Form DJ-96a
(Rev. 6-22-66)

DEPARTMENT OF JUSTICE

ROUTING SLIP

TO: NAME	DIVISION	BUILDING	ROOM
1. S. J. Pollak			1145
2. O. M. Fiss			1607
3.			
4.			

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- ☐ APPROVAL
- ☐ SEE ME
- ☐ RECOMMENDATION
- ☐ COMMENT
- ☐ NECESSARY ACTION
- ☐ NOTE AND RETURN
- ☐ CALL ME
- ☐ PER CONVERSATION
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- ☐ ANSWER OR ACKNOWLEDGE ON OR BEFORE _____
- ☐ PREPARE REPLY FOR THE SIGNATURE OF _____

REMARKS

Thoughtful memorandum. See my note on page 5.

Do you or Nat have your hands around the appeal? I will try to become involved.

Owen

Inter-division memo.

FROM: NAME	BUILDING & ROOM	EXT.	DATE
~~O.~~ M. Fiss			4/12

Form DJ-96a
(Rev. 6-22-66)

DEPARTMENT OF JUSTICE

ROUTING SLIP

TO: NAME	DIVISION	BUILDING	ROOM
1. ~~Mr. Fiss~~			
2. SJP			
3. Fiss			
4.			

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Do you or Nat have your hands around the appeal? I will try to become involved.

FROM: NAME	BUILDING & ROOM	EXT.	DATE
SJP			3/29

Stephen J. Pollak
Assistant Attorney General
Civil Rights Division

March 26, 1968

Richard K. Berg
Office of Legal Counsel

United States v. Sheet Metal Workers et ano.

This is in response to your request for comments on the draft appeal memorandum on the above case. Let me make clear that my views are based entirely on the draft memorandum and Judge Meredith's opinion. I have no other knowledge of the fact situations involved.

In my view these both look like rather weak cases for appeal, both in terms of the facts and the legal issues involved. I consider them one at a time:

Electrical Workers, Local 1--

This is apparently the stronger case of the two from the Government's point of view. The appeal memorandum expresses (pp. 6-8) substantial disagreement with Judge Meredith's factual findings, and argues that the Court should have found:

1) that Walter Hampton was treated differently from other applicants similarly situated;

2) that Local 1 declined to organize Frank Witt's workers because they were Negroes and that subsequent to his signing a contract Local 1 referred workers to him because they were Negroes;

3) between July 2, 1965 and February 4, 1966 Negroes actively sought membership in Local 1 and were excluded; and

4) referrals through the union hiring hall up until the time of trial gave preference to union members.

Since I do not know what evidence was before the Court I cannot judge whether the Court's findings on these questions were "clearly erroneous". Rule 52(a), F.R.C.P.

However, I think in analyzing the case against Local 1, we must look at three distinct situations--membership, apprenticeship, and job referral.

1. Membership. The Court states that on July 2, 1965 there were 25 Negro members in the construction classification, none in the non-construction classification. Ten more Negroes were admitted to the non-construction classification prior to suit. Between July 2, 1965 and February 4, 1966 only one Negro, Hampton, had applied for membership in the construction classification. Subsequent to February 4 twelve Negroes had applied and been admitted. The Court found that Hampton had not been denied membership on discriminatory grounds. The draft memorandum concedes tacitly that the denial of membership was not in itself discriminatory, but may have been discriminatory in legal effect because it resulted from a discriminatory refusal to refer.

In connection with membership practices the memorandum suggests the Court improperly refused to consider conduct prior to July 2, 1965. I believe there are two theories under which pre-July 1965 conduct may be relevant in a Title VII case. First, it seems to me indisputable that pre-July conduct is relevant in attempting to show defendant's bias in order to explain otherwise ambiguous conduct. Machinists Local v. NLRB, 362 U.S. 411, 416 (1960). Thus, if the union had turned down Negro applicants for membership after July 2, 1965 for assertedly nondiscriminatory reasons, it would be permissible to show prior discrimination in order to prove that these were not the real reasons for the union's actions. Second, it may in some cases be permissible to show past discrimination in order to show that the present course of conduct, although not explicitly discriminatory, unlawfully carries forward past discrimination. Quarles v. Philip Morris, ____ F. Supp. ____ (E.D.Va. 1968). Obviously, the first proposition is merely a rule of evidence; the latter is one of substantive law.

With respect to Local 1 the pre-July 1965 evidence would seem to be relevant only if since 1965 there were rejections of Negro members under ambiguous circumstances. If Judge Meredith's findings (pp. 12-14) that since July, 1965 no Negro other than Hampton has been refused membership and that Hampton was not treated differently from other applicants are correct, then it would be hard to see what the pre-July 1965 evidence would tend to prove with respect to Local 1's current practices, except possibly that Local 1 deliberately refused to attempt to organize Negro firms. As to the use of evidence of pre-July 1965 discrimination to prove that Local 1's practices carry forward the effects of earlier discrimination, this does not appear to be true with respect to membership, except to the extent that discrimination in referrals may make it more difficult to become eligible for membership.

2. Apprenticeship. The draft memorandum discusses the question of nepotism in Local 1's practices for admitting apprentices, and also suggests that discrimination can be inferred from statistics. But Judge Meredith finds (pp. 15-16) that four Negroes passed the objective qualifying examinations for apprenticeship training, one failed to appear for the interview, and the other three were admitted to the program. I do not believe that the statistical evidence can establish either nepotism or racial discrimination; it can merely furnish the basis for a permissible inference. If Judge Meredith is correct in finding that every Negro who sought to become an apprentice since July 1965 was fairly treated, any inference which might otherwise be drawn from the statistics or from pre-1965 practices is rebutted.

3. Referral practices. The referral practices of Local 1 seem to raise the most complicated and significant legal questions. Under Local 1's referral system, in effect since 1958, journeymen with previous experience under the collective bargaining agreement have priority over those journeymen, similarly qualified, who lack such experience. The Government's position, as I understand the draft memorandum, is that since (a) Negroes were formerly denied admission to the union, and

(b) the requirement of experience under the collective bargaining agreement discriminates in favor of union members, therefore to continue to maintain the present system of priorities carries forward the pre-July 1965 discrimination against Negroes. Judge Meredith's position is not entirely clear. With respect to Local 36's similar priority system, he said (p. 9, "It is clear that the groups distinguish between union and non-union members * * *." With respect to Local 1's system, he seems to think that it prefers union to non-union members (p. 24), but seems to say that in any event such discrimination is exclusively a matter for the National Labor Relations Board (pp. 19-20).

I think it clear that the same act or practice may constitute a violation of both the Labor Management Relations Act and Title VII, and a court is not divested of jurisdiction of a Title VII suit simply because a case could have been brought or even has been brought under the LMRA on the same facts. Robinson v. Lorillard Co. (M.D.N.C. 1967). But the instant case is considerably more complicated because it involves the relationship not only of the procedures but also of the substance of both statutes.

Title VII prohibits discrimination based on race, the LMRA prohibits discrimination based on union membership. Where prior to 1965 a union excluded Negro members, I believe that a present practice preferring in some way pre-1965 members over new members and non-members, Negro and white, might violate Title VII, depending to some extent on the relative numbers involved and the practical impact of the practice. On the other hand, it seems that it would be much easier to deal with the case as an LMRA violation.

However, it is by no means clear to me that Local 1's referral system does discriminate in favor of union members, at least under prevailing cases interpreting the LMRA. In NLRB v. Local 269, IBEW, 357 F.2d 51 (C.A. 3, 1966), a case cited in Judge Meredith's opinion, a referral system similar to Local 1's was held discriminatory under the LMRA where the evidence showed that in the past the hiring hall had unlawfully preferred union members to non-members in referrals. The Court and the Board reasoned that where union members had unlawfully obtained better opportunities to accrue experience under the collective bargaining agreement, it was unlawful to make such

experience a basis for priority in future referrals. However, neither the Court nor the Board assumed that a provision basing "seniority" on experience under the collective bargaining agreement was unlawful per se. Quite the contrary. NLRB v. Local 269, supra at 55-56. Under the LMRA there is no presumption that a union controlling a hiring hall discriminates in its referrals in favor of union members. Teamsters Local v. NLRB, 365 U.S. 667, 676 (1961). Consequently a referral system which gives priority to those with experience under the collective bargaining agreement does not necessarily favor union members over non-union members. Neither the Court's opinion nor the draft memorandum indicates whether there is evidence in the record indicating either that Local 1's system was superimposed on a previous system of discrimination in favor of union members, 1/ or that it is currently being administered other than in accordance with its terms.

If the referral system does not discriminate against non-members, then a fortiori it cannot be said to carry forward the effects of the pre-1965 exclusion of Negroes from membership. Therefore, if the Government's attack on the present referral system is based solely on Local 1's pre-1965 membership practices, and the assumed effect of the language of the collective bargaining agreement, the position seems to me legally insufficient. On the other hand, if the record establishes that the operation of the referral system presently discriminates against non-members, it may be possible to carry the argument a step further and find racial discrimination as well. Even here, however, we would face the tactically difficult problem of having to prove a violation of the LMRA in order to prove a violation of Title VII. 2/

1/ Since the referral system dates from 1958, it is likely that the effects of any pre-1958 discrimination have been dissipated.
2/ I am aware that the test of discrimination under Title VII is not necessarily the same as under the LMRA. But where the question is whether a given referral system discriminates in favor of union members, the courts will be hard put to avoid applying LMRA authorities. If we are to attempt to drive a wedge between the two statutes, we must select a case with a very favorable fact situation.

There is another point in — That is, without regard to member or non-member discrimination, in the past Negroes were unable to use the referral system to acquire any experience, and therefore a present experience requirement applicable to all would carry forth the past discrimination in that it would be tougher on Negroes as a class than whites. Is this part of our case?

I am not sure what Judge Meredith's holding on the LMRA question means. He may be saying that as a matter of law discrimination based on union membership is not discrimination based on race, whatever the circumstances. I would disagree with this proposition. He may be saying (p. 25) that in the circumstances of this case the racial aspects are so tangential to either the motives or the practical effects of the union's policy that discrimination in favor of union members cannot be regarded as racial discrimination. This is basically a factual judgment. Or he may be saying that where the question of whether Title VII has been violated depends in the first instance on whether the LMRA has been violated, the case should be handled by the NLRB. This last is a somewhat complicated proposition, and I doubt that it is what the Court meant, but it does have something to recommend it.

To sum up, the draft memorandum certainly does not convince me that the Court erred in failing to find that Local 1's referral system violates Title VII.

Sheet Metal Workers, Local 36--

Many of my comments with respect to Local 1 are applicable to the case against Local 36. The draft memorandum emphasizes statistical evidence and past history of discrimination and nepotism, and evidence of present reluctance to organize Negro firms, but the only specific instance of post-July 1965 discrimination cited is the incident involving Wells and Lee Heating Service. How persuasive this is I cannot tell. Wells and Lee were offered membership for the fee then prevailing for individual new members. The Government's theory is that since they were also employers, they should have been offered membership at the lower fee used in organizational campaigns. However, the union may have felt that the lower fee was inappropriate where the firm had only two employees, if such was the case. At any rate the record would have to be very strong to justify reversal on this point. Outside of this one instance there seems to be no evidence of specific acts

of discrimination by Local 36. The Court says (p. 4) there was no evidence that any Negro has ever applied to take the union's journeyman examination before or since July 1965. With respect to apprentices the Court found (p. 7) that no Negro who applied and went through the required procedures was rejected. With respect to referral the Court found (p. 8) that "there is no evidence that a Negro ever signed up for a work referral under the non-exclusive referral system in effect prior to January 1, 1968." If these findings are correct, I fail to see how the Court could have found a pattern or practice of discrimination simply on the basis of statistical evidence or pre-1965 history. As for Local 36's new referral system, it was instituted subsequent to the trial and, therefore, is properly not a part of the case. However, for the reasons I discussed before it seems unlikely that it is illegal under either the LMRA or Title VII. If the union did not discriminate in referrals in the period prior to January 1968, a system which thereafter bases referral priority on experience under the collective bargaining agreement does not discriminate in favor of union members.

With respect to Judge Meredith's references to "seniority," it seems to me the draft memorandum places undue emphasis on this point. The Court's opinion does not rely on or even cite section 703(h). The Court did cite the Department of Justice memorandum with respect to "vested seniority rights," but I think that the logic of that memorandum does carry over to the kind of referral priority we have here. In any event before we can even get to the question of whether the referral system is or is not a seniority system, we must prove that it carries forward the effects of past discrimination. For the reasons previously stated, the draft memorandum read together with the opinion do not persuade me that it does.

Theory of the case. There seems to me to be a basic disagreement between my view of a pattern or practice case and the view indicated in the draft memorandum. The theory of the memorandum seems to be that statistical evidence plus a previous history of discrimination, if persuasive enough, can establish a pattern or practice of discrimination even in the absence of evidence of specific discriminatory acts. I do not agree. I have no trouble inferring from such evidence the necessary discriminatory intent, but it seems to me that the Government must at least show a reasonable number of instances in which that intent was translated into unlawful action.