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holds that the single fact of being a larger purchaser establishes illegal reciprocity potential and that such potential constitutes an antitrust violation per se. It is somewhat doubtful whether the *Allis-Chalmers* decision will be followed in light of the recent *Northwest*⁸⁸ and *ITT*⁸⁹ cases. But if *Allis-Chalmers* is followed extensively or applied to situations where there is a mere possibility of reciprocity, its effect will be to thwart many mergers which would otherwise have been legitimate since the granting of preliminary injunctive relief normally causes acquiring companies to abandon their takeover plans.⁹⁰ To avoid this consequence, courts should adhere to a higher standard in demonstrating potential reciprocity than that espoused in *Allis-Chalmers* before granting preliminary injunctive relief to deny the consummation of a proposed conglomerate merger.

JERRALD J. ROEHL

CIVIL RIGHTS ACT OF 1964: RACIAL DISCRIMINATION AND UNION MEMBERSHIP

The Civil Rights of 1964¹ represents a massive attack on racial discrimination. Title VII² prohibits discrimination in all aspects of employment.³ Other titles aim to eliminate discrimination in voting,⁴

⁸⁸United States v. Northwest Indus., Inc., 301 F. Supp. 1066 (N.D. Ill. 1969).

⁸⁹United States v. International Tel. & Tel. Corp., 306 F. Supp. 766 (D. Conn. 1969).

⁹⁰Cases cited note 75 *supra*.

¹Pub. L. No. 88-352, 78 Stat. 241 (1964).

²42 U.S.C. § 2000e (1964).

³For discussions of the problem of minority employment and the role of Title VII, see Cooksey, *The Role of Law in Equal Employment Opportunity*, 7 B.C. IND. & COM. L. REV. 417 (1966); Gould, *Seniority and the Black Worker: Reflections on Quarles and Its Implications*, 47 TEXAS L. REV. 1039 (1969); Hill, *The Role of Law in Securing Equal Employment Opportunity: Legal Powers and Social Change*, 7 B.C. IND. & COM. L. REV. 625 (1966); Morse, *The Scope of Judicial Relief Under Title VII of the Civil Rights Act of 1964*, 46 TEXAS L. REV. 516 (1967); Rachlin, *Title VII: Limitations and Qualifications*, 7 B.C. IND. & COM. L. REV. 473 (1966); Rosen, *The Law and Racial Discrimination in Employment*, 53 CAL. L. REV. 729 (1965); Schmidt, *Title VII: Coverage and Comments*, 7 B.C. IND. & COM. L. REV. 459 (1966); Note, *Title VII, Seniority Discrimination, and the Incumbent Negro*, 80 HARV. L. REV. 1260 (1967); Note, *The Civil Rights Act of 1964: Racial Discrimination by Labor Unions*, 41 ST. JOHN'S L. REV. 58 (1966); Comment, *Enforcement of Fair Employment Under the Civil Rights Act of 1964*, 32 U. CHI. L. REV. 430 (1965).

⁴42 U.S.C. § 2000f (1964).

education,⁵ and public accommodations.⁶ Prior to the enactment of this Act, certain restrictions had been placed on union conduct with respect to the worker.⁷ A limited duty of nondiscrimination was imposed,⁸ although unions were still free to discriminate in their membership and admission policies.⁹ The Civil Rights Act of 1964 specifically addresses this problem.

Title VII makes it unlawful for a labor union to deny membership to a worker, or act to deprive or limit his employment opportunities, because of his race or color.¹⁰ When the Attorney General has reason to suspect "a pattern or practice" of resistance to the enjoyment of rights secured by Title VII, he may seek injunctive relief.¹¹ If the court finds that the defendant has engaged in an unlawful employment

⁵42 U.S.C. § 2000c (1964).

⁶42 U.S.C. § 2000a (1964).

⁷See National Labor Relations Act, 49 Stat. 449 (1935), as amended, 29 U.S.C. §§ 151-67 (1964).

⁸In *Steele v. Louisville & N.R.R.*, 323 U.S. 192 (1944), a Negro fireman was excluded from the Brotherhood of Locomotive Fireman and Enginemen. Although exclusion from union membership was not illegal, the Supreme Court, interpreting the Railway Labor Act, held that where a union is designated by a majority of the workers as an appropriate bargaining agent, it must represent all workers, union and nonunion alike, "without hostile discrimination, fairly, impartially, and in good faith." *Id.* at 204. This duty of fair representation may require unions to resist employer discrimination as well. *Central of Ga. Ry. v. Jones*, 229 F.2d 648, 650 (5th Cir.), cert. denied, 352 U.S. 848 (1956). See *Sovern, The National Labor Relations Act and Racial Discriminations*, 62 COLUM. L. REV. 563 (1962). But see *Cox, The Duty of Fair Representation*, 2 VILL. L. REV. 151 (1957). Conversely it is an unfair labor practice for a union to cause an employer to discriminate against any worker. 29 U.S.C. 158(b)(2) (1958).

The Civil Rights Act deals expressly with the problem of racial discrimination. 42 U.S.C. § 2000e-2(c) (1964). Previous legislation has sought to protect the worker as a general class and not specifically in terms of race. 29 U.S.C. §§ 151-67 (1964).

⁹Congress in the National Labor Relations Act provided that:

It shall be an unfair labor practice for a labor organization or its agents—

(1) to restrain or coerce (A) employers in the exercise of the rights guaranteed in . . . this title: *Provided*, That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein . . .

29 U.S.C. § 158(b)(1) (1964).

¹⁰42 U.S.C. §§ 2000e-2(c) (1964) provides:

It shall be an unlawful employment practice for a labor organization—(1) to exclude . . . from its membership, or otherwise to discriminate against, any individual because of his race, color, . . . (2) to limit, segregate, or classify its membership, or . . . deprive any individual of employment opportunities, . . . or otherwise adversely affect his status as an employee or as an applicant for employment, because of such individual's race, color, religion, sex, or national origin . . .

¹¹42 U.S.C. § 2000e-6(a) (1964). Title VII also provides for a civil remedy for individual complainants. 42 U.S.C. § 2000e-5(e) (1964).

practice, it may enjoin the offensive conduct, and "order such affirmative action as may be appropriate."¹²

Title VII explicitly demands only nondiscrimination. The Act does not require affirmative action to correct the present effects of past discrimination.¹³ It is clear, however, that Congress did not intend to freeze an entire generation of Negroes into patterns predicated upon discriminatory practices that existed before the Act.¹⁴ The courts have been confronted, therefore, with the dilemma of just how far they may go in eliminating the vestiges of past discrimination.¹⁵

The Attorney General may obtain relief only where a "pattern or practice" of discrimination has been shown to exist.¹⁶ Yet Congress did not establish the precise metes and bounds of the "pattern or practice" terminology.¹⁷ It has been left to the courts to develop this point on a case by case basis. The Court of Appeals for the Eighth Circuit in *United States v. Sheet Metal Workers, Local 36*,¹⁸ was recently confronted by this question. Although there was no evidence of discriminatory conduct since the effective date of the Act (July 2, 1965), the court nevertheless found a prima facie "pattern or practice" of resistance solely because of a racial imbalance in the composition of the union.

In *Sheet Metal Workers*, the Attorney General charged the sheet metal (local 36) and electrical workers (local 1) unions with engaging

¹²42 U.S.C. § 2000e 5(g) (1964).

¹³For an excellent discussion of the Act see B.N.A., *THE CIVIL RIGHTS ACT OF 1964, TEXT, ANALYSIS, LEGISLATIVE HISTORY* (1964).

¹⁴Title VII represents in large measure a response to Congressional concern over the depressed economic status of the Negro. See 1961 COMMISSION ON CIVIL RIGHTS, REPORT: EMPLOYMENT 127; H.R. REP. NO. 570, 88th Cong., 1st sess. 2-4 (1963).

¹⁵In the voting rights field, Mr. Justice Black stated that "the Court has not merely the power but the duty to render a decree which will so far as possible eliminate the discriminatory effect of the past as well as bar like discrimination in the future." *Louisiana v. United States*, 380 U.S. 145, 154 (1965). The Supreme Court was concerned with remedying the present effects of past conduct which was unlawful at the time it was committed. In Title VII litigation where a court is addressing conduct proscribed in the past, this approach would also seem appropriate. However, the mandate of the Civil Rights Act is broader than that of prior legislation, and a court may well be fashioning a decree to compensate for past conduct not proscribed when committed. This would be the case with regard to union membership and admission policies.

¹⁶42 U.S.C. § 2000e-6(a) (1964).

¹⁷It is clear, however, that a "pattern or practice" is present only when the denial of rights is repeated, routine, or of a generalized nature. Isolated incidents of discrimination are left to correction by individual complainants. 110 CONG. REC. 14270 (1964).

¹⁸416 F.2d 123 (8th Cir. 1969).

in a "pattern or practice" of discrimination against Negroes. At the time of trial, local 36 had approximately 1275 journeymen members, all of whom were white, and 116 apprentices, three of whom were Negro. Local 1 had some 5000 members, of whom approximately 50 were Negroes.¹⁹

The trial court found that both locals had excluded Negroes prior to 1964, but that after the effective date of the Act (July 2, 1965) there had been no instances of discrimination by either local.²⁰ The court concluded that:

[t]he Civil Rights Act of 1964 was not intended to penalize unions or others for their sins prior to the effective date of the Act. It is prospective only. . . . The Act specifically forbids a union or a business from giving preferential treatment to Negroes to correct an existing imbalance of whites. . . . There is no pattern or practice of discrimination in this case since the effective date of the Act.²¹

On appeal, the Attorney General argued that it was not necessary to prove that a number of Negroes sought and were denied union membership or related benefits in order to establish a "pattern or practice" of discrimination. The circuit court agreed, noting that when a large labor organization in an area with a diverse population is found to have no Negro members (or only a token number), and has standard job requirements, the inference of discrimination is reasonable.²²

The record did not indicate a number of instances of post-Act discrimination.²³ But the court felt that such evidence was unnecessary, since the record did show that Negro tradesmen were residents of the area. In light of past union policies toward minority groups, the court thought it was unreasonable to expect that any Negro tradesmen would seek to join either local.²⁴

¹⁹Local 36 represents sheet metal workers in the construction industry in St. Louis, Mo., and in forty-four surrounding counties. Local 1 represents electrical workers in St. Louis, and twenty-four surrounding counties. 280 F. Supp. 719, 721, 724 (S.D. Mo. 1968).

²⁰United States v. Sheet Metal Workers, Local 36, 280 F. Supp. 719 (S.D. Mo. 1968).

²¹*Id.* at 730.

²²416 F.2d at 127.

²³The record was devoid of any instances of post-Act discrimination by local 36. There had been one qualified Negro who sought membership in local 1 and had received evasive responses. The circuit court appears to suggest that this was an incident of racial discrimination, although the opinion on this question is far from clear. 416 F.2d at 128. Otherwise, there was no evidence of post-Act discrimination by local 1.

²⁴Moreover, the circuit court held that both locals had failed to adequately publicize their abandonment of racially discriminatory policies and that they

This holding represents a step beyond previous decisions. In the past, courts have stressed the prospective nature of the Act and have required that there be actual instances of discriminatory conduct after July 2, 1965, in order to find a "pattern or practice" of discrimination.²⁵ These decisions hold that the present consequences of past discrimination cannot be remedied under the Act.

This was the approach taken in *Griggs v. Duke Power Co.*²⁶ Prior to the Act, Negroes were relegated to the labor department and denied access to higher-paying departments. The complainant contended that the company requirement of a high school education for departmental transfer carried past discrimination into the present and thus violated the Act. The court noted that the plaintiffs did in fact toil under the inequities of past discrimination, but held that Congress intended the Act to be given prospective application only. Since the Act, Negroes had not been denied employment in other departments. Furthermore, the education requirement had a legitimate business purpose and was equally applicable to all employees. Without evidence of unfair employment practices since the Act, a finding of Title VII discrimination could not be made. Congress had faced the "cold hard facts of past discrimination and the resulting inequities."²⁷ Realizing the "practical impossibility of eradicating all the consequences of past discrimination"²⁸ the Act sought to eliminate the policies of discrimination which produced the inequities. The court would go no further.

In *Dobbins v. Local 212, IBEW*,²⁹ a case involving issues similar to those in *Sheet Metal Workers*, the Attorney General charged discrimination with respect to membership. Local 212 had approximately 800 journeymen, all of whom were white. The court found a number of specific instances of union discrimination, and ordered relief with respect to these. However, it rejected the government's contention that Title VII required an all-white union to take affirmative action to

had an affirmative obligation to do so. The record clearly evidenced efforts in this direction. Union representatives had appeared at predominantly Negro schools, met with area high school counsellors, and issued newspaper, radio, and television releases concerning opportunities in the building trades. The court held that these efforts fell short of what was necessary. 416 F.2d at 137-40.

²⁵*Dobbins v. Local 212, I.B.E.W.*, 292 F. Supp. 413 (S.D. Ohio 1968); *Griggs v. Duke Power Co.*, 292 F. Supp. 243 (M.D.N.C. 1968); *United States v. Sheet Metal Workers, Local 36*, 280 F. Supp. 719 (S.D. Mo. 1968)

²⁶292 F. Supp. 243 (M.D.N.C. 1968).

²⁷*Id.* at 248.

²⁸*Id.*

²⁹292 F. Supp. 413 (S.D. Ohio 1968).

remedy the present imbalance resulting from pre-Act discrimination. The court noted that such action would constitute preferential treatment, and Congress had specifically stated that Title VII should not be construed to require a labor union to grant preferential treatment to any group.³⁰ The union was not required to seek out Negroes who might be competent to become members.³¹ The only affirmative action demanded was the posting on union premises of notices of nondiscrimination as required by the Act.³²

Nevertheless, some courts have endeavored to eliminate the present consequences of past discrimination.³³ However, in these cases there has always been a readily identifiable class of discriminates. In *Local 53, Heat & Frost Workers v. Vogler*,³⁴ a number of Negroes had been refused membership because the union excluded persons not related to present members by blood or marriage. The court held that while the nepotism requirement applied to black and white alike, and was therefore not discriminatory on its face, the present effect of its continued application in a union completely white as a result of past discrimination, was to deny Negroes any real opportunity for membership. The court required the immediate admission of the discriminates, and ordered the development of objective, trade-related membership criteria and procedures.

However, the cases are unanimous in refusing to make assumptions as to the presence of a class of discriminates.³⁵ Thus, in *Quarles v.*

³⁰42 U.S.C. § 2000e-2(j) (1964) reads:

Nothing contained in this title shall be interpreted to require any... labor organization... to grant preferential treatment to any individual or to any group because of the race, color... 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... admitted to membership... by any labor organization... in comparison with the total number or percentage of persons of such race, color... in any community... or other area, or in the available work force in any community... or other area.

³¹Moreover, the court found nothing in Title VII that required the union to publicize its policies with respect to membership or employment opportunities to the public generally, or to the Negro community specifically. 292 F. Supp. at 447. In contrast the court in *Sheet Metal Workers* held that unions have an affirmative obligation to do so. See note 21 *supra*.

³²42 U.S.C. § 2000e-10 (1964).

³³Local 189, *United Paper Workers v. United States*, 416 F.2d 980 (5th Cir. 1969); *Local 53, Heat & Frost Workers v. Vogler*, 407 F.2d 1047 (5th Cir. 1969); *Quarles v. Philip Morris, Inc.*, 279 F. Supp. 505 (E.D. Va. 1968).

³⁴407 F.2d 1047 (5th Cir. 1969).

³⁵*Dobbins v. Local 212, I.B.E.W.*, 292 F. Supp. 413 (S.D. Ohio 1968); *United States v. H. K. Porter, Co.*, 296 F. Supp. 40 (N.D. Ala. 1968); *Quarles v. Philip Morris, Inc.*, 279 F. Supp. 505 (E.D. Va. 1968).

Philip Morris, Inc.,³⁶ the complainants pointed to the small number of Negro supervisory employees in comparison with the larger number of white supervisors, and alleged that the company discriminated with respect to employment and promotion of supervisory personnel. The court refused to infer discrimination where there had been no instances of a qualified Negro being denied employment or promotion to a supervisory position.

In *United States v. H.K. Porter Co.*,³⁷ the government sought the abolition of departmental seniority and the creation of unrestricted plantwide seniority and job bidding.³⁸ The Attorney General relied on numerical and percentage distributions of Negro and white employees indicating that the majority of employees in low paying departments were Negroes. Based on this evidence, the court held that an inference of discrimination would be unreasonable because substantial opportunities of transfer, training, and progression were available to Negroes, although few had taken advantage of the opportunities. Moreover, the court required more than "speculation and arguments in briefs"³⁹ before it would assume the experience needed for the proper and safe performance of jobs in a steel mill.

In a similar context, *Dobbins* refused to make assumptions about the qualifications for the electrician trade in the absence of some evidence to sustain those assumptions.⁴⁰ The court noted that in some fields a prima facie case of "pattern or practice" of discrimination is established by showing that given rights are exercised only, or to a greater extent, by whites, and that there is a substantial Negro population in the area.⁴¹ However, the court underscored the fact that it

³⁶279 F. Supp. 505 (E.D. Va. 1968).

³⁷296 F. Supp. 40 (N.D. Ala. 1968).

³⁸The steel mill in *H. K. Porter* was divided into departments, within which jobs were arranged in lines of progression. One moved up the ladder within his department. When a job would open, the men in the slot below would bid for that job. The man with the greatest seniority in the department would get the job. *Id.* at 54-55.

The Attorney General argued that Negroes were locked in the low paying departments. Therefore, he wanted them to be able to bid on any job opening in the plant (not just in their department), and to compete on the basis of time worked in the mill (rather than departmental seniority which they didn't have). *Id.* at 64.

³⁹296 F. Supp. at 68.

⁴⁰292 F. Supp. at 445.

⁴¹This is the approach taken in the jury discrimination cases. A showing that Negroes constitute a substantial segment of the population, that some are qualified to serve as jurors, and that none or a token number have been called for jury service over an extended period of time is prima facie proof of discrimination. *Hernandez v. Texas*, 347 U.S. 475 (1954); *Cassell v. Texas*, 339 U.S. 282 (1950); *Patton v. Mississippi*, 332 U.S. 463 (1947); *Hill v. Texas*, 316 U.S. 400 (1942); *Rabinowitz v. United States*, 366 F.2d 34 (5th Cir. 1966).

was dealing with a craft union and that there was "no such thing as an 'instant electrician' . . ." ⁴² To establish a prima facie case of class discrimination, it would be necessary to prove the existence of a significant number of the group with basic skills in the particular trade. The court found no evidence of any significant number of competent Negroes and concluded that "[n]o court should engage in assumptions in such a field." ⁴³

In light of these decisions it is evident that *Sheet Metal Workers* stand apart. In each previous decision where a "pattern or practice" of discrimination was found, a number of Negroes had been discriminated against after the effective date of the Act. ⁴⁴ In *Sheet Metal Workers* this was not the case. Rather the court sought to remedy the racial disproportion of the union, a present result of past discrimination. The court assumed the presence of a class of qualified Negroes ready to join the craft union and inferred a "pattern or practice" of discrimination.

In drawing an inference of discrimination because of the absence of Negroes in the union and demanding affirmative action to correct the racial imbalance, the court adopted an approach found in jury discrimination cases. ⁴⁵ Where statistics show a pattern of exclusion, ⁴⁶ or token inclusion, ⁴⁷ courts are hostile to the refusal to search out qualified jurors. The law requires a fair cross section of the community on juries, and jury commissioners have the duty to become acquainted with, and seek competent jury prospects from all significantly identifiable elements of the community. ⁴⁸

But courts should be careful in transposing the statistical technique of the jury selection cases. ⁴⁹ Jurors are conscripted, yet labor unions

⁴²292 F. Supp. at 445 n.15.

⁴³*Id.* at 446.

⁴⁴Local 53, Heat & Frost Workers v. Vogler, 407 F.2d 1047 (5th Cir. 1969); Dobbins v. Local 212, I.B.E.W., 292 F. Supp. 413 (S.D. Ohio 1968); Quarles v. Phillip Morris, Inc., 279 F. Supp. 505 (E.D. Va. 1968).

⁴⁵The circuit court noted the jury discrimination cases in support of its inference of discrimination. 416 F.2d at 127 n.7.

⁴⁶See cases cited note 38 *supra*.

⁴⁷See Cassell v. Texas, 339 U.S. 282, 286-87 (1950).

⁴⁸*Id.* at 289; Brooks v. Beto, 366 F.2d 1, 12 (5th Cir. 1966).

⁴⁹The courts' willingness to recognize a prima facie case of discrimination in jury selection cases can be explained in part by the fact that the remedy usually sought is the impeachment of a criminal verdict. The policy of assuring the accused a fair trial would seem to outweigh other considerations. Also where a general injunction is sought, less certainly in the proof would be necessary than where affirmative action is the remedy desired. Note, *An American Legal Dilemma—Proof of Discrimination*, 17 U. CHI. L. REV. 107, 124 (1949).

have no apparatus to make qualified Negroes step forward. Furthermore, estimation of the number of Negroes that meet the relatively simple standards imposed upon jurors is far easier than calculating the number of Negroes competent to perform jobs of a certain degree of difficulty.⁵⁰

Clearly the most persuasive approach the Attorney General can take in proving the existence of discrimination is to point out a number of distinct acts of resistance, and then allege that these constitute a "pattern or practice".⁵¹ Moreover, when a number of Negroes have been rejected for union membership, while whites have been admitted, the fact that few, or no Negroes, are members may well afford a strong inference of discrimination.⁵² It would be a reasonable assumption that at least one of the Negroes would have been as well qualified as one of the whites. But in *Sheet Metal Workers* there was no evidence to lend validity to an inference of discrimination other than a showing of racial imbalance in the union.⁵³ The use of statistical probability to infer the existence of a "pattern or practice" of resistance is therefore less persuasive.⁵⁴

Moreover, the judicial approach found in *Sheet Metal Workers* stands in opposition to the legislative history, and express language

⁵⁰California has a fair Employment Practices Statute similar to Title VII. Nevertheless, the Attorney General of California has stated in a written opinion that any work force composed solely of individuals of one race is prima facie discriminatory. 43 OPS. CAL. ATT'Y. GEN. 200 (1964), as cited in 416 F.2d at 127 n.7.

⁵¹See Comment, *Enforcement of Fair Employment Under the Civil Rights Act of 1964*, 32 U. CHI. L. REV. 430, 450 (1965).

⁵²The absolute absence of Negroes plus evidence of specific instances of exclusion after the effective date of the act, has been held to constitute evidence of a "pattern or practice" of resistance. *Cypress v. Newport News Gen. & Nonsectarian Hosp. Ass'n*, 375 F.2d 648 (4th Cir. 1967).

⁵³The Court of Appeals for the Fifth Circuit in *Alabama v. United States*, 304 F.2d 583 (5th Cir.) *aff'd*, 371 U.S. 37 (1962) (voting discrimination) said, however, that: "In the problem of anti-union discrimination, statistics often tell much, and Courts listen." *Id.* at 586.

⁵⁴Where possible variable factors are few in number, an inference of resistance may be strong. The courts have, for example, relied heavily on statistical evidence to find discrimination when a pattern of lower wages for Negro school teachers than for white was established. *Freeman v. County School Bd.*, 82 F. Supp. 167 (E.D. Va.), *aff'd*, 171 F.2d 702 (4th Cir. 1938); *Davis v. Cook*, 80 F. Supp. 443 (N.D. Ga. 1948), *rev'd on other grounds*, 178 F.2d 595 (5th Cir. 1949). Similarly the NLRB has found a strong inference of anti-union discrimination when the proportion of union members laid off exceeded the proportion existing in the group from which the selection was made. *F.W. Woolworth Co.*, 25 N.L.R.B. 1362 (1940).

But in *Sheet Metal Workers*, it would seem that the court should have considered other factors, including the number of openings in the local during the period in question, the number of qualified Negro applicants, and the number of Negro applicants accepted or rejected, along with the statistical showing of racial disproportion to support a valid inference of discrimination.

of the Act.⁵⁵ Congress intended the operation of Title VII to be "prospective, and not retrospective."⁵⁶ Thus, for example, if a labor union is all white as a result of past discrimination, the Act simply requires the union to fill future openings on a nondiscriminatory basis.

It was in response to fears that statistical evidence might be sufficient to establish a prima facie case of discrimination, and that unions would be required to achieve some sort of racial balance, that the Senate added to the Act a provision expressly stating that Title VII does not require preferential treatment for any group merely because it is underrepresented in a particular union.⁵⁷ Therefore, an explicit attempt either to prefer a racial group or to maintain a racially balanced membership would involve a violation of Title VII, because such a practice would require a union to admit or refuse to admit on the basis of race.⁵⁸ The Act clearly does not demand affirmative action such as special training programs or recruitment practices to improve the employment situation of any minority.⁵⁹ The only affirmative action demanded by the Act is the posting of notices of equal employment opportunity.⁶⁰

Thus the decision reached in *Sheet Metal Workers* goes further than prior decisions in demanding more than the letter of the law. The court makes it clear that labor unions have an affirmative duty to correct racial imbalance in their ranks. It would seem that a union must, therefore, include a substantial number of Negroes or else risk being judged to have discriminated against an unknown quantity of Negro workers who have not even applied for membership.

If qualified Negroes are available and willing to join the local, the union may have to resort to quota admissions to impress government officials that they are not discriminating. Such a policy would

⁵⁵See B.N.A., THE CIVIL RIGHTS ACT OF 1964, TEXT, ANALYSIS, LEGISLATIVE HISTORY (1964).

⁵⁶110 CONG. REC. 7213 (1964).

⁵⁷42 U.S.C. § 2000e-2(j) (1964). In explaining Title VII Senator Humphrey told the Senate that:

the proponents of this bill have carefully stated on numerous occasions that title VII does not require...any sort of racial balance...by giving preferential treatment to any individual or group. Since doubts have persisted, subsection(j) is added to state this point expressly. This subsection does not represent any change in the substance of the title. It does state clearly and accurately what we have maintained all along about the bill's intent and meaning.

110 CONG. REC. 12723 (1964).

⁵⁸110 CONG. REC. 7207, 7213 (1964).

⁵⁹42 U.S.C. § 2000e-2(j) (1964).

⁶⁰42 U.S.C. § 2000e-10 (1964).