. 676):

"The present agreement for a union hiring hall has a protective clause in it, as we have said; and there is no evidence that it was in fact used unlawfully. We cannot assume that a union conducts its operations in violation of law or that the parties to this contract did not intend to adhere to its express language. Yet, we would have to make those assumptions to agree with the Board that it is reasonable to infer the union will act discriminatorily."(emphasis supplied)

In the absence of any evidence of discrimination in the past or at the present time under the referral system and the amended referral system, and in the face of express protective language in the amended referral system; defendant Local 36 submits that there is no merit to plaintiff's attack upon the amended referral system that goes into effect on January 1, 1968.

^{24 /} Plaintiff Exhibit No. 21, 1966 contract, Article IV, Section 2 (B)(3).

d. Sheet Metal Workers Apprenticeship Program

Plaintiff's attack upon the Sheet Metal Workers Apprenticeship Program is similar in many ways to its baseless attack upon the referral system. Without evidence to supports its charges, plaintiff in its proposed finding of fact states that Local 36 excluded Negroes from apprenticeship, discriminated against Negroes, dominated the Joint Apprenticeship Committee and failed to publicize any change in an alleged policy of excluding Negroes from apprenticeship until after the filing of this lawsuit^{25/}. Then, to top matters off, plaintiff in its proposed remedy requests that this Court scrap the non-discriminatory "best qualified" requirements established by the Secretary of Labor in Title 29 PART 30 Non-Discrimination in Apprenticeship and Training, and adopt a "least qualified" requirement for Negroes^{26/}. But, let us briefly review the evidence which plaintiff continually ignores.

In 1963, when contractors were selecting apprentices, the first Negro apprentice was accepted into the Apprenticeship Program and has continued in the Program to the present time. In the first part of 1964, the Secretary of Labor's non-discrimination standards for the selection of apprentices, operation of apprenticeship and training programs, and the establishment of review and complaint procedures took effect. Pursuant to Title 29, Local 36 and sheet metal contractors set up a Joint Apprenticeship Committee, revised the Sheet Metal Worker Apprenticeship Program and then sent the revised qualifications and procedures to the Secretary of Labor. The Secretary of Labor in February, 1965 held that the Apprenticeship Program was in compliance with Title 29, and the Apprenticeship Program has been operating with these qualifications and procedures since that time. No complaint has ever been filed by any person against the Sheet Metal Workers Apprenticeship Program.

25/ Paragraph 5, page A 5 of plaintiff's Appendix.

26/ Paragraph II, g, page A 22 of plaintiff's Appendix.

There is no evidence that any Negro has been excluded from the Sheet Metal Workers Apprenticeship Program, either prior to or after July 2, 1965. The evidence established that all applicants since February, 1965, whether they be white or Negro and related or not related to present members, have followed the same procedure. All applicants fill out an application, and are then assigned a testing date. Upon completion of the test (there is no fee for the test), all applicants are interviewed. All persons with a score of 80 or more out of 200 points are then slotted on the "available for training" list according to their score, and when their name and score reach the top of the list they are sent out as an apprentice.

The two additional Negro apprentices who are in the Program followed the aforementioned procedure the same as did the white applicants. All applicants, Negro and white, who did not appear for the tests were not processed any further. The program has been uniformly and non-discriminatorily administered by the three contractors and three sheet metal journeymen on the Joint Apprenticeship Committee. There is no evidence that either the contractors or the sheet metal journeymen control or dominate the Committee.

There has been no favoritism shown to relatives of members of Local 36. In fact, the results of the questionnaires show that 56% of the applicants who were rejected for failing to receive the minimum score of 80 points were white and related by blood or marriage. Furthermore, at least four white applicants who were sons of present members of Local 36 have been rejected for failing to obtain the minimum of 80 points. Perhaps the best illustration of the fairness and objectivity of the Sheet Metal Workers Apprenticeship Program was the testimony of Henry Spitzmiller, a witness called by plaintiff. Spitzmiller testified that his father, brother and cousin are members of Local 36, and his father was on the Executive Board for 6 years and his brother presently is a member of the Executive Board. Yet, Henry Spitzmiller was rejected for

the Sheet Metal Workers Apprenticeship Program because he did not score the minimum of 80 points. Spitzmiller had followed the same procedure as all other applicants for the Apprenticeship Program.

Plaintiff's statement that "Local 36 never publicized any change which may have occurred in its policy of excluding Negroes from apprenticeship until after the filing of this lawsuit" just isn't true. First, of all there is no evidence that Local 36 ever had a policy of excluding Negroes ^{from} apprenticeship. Second, in May, 1965, prior to the effective date of the Act and prior to the filing of this lawsuit, the Joint Apprenticeship Committee, with the concurrence of its sheet metal journeymen members, mailed out letters to 28 schools in this area and to various agencies such as the Division of Employment Security stating that the Sheet Metal Worker Apprenticeship Program was accepting apprenticeship applications the year around and that it was in conformance with Title 29. A summary of the amended qualifications and procedures was enclosed with each letter and the summary stated that apprentices would be selected without regard to race, creed, color, national origin, sex or occupationally irrelevant physical requirements.

The dissemination of information to the Negro and white communities has continued to the present time. In the "Evidence" section of this Brief, Local 36 has summarized the methods and procedures by which the Joint Apprenticeship Committee has publicized the Program, including the May, 1965 letter, the February, 1966 article in the Post Dispatch, the April, 1967 letter^{27/} and the activities of the Apprenticeship Information Center which the Joint Apprenticeship Committee co-operates with and supports.

In the same way that plaintiff's proposed remedy regarding Local 36's referral system seeks to nullify the express language in Section 8(f)(4) of the Labor Management Relations Act, which was inserted in the Act in 1959;

^{27/} The expanded mailing in April, 1967, by the Joint Apprenticeship Committee, and the continued co-operation by the Committee with the Apprenticeship Information Center refutes the inference on page 23 of plaintiff's Brief that Local 36 ceased publicizing the Apprenticeship Program after the second Negro became an apprentice.

plaintiff's proposed remedy dealing with the Apprenticeship Program would directly conflict with the Department of Labor's Title 29 PART 30. Plaintiff says that Negroes should be admitted to the Apprenticeship Program if they possess qualifications equal to or higher than those possessed by the least qualified white person who has been accepted as an apprentice since 1961. Notwithstanding the fact that the sheet metal contractors selected the apprentices prior to 1964, it is important to note the stated purpose of Title 29, PART 30.1:

"The purpose of this part is to promote equality of opportunity and to prevent discrimination based on race, creed, color or national origin in all phases of apprenticeship."

Title 29, PART 30.4 then provides that objective standards are to be used and the "best qualified" applicants are to be selected. The Secretary of Labor has stated in writing that the Sheet Metal Worker Apprenticeship Program is in compliance with Title 29, PART 30 (Defendant Exhibit No. Q). There have been no complaints filed against the Apprenticeship Program. Plaintiff has not adduced any evidence that a single Negro has been discriminated against by the Apprenticeship Program.^{28/} If the Department of Justice doesn't believe that the Department of Labor is doing a good job in the area of civil rights, then it seems that the matter should be discussed internally within the Executive Branch of the Government and not in the arena of a lawsuit with the Sheet Metal Workers Apprenticeship Program caught in the middle.

^{28 /} Plaintiff photographed the files of all the apprentices and apprentice applicants, which consisted of thousands of letters, forms, interview sheets, etc.; yet, none of the records were introduced as evidence in support of plaintiff's charge of discrimination.

e. Local 36 Does Not Have a Policy or Practice of Nepotism.

Plaintiff is at least consistent in its incredible conclusions. Plaintiff in its Brief states that Local 36 has "an open and avowed nepotistic policy" (Page 24). Yet, where is there evidence to support such a statement? There is no evidence that any relative by blood or marriage of any member or apprentice of Local 36 received any favored treatment in applying for the apprenticeship program, signing up for the referral system, or in applying for journeyman membership.

The results of the questionnaires that plaintiff sent out to all persons who applied for membership or the Apprenticeship Program clearly refute plaintiff's charge, but plaintiff continues to make the accusation without supporting evidence. The results established that 88% of the journeymen admitted since the effective date of the Act were not related by blood or marriage to a member or former member of Local 36. The results showed further that 66% of the apprentices admitted since the effective date of the Act were not related by blood or marriage.

Plaintiff points to a motion made at an Executive Board meeting in 1951 that members' sons and sons of employers have preference when new apprentices were allowed. However, plaintiff ignores the fact that since 1964 the old method of letting contractors select apprentices has been eliminated, and the new Apprenticeship Program with objective qualifications and standards (and without any special treatment for contractor or members' sons) was adopted and is currently in full force and effect. If there is such an "open and avowed nepotistic policy" as alleged by plaintiff, how did the four sons of members get rejected by the Joint Apprenticeship Committee in the period 1965 to the present time? Specifically, how could Henry Spitzmiller be rejected when his father, brother and cousin are members? From February, 1965, when the amended qualifications and

procedures of the Apprenticeship Program went into effect, to the present time, there is not one shred of evidence that any relative of a member of Local 36 received any favored or special treatment.

There is no vote taken by Local 36 upon an application for membership, and the space for vouchers on the membership application is routinely and automatically filled in by an Executive Board member. Apprentice applicants are requested to furnish recommendations from persons of their own choosing; and are not required to furnish them from the ranks of the current or past members^{29/} .

Plaintiff cites Lefkowitz v. Farrell & Sheet Metal Workers Local 28 9 R.R.L.R. 393 (N.Y. Comm. on Human Rights, 1964), aff'd 252 N.Y.S. 2d, 649 (Sup. Ct. N.Y. County, 1964), but the facts in that case and in the instant case are critically different. In Lefkowitz v. Farrell, supra, the evidence established that while there was a Joint Apprenticeship Committee, it had failed to act and the union alone selected the apprentices. The evidence in Lefkowitz established that applicants had to be sponsored by someone such as a union member or by an employer or friend, and that no applicant sponsored by the union had ever been rejected. Over 80% of all apprentices in training were relatives of Local 28 members. There had never been a Negro apprentice in the history of the union, and the case had been processed when a qualified Negro applicant had applied for the apprenticeship program and had been rejected for arbitrary and discriminatory reasons. None of the aforementioned facts in Lefkowitz v. Farrell, supra, are present in the instant case involving Local 36 and the Joint Apprenticeship Committee.

Another case repeatedly cited by plaintiff in its Brief, Vogler v. McCarthy, supra, is also clearly distinguishable from the instant case. In Vogler the facts were that applicants for membership had to obtain written

29 / The "certificate from alumni", "recommendation from member" and "brother-sister" cases cited by plaintiff, such as Ross v. Dyer, 312 F.2d 191 (5th Cir., 1963), Meredith v. Fair, 298 F. 2d 696 (5th Cir., 1959), Hawkins v. N.C. Dental Society, 355 F.2d 718 (4th Cir., 1966), etc., are clearly distinguishable from the instant case on the facts.

recommendations from three members, and none of the members were Negroes. In addition, ^{an} applicant had to obtain the approval of a majority of the members before he could become a member. The evidence established further that it was the policy of the union to restrict its membership to the sons or close relatives of other members, and of 72 first-year improvers affiliated with the union (there was no formal apprenticeship program) 69 were sons or step-sons of members and the other 3 were nephews who had been raised by a member as his son. The evidence in Vogler further established that it was the policy and practice of the union to refuse to consider Negroes for membership in the union and to refuse to refer Negroes to employment. The suit was initiated when a number of persons of a minority race sought membership in and/or referrals from the union, and were rejected or denied because of the aforementioned evidence. Without summarizing the evidence in this case again, there can be no doubt that the facts in the instant case and those in Vogler are clearly distinguishable.

- f. Plaintiff's Proposed Findings of Fact are Not Supported by Substantial Evidence in the Record as a Whole; and Plaintiff's Proposed Conclusions of Law Conflict with the Express Language, Intent and Legislative History of the Civil Rights Act of 1964.

In the previous portions of this Brief, defendant Local 36 has discussed in detail many of plaintiff's Proposed Findings of Fact because Local 36 submits that the evidence established that such statements were incorrect or misleading. Plaintiff has conspicuously ignored the critical facts that Negroes have not applied for membership in Local 36 nor have they sought to use the non-exclusive referral system. Furthermore, plaintiff has conspicuously ignored the fact that the Sheet Metal Worker

Apprenticeship Program was revised in 1964-65 to conform to Title 29 PART 30, and that since the revision Negroes have inquired and applied for the Program but only two Negroes appeared to take the tests and interviews which are required of all applicants. [Both of these Negroes were admitted as apprentices.]

In its attempt to avoid facing critical facts, including the fact that no Negro has ever filed a complaint with any State or Federal administrative agency charging racial discrimination against Local 36, plaintiff cites excerpts from the minutes and infers discrimination from non-discriminatory statements. If defendant undertook some action or activity, plaintiff continually refers to it to as either inadequate or that it was done because of the filing of the lawsuit. One can only conclude that no matter what defendant (and other agencies of the Federal Government) have done, it just isn't enough for the Justice Department.

For instance, in paragraph 5 of plaintiff's Proposed Finding of Fact^{30/} plaintiff stated that Local 36 "failed to adequately publicize its adoption of a new apprenticeship program"^{30/}. The evidence of what was done is in the record and has been discussed in this Brief. What isn't in the record is any testimony or evidence by any person or governmental agency as to what that person or agency believes should have been done. In fact in the proposed Remedy plaintiff asks the Court to order the defendants to submit an informational program by which the defendants propose to bring to the attention of the Negro community the availability of membership, job referrals, and apprenticeship. Even after seeing evidence of what was done, the Justice Department declines or refuses to say in its Brief what additional activity should be done. It is much easier for plaintiff to do what it has done; to wit, sit in "ivory tower" judgment as to what was done; ignore

^{30/} Paragraph 5, page A 5 of plaintiff's Appendix.

the lack of interest on the part of the Negro community; criticize and seek to undermine the tremendous accomplishments of the Secretary of Labor's Title 29 PART 30 Non-Discrimination in Apprenticeship and Training; and to demand some unknown form of affirmative steps when the Civil Rights Act of 1964 doesn't even require such action.

Local 36 submits that there is a distinction between terminating discrimination and compelling integration^{31/}. In fact, as discussed previously, Section 703 (j) of the Civil Rights Act of 1964 expressly prohibits the granting of preferential treatment to any individual or group on account of an imbalance which may exist because of a racial composition. Over and above what it is legally required to do, Local 36 and the Joint Apprenticeship Committee both prior to the effective day of the Act and the filing of this lawsuit, and continuing to the present time, has directly contacted the Negro and white communities, and has co-operated fully and completely with the Department of Labor's Apprenticeship Information Center. Plaintiff's reaction to all of this is that it is inadequate; but then doesn't state what is adequate. Perhaps, plaintiff in its Reply Brief will come back and tell us for the first time what specific action should be taken. On the other hand, maybe plaintiff, after the lesson it learned in its charge of nepotism,

^{31/} This point was succinctly stated by the New York Supreme Court, Appellate Division in Commission for Human Rights v. Farrell, 264 N.Y.S. 2d 489 (1965):

"In view of the discussion had upon argument it may be well for us to point out that the order of the court does not look toward the integration of the union. There is a distinction between compelling integration and the termination of discrimination. A party has the right not to be excluded from the union because of race, creed, color, or religious persuasion. Quite different would be the assertion of a right -- non-existent under the Law Against Discrimination -- to have the union take affirmative steps looking toward integration. The law does not call for it, nor does the order appealed from require it. The order of the Commission on Human Rights did not call for the parties to do any more than to cease and desist from continuing discrimination." (emphasis supplied)

believes it best to keep its charges and demands vague and general. When plaintiff couldn't come up with evidence as to a policy or practice of nepotism, it sought to establish the point by statistics derived from a questionnaire; but, the results of the questionnaire established that the overwhelming number of new members and apprentices were not related by blood or marriage to members of Local 36.

It is to be noted that the affirmative action required of unions, employers, and joint labor-management apprentice committees is set forth in Section 711 (a) of the Act and is limited to the posting of notices prepared by the EEOC summarizing pertinent provisions of the Act and information concerning the filing of a complaint^{32/}. There is no requirement that the aforementioned organizations publish information as to the requirements for admission to membership and apprenticeship programs or the waiver of such requirements. Congress refused to enact the proposal of the House Judiciary Committee which would have authorized the inclusion in the notices of "such other relevant information which the Commission deems appropriate to effectuate the purposes of this Title"^{33/}.

^{32/} Section 711 (a) of the Civil Rights Act of 1964, 42 USC 2000e-10(a):

"Sec. 711 (a) Every employer, employment agency and labor organization, as the case may be, shall post and keep posted in conspicuous places upon its premises where notices to employees, applicants for employment and members are customarily posted a notice to be prepared or approved by the Commission setting forth excerpts from or, summaries of, the pertinent provisions of this title and information pertinent to the filing of a complaint."

^{33/} Report to Accompany H.R. 7152, 88th Congress, 1st Session, November 20, 1963, Section 712 (a).

Senator Dirksen summarized the change in Section 711 on the floor of the Senate on June 5, 1964^{34/}:

"Section 711: This section requires employers, employment agencies, and labor organizations to post upon their bulletin boards excerpts from this title. The provision requiring the posting of 'such other relevant information which the Commission deems appropriate' was deleted and a provision providing for the posting of summaries of pertinent provisions of the title and information pertinent to the filing of a complaint is substituted for it."

Plaintiff is seeking injunctive relief from this Court, and consequently it brushes off any action taken by defendant since the date the suit was filed as attempts to militate the relief. Such is the manner in which it characterizes Local 36's contacts in December, 1966 with Kennedy & Sons Sheet Metal Shop and with the sheet metal workers of said shop. Similarly, plaintiff minimizes Local 36's offer to Wells and Lee to sign a contract and to become members of Local 36. But, critical to plaintiff's request for an injunction is that there is no evidence in the record of any other Negro sheet metal shops and Negro sheet metal workers besides Kennedy & Sons and Wells & Lee. And as plaintiff well knows, any attempt by Local 36 to sign contracts with Kennedy & Sons and other sheet metal contractors in the Midwest Contractors Association between June 15, 1965 and the so-called "soft period" in December, 1966, would have squarely conflicted with the contract-bar rules of the National Labor Relations Board.

^{34/} Senator Dirksen, 110 Cong. Rec. 12381-85 (June 5, 1964)

V. CONCLUSION

Plaintiff has brought this cause of action against defendant Local 36 under Section 707 of the Civil Rights Act of 1964. In order for plaintiff to prevail it must prove that Local 36 "is engaged in a pattern or practice of resistance to the full enjoyment of any of the rights secured by this title, and that the pattern or practice is of such nature and is intended to deny the full exercise of the rights herein described" (emphasis supplied). Furthermore, the pattern or practice or resistance with intent to deny must have occurred since July 2, 1965, the effective date of the Act.

The language of Section 707 is significant, since the Act expressly requires proof that a defendant is resisting the rights secured by the Act, and that the pattern or practice is intended to deny such rights. Both resistance and intent must be established by the evidence, before defendant can be held to have violated Section 707.

What did the record in this case establish? It established that there is no evidence that any Negro ever applied for or was excluded from membership in Local 36. There is no evidence that any Negro ever applied for or was excluded from the referral system. There is no evidence that any qualified Negro applicant was ever rejected by the Sheet Metal Workers Apprenticeship Program other than those Negroes who signed up for and then failed to appear for the tests. There is evidence that Local 36 sought to sign contracts with the only two Negro sheet metal shops mentioned in the evidence. There is evidence that Local 36 sought to bring into its membership the Negro sheet metal workers of the aforementioned Negro sheet metal shops, but that said workers were not interested in becoming members of Local 36. Further, Local 36 submits that based upon the totality of the evidence and in particular the facts concerning Local 36's relationship with Kennedy & Sons, that any doubts as to the terms offered to Wells and Lee should


be resolved in favor of Local 36. There is no evidence that any person has ever filed a complaint with any federal or state agency against Local 36 charging racial discrimination. And there is no evidence in the record that any Negro is presently seeking membership in Local 36 or to use the referral system.

Finally, the record established that Local 36 and its officers not only desire to and are complying with all of the State and Federal laws, but in addition, have undertaken activities and programs that go beyond the requirements in the statutes and ordinances. Such conduct and activities began prior to the effective date of the Civil Rights Act of 1964, and are continuing to the present time. What concerns Local 36, however, is that plaintiff by its improper insertion of the settlement discussions between plaintiff and some of the other original defendants, is seeking to go beyond the law and the facts to obtain judicial relief. But, Local 36 submits that when the Office of the Attorney General in Washington, D.C. rejected the agreement worked out in St. Louis between counsel for plaintiff and defendant Local 36, which resulted in this case going to trial; that both plaintiff and Local 36 understood that this case would be decided on the evidence in the record and the existing law, and that this Court would either dismiss the suit or issue an injunction.

Local 36 submits that based upon the law and the evidence of this case, plaintiff has not proven that Local 36 is engaged in a pattern or practice of resistance with intent to deny the rights secured by the Act, and that this cause of action against Local 36 should be dismissed.

Respectfully submitted,

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Attorneys for Defendant Sheet Metal Workers'
International Association, AFL-CIO, Local
Union No. 36



Charles A. Werner

U.S.

vs.

Sheet Metal Workers
etc

No. 66 C 58 (2)

United States District Court

Eastern District of Missouri

1/8, 19 67

MEMORANDUM FOR CLERK

Defendant Local 1, IBEW files
Memorandum of Defendant
Local 1, IBEW in Support
of its Proposed Findings
of Fact and Conclusions of
Law
and, attached,
Appendix: Defendant
IBEW Local 1's Proposed
Findings of Fact and
Conclusions of Law

James K. Cook

Attorney's for ~~Plaintiff~~
Defendant

Local 1
IBEW