Black Workers Inside the House of Labor

By William B. Gould

Abstract: While both construction and industrial unions have made some efforts to remedy racial discrimination in employment, their failure to come to grips with systematic practices of discrimination has made the federal judiciary the main forum for the resolution of such disputes. Institutional practices that can have a discriminatory impact upon black workers and racial minorities remain in effect. Contrary to public belief about rank and file and local union resistance to national union policies that promote civil rights, it is the official policy of the American Federation of Labor and Congress of Industrial Organizations (AFL-CIO) not to alter such procedures which are negotiated in the collective bargaining process—and which screen out blacks disproportionately to whites. Even unions with a substantial black membership continue to have lily-white executive boards at the national level. More blacks are moving into leadership positions—especially in the United Auto Workers (UAW) and some of the public employee unions. However, in the interim the phenomenon of black workers in white-led unions is bound to produce discontent, black worker organizations, and, in some instances, industrial strife.

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AMERICAN trade unions have been a significant factor in the development of racial discrimination patterns in employment in this country.[1] The support that many unions gave to President Nixon's reelection and the anti-black policies which that Administration has furthered, George Meany's benign neutrality during the 1972 campaign, and the appointment of construction union leader Peter Brennan as secretary of labor are all signs pointing ominously to the conclusion that the labor movement's instinct in the '70s may be to thwart equal employment opportunity and not advance its cause.[2]

Yet paradoxically, some elements in the labor movement are playing a role in undoing past discrimination—a role which may become more significant as blacks, Chicanos, and Puerto Ricans gain a more secure political position in the blue collar unions that have bargaining rights in industries where the influx of minority group workers has been substantial during the past decade.

Some unions, like the United Auto Workers (UAW), have attempted to press employers to alter discriminatory hiring patterns and to induce their white members to work alongside of blacks on the production line.[3] Unions in both construction and manufacturing, along with employers, have made some efforts to integrate the skilled job classifications from which blacks and other racial minorities have been traditionally excluded.

Moreover, the fact that some of the most rampant racial discrimination exists where unions are weak is often ignored. Not only does the American trade union movement represent a much smaller percentage of the work force than do their counterparts in most Western industrially advanced countries,[4] but in industries such as utilities—particularly the electric power industry—the unions are deprived of effective economic power in the form of the strike weapon because technological innovation permits the employer to operate with a supervisory work force. Yet despite the absence of an influential or dominant work group, racial discrimination flourishes.[5]

The industrial unions, like the United Auto Workers, the United Steelworkers, and the United Rubber Workers, have had the least discriminatory of union policies inasmuch as economic realities permitted blacks to penetrate the mass production industries in which those unions bargained in the 1930s and during World War II—the time at which such unions were coming into existence and gaining their first bit of muscle power. But, until very recently, blacks have remained virtually absent from skilled trades and better-paying jobs in such industries—usually with union acquiescence and sometimes through local union urging. The emergence of black caucuses in many locals as whites have begun to leave the industry and the re-

1. See generally Arthur Max Ross, "The Negro in the American Economy," in Arthur Max Ross and Herbert Hill, eds., *Employment, Race and Poverty* (New York: Harcourt, Brace and World, 1967).

2. See William B. Gould, "Moving the Hard-Hats In," *Nation* 216 (January 8, 1973), p. 41.

3. See Irving Howe and B. Jack Widick, *The UAW and Walter Reuther* (New York: Random House, 1949), pp. 207–34.

4. International Labour Office, *Yearbook of Labour Statistics* (Geneva, 1967), Table 3, pp. 276–95.

5. Equal Opportunity Commission, *Promise versus Performance: A Study of Equal Employment Opportunity in the Nation's Electric and Gas Utilities* (June 1972). See particularly *Willie Stamps, et al.*, v. *Detroit Edison, et al.* Civil No. 36515 and 38479 (E.D. Mich., filed May 17, 1971); *U.S.* v. *Virginia Electric and Power Co.*, 327 F. Supp. 529 (E.D.Va. 1971).

tention of lily-white international executive boards in all major unions except the United Automobile Workers, the American Federation of Teachers, the International Longshoremen's and Warehousemen's Union (ILWU), and American Federation of State, County and Municipal Employees, have fanned the fires of discontent and sometimes triggered industrial strife.[6]

The International Brotherhood of Teamsters, with a minority membership of more than 10 percent, has no black executive board members. Blacks are excluded from the lucrative over the road driving jobs—often because whites have refused to ride with them in sleeper cabs.[7] With a minority membership of approximately 30 percent, the Steelworkers has no black or Chicano on the executive board. The same pattern prevails in the International Ladies Garment Workers Union. Thus far, however, the issue of political power for black caucuses inside the unions has begun to emerge in the courts only where there have been previously segregated locals. Two of the principal unions receiving attention are the American Federation of Musicians[8] and the International Longshoremen Union (not to be confused with the West Coast ILWU)—both of which have a tradition of segregated locals.

However, it is the multi-union industries, such as railroads, and construction which represent the most flagrant instances of racial discrimination in the unionized sector of the economy—and here labor has played a very active role. On the railroads, blacks have been limited to menial classifications, such as train porters, and have been systematically driven from the industry by unions which, in some instances, have had constitutional color bars. The pattern in construction is different because in sharp contrast to railways, it has been a growth industry. Accordingly, while blacks have been locked in—and in this instance to a laborer's position where they are represented by the Laborers Union—the exclusive question has been one of penetration to other trades, particularly the near lily-white mechanical trades: plumbers and pipefitters, sheet metal workers, electricians, iron workers, and operating engineers.

Restrictive practices attacked

Two important themes run through all disputes and litigation arising out of employment discrimination practiced by the unions. The first is restrictive practices; that is, mechanisms which are geared to protect union member job security have been the vehicles for racial discrimination and have been successfully attacked in a series of cases in the federal court decisions. With the industrial unions, the seniority system is most often the subject of litigation. Seniority systems have been struck down where they limited and interfered with the promotion and transfer rights of black employees previously restricted in all or predominantly black job departments or lines of progression. Where the construction unions have been involved, the matter has been considerably more complex. Recruitment methods: nepotism in the selection of both journeymen and apprentices, written and oral examinations in apprentice selection, reliance upon arrest and conviction records as

6. See generally William B. Gould, "Black Power in the Unions: The Impact upon Collective Bargaining Relationships," *Yale Law Journal* 79 (1969), p. 46; Herbert Hill, "Black Protest and the Struggle for Union Democracy," *Issues in Industrial Society* 1 (1969), p. 19.

7. See Equal Employment Opportunity Commission, Initial Statement before the Interstate Commerce Commission, December 1, 1971.

8. See, for example, *Pittsburgh Black Musicians* v. *American Federation of Musicians, Local 60-471,* Civil No. 71-1008 (W.D.Pa., filed October 22, 1971).

the basis for exclusion, high school diploma and course requirements, limited membership size and the duration of the apprentice programs, the hiring hall and referral seniority credits utilized to determine who is to be referred out first—all of these mechanisms, arguably legitimate and reasonable in vacuo, have been the subject of employment discrimination litigation and in many circumstances have been declared to be at odds with the strictures of Title VII of the Civil Rights Act of 1964.[9]

Trade union resistance

The second important point is that there has been near total trade union resistance to the voluntary resolution of disputes that arise out of protests against systematic discrimination involving large groups of employees. What is not recognized is that this rigidity is not simply an attitude expressed by the rank and file which takes a form of local union leadership resistance to national policy. This is national policy itself.

The public's understanding is reflected in what the Civil Rights Commission said in 1961: "Within the labor movement itself, civil rights goals are celebrated at the higher levels, but fundamental internal barriers tend to preserve discrimination at the working man's level."[10] Whatever its truth in 1961—when the Commission's study of employment discrimination was published—it is clearly inaccurate in 1973. Indeed, it has been inaccurate ever since the effective date of Title VII.

George Meany, the AFL-CIO (American Federation of Labor and Congress of Industrial Organizations) leader, supported the passage of fair employment practices legislation in 1963, while the Kennedy administration still equivocated about including job discrimination proposals as a part of its civil rights legislative package. But this pro–civil rights position of the AFL-CIO evaporated when it came to the actual implementation of Title VII.

In 1966, a solid phalanx of AFL-CIO union representatives (including the UAW—then still a member of the AFL-CIO) appeared before the Equal Employment Opportunity Commission to say that industrial seniority was a complex matter, that seniority procedures were under no circumstances to be tampered with—even though the failure to modify them meant limiting the advance of black union members—and that the Commission and courts should not interfere with sanctified collective bargaining agreements which protected union members from "the bad old days." Subsequently, the Building and Construction Trades Department expressed the view, in its Statement of Policy on Equal Employment Opportunity at the 1969 AFL-CIO Convention, that a three-pronged attack on racially exclusionary practices was appropriate: (1) the "acceleration and extension" of Department of Labor sponsored Apprenticeship Outreach programs; (2) the "flat and unqualified" recommendation to locals that they for a "stated period of time" invite qualified minority journeymen into membership; and (3) training programs for the upgrading of minority workers no longer of apprenticeable age. But these proposals have been relatively insignificant because both the Department of Labor–sponsored Outreach Apprenticeship programs and "hometown plans," which purport to upgrade workers beyond apprenticeship age, are slow-moving and ineffective. The gains achieved by both of

9. *Griggs* v. *Duke Power Co.*, 401 U.S. 424 (1971); *Rowe* v. *General Motors Corp.*, 457 F. 2d 348 (5th Cir. 1972); *U.S.* v. *Sheet Metal Workers, Local 36*, 416 F. 2d 123 (8th Cir. 1968); *Asbestos Workers Local 53* v. *Vogler*, 407 F. 2d 1047 (5th Cir. 1969).

10. United States Civil Rights Commission Report, "Employment," vol. 4 (1961), p. 151.

these programs have been, to put it euphemistically, modest indeed. Moreover, there are very few skilled minority journeymen who can take advantage of invitations to join when they are given—and they are given rarely. When invitations have been forthcoming, they are qualified with a "Catch 22" process, which requires in some instances the loss of economic benefits—often specifically in the form of being placed at the bottom of the seniority referral ladder where one exists.

Accordingly, despite the protestations of innocence for them by their apologists,[11] the unions are in the federal courts a great deal these days. Like the employers, they have lost practically all of the major cases to either private plaintiffs or the Department of Justice.[12] The fact that the practices attacked are provisions of collective bargaining agreements means little if anything at all. As Judge David W. Dyer said two years ago:

> That hoary collective bargaining agreements now mandate perpetuation of past aberration from the government policy backing [against racial discrimination in employment] does not affect the propriety of judicial action. . . . Such agreements do not, *per se*, carry the authoritative imprimatur and moral force of sacred scripture, or even of mundane legislation.[13]

Moreover, even where legislation, like the Railway Labor Act, has established separate crafts and bargaining units for employees, previously excluded minority employees have been held to have promotion and transfer rights despite the existence of such statutory and contractual walls. Judge Dyer, once again speaking from the Fifth Circuit, has said the following:

> In many respects the Union arguments in favor of the *status quo* echo the Terminal's. Implicit in their briefs is the additional *in terrorem* prediction that imposition of Title VII remedies would precipitate the demise of craft and class seniority systems, which had their genesis in General Order No. 27 and have been nurtured through a half century by myriad collective bargaining agreements. These labor representatives fail to perceive that their pre-Act discriminatory policies, practices, and "understandings"—whether formal or informal—have compromised the racially neutral integrity of that venerable order and its interpretative supplements. . . . At the terminal today, blacks continue to experience the effects of pragmatic injustice; certainly this situation contravenes the avowed purpose of the Order and the Railway Act.[14]

Industrial union security

Seniority, as I have indicated, is important in the industrial union context, since it determines what the worker's competitive status is against another worker, that is, where a worker stands for the purpose of promotion, transfer, or layoff. America's trade unions adopted the seniority principle not only because it eliminates the playing of favorites among employees, but because it also removes the union from the inevitable political crossfire that it would be caught in if it had to continuously choose among each individual worker's competing claims on his merits. While seniority is not the only basis for choosing employees competing for promotions—qualifications play a role as well—in some industries, such as steel,

11. One of the most uncritical of recent efforts is contained in Derek Curtis Bok and John T. Dunlop, *Labor and the American Community* (New York: Simon and Schuster, 1970), pp. 116–37.

12. The Department of Justice has won every Title VII case at the Circuit Court of Appeals level.

13. *U.S.* v. *Jacksonville Terminal Co.*, 451 F. 2d 418 (5th Cir. 1971), *cert. denied,* 406 U.S. 906 (1972).

14. Id. at 454.

the junior employee cannot be promoted over a senior worker unless he is "head and shoulders" better.

This tradition accounts for the proviso, which Congress tacked onto Title VII's broad prohibitions against racial discrimination in employment, to the effect that Congress did not intend to eliminate so-called bona fide seniority systems. The courts, however, were quick to say that a seniority system which had its genesis in the past segregation of the races in different jobs and departments was unlawful and therefore not to be regarded as bona fide. The first court of appeals decision was by the Fifth Circuit, *Local 189, United Papermakers* v. *United States*.[15] In that case, Judge John M. Wisdom, speaking for the court, concluded that departmental or job seniority violated Title VII where it denied to blacks seniority credits which might have been theirs had they formerly had access to previously all-white jobs into which they were now permitted to transfer. Said Judge Wisdom:

> The defendants assert, paradoxically, that even though the system conditions future employment opportunities upon a previously determined racial status, the system is itself racially neutral and not in violation of Title VII. The translation of racial status to job-seniority status cannot obscure the hard, cold fact that Negroes at Crown's Mill will lose promotions which, *but for* their race, they would surely have won. Everytime a Negro worker, hired under the old segregated system, bids against the white worker in his job slot, the old racial classification reasserts itself, and the Negro suffers anew for his employer's previous bias.[16]

Local 189, however, was one of the easier cases. In the paper industry, black employees had often worked as helpers to white workers, filled in for them during vacations and absence, and generally possessed a substantial portion of the experience and skill that was a prerequisite for the job to which the seniority credit was to be applied. In this situation, however, black employees were paid a low wage rate and were in a separate seniority district. A step removed from this example was one in which blacks were in a different department and performed work that was roughly similar in terms of skill content. Whites who had gone into the previously white department did not require special training, but rather an on-the-job "learning by doing" procedure.

The most difficult of the seniority disputes relates to the situation where there is a difference in the skills required for the jobs and where the employee transferring from one department would require special training to remedy his lack of preparation. One court has ordered such training as a remedy for past discrimination in order to permit black employees to make a transfer and to carry seniority credits with them. In *U.S.* v. *San Francisco Railway Company,*[17] the Eighth Circuit has held that the training may be provided—although it has severely undermined the remedy by awarding black porters only 50 percent of their previously accumulated seniority to be carried over to the brakeman's classification, and more important, it did not award back pay. (In the most comprehensive decree fashioned by any federal court under Title VII, Judge William Lindberg, in *U.S.* v. *Local 86, Ironworkers,*[18] ordered the establishment of a special training program for black apprentices in the Seattle construction industry.)

15. 416 F. 2d 980 (5th Cir. 1969), *cert. denied,* 397 U.S. 919. Cf. *Taylor* v. *Armco Steel Corp.,* 429 F. 2d 498 (5th Cir. 1970).

16. Id. at 988.

17. 464 F. 2d 301 (8th Cir. 1972).

18. 315 F. Supp. 1202 (W.D.Wash. 1970), *affirmed,* 443 F. 2d 544 (9th Cir. 1971), *cert. denied,* 404 U.S. 984 (1971).

The federal courts have held that blacks may transfer to previously all-white jobs and take seniority with them even though a majority of the employees in the jobs which blacks have previously occupied have been white.[19] However arbitrary the reasons may be, the reason that the whites are in low classifications is not racial discrimination, and therefore their presence in these circumstances in such jobs is irrelevant to both the finding of discrimination and the relief to be fashioned. Accordingly, even in such circumstances, both the no-transfer and seniority systems have been overridden.

Moreover, the primary reason for the obstinate attitude in the trade union movement, that is, white rank and file resistance to change, has thus far been uniformly rejected by the court defense as discriminatory seniority systems. Chief Justice Earl Warren's comment, in *Brown* v. *Board of Education II*,[20] to the effect that "it should go without saying that the vitality of these constitutional principles cannot be allowed to yield simply because of this disagreement with them,"[21] has been followed by the federal courts in Title VII litigation. As Judge Wilfred Feinberg has said:

> Assuming arguendo that the expectations of some employees will not be met, their hopes arise from an illegal system. Moreover, their seniority advantages are not indefeasibly vested rights but mere expectations that arise from a bargaining agreement subject to modification. . . . If relief under Title VII can be denied merely because the majority group of employees, who have not suffered discrimination, will be unhappy about it, there will be little hope of correcting the wrongs to which the act is directed.[22]

Accordingly, an employer cannot defend a discriminatory seniority system on the ground that unilateral modification would have triggered a strike.[23]

What is troubling, however, is the case of the all-white establishment or union. Apparently, Congress did not want incumbents to be displaced by unemployed blacks. Under *Local 189,* it seems plausible that a black employee who was discriminated against and never hired prior to the effective date of the statute cannot assert seniority rights against whites who were hired later and then began to accumulate credits. However, it seems as though the *Local 189* remedy would be provided for a black who was discriminated against in connection with hire subsequent to the effective date of the statute to the extent that fictional seniority, that is, credit for time not actually worked, could be utilized to take work opportunities away from incumbent whites. But here the difficulty is class relief for the entire black community rather than specific individuals, and this may make the courts more sensitive to the argument that preferential treat-

19. *Jones* v. *Lee Way Motor Freight, Inc.,* 431 F. 2d 245 (10th Cir. 1970), *cert. denied,* 401 U.S. 954 (1971); *Witherspoon* v. *Mercury Freight Lines,* 457 F. 2d 496 (5th Cir. 1972); *Bing* v. *Railway Express,* 444 F. 2d 687 (5th Cir. 1971); *Belt* v. *Johnson Motor Lines,* 458 F. 2d 443 (5th Cir. 1972); *U.S.* v. *Central Motor Lines, Inc.,* 338 F. Supp. 532 (W.D. N.C. 1971). See also *U.S.* v. *Chesapeake & Ohio Railway Co.,* 5 F.E.P. Cases 308 (4th Cir. 1972); *U.S.* v. *Jacksonville Terminal Co.* (note 13 above); *U.S.* v. *St. Louis–San Francisco Railway* (note 17 above). See generally William B. Gould, "Seniority and the Black Worker: Reflections on Quarles and its Implications," *Texas Law Review* 47 (1969), p. 1039; William B. Gould, "Employment Security, Seniority and Race: The Role of Title VII of the Civil Rights Act of 1964," *Howard Law Journal* 13 (1967), p. 1.

20. 349 U.S. 294 (1955).

21. Id. at 300.

22. *U.S.* v. *Bethlehem Steel Corp.,* 446 F. 2d 652 (2d Cir. 1971), at 663.

23. *Robinson* v. *Lorillard,* 444 F. 2d 791 (4th Cir. 1971), at 799, *cert. denied,* 404 U.S. 1006 (1971).

ment is involved. The reasoning is that the black was not harmed individually and for him to receive seniority credits superior to employed whites would be a remedy with windfall dimensions because it is necessarily speculative. The accuracy of this conclusion, however, must await future litigation inasmuch as all seniority remedies, in varying degrees, suffer from the same defect.

Segregated locals

Most segregated or auxiliary locals appear to be something of the past. The dominant view of the federal judiciary is that existence of segregated locals is a per se violation of Title VII.[24] However, when segregation has been eliminated, blacks who are in a minority often have not been able to obtain any kind of political representation. This is because whites generally will not vote for blacks—especially where there has been segregation. Accordingly, they are either less or no better able to protect themselves than they were prior to the elimination of segregation, since discrimination against them is very often continued in the employment relationship, and they are without political representation in the integrated local.

Accordingly, several courts have ordered transitional agreements which allocate seats to each local so as to provide for representation for local unions and thus minimize unfairness in employment.[25] Can the courts order such arrangements? And more important, where transitional agreements expire without any substantial changes of the employment conditions that led to such a special remedy, can the courts reinstate the merger arrangement?

The leading case is *Long* v. *Georgia Craft Co.*,[26] where the Fifth Circuit rejected such relief requested by black employees. The court did so for two reasons: (1) a black had been elected by the merged local to one of seven union offices, and the appointment of other blacks had taken place; (2) the merger was not court-ordered, but undertaken voluntarily. Thus, the court indicated that there are circumstances that warrant a revival of such racial classifications where the first transitional agreement had expired. Limitations to such an approach become evident when one considers the following: (1) that the courts are concerned that an order more sweeping which would purport to establish a permanent allocation of positions on the basis of race would run afoul of the racial classification or reverse discrimination prohibitions in both the Constitution and Title VII; and (2) that some defendants have therefore simply waited out the transitional period and resumed discriminatory practices at a more propitious time, a time at which minorities would be excluded from the political process. Accordingly, the answer to this problem may require that the courts make their orders transitional but avoid providing for a specific period of time after which the agreement providing for an allocation of leadership positions will expire. An appropriate approach might be to preserve the transitional merger agreement until blacks get a certain share of employment opportunities under the union's jurisdiction. After all, discrimination in employment is one of the principal justifications for a division of leadership positions between blacks and whites. After employment discrimination ceases, presumably both groups could take their chances in the political process together.

24. *U.S.* v. *International Longshoremen's Association,* 460 F. 2d 497 (4th Cir. 1972).

25. See, for example, *Hicks* v. *Crown Zellerbach Corp.,* 310 F. Supp. 536 (E.D.La. 1970).

26. 455 F. 2d 331 (5th Cir. 1972).

Construction unions

As the wage increases negotiated in the building and construction industry in the past four years attest, the construction and building trades are among the most powerful unions—if not the most powerful—in the United States. Their authority is in part explained by their control over both the labor market and referral systems; and it is exercised through apprenticeship programs (usually jointly established by both unions and employers—but often dominated by the unions), the hiring hall, and the closed shop. The closed shop was made unlawful by the Taft-Hartley amendments, but it has thrived in this country on a de facto basis. The 1959 amendments to the National Labor Relations Act have helped the building trades to defy the closed shop prohibition: by permitting the parties in that industry to make apprenticeship training experience a condition of employment; by authorizing recognition agreements before workers have actually come on the job and been able to express their free choice; and by permitting the employer to contract with the union about filling job vacancies.[27] The Supreme Court has held that the negotiation of an exclusive hiring hall through which workers are referred is not per se unlawful under Taft-Hartley.[28] However, nonunion workers are hardly ever referred except in time of labor shortage—despite the fact that Taft-Hartley prohibits discrimination against nonunion workers.[29]

The mechanical trades are among the most racially exclusionary in the country. During the past six years, the unions have dropped their formal color bars and instituted Outreach Programs funded by the Department of Labor which affirmatively attempt to recruit minorities into the apprenticeship programs. Two immediate problems with this effort are that (1) most of the building trades journeymen acquire their status through routes other than apprenticeship, and (2) Outreach affects a very small percentage of apprenticeship opportunities throughout the country—according to AFL-CIO estimates, approximately 5 percent. Nevertheless, Outreach is of some significance and has provided more jobs for racial minorities than there would have been if the program had not existed.

In this connection it should be noted that the winds of Philadelphia have been felt throughout the country. Once the Department of Labor indicated that it might impose goals and timetables upon unions and contractors throughout the country, as it did in Philadelphia in 1969 under Executive Order 11246, the unions began to negotiate plans themselves. To be sure, the primary reason was both to defend themselves against an imposed plan and to use the hometown approach as a hedge against future litigation. Nevertheless, the negotiation of such plans indicated a willingness on their part to accept the principle of quotas. Also, the hometown plan was preferable in some respects to the government's contract compliance efforts under the Executive Order—the attempt to require government contractors to affirmatively recruit minorities—inasmuch as it affected unions directly, that is, the quotas

27. See section 8(f) of the National Labor Relations Act.

28. See *Local 357, Teamsters* v. *N.L.R.B.*, 365 U.S. 667 (1961).

29. *U.S.* v. *Local 86, Ironworkers,* 315 F. Supp. 1202 (W.D.Wash. 1970), *affirmed,* 443 F. 2d 544 (9th Cir. 1971), *cert. denied,* 404 U.S. 984 (1971); *U.S.* v. *Plumbers, Local 638,* 347 F. Supp. 169 (S.D.N.Y. 1972); *U.S.* v. *Local 46, Wood, Wire and Metal Lathers,* 328 F. Supp. 429 (S.D.N.Y. 1971), *motion to stay denied,* 341 F. Supp. 694 (S.D.N.Y. 1972), *affirmed,* 5 F.E.P. cases 318 (2nd Cir. 1973).

imposed requirements on union programs rather than on contractors. The latter might only affect union practices indirectly. To the extent that hometown plans have brought minorities onto construction sites—Boston seems to be the best effort undertaken yet—minority laborers who are employed are more likely to obtain union membership cards and to be on a job ladder which leads to permanent employment security, that is, the possession of a journeyman's card.

Nevertheless, the hometown plans contain many deficiencies and have generally not worked well.[30] In the first place, the goals or quotas to which the unions became committed were carefully qualified so as to make them inoperative where economic conditions were not suitable. This meant that whenever white journeymen—and in many unions apprentices cannot even vote—became concerned about work opportunities or began to fret about the kind of work that was available, black entry into the trades would cease. Since in the past three years we have witnessed a downturn in both the economy in general and in the construction industry in particular, such clauses have assumed a fair amount of importance. Second, the plans were voluntary and were privately negotiated—albeit with the assistance in many instances of the Department of Labor. Accordingly, there was less of an incentive for the unions to behave. Finally, and perhaps most important, the plans, as well as Outreach, left intact so many of the basic assumptions behind union practices that discriminate against racial minorities.

These practices take a number of forms. First, some unions restrict membership and apprenticeship opportunities to the sons or relatives of the members. Where this happens, the obvious result is that the racial composition of the incumbent work force is perpetuated. While nepotism or practices that involve the recruitment of friends best prove the traditional craft union argument that they discriminate against the world as distinguished from blacks, the effect is to exclude blacks along with others—and where the exclusion is in part racial, it is unlawful. Accordingly, courts have struck down such practices as unlawful—at least when there is a showing of past discrimination.[31]

Second, many apprenticeship programs require that an applicant have a high school diploma and pass a written examination. In such circumstances the Supreme Court has said that where educational or examination requirements screen out blacks disproportionately to whites, and where there is no showing that the test or educational qualification is necessary for performance on the job, a violation of Title VII may be made out.[32] Interestingly enough, such barriers all too often only let in the black youngster who is college oriented, leaving out the ghetto dropout who could perform the work but who lacks the formal credentials. Accordingly, it is difficult to find black applicants for the apprenticeship program, in large part because of artificially high barriers.

Third, the apprenticeship programs exclude applicants who are over a certain age—generally between twenty-five and twenty-eight. Where black employees have been discriminated against in the past, they cannot qualify for programs such as Outreach, since many of them may be too old. To some extent,

30. See William B. Gould, "Blacks and the General Lockout," *New York Times*, July 17, 1971, p. 23.

31. *Asbestos Workers* v. *Vogler* (note 9 above); *U.S.* v. *Plumbers Local Union No. 73*, 314 F. Supp. 160 (S.D.Ind. 1969).

32. *Griggs* v. *Duke Power* (note 9 above); *U.S.* v. *Local 86, Ironworkers* (note 29 above).

the hometown plans tend to remedy this by creating special trainee classifications for workers who cannot qualify for the apprenticeship program because of age. Yet the deficiencies in the hometown approach have made the federal judiciary the main forum for resolution of such inequities.

Fourth, the oral interview is generally included as part of the admission criteria. The job seeker who knows nothing about the trade and has no friends or relatives in the trade to look to as models is at a disadvantage. Such an applicant is more likely to be black than white. Moreover, the applicant will often be asked whether he has an arrest or conviction record. If he indicates that he does, he may be disqualified automatically, or, at a minimum, this will count against him. Yet the courts have indicated that in many instances reliance upon such criteria to screen out minority workers from employment opportunities violates the law.[33]

The duration of apprenticeship programs—in many instances four or five years—may result in a higher dropout rate for blacks than for whites, since blacks know less about the trade and, more important, less about the importance of sacrifice for future opportunities. One court has held that where past discrimination is evidenced, the burden is upon the defendant to show that there is a business necessity for the program's duration—even without a showing that blacks are more adversely affected by the program's duration than whites.[34]

Finally, none of the voluntarily negotiated programs has dealt with reliance upon seniority referral to journeyman work opportunities. Such procedures put blacks who have worked for nonunion contractors outside the collective bargaining agreement at a disadvantage—and accordingly they violate Title VII.[35]

One point which neither the parties to collective arrangements nor the courts have focused upon is the extent to which members of the Laborers Union—many of whom are black, and who quite often perform some of the functions involved in the sheet metal and plumber's classifications—may be upgraded. The Laborers Union has not had a great interest in this matter—probably because (1) they fear that the departure of their more skilled members may erode the union's jurisdiction in an industry that is plagued with such disputes; and (2) the fringe benefit schemes for the various unions are separate, and the worker who moves gives up what he has. Presumably, the sacrifice involved in the promotion is itself unlawful under Title VII, since the courts have been careful to preserve benefits that workers have so that they

33. The leading cases are *Carter* v. *Gallagher,* 452 F. 2d 315, 327 (8th Cir. 1972) and *Gregory* v. *Litton Systems,* 5 F.E.P. Cases 267 (9th Cir. 1972). See generally Herbert Hill, "The New Judicial Perception of Employment Discrimination Litigation Under Title VII of the Civil Rights Act of 1964," *University of Colorado Law Review* 63 (1962), p. 243.

34. *U.S.* v. *Operating Engineers, Local 3,* 4 F.E.P. Cases 1088 (N.D.Cal. 1972). See generally Dennis R. Yeager, "Litigation Under Title VII of the Civil Rights Act of 1964, the Construction Industry, and the Problems of Unqualified Minority Workers," *Georgetown Law Journal* 59 (1971), p. 1265.

35. Rates have been "red circled" in industrial seniority litigation so that employees would not be deterred from exercising Title VII promotion rights. See, for example, *U.S.* v. *Bethlehem Steel* (note 22 above). See also William B. Gould, "Employment Security, Seniority and Race: The Role of Title VII of the Civil Rights Act of 1964," *Howard Law Journal* 13 (1967), p. 1.

will not be deterred from taking promotions that open up in a higher paying classification.

CONCLUSION

Contrary to public belief, both the industrial and construction unions at the national as well as the local level are wrongdoers insofar as racial discrimination in employment is concerned. The industrial unions adopt a more progressive posture toward fair employment practices legislation and other policies that will improve the lot of low-income workers of both races. This is primarily because industrial unions are more likely to represent such workers in the semiskilled and unskilled classifications.

The labor movement generally has a considerable way to go before its house can be said to be in order on the issue of racial equality. What tends to be dominant as of this time is a narrow, parochial, and selfish point of view, which has been historically associated with the American craft unions. Despite the fact that the percentage of union membership which is black is higher than the Negro portion of the population, this has made the labor movement look inward and away from the plight of minority working people—many of whom are unorganized (particularly in service jobs) and consciously disregarded by the AFL-CIO.

One of the more interesting and encouraging developments in the future will be in the public sector, where both trade unionism and industry are growing at a breakneck rate. The American Federation of State, County, and Municipal Employees has an extremely able and articulate black Secretary-Treasurer, William Lucy. On the other hand, the American Federation of Teachers has been in a number of controversies with the black community about the relationship between black children and white teachers—Ocean Hill Brownville in New York being the most prominent among them. Police and fire departments and the unions with whom they bargain have been on the receiving end of a number of lawsuits.[36] The American Federation of Government Employees, while it represents a substantial number of minority groups, has only one out of twenty minority executive board members.

The public employee unions, while they are to be envied inasmuch as so many of them have a fresh slate to write on because of their recent arrival on the scene, are in a sector of the economy that will produce litigation and charges of employment discrimination for years to come. One reason for this is the prevalence of civil service examinations that have a discriminatory impact upon minorities. Another factor in all of this is that Title VII now applies to federal, state, and local governments; the Equal Employment Opportunity Commission has the authority to hear complaints of discrimination involving state and local, and the Justice Department has the right to sue in this area.

Persistent obduracy on the part of the industrial and craft unions is triggering the emergence of black workers' organizations which, while not challenging trade union exclusive bargaining rights, seek to fill the void that the unions themselves have ignored, that is, employment discrimination. Two recent and successful examples of this are the

36. See, for example, *Castro* v. *Beecher,* 459 F. 2d 725 (1st Cir. 1972); *Chance* v. *Board of Examiners,* 458 F. 2d 1167 (2nd Cir. 1972); *Western Addition Community Org.* v. *Alioto* 340 F. Supp. 1351 (N.D.Cal. 1972); *Commonwealth* v. *O'Neill,* 4 F.E.P. Cases 970 (E.D. Pa. 1972), *vacated and remanded,* 4 F.E.P. Cases 1286 (3rd Cir. 1972), *remanded to,* 5 F.E.P. Cases 277, 279, 280 (E.D.Pa. 1972).

United Construction Workers Association in Seattle and the Association for the Betterment of Black Edison Employees in Detroit. The former has recruited black workers whom the Seattle mechanical trades would not recruit for a court-ordered special apprenticeship program. The latter has represented the interests of black union members where the Utility Workers Union in Detroit was unwilling to do so. The same phenomenon has appeared in some of the public employee unions.[37]

There is trouble in all segments of the house of organized labor today. The most important thing on the minus side is the adherence by national trade union leadership to policies which perpetuate the racially discriminatory past. What gives cause for hope, however—particularly in the industrial and public employee unions—is the emergence of a substantial number of minority employees with a strong political base. Trade unionism will be the first major private institution in American life in which minority workers have a substantial share of political leadership. It may well provide the forum in which the proposition that a multi-racial society dominated by whites can provide justice for all races will be tested most thoroughly.

37. See the statements of William Lucy in *Government Employment Relations Reporter*, Jan. 22, 1973 (No. 487, BB-11, BNA).