THE WEBER CASE AND COLLECTIVE BARGAINING

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I. Introduction

The Weber case\(^1\) is examined from a labor market perspective, i.e., significance of collective bargaining as a mechanism to implement affirmative action efforts in the workplace. At issue was whether employers and unions may voluntarily select craft trainees for an in-plant training program, based on race even if a court could require this in a litigated case or approve it in a consent decree. Why would a powerful union and a large employer agree as a part of a collective bargaining contract to correct racial imbalances in selected jobs? In the words of Judge Wisdom's dissent on this case in the Fifth Circuit court, "Today the Court grapples with the question whether, in a collective bargaining agreement, recognition of race for remedial purposes in employment practices is legal 'affirmative action' or illegal 'reverse discrimination.'\(^2\)

This paper analyzes the collective bargaining aspects of the Weber case, especially the linkage of the 1974 Master Aluminum Agreement, and the 1974 Steel Consent Decree. It comments on the motives of both the union and the employer for joint participation in a "race-conscious" training program. It outlines some of the consequences of the Weber decision for implementation of affirmative action programs. Much of the information is presented in the four volume series of petitions and briefs, and amicus briefs of the interested parties in the Weber case.\(^3\)
II. Master Aluminum Agreement, 1974

In February 1974, the United Steelworkers entered into an industry-wide collective bargaining agreement (Master Aluminum and Can and Container Labor Agreement) with Kaiser and two other major producers in the aluminum industry, (Reynolds Metal and ALCOA). The Master Agreement covered workers at 15 Kaiser plants, and included a provision on affirmative action for skilled craft jobs. Under the aegis of a joint company-union committee, goals were established for reducing racial imbalances in the skilled jobs. In a number of the Kaiser facilities, as well as other companies in the aluminum industry, the craft work forces were almost exclusively white males. At the Gramercy, Louisiana plant where Brian Weber was employed only 1.83 percent (or 5) of the 273 skilled workers in 1973 were black. Blacks were approximately 39 percent of the external labor market from which the plant drew its workforce and 14.8 percent of all production workers at that Kaiser facility.

A memorandum of understanding, supplementing the Master Agreement stated "that participation of minority employees in skilled craft jobs had to be increased in order to assure full compliance with standards enunciated by the Federal government and in recent court decisions." It was specified that a Joint Committee review minority representation in the existing Trade, Craft, and Assigned Maintenance classifications and where necessary establish goals that would enable unskilled production workers without craft experience to become craft qualified. Previously Kaiser had required that new hires for craft work have at least five years of craft experience.*

Since blacks had traditionally been excluded from craft unions and apprent-

*When the work experience requirement subsequently was reduced to three years, only three blacks were recruited.
tieship programs, few could be found in the external labor market to meet the experience requirement of the company. Between 1964 and 1971 Kaiser offered a limited training program in two craft jobs for unskilled plant employees with some prior work experience. Of the 28 trainees admitted to the two craft training programs only two were blacks.7/

The on-job-training program for craft workers stipulated that 50 percent of the openings in each in-plant training class would be minority and/or female employees.8/ At the Gramercy plant, selection of successful bidders for trainee positions was based on plant seniority with the limitation that 50 percent of the employees was to be black until the goal of 39 percent black craftsmen in each craft family was achieved. Where there were successful female bidders for the training vacancies, their participation could be counted against the 50 percent reserved for minorities.9/ The training program was expected to accommodate no more than 20 Gramercy employees at one time, i.e. during the training period of three years. In the several months between the initiation of the craft training program and the time that a Federal district court issued an injunction against the use of training eligibility quotas, thirteen craft trainee positions were bid and filled at the Gramercy plant.10/

Seven positions had been filled by blacks and six by whites, but blacks had bid only on vacancies reserved for blacks and whites likewise bid only on vacancies set aside for whites. Thus, a dual seniority roster was created. All of the blacks were more junior in plant seniority than one or more white employees not selected.11/ The dual seniority lists were maintained only for purpose of selecting on-the-job trainees and did not reflect preferential treatment in layoff, recall, transfer assignments, working conditions or any
other benefits. "No white workers lost their jobs; none had their expectations disappointed."\textsuperscript{12/}

III. Steel Consent Decree

The provision of the Aluminum industry's Master Agreement whereby a joint committee would review minority representation on a plant by plant basis and establish goals to reach desired minority ratios in craft jobs was identical to an "Affirmative Action for Trade and Craft Occupations" provision included in a 1974 consent decree for the basic steel industry.\textsuperscript{13/}

The requirement that at least one-half of the entry vacancies in each craft grouping be earmarked for minorities and women was also included in the steel consent decree. The consent decree approved in \textit{United States v. Allegheny Ludlum Industries, Inc.}, called for race and sex-conscious selections for craft training programs in 250 plants.\textsuperscript{14/} Thus, the Steelworkers union had a model for affirmative action which it could attempt to test in other industries where multi-employer bargaining was conducted.

For a number of years the Steelworkers union had engaged in industry-wide collective bargaining in basic steel. Following the lengthy steel strike in 1959, representatives of the union and the basic steel companies working with three arbitrators established a Human Relations Committee and met regularly on joint problems. In 1973 the union and companies decided to utilize a new bargaining procedure — the Experimental Negotiating Agreement (ENA). All issues not settled by the parties during contract negotiation would be submitted to final and binding arbitration. This major cooperative effort in collective bargaining designed to reduce conflict and to stabilize and strengthen the industry established a context for tackling
even more difficult issues related to employment discrimination.

The considerable antidiscrimination litigation (Title VII of the Civil Rights Act of 1964, as amended) over the seniority systems in the steel industry had encouraged the union and representatives of nine large producers of basic steel to negotiate the 1974 industry-level pattern settlement of seniority, transfer rights, training for craft jobs, and back pay. The steel consent decree, a tripartite agreement between employers, the union, and Federal agencies was to be supervised by a Federal District court over a five year period.

IV. Union Motives

The Steelworkers Union with 1.4 million members has a sizeable black membership (approximately 30 percent), and union leaders had to respond to increasing criticism of whether the union represented blacks fairly. Black members for more than a decade had charged that both the union and the basic steel companies were guilty of racial discrimination, and much litigation had ensued. Since a model of dealing with the affirmative action had been designed in the steel industry under a consent decree, the international union may have decided to apply the same procedures in the aluminum industry. The collective bargaining process might prove to be a valid way for private parties to attempt a resolution of a conflict over seniority. Perhaps, the union could serve as a catalytic agent in this instance because more racial harmony in the workplace was consistent with a Southern strategy by this union of increasing its membership. The United Steelworkers embraces a wide range of steel fabricating industries and nonferrous metals.
The union had merged with the Mine, Mill and Smelter Workers, United Stone and Allied Products Workers, and District 50 of the United Mine Workers as well as several small independent unions. An indication of a more aggressive Southern organizing drive of the Steelworkers Union was shown by its 1978 success in winning the representation election for 19,000 production and maintenance workers at Tenneco's huge Newport News Shipbuilding and Dry Dock Company in Virginia. The union may have scored an organizing breakthrough in the traditionally anti-union South through its support from the shipyards' heavily black work force.19/

Another motive for the union might have been to gain control over more jobs. In its brief for Weber the union stated that one of its long term objectives had been to establish apprenticeship or craft training programs enabling in-plant production workers to train and qualify for craft positions. Kaiser usually filled its craft positions by hiring from outside of its workforce. Thus, in order to control jobs and provide upward mobility for membership---this provision was seen as a benefit to all workers and perhaps to white workers more than black since the probability of finding white craftsmen on the outside was higher than the probability of finding black craftsmen.

"There would be no training program at Gramercy today were it not for the parties' quota agreement. USWA (United Steelworkers of America) had sought such a training program for many years, but Kaiser had continually demurred on the ground that it was too costly. In consequence, all of the production employees at the plant, including Brian Weber and the entire class he represents, were without any hope of ever achieving a craft job. The negotiation of the nationwide USWA-Kaiser quota program made it impera-
tive that Kaiser establish training programs, and thereby created opportunities for whites as well as for blacks which would not otherwise have come into being. The New York Times has indicated "the union's interest in the craft jobs coincided with the company's fear of losing government contracts."

V. Company Motives

The company had engaged in preparatory discussions prior to collective bargaining negotiations and had endorsed the provision on dual racial bidding lists for entry into skilled craft training programs. It wished to avoid further litigation under Title VII and as a Federal contractor it hoped to be relieved of the considerable threat of sanctions being imposed by the Office of Federal Contract Compliance (OFCC). Two neighboring Kaiser plants (Baton Rouge and Chalmette) were already subject to Title VII proceedings. The company requirement of prior craft experience was found to be in violation of Title VII at these facilities. In 1975 Kaiser settled the litigation at its Baton Rouge plant, and signed a consent decree for $255,000. In litigation, which had been pending at the Chalmette plant since 1967, the Fifth Circuit court in 1978 held that a prima facie case had been established of discrimination against blacks in hiring for craft positions.

In 1971, after a compliance review, Kaiser was notified by OFCC that its practices in craft jobs at the Gramercy plant did not conform with the requirements of the executive order 11246 and minority representation had to be improved. At that time, there were no blacks among the 246 craftsmen
then employed at the Gramercy facility. The OFCC indicated that a craft training program was needed and that the minority ratio of the trainees should be at least as high as the minority ratio of the company's recruitment area. Again in 1973 Kaiser was told to eliminate underutilization of minorities at the Gramercy plant and to assure minority representation in craft jobs. Kaiser had waived experience requirements for whites but not for blacks in filling skilled-craft jobs at the Gramercy plant.24/

The Gramercy plant had opened in 1958 but until 1969 had not aggressively recruited blacks from the available external labor market pool where blacks were nearly two-fifths of the labor force. There was a sharp increase from 10 percent representation of blacks in the Gramercy plant after 1969 when, under pressure from the Federal government, Kaiser began hiring at the gate on a one to one black to white ratio. The company was reluctant to establish a training program to prepare its production workers for skilled craft jobs. Kaiser estimated that an in-plant training program cost from $15,000 to $20,000 per trainee/per year over a training period of 2 1/2 to 3 1/2 years.25/ Such a heavy investment (approximately $400,000 per year) by the company had been resisted.

Although the Office of Federal Contract Compliance had found the three Kaiser facilities in Louisiana plants not in compliance with the executive order 11246, this evidence of discrimination for the Gramercy plant was not on the record of the lower court. If employers attempt voluntarily to comply with Title VII (where no case is shown of past discrimination) they may be charged with reverse discrimination by white employees, however if they admit past acts of discrimination, they may be liable for back pay and other remedial actions on behalf of minority and/or women workers.26/ The
company called for a standard that would permit an employer and union to act voluntarily within a "zone of reasonableness": first to make determination that the circumstances justify the adoption of a race conscious remedy and second to design and implement a reasonable remedy. Kaiser argued that the company and the union acted well within the zone of reasonableness of affirmative action in adopting a race conscious training program. The objective of eliminating the absence of qualified minority craft workers could be achieved by reconciling the competing interests of employer and employees and in a manner that would be least disruptive.27/

VI. Meaning of Weber

The Weber decision is seen as a victory for collective bargaining as a means of accommodating diverse interests in the workplace. Weber emphasized that voluntary compliance is preferable to court action and that private settlement without litigation is central to Title VII. The Supreme Court broadened the circumstances under which quotas may be imposed but left open issue of whether affirmative action programs might be unilaterally established by management. The Equal Employment Opportunity Commission had adopted "Guidelines on Affirmative Action" to clarify the relationship between affirmative action and so-called "reverse discrimination." Under the Guidelines employers and unions may take reasonable corrective action to improve employment opportunities of women and minorities. Such action may include goals and timetables or other employment tools which recognize the race, sex, or national origin of workers. Employers who have designed affirmative action plans that conform with the Guideline principles will not be held liable for reverse discrimination claims.28/
The majority opinion that was delivered by Justice Brennan stated "We need not today define in detail the line of demarcation between permissible and impermissible affirmative action plans. It suffices to hold that the challenged Kaiser-USWA plan falls on the permissible side of the line. The purposes of the plan mirror those of the statute. Both were designed to break down old patterns of racial segregation and hierarchy. Both were structured to 'open employment opportunities for Negroes in occupations which have been traditionally closed to them.'

At the same time, the plan does not unnecessarily trammel the interests of white employees. The plan does not require the discharge of white workers and their replacement with new black hires.---Nor does the plan create an absolute bar to the advancement of white employees; half of those trained in the program will be white. Moreover, the plan is a temporary measure; it is not intended to maintain racial balance, but simply to eliminate a manifest racial imbalance."29/
FOOTNOTES


2. 16 FEP Cases 10.


4. Revere Copper and Brass, Inc., Conalco, Inc., Ormet and other smaller companies usually followed the patterns of the three largest companies.

5. Weber, the individual plaintiff and class representative, was active in the local Steelworkers' activities (Local 5702). He chaired the plant's grievance committee and served as shop steward and as a member of the negotiating committee formed to supply a local supplement to the 1974 Master Labor Agreement.


8. The Master Agreement provided that the employers had to fill the craft vacancies from qualified workers in the plant before going to the outside. The Kaiser implementing memorandum of understanding permitted the use of off the street hires, if necessary.
9. Five percent of craft training positions were to be made available to women. In 1975 women were five percent of the unskilled labor pool at the Gramercy plant but did not have any of the craft positions.

10. In 1974, in addition to the 13 bidders into its craft training program, Kaiser hired 22 craftsmen from outside the plant, only one of whom was black. Petitions and Briefs, p. 308. (Brief for the United States and the Equal Employment Opportunity Commission).

11. If the sole prerequisite for selection into the training program had been plant seniority, Weber would not have been selected since between 35 and 40 white males who bid on the three jobs on which Weber bid had more seniority.


14. Ibid.


16. See William Gould, Black Workers in White Unions, for discussion of the actions of the black steelworkers group, the Ad Hoc Steelworkers Committee.

17. See 15/ supra.

18. "When the company (Kaiser) first started hiring they had two kinds of badge numbers—certain numbers for whites and certain numbers for blacks. They were separated, segregated you know. So I would say that there was discrimination. That didn't change until the union came in and they merged the lists." J. P. Roussel, President of Local 5702 at Gramercy plant. The New York Times, December 15, 1978.

20. Brief for Petitioners, United Steelworkers of America, AFL-CIO-CLC, p. 84.

21. "The almost total absence of blacks from craft jobs at Kaiser's Gramercy facility posed a serious threat to the Company's contract compliance status. It also presented the clear possibility of Title VII litigation which had already engulfed the entire steel and aluminum industries." Company Brief, p. 10.


26. On the same day on which the Supreme Court agreed to hear the Weber case, the Equal Employment Opportunity Commission issued Affirmative Action Guidelines stating that the Commission would not act on complaints of reverse discrimination brought against employers undertaking voluntary affirmative action to comply with Title VII.

27. Petitions and Briefs, pp. 44-60. (Kaiser Brief).


29. 20 FEP Cases 7.