

not violate the Civil Rights Act of 1964.

#### The National Labor Relations Act

The June 27, 1969 order, par. 8(b) provides:

'It is no excuse that the union with which the contractor has a collective bargaining agreement failed to refer minority employees. Discrimination in referral for employment, even if pursuant to provisions of a collective bargaining agreement, is prohibited by the National Labor Relations Act and the Civil Rights Act of 1964. It is the longstanding uniform policy of OFFCC that contractors and subcontractors have a responsibility to provide equal employment opportunity if they want to participate in federally involved contracts. To the extent they have delegated the responsibility for some of their employment practices to some other organization or agency which prevents them from meeting their obligations pursuant to Executive Order 11246, as amended, such contractors cannot be considered to be in compliance with Executive Order 11246, as amended, or the implementing rules, regulations and orders.'

The union amici vigorously contend that the Plan violates the National Labor Relations Act by interfering with the exclusive union referral systems to which the contractors have in collective bargaining agreements bound themselves. Exclusive hiring hall contracts in the building and construction industry are validated by Section 8(f) of the National Labor Relations Act, 29 U.S.C. § 158(f). In *Teamsters Local 357 v. NLRB*, 365 U.S. 667, 81 S.Ct. 835, 6 L.Ed.2d 11 (1961), the Supreme Court held that the National Labor Relations Board could not proscribe exclusive hiring hall agreements as illegal per se since Congress had not chosen to prohibit hiring halls. It is argued that the President is attempting to do what the Supreme Court said the National Labor Relations Board could not do-- prohibit a valid hiring hall agreement. Of course collective bargaining agreements which perpetuate the effects of past discrimination are unlawful under Title VII. *Local 189, United Papermarkers & Paperworkers v. United States*, supra; *United States v. Sheet*

*Metal Workers, Local 36*, 416 F.2d 123, 132 (8th Cir. 1969). The findings of past discrimination which justified remedial action in these cases were made in judicial proceedings, however. See 42 U.S.C. § 2000e-5(g). The amici contend that the Assistant Secretary's nonjudicial finding of prior exclusionary practices is insufficient to support the Plan's implied requirement that the contractor look to other sources for employees if the unions fail to refer sufficient minority group members.

[11][12] It is clear that while hiring hall arrangements are permitted by federal law they are not required. Nothing in the National Labor Relations Act purports to place any limitation upon the contracting power of the federal government. We have said hereinabove that in imposing the affirmative action requirement on federally assisted construction contracts the President acted within his implied contracting authority. The assisted agency may either agree to do business with contractors who will comply with the affirmative action covenant, or forego assistance. The prospective contractors may either agree to undertake the affirmative action covenant, or forego bidding on federally assisted work. If the Plan violates neither the Constitution nor federal law, the fact that its contractual provisions may be at variance with other contractual undertakings of the contractor is legally irrelevant. Factually, of course, that variance is quite relevant. Factually it is entirely likely that the economics of the marketplace will produce an accommodation between the contract provisions desired by the unions and those desired by the source of the funds. Such an accommodation \*175 will be no violation of the National Labor Relations Act.

[13] The absence of a judicial finding of past discrimination is also legally irrelevant. The Assistant Secretary acted not pursuant to Title VII but pursuant to the Executive Order. Regardless of the cause, exclusion from the available labor pool of minority tradesmen is likely to have an adverse effect upon the cost and completion of construction projects in which the federal government is interested.