84-1656

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

LOCAL 638 . . ., LOCAL 28 OF THE SHEET METAL WORKERS' INTERNATIONAL ASSOCIATION, LOCAL 28 JOINT APPRENTICESHIP COMMITTEE,

Petitioners,

— against —

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, THE CITY OF NEW YORK, and NEW YORK STATE DIVISION OF HUMAN RIGHTS,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTIONS PRESENTED

A divided panel of the United States Court of Appeals for the Second Circuit affirmed orders of the United States District Court for the Southern District of New York which held Petitioners in contempt for violating a Revised Affirmative Action Program and Order (RAAPO) and an Order and Judgment (O&J); imposed substantial monetary fines on Petitioners to establish, as part of the contempt remedy, an Employment, Training, Education and Recruitment Fund to be financed by Petitioners and to be employed solely to benefit nonwhite apprentices and journeymen; adopted an Amended Affirmative Action Plan and Order (AAAPO), which included a race-conscious quota of 29.23% for nonwhite membership in Local 28; and continued the office of the Administrator, which has placed Local 28 and the Joint Apprenticeship Committee ("JAC") under a judicially-imposed receivership.

The questions presented are:

1. After a general finding of discrimination against unidentified persons, may a district court order a race-conscious affirmative action program under Title VII of the Civil Rights Act to benefit nonwhites?

2. May such an affirmative action program include a percentage "goal" for nonwhite membership and a judicial threat that the goal must be met by a specified date?

3. Does the Constitution prohibit such reverse discrimination as a violation of the Equal Protection clause?

4. Does the Constitutional prohibition against Corruption of Blood invalidate such reverse discrimination?

5. Should civil contempt remedies be declared to be illegal criminal contempt remedies imposed without Due Process of law when they include (a) a compensatory component without proof of damage and (b) a coercive component unrelated to the contempt and without an opportunity to purge the contempt?

6. Do findings of discrimination, premised upon improper standards and statistics, followed by findings of contempt of the resulting orders also based upon improper standards and statistics, deprive Petitioners of Due Process of law?

7. Does a district court order appointing an Administrator with day-to-day supervisory powers over the internal affairs of a labor union violate the union's right to self-governance, or exceed the court's power to appoint special masters.

PARTIES

With the exception of the Sheet Metal and Air-Conditioning Contractors' Association of New York City ("Association"), the caption of this petition contains the names of all parties in the Court of Appeals. * The Association is composed of building contractors in New York City who are engaged in sheet metal construction work. Although no claim was made that it engaged in discriminatory practices or policies, the Association was deemed an indispensable party in the original action and was joined as a defendant for purposes of granting complete relief. All contempt sanctions against the Association were reversed by the Court of Appeals, and it does not join in this petition.

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* The contempt proceeding in the district court was also brought against 121 individual contractors. Although the district court found that all of them were guilty of contempt, it imposed no sanctions against them. They therefore did not pursue appeals.

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EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, THE CITY OF NEW YORK, and NEW YORK STATE DIVISION OF HUMAN RIGHTS,

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioners, Local 28 of the Sheet Metal Workers' International Association and its Joint Apprenticeship Committee ("JAC"), respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit entered in this proceeding on January 16, 1985.

CITATION TO OPINIONS BELOW

The opinion of the Court of Appeals (A-1-52)[1] is officially reported at 753 F.2d 1172 (2d Cir. 1985) and is unofficially

[1] References as to the Appendix to this petition are referred to herein as (A-).

reported at 36 Fair Empl. Prac. Cas. (BNA) 1466 (2d Cir. 1985). Other reported decisions in this case, also included in the Appendix, are as follows: *United States v. Local 638 et al.*, 337 F. Supp. 217 (S.D.N.Y. 1972); *United States v. Local 638 et al.*, 347 F. Supp. 164 (S.D.N.Y. 1972); *United States v. Local 638 et al.*, 347 F. Supp. 169 (S.D.N.Y. 1972); *Equal Employment Opportunity Commission v. Local 638 et al.*, 401 F. Supp. 467 (S.D.N.Y. 1975), *aff'd as modified*, 532 F.2d 821 (2d Cir. 1976) (Feinberg, J., concurring); *Equal Employment Opportunity Commission v. Local 638 et al.*, 421 F. Supp. 603 (S.D.N.Y. 1975); *Equal Employment Opportunity Commission v. Local 638 et al.*, 565 F.2d 31 (2d Cir. 1977) (Meskill, J., dissenting).[2]

JURISDICTION

The judgment of the United States Court of Appeals for the Second Circuit was entered on January 16, 1985. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES

Article I, §9, cl. 3 of the United States Constitution provides:

> No Bill of Attainder or ex post facto Law shall be passed.

Article III, §3, cl. 2 of the United States Constitution provides:

> The Congress shall have Power to declare the Punishment of Treason, but no Attainder of Treason shall

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[2] Earlier proceedings in the state courts are reported as follows: *State Commission For Human Rights v. Farrell*, 43 Misc. 2d 958, 252 N.Y.S.2d 649 (Sup. Ct. N.Y. County 1964); *State Commission For Human Rights v. Farrell*, 47 Misc. 2d 244, 262 N.Y.S.2d 526 (Sup. Ct. N.Y. County 1965); *State Commission For Human Rights v. Farrell*, 47 Misc. 2d 799, 263 N.Y.S.2d 250 (Sup. Ct. N.Y. County 1965); *State Commission For Human Rights v. Farrell*, 52 Misc. 2d 936, 277 N.Y.S.2d 287 (Sup. Ct. N.Y. County), *aff'd*, 27 A.D.2d 327, 278 N.Y.S.2d 982 (1st Dep't), *aff'd*, 19 N.Y.2d 974, 228 N.E.2d 691, 281 N.Y.S. 2d 521 (1967).

> work Corruption of Blood, or Forfeiture except during the Life of the Person attainted.

The Fifth Amendment to the United States Constitution provides in pertinent part:

> No person shall . . . be deprived of life, liberty, or property, without due process of law. . . .

Section 1 of the Fourteenth Amendment of the United States Constitution provides in pertinent part:

> No state shall . . . deny to any person within its jurisdiction the equal protection of the laws.

Section 706(g) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e-5(g), provides in pertinent part:

> If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay (payable by the employer, employment agency, or labor organization, as the case may be, responsible for the unlawful employment practice), or any other equitable relief as the court deems appropriate.

Section 703(j) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e-2(j), provides:

> Nothing contained in this subchapter shall be interpreted to require any employer, employment agency, labor organization, or joint labor-management committee subject to this subchapter to grant preferential treatment to any individual or to any group because of the race, color, religion, sex, or national origin 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, religion, sex, or national origin employed by any employer, referred or classified for employment by any employment agency or labor organization, admitted to membership or classified by any labor organization, or admitted to, or employed in, any apprenticeship or other training program, in comparison with the total number or percentage of persons of such race, color, religion, sex, or national origin in any community, State, section, or other area, or in the available work force in any community, State, section, or other area.

Section 401(a) of the Labor-Management Reporting and Disclosure Act, 29 U.S.C. §401(a) provides in pertinent part:

> The Congress finds that, in the public interest, it continues to be the responsibility of the Federal Government to protect employees' rights to organize, choose their own representatives, bargain collectively, and otherwise engage in concerted activities for their mutual aid or protection.

STATEMENT OF THE CASE

Summary

Since 1975, Petitioners, a labor union and its joint apprenticeship committee, have been living under an elaborate race-conscious affirmative action program designed to integrate the sheet metal industry in New York. The centerpieces of the program are (1) a nonwhite membership quota of 29%, denominated a "goal", and (2) a court-appointed Administrator (*i.e.* a special master) who governs Petitioners with respect to the program on a daily basis, at their expense. As a result of their failure to meet the goal, Petitioners have now been held in contempt, largely for failing to comply with ministerial provisions of the program. An expanded race-conscious affirmative action program has now been ordered in which fines and

penalties will fund education, training, counselling and financial assistance exclusively for nonwhites. The Administrator continues to govern. Petitioners have been warned by the district court that if the nonwhite membership "goal" is not met by August 31, 1987, they "will face fines that will threaten their very existence." (A-123). A divided panel of the Court of Appeals distinguished and limited this Court's recent decision in *Firefighters Local Union No. 1784 v. Stotts*, 104 S. Ct. 2576 (1984), and affirmed, but stayed its mandate pending this petition.

Facts and Prior Proceedings

Sheet metal workers are skilled artisans who fabricate sheet metal into ducts and conduits to convey heating and air-conditioning through offices and homes. Local 28 is a union affiliated with the Sheet Metal Workers' International Association. The JAC is an apprenticeship committee composed of labor and management representatives which is responsible for managing the Sheet Metal Workers' Apprenticeship Training Program.

In earlier proceedings in the state courts, Local 28 and the JAC were found to have practiced discrimination against minority applicants to the apprenticeship program by engaging in nepotistic practices which gave "some preference to those applicants who are sons or sons-in-law of present or deceased members of the Union." (A-421). In 1971, the United States brought suit against Local 28 and three other unions[3] and their JACs alleging that they had violated Title VII by engaging in discriminatory hiring practices regarding the employment of nonwhites.[4]

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[3] The case was severed as to each of the defendant unions prior to trial and has since been separately litigated.

[4] The Equal Employment Opportunity Commission was substituted as named plaintiff for the federal government. 532 F.2d at 824 n.2 (A-210). The New York City Commission on Human Rights was granted leave to intervene in the action against Local 28. 347 F. Supp. 164 (S.D.N.Y. 1972). (A-394-401). The New York State Division of Human Rights, initially named as a third-party defendant, realigned itself as a plaintiff. 753 F.2d at 1175. (A-6).

The district court found that Local 28 and the JAC had discriminated against nonwhites in violation of Title VII, largely by following long-established practices of filling positions in the industry with friends and relatives. 401 F. Supp. at 476. (A-330). On August 28, 1975, the court entered an Order and Judgment (the "O & J") (A-300-316), which required Local 28 and the JAC to refrain from discriminatory practices in the future and (a) established a nonwhite membership goal of 29% to be reached by July 1, 1981; (b) appointed a special master, called an Administrator, with broad supervisory powers, who was to propose and implement an affirmative action plan to govern Petitioners' employment practices; (c) required Petitioners to administer "hands-on" nondiscriminatory tests for journeymen; (d) ordered Petitioners to keep extensive records of applicants to the union or apprenticeship program; (e) directed Petitioners to issue temporary work permits on a nondiscriminatory basis; and (f) ordered Petitioners to conduct a publicity campaign to increase nonwhite awareness of employment opportunities within the union.

The Administrator submitted an Affirmative Action Program and Order (AAPO) which established interim annual goals for nonwhite membership in Local 28, detailed the mechanics for the conduct of the testing and apprenticeship programs and set forth elaborate record-keeping requirements for Local 28 and the JAC. AAPO was approved by the district court and substantially affirmed by the Court of Appeals.[5] 532 F.2d 821 (2d Cir. 1976) (Feinberg, C.J., concurring). (A-207-229).

Thereafter, a Revised Affirmative Action Plan and Order (RAAPO) was entered in 1977. (A-182-206). RAAPO preserved the interim membership goals in AAPO, the detailed testing,

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[5] The Court of Appeals modified the district court's order to the extent it had required that one of the three union representatives to the JAC be replaced by a representative of minority descent and that three nonwhites be admitted to the apprenticeship program for every two whites admitted. The Court held that these remedies constituted quotas of a nature forbidden by Title VII. Judge Feinberg concurred in the result and the disapproval of the racial quotas. He wrote separately to stress the difference between racial quotas and goals, and to note his approval of the 29% figure in the district court order because it was a goal. (A-227-229).

record-keeping and reporting requirements and the mandated publicity campaign program to attract nonwhite applicants. A divided panel of the Second Circuit affirmed RAAPO. 565 F.2d 31 (2d Cir. 1977). (A-160-181).

Judge Meskill dissented (A-169-181) on the ground that the findings of discrimination, which had been approved by the earlier Court of Appeals decision, had been improperly derived from employment statistics which violated this Court's intervening ruling in *Hazelwood School District v. United States*, 433 U.S. 299 (1977). These statistics utilized a population base restricted to New York City as opposed to the wider geographical area from which the union actually attracted applicants, and the findings were in part based upon discriminatory practices which occurred prior to the Civil Rights Act of 1964. Title VII does not apply to acts or practices which occurred prior to its effective date. Judge Meskill concluded that the failure to apply the *Hazelwood* criteria "cast substantial doubt on the existence of illegal discrimination by these unions. . . ." (A-169).

For the next several years, Local 28 and the JAC were governed by the O & J, RAAPO and the day-to-day dictates of the Administrator. The Administrator approved the size of each of more than 60 classes of apprentices, the major entry point into the industry. (A-42). These classes consisted of approximately 45% persons of minority extraction. (A-43). From April 1977 to April 1982, a period of extreme economic distress for the New York Sheet Metal Industry (A-23-24, 46), total nonwhite membership in Local 28 increased from 6.1% to 14.9%, while total membership declined. (A-480).

Despite the substantial increase in nonwhite membership, in April 1982, as the extended July 1982 deadline for reaching the nonwhite membership goal approached, the City and State initiated contempt proceedings against the Petitioners, claiming they had failed to achieve the requisite 29% "goal". (A-441-477).

The contempt proceeding was clearly premised on the failure to meet the requisite percentage of minority membership, which was treated as a quota. Nevertheless, the district court purported

to hold Petitioners in civil contempt for (1) underutilization of the apprenticeship program; (2) failure to conduct the general publicity campaign ordered in RAAPO; (3) adoption of a job protection provision in the collective bargaining agreement that favored older workers during periods of unemployment (older workers' provision); (4) issuance of unauthorized work permits to white workers from sister locals; and (5) failure to maintain and submit certain records and reports. The district court imposed a fine of $150,000 and assessed costs and attorneys' fees. (A-149-159).

In holding Petitioners in civil contempt, the district court observed that it was not placing primary emphasis on any one of the above violations but "that the collective effect of these violations has been to thwart the achievement of the 29% goal of non-white membership. . . ." (A-155-156).

In April 1983, the City commenced a second contempt proceeding before the Administrator, charging Local 28 and the JAC with violating certain ministerial provisions of the O & J and RAAPO: (1) Local 28's tardy submission of various records; (2) submission of certain inaccurate data by Local 28 and the JAC,[6] and (3) Local 28's failure to serve the O & J and RAAPO on certain contractors. (A-127-148). No act of racial discrimination was alleged in the second contempt proceeding.

The district court adopted the Administrator's recommendation that Local 28 and the JAC be held in contempt and assessed additional penalties. (A-125-126). On September 1, 1983, the district court issued an order establishing an Employment, Training, Education and Recruitment Fund (the "Fund") (A-113-118), which was "for the purpose of promotion, employment, training, education and recruitment, and shall be used solely for the benefit of nonwhites." (A-114). The Fund was to be financed in part by the $150,000 levied against Petitioners in the first contempt proceeding, plus additional administrative

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[6] The sum total of the "inaccurate data" enumerated by the Administrator consisted of describing "Kaplan" as a Spanish surname and "Marquez" as a "white" surname. (A-132-133).

expenses and a further fine of $.02 per hour for each journeyman and apprenticeship hour worked. Its stated purpose is to create a tutorial program, summer jobs, counselling and support services, and financial support solely for nonwhite apprentices and journeymen.

By separate order (A-111-112), the district court adopted an Amended Affirmative Plan and Order (AAAPO) (A-53-107) which altered RAAPO in various ways, including: (1) computerization of records to be monitored by an independent advisor to the Administrator; (2) extension of the Plan's coverage to include merged locals and their JACs; (3) a requirement that one nonwhite apprentice be indentured for each white apprentice; (4) a requirement that contractors employ one apprentice for every four journeymen; and (5) replacement of the apprenticeship testing program by a three-member selection board, with one representative selected each by the court, JAC and the respondents. AAAPO continues the office of the Administrator. The expenses of the entire affirmative action program, including the fees of the Administrator (at $150 per hour), his office and administrative expenses, and expenses of the selection board are all to be borne by Petitioners.

AAAPO also adopted a 29.23% nonwhite membership "goal"; the slight change from 29% resulted from the merger of several unions into Local 28. In a separate memorandum and order adopting the 29.23% "goal" (A-119-124), the district court stated that if the Petitioners fail to achieve the percentage by August 31, 1987, they "will face fines that will threaten their very existence." (A-123).

The Court of Appeals affirmed all findings of contempt against Local 28 and the JAC, save one. The exception was the inclusion of the older workers' provision in the collective bargaining agreement, which the court held could not form the basis for contempt because it had never been implemented. Inasmuch as the only contempt finding against the Association was occasioned by its agreement to the older workers' provision, all findings and sanctions entered against it were reversed. The Court affirmed all contempt remedies against Local 28

and the JAC, including the Fund created only to benefit nonwhites. The adoption of AAAPO was similarly affirmed with two modifications. First, AAAPO's requirement that the JAC indenture whites and nonwhites on a 1:1 ratio was reversed. Second, the court clarified selection board procedures to avoid possible confusion as to whether such procedures can be utilized before the 29.23% nonwhite membership goal is reached.

Judge Winter dissented and voted to reverse AAAPO and all findings and remedies. He found "that Local 28 had the approval of the administrator for every act it took that affected the number of minority workers entering the sheet metal industry" (A-38); that the 29% "goal" was, in fact, "an inflexible racial quota" which is illegal and unconstitutional (A-38-39); that the only allegation even remotely justifying "the extraordinary sanctions imposed" was the allegation of underutilization of the apprenticeship program over which the Administrator had total control (A-39); that the finding of underutilization was based on a statistical analysis which the entire panel and all parties agreed was erroneous (A-43); that Local 28 has improperly been effectively placed in receivership and denied its right of self-government (A-38, 45); and that the race-conscious contempt remedies are inconsistent with this Court's decision in *Firefighters Local Union No. 1784 v. Stotts*, 104 S. Ct. 2576 (1984), and are of "questionable constitutional validity." (A-44, 48).

REASONS FOR GRANTING THE WRIT

Judge Winter, in the opening lines of his dissent, outlined the reasons for this Court to grant certiorari:

> This case, which raises sensitive constitutional issues regarding the judicial imposition of racial quotas, controversial questions of statutory interpretation concerning so-called reverse discrimination as a remedy under Title VII, and more mundane yet important legal issues as to the use of the contempt power, divides this court for a third time. *EEOC v. Local 638*, 565 F.2d 31, 37 (2d Cir. 1977) (Meskill J.,

dissenting); *EEOC v. Local 638*, 532 F.2d 821, 833 (2d Cir. 1976) (Feinberg, C. J., concurring).

(A-38).

I

THE COURT SHOULD DETERMINE THE LEGALITY OF COURT-IMPOSED AFFIRMATIVE ACTION PROGRAMS UNDER TITLE VII

In *United Steelworkers of America v. Weber*, 443 U.S. 193, 200 (1979) the Court reserved the issue of "what Title VII requires or . . . what a court might order to remedy a past violation of the Act." It appeared that the issue was resolved in *Firefighters Local Union No.1784 v. Stotts*, 104 S. Ct. 2576 (1984). The Court's opinion, written by Justice White, in which Chief Justice Burger, Justice Rehnquist and Justice Powell joined, exhaustively considered section 706(g) of Title VII and its legislative history and held that courts could not order race-conscious quotas or remedies except to make whole actual victims of discrimination. 104 S. Ct. at 2588-90. In a concurring opinion, Justice O'Connor expressed her agreement with this holding. She concluded that judicial remedies for Title VII violations were to be employed "only to prevent future violations and to compensate identified victims of unlawful discrimination," (as was done in *Franks v. Bowman Transp. Co., Inc.*, 424 U.S. 747 (1976) and *International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 371-74 (1977)) and that the "District Court had no authority to order the Department to maintain its current racial balance or to provide preferential treatment to blacks." 104 S. Ct. at 2593-94.

Justice Blackmun's dissent, in which Justice Brennan and Justice Marshall joined, also considered the issue fully. Clearly, the Court intended to resolve the issue, but the Courts of Appeals and District Courts which have considered the issue since *Stotts*, including the Court of Appeals in the present case,

have refused to read *Stotts* as precluding race-conscious affirmative action as a judicial remedy under Title VII. *Vanguards of Cleveland v. City of Cleveland*, No. 83-3091 (6th Cir. Jan. 23, 1985) (*cf.* dissent of Kennedy, C.J.); *Kromnick v. School District of Philadelphia*, 739 F.2d 894 (3rd Cir. 1984), *cert. denied*, 105 S. Ct. 782 (1985); *Diaz v. American Telephone & Telegraph*, 752 F.2d 1356, 1360 n. 5 (9th Cir. 1984). *Deveraux v. Geary*, 596 F. Supp. 1481 (D. Mass. 1984). These cases restrict *Stotts* to situations involving *bona fide* seniority plans.

The majority opinion below limits *Stotts* even more severely. The blatantly race-conscious program judicially imposed since 1975, the Fund order providing benefits solely to nonwhites, and the nonwhite membership "goal" compelling Petitioners to discriminate against whites or "face fines that will threaten their very existence" cannot be justified under Justice White's analysis. Nor can Judge Pratt's three-pronged attempt to distinguish *Stotts* withstand scrutiny. It is an unfair reading of *Stotts* to limit it to *bona fide* seniority plans, "make whole" as opposed to prospective relief, and cases where there has been no finding of intent to discriminate. (A-30-31).

This Court should grant certiorari to resolve the issue of whether *Stotts* is limited as the Court of Appeals held below. The present case squarely raises the issue. The legality of the O & J and RAAPO are before the Court because Petitioners have now been held in contempt for alleged noncompliance with these decrees.[7]

AAAPO and the Fund Order raise the issue directly. These decrees cannot be justified as civil contempt remedies, the permissible breadth of which they vastly exceed. (See Point III,

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[7] A contempt proceeding requires consideration of the legality of the underlying order. *United States v. United Mine Workers*, 330 U.S. 258 (1947); *National Maritime Union v. Aquaslide 'N' Dive Corp.*, 737 F.2d 1395 (5th Cir. 1984); *Ager v. Jane C. Stormont Hospital & Training, Inc.*, 622 F.2d 496 (10th Cir. 1980); *Latrobe Steel Co. v. United Steelworkers of America*, 545 F.2d 1336 (3rd Cir. 1976).

infra). As the entire panel of the Court of Appeals recognized, they can be justified, if at all, only as Title VII remedies.

This case is of great national importance because the determination of this issue will have enormous impact on the numerous court-imposed plans presently in effect. *See, e.g., Chisholm v. United States Postal Service*, 665 F. 2d 482 (4th Cir. 1981); *United States v. City of Buffalo*, 633 F.2d 643 (2d Cir. 1980).

Regardless of whether this Court intended the limited reading of *Stotts* which the majority in the Court below adopted, this petition for certiorari should be granted. If the important issue of whether district courts may impose race-conscious plans under Title VII was not decided by *Stotts*, it should be decided in this case. If the Court were to determine that such remedies may be imposed, the guidelines for such orders should be addressed. In the present case the decrees far exceed the bounds which this Court has fixed for voluntarily-adopted affirmative action programs,[8] and violate the Congressional prohibition against employers granting preferential treatment to any group on the basis of a racial imbalance. Title VII, Section 703(j), 42 U.S.C. §2000e-2(j).

II

THE FUND ORDER AND AAAPO VIOLATE THE CONSTITUTION

A. *Equal Protection of the Law*

The Due Process clause of the Fifth Amendment imposes the equal protection limitations of the Fourteenth Amendment on actions of the federal government and its agencies, including judicial orders, and prohibits the federal government from

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[8] *United Steelworkers of America v. Weber*, 443 U.S. 193, 208 (1979) adopted a three-pronged test for voluntarily-adopted plans. (1) They must be "specifically designed to break down patterns of racial discrimination"; (2) they must not "unnecessarily trammel" the rights of whites; and (3) they must be temporary.

discriminating between individuals or groups. *Washington v. Davis*, 426 U.S. 229 (1976); *Schlesinger v. Ballard*, 419 U.S. 498, 500 n. 3 (1975); *Bolling v. Sharpe*, 347 U.S. 497 (1954); *National Black Police Association, Inc. v. Velde*, 712 F.2d 569 (D.C. Cir. 1983), *cert. denied*, 104 S. Ct. 2180 (1984).[9]

The race-conscious quota in AAAPO and the race-conscious Fund order deny equal protection of the law to present and future white members of the union and white applicants to the apprenticeship program by mandating benefits solely to nonwhites. The nonwhites benefiting from the program are not identifiable victims of past discrimination, and the whites discriminated against by the program are not persons who practiced discrimination.[10]

AAAPO requires the Petitioners to achieve a racial balance of 29.23% nonwhite members by 1987, and the court has threatened them with dire consequences if the percentage is not realized. (A-123). In affirming the O & J in 1976, the majority opinion of the Court of Appeals acknowledged that in practice the mathematical membership goal would require Petitioners to exclude whites from membership solely on the basis of race. 532 F.2d at 827. (A-216). The Court of Appeals held that such reverse discrimination was permissible.

In the Court of Appeals decision to which this petition is addressed, the majority simply states its conclusion that the race-conscious program does not violate the Constitution. (A-29). Its only authority is its own decision in *Rios v. Enterprise Association of Steamfitters Local 638*, 501 F.2d 622, 629-31 (2d Cir. 1974), which itself contains no reasoned discussion of the issue. The majority ignores the fact that Petitioners will obviously be

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[9] Equal protection analysis under the Due Process Clause of the Fifth Amendment is the same as under the Fourteenth Amendment. *Buckley v. Valeo*, 424 U.S. 1, 93 (1976).

[10] Judge Winter observed in his dissent that the Fund order has the effect of holding "Local 28 responsible for improving the quality of public education in New York." 753 F.2d at 1195. (A-50).

required to engage in overt reverse discrimination to meet the nonwhite membership "goal" mandated by the district court.

As Judge Winter states in dissent, the orders of the district court are of "questionable constitutional validity. *See Regents of the University of California v. Bakke*, 438 U.S. 265, 287-320 (1978) (opinion of Powell, J.)." (A-48). In *Bakke*, Justice Powell delivered the opinion of the Court for less than a majority. In his learned discussion of the application of the equal protection clause to affirmative action programs, he concludes that strict racial quotas and other broad racial benefits constitute unconstitutional reverse discrimination unless tailored to make whole identified victims of past discrimination, in a manner which has clearly not occurred here.

The Court should grant certiorari to address the application of the equal protection clause to the orders of the district court.

B. *Corruption of Blood*

The construction of Title VII adopted by the Court of Appeals has the effect of making the Civil Rights Act an unconstitutional bill of attainder. The reverse discriminatory impact on innocent white workers occasioned by AAAPO and the Fund order visits upon them the sins of past discrimination by others. This construction of Title VII is contrary to basic principles of individual accountability, and is specifically outlawed by the prohibition against bills of attainder and corruption of blood contained in art. I, §9, cl. 3 of the Constitution.

Bills of attainder punish either named individuals or classes of persons, without judicial proceedings. The practice of "corruption of blood," abolished by art. III, §3, cl. 2, continued the punishment to the heirs of the person attainted. This Court has repeatedly voiced its objection to such discriminatory legislation. *County of Oneida v. Oneida Indian Nation of New York*, 53 U.S.L.W. 4225, 4238 (U.S. Mar. 5, 1985) (Stevens, J. dissenting) ("The Framers recognized that no one ought to be condemned for his forefathers misdeeds . . . . "); *Korematsu v. United States*, 323 U.S. 214, 243 (1944) (Jackson, J. dissenting)

(" . . . if any fundamental assumption underlies our system, it is that guilt is personal and not inheritable.") Guided by these fundamentals of our jurisprudence, the Court has declared unconstitutional legislation that abridged the rights of identifiable classes of individuals to employment. *United States v. Brown*, 381 U.S. 437 (1965); *United States v. Lovett*, 328 U.S. 303 (1946).

The Court should grant certiorari to address the dimensions of these constitutional rights and their application to the Civil Rights Act.

III

THE SANCTIONS IMPOSED EMASCULATE THE DIFFERENCE BETWEEN CIVIL AND CRIMINAL CONTEMPT AND DENY DUE PROCESS TO PETITIONERS

Judicial sanctions for civil contempt are wholly remedial and may be imposed only to compel compliance with prior orders of the court or to compensate the complaining party for actual losses proved to have been suffered by him. *McComb v. Jacksonville Paper Co.*, 336 U.S. 187 (1949); *United States v. United Mine Workers*, 330 U.S. 258, 303-304 (1947); *Penfield Co. of California v. S.E.C.*, 330 U.S. 585 (1947). Contempt remedies which are punitive in nature may be imposed only in a criminal contempt proceeding, *Nye v. United States*, 313 U.S. 33 (1941), brought under Rule 42, Fed. R. Crim. P., in which the defendant is afforded the protections of Due Process applicable to criminal proceedings. *Cheff v. Schnackenberg*, 384 U.S. 373 (1966).

The entire panel in the Court of Appeals agreed, and all parties concede, that such procedures were not followed in this case. (A-25). The remedies must thus be justified as sanctions for civil contempt, or they cannot be upheld.[11]

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[11] Alternatively, Respondents may argue, certain provisions could be justified as remedies under Title VII. See Point I, *supra*.

In upholding the remedies imposed here, the majority paid lip service to the standards enumerated above, but so departed from their application as to emasculate the differences between civil and criminal contempt and sustain criminal sanctions against the Petitioners without Due Process. In addition, the Court of Appeals has created a precedent with potential broad applicability which departs from well-settled principles.

The Court of Appeals misconstrued the nature of compensatory civil contempt remedies, and then clearly implied that if the sanctions imposed can be said to have compensatory or coercive "components", then the inquiry ends without even examining other aspects of the penalty which have neither feature.

The fines imposed here are to be used to provide tutorial, counselling and financial support for nonwhites. The majority approved these fines as a compensatory civil contempt remedy despite the fact that no proof was presented that any identifiable person was damaged. Indeed, no proof of damage of any kind was offered.

The "coercive component" found by the Court of Appeals suffers from a similar infirmity. The orders continue until the 29.23% nonwhite membership "goal" is reached, which the Court of Appeals found provided Petitioners with the requisite opportunity to purge themselves of the contempt. But the contempt was purportedly not based on Petitioners' failure to meet the "goal".[12] Thus a civil contempt remedy which coerces them to reach the "goal" is a gross departure from settled principles of civil contempt remedies.

In actuality, Petitioners have been punished criminally without the procedural requirements of such a proceeding, and thus without Due Process. This Court should grant certiorari to restate the principles of civil contempt.

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[12] In his dissent, Judge Winter reasons with compelling logic that petitioners were in reality held in contempt solely for their failure to meet the 29% racial quota. (A-38-48).

IV

THE DISTRICT COURT'S USE OF STATISTICAL EVIDENCE VIOLATED TITLE VII AND DUE PROCESS

The district court's 1975 finding that petitioners violated the Civil Rights Law is the underpinning for all the proceedings which have followed. Two years later, this Court decided *Hazelwood School District v. United States*, 433 U.S. 299 (1977) and held: (1) events which predated the Civil Rights Act could not be used as evidence of the Act's violation; and (2) proof of a pattern of discrimination by statistical evidence must be logically consistent and must be drawn from relevant geographical locations. The original district court decision in the present case violated both of these requirements. This departure was the basis for Judge Meskill's dissent from the court's affirmance of RAAPO. Inasmuch as Petitioners have now been held in contempt for violating the O & J and RAAPO, the propriety of the evidence upon which they were based is ripe for review by this Court.

The misuse of statistics was repeated, and thus compounded, in the 1982 contempt finding. Proof of the only charge which could be construed as a discriminatory practice, the underutilization of the apprentice program, was based upon statistics which all parties and the entire panel of the Court of Appeals agree were misunderstood by the district court. (A-15-16). The majority below overlooked this failure by stating that other facts substantiated the finding, which they do not.[13]

The facts are logically analyzed in Judge Winter's dissent. (A-38-52). As he demonstrates, the proof concerning underutilization of the apprentice program is additionally deficient. It overlooks the role of the Administrator who has final authority with respect to the utilization of the apprentice program, and who approved each new class of apprentices.

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[13] Thus, for example, the percentage of unemployed apprentices had dropped to 0% by 1981, the time when it is claimed they were not being utilized. Clearly, they were utilized fully.

This Court should review the procedures followed by the district court in drawing conclusions from statistics without carefully considering " . . . all of the surrounding facts and circumstances." *International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 340 (1977), including whether acts approved by the Administrator can be contemptuous.

V

THE OFFICE OF ADMINISTRATOR CONSTITUTES UNJUSTIFIED INTERFERENCE WITH THE RIGHT OF SELF-GOVERNMENT

AAAPO continues the office of the special master, called an Administrator, originally appointed in the O & J, with broad supervisory powers over Petitioners' compliance with the affirmative action plan. Thus, with respect to key elements of its internal affairs – hiring and employment – Petitioners have been placed under what Judge Winter characterized as a receivership. (A-38, 45). This infringement of the union's statutory right of self-government began in 1975 and will continue until August 1987.

The Court should grant certiorari to consider the extent of judicial power to interfere with the internal management of a union as a part of the remedial action ordered under Title VII of the Civil Rights Act. The issue was addressed by the Court of Appeals in 1976 on appeal from the O & J (532 F.2d at 829). (A-220). It then approved the suspension of self-government as "necessary", with little discussion and without citation of authority. In its decision to which this petition is addressed, the Court of Appeals again considered the issue and adhered to its earlier position.

The appointment and continuation of the Administrator possessed with broad powers "to exercise day-to-day oversight of the union's affairs" (A-220) constitutes an unwarranted denial of the union's right to self-governance Congressionally protected by Section 401(a) of the Labor-Management Reporting and Disclosure Act of 1959, 29 U.S.C. §401(a). *Cf. Local No. 82,*

Furniture & Piano Moving, etc. v. Crowley, 104 S. Ct. 2557 (1984). Before approving an order which abridges this right, a court should be required to find that enforcement of its orders by use of traditional remedies is unavailing.

Rule 53, Fed. R. Civ. P., empowers the court, in exceptional circumstances, to appoint a special master to ensure compliance with its orders. The text of Rule 53(b), however, counsels restraint in the use of a special master: "A reference to a master shall be the exception and not the rule", *accord, Mathews v. Weber*, 423 U.S. 261, 272 (1976), and this Court has employed the extraordinary remedy of mandamus to vacate improvident references to a special master. *La Buy v. Howes Leather Co.*, 352 U.S. 249, 256-57 (1957).[14]

The Court should grant certiorari to review this judicial intrusion in the internal affairs of a union.

CONCLUSION

A decade ago, petitioners were found to have violated Title VII of the Civil Rights Act, largely on the basis of statistical evidence of a kind which has since been disallowed. A well-intentioned but ill-conceived series of orders and judgments are all hinged upon this questionable finding. Petitioners have been ordered to comply with racial quotas under penalty of extinction; ordered to fund and administer a blatantly race-conscious affirmative action program; been adjudicated in contempt on the basis of evidence which does not withstand scrutiny; been subjected to civil contempt penalties which deny Due Process because they are in reality criminal penalties; have endured an unjustifiable denial of self-government; and have been subjected to the daily interference of a court-appointed Administrator.

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[14] *See also Pennhurst State School & Hospital v. Halderman*, 451 U.S. 1, 54 (1981) (White, J. dissenting in part) ("In any event, however, the court should not have assumed the task of managing Pennhurst or deciding in the first instance which patients should remain and which should be removed"). In its subsequent opinion in *Pennhurst*, 104 S. Ct. 900, 906 (1984), this Court reserved decision on the propriety of the order appointing the special master as it may have violated principles of comity.

Throughout this decade, it has never been shown that Petitioners have discriminated against even one identifiable person, or that the purposes of the Civil Rights Act could not have been achieved by a simple injunction.

Moreover, the end is not in sight. There is no apparent course of action which Petitioners could follow which would end the judicial interference, the endless litigation and the great financial drain.

This Court should grant certiorari, vindicate Petitioners' rights, and fix the rules so that the numerous civil rights proceedings brought throughout the nation do not result in similar departures from the law and the Constitution, and cause many others the loss of basic freedoms.

Dated: New York, New York
April 16, 1985

Respectfully submitted,

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APPENDIX

INDEX TO APPENDIX

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 1106, 1107, 1108. 1109, 1110, 1111 — Aug. Term 1983

(Argued: April 13. 1984 Decided: January 16, 1985)

Docket Nos. 82-6241, 82-6243, 83-6353, 83-6357, 83-6295, 83-6299

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Plaintiff-Appellee,

and THE CITY OF NEW YORK,
Plaintiff-Appellee-Cross-Appellant,

—against—

LOCAL 638 . . . LOCAL 28 OF THE SHEET METAL WORKERS' INTERNATIONAL ASSOCIATION, LOCAL 28 JOINT APPRENTICESHIP . . . , SHEET METAL AND AIR-CONDITIONING CONTRACTORS' ASSOCIATION OF NEW YORK CITY, INC.,
Defendants-Appellants-Cross-Appellees.

LOCAL 28,
Third-Party Plaintiff,

—against—

NEW YORK STATE DIVISION OF HUMAN RIGHTS,
Third-Party Defendant-Plaintiff-Appellee.

LOCAL 28 JOINT APPRENTICESHIP COMMITTEE,
Fourth-Party Plaintiff,

—against—

NEW YORK STATE DIVISION OF HUMAN RIGHTS,
Fourth-Party Defendant.

Before:

MANSFIELD, WINTER, and PRATT, *Circuit Judges.*

Appeal from several orders of the United States District Court for the Southern District of New York, granted by the late Judge Henry F. Werker, finding defendants in contempt of court, imposing both compensatory and coercive fines, and adopting an amended affirmative action plan to govern defendants' employment practices. Cross-appeal by plaintiff City of New York from an order establishing for defendant union a non-white membership goal of 29.23%.

Affirmed in part, reversed in part, and remanded for proceedings consistent with the opinion. Judge Winter dissents in a separate opinion.

OTTO V. OBERMAIER, New York, NY (Ronald C. Minkoff, Obermaier, Morvillo & Abramowitz, Edmund P. D'Elia, NY, NY; William Rothberg, Brooklyn, NY, of Counsel), *for Defendants-Appellants-Cross-Appellees Local 28 and Local 28 Joint Apprenticeship Committee.*

MARTIN R. GOLD, New York, NY (Jane G. Stevens, Deborah Sherman, Gold, Farrell, & Marks, NY, NY; William Rothberg, Brooklyn, NY, of Counsel), *for Defendant-Appellant Sheet Metal and Air Conditioning Contractors' Association of New York City, Inc.*

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PRATT, *Circuit Judge*:

Defendants, Local 28 of the Sheet Metal Workers' International Association (Local 28), the Local 28 Joint

Apprenticeship Committee (JAC), and the Sheet Metal and Air Conditioning Contractors' Association of New York City (contractors' association) appeal from several orders of the United States District Court for the Southern District of New York, granted by the late Henry F. Werker, *Judge*, which (1) held all defendants in contempt of court for violating numerous provisions of the Revised Affirmative Action Program and Order (RAAPO) governing defendants' employment practices relating to nonwhites (black and Spanish-surnamed workers); (2) imposed both compensatory and coercive contempt fines to be used to fund supplemental training for nonwhite apprentices; and (3) adopted a new Amended Affirmative Action Plan and Order (AAAPO) proposed by plaintiffs. The City of New York (city) cross-appeals from an order, incorporated in AAAPO, establishing a temporary nonwhite membership goal for Local 28 of 29.23%. As to Local 28 and the JAC, we affirm all but one of the contempt findings and all of the sanctions ordered below; as to the contractors' association, we reverse the only contempt finding attributable to it, and reverse the award of administrative expenses, costs, and attorneys fees against it. We also affirm, with two modifications, the AAAPO entered by the district court. Because Judge Werker's findings with regard to the membership goal contained in AAAPO were not clearly erroneous, we affirm the cross-appeal.

These appeals and cross-appeal arise from yet another attempt to force Local 28 and its JAC to correct the discriminatory practices they have used to keep nonwhites out of Local 28. As we have stated before, "Local 28 and the JAC are no strangers to the courts", *EEOC* v. *Local 638*, 532 F.2d 821, 824 (2d Cir. 1976), and for a more complete history of this protracted struggle we refer

the uninitiated reader to the many earlier opinions dealing with these defendants. *E.g.*, *State Commission for Human Rights* v. *Farrell*, 43 Misc. 2d 958 (New York Cty. 1964); *State Commission of Human Rights* v. *Farrell*, 47 Misc. 2d 244 (New York Cty. 1965); *State Commission of Human Rights* v. *Farrell*, 52 Misc. 2d 936 (New York Cty. 1967), *aff'd*, 27 A.D.2d 327 (1st Dep't), *aff'd*, 19 N.Y.2d 974 (1967); *United States* v. *Local 638, Enterprise Association, etc.*, 347 F. Supp. 164 (S.D.N.Y. 1972); *EEOC* v. *Local 638*, 401 F. Supp. 467 (S.D.N.Y. 1975), *aff'd as modified*, 532 F.2d 821 (2d Cir. 1976); *EEOC* v. *Local 638*, 421 F. Supp. 603 (S.D.N.Y. 1975); *EEOC* v. *Local 638*, 565 F.2d 31 (2d Cir. 1977).

I. Background

Local 28 is a union composed of workers who perform sheet metal work in the New York metropolitan area. At the time this litigation was instituted Local 28 represented sheet metal workers only in New York City; but in 1981 it merged with several of its sister locals and now represents sheet metal workers in New York City, in Nassau and Suffolk counties in New York State, and in Essex, Passaic, Hudson, and Bergen counties in New Jersey.

The JAC is a management-labor committee responsible for operating the Sheet Metal Work Apprenticeship Training Program (apprenticeship program), a four-year program designed to teach sheet metal skills. A student entering the apprenticeship program is indentured, and upon graduation becomes a journeyman.

The contractors' association, as its name implies, is a trade association of building contractors who perform

sheet metal work in New York City. Although not named in the original complaint, the contractors' association was joined by the court to permit complete relief. *EEOC* v. *Local 638*, 532 F.2d at 824 n.3.

A. *Prior Proceedings.*

This action was instituted in 1971 by the United States Department of Justice under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.* (1982), against Local 28 and the JAC to enjoin a pattern and practice of discrimination against nonwhites. Shortly thereafter, the Equal Employment Opportunity Commission (EEOC) was substituted as plaintiff, the city intervened as a plaintiff, and the New York State Division of Human Rights (state), initially named as a third-party defendant, realigned itself with the EEOC and the city. After a three-week trial in 1975, Judge Werker found that Local 28 and the JAC had purposefully discriminated against nonwhites in violation of Title VII. *EEOC* v. *Local 638*, 401 F. Supp. at 486.

The district court found that the discriminatory methods used by Local 28 and the JAC effectively obstructed every route that nonwhites might use to gain admission to the union. There are four ways to become a member of the local: (1) graduation from the apprenticeship program; (2) successful performance on a journeyman's examination; (3) transfer from a sister local; and (4) organization of nonunion shops coupled with certification of both employer need and worker ability.

Judge Werker found that a majority of Local 28's members were admitted through the apprenticeship program. He further found that entry of nonwhites into

that program had been blocked by the JAC and Local 28 by using invalid entrance exams, by requiring that applicants possess a high school diploma, and by inquiring into applicants' arrest records. Significantly, Judge Werker also noted that proof of the plaintiffs' case was made extremely difficult because the union refused to keep records showing each applicant's race and national origin as required by EEOC regulations.

Judge Werker further found that the local had impeded the other avenues of entry into the union by using invalid journeymen's examinations, by refusing to accept nonwhite transfers from sister locals while issuing temporary work permits primarily to white workers, and by selectively organizing only those shops having a high percentage of white employees. *Id.* at 476-87. In July 1975 Judge Werker ente an order and judgment (O&J) which not nly prohibited the defendants from discriminating against nonwhites seeking union membership, but also (a) appointed a special master, called an "administrator", to propose and implement an affirmative action plan to govern defendants' employment practices; (b) established a nonwhite union membership goal of 29% to be reached by July 1, 1981; (c) directed defendants to administer a nondiscriminatory "hands-on" journeymen's examination at least once a year; (d) directed defendants to issue temporary work permits on a nondiscriminatory basis; and (e) ordered defendants to conduct a publicity campaign designed to increase nonwhite awareness of employment opportunities in the union. *Id.* at 489-90.

On appeal, we affirmed Judge Werker's finding that Local 28 and the JAC had intentionally violated Title VII, but reversed two provisions of the relief ordered in the

O&J and in the Affirmative Action Plan and Order (AAPO), which was adopted by the district court during the pendency of the appeal from the O&J. *EEOC* v. *Local 638*, 532 F.2d at 833. After remand, Judge Werker adopted a Revised Affirmative Action Plan and Order (RAAPO) to reflect the modifications this court made to the O&J and AAPO. We subsequently approved RAAPO. *EEOC* v. *Local 638*, 565 F.2d at 36.

Generally, RAAPO incorporated the provisions of the O&J. It also established intermediate nonwhite membership goals in order to accomplish the ultimate 29% goal, and ordered defendants to develop the apprenticeship program, to increase and maintain nonwhite enrollment, to maintain detailed records regarding union employment practices, and to submit periodic reports summarizing those records.

B. *The Contempt Proceedings and AAAPO.*

On April 16, 1982, the city and state moved in the district court for an order holding Local 28, the JAC, the contractors' association, and 121 contractors in contempt for failing to comply with the O&J, RAAPO, and two orders of the administrator. Specifically, plaintiffs alleged that defendants had violated the O&J and RAAPO by not achieving the 29% nonwhite membership goal by July 1, 1982, and that the failure was due to defendants' numerous violations of the district court's orders. Defendants cross-moved to terminate both the O&J and RAAPO. A hearing was held on June 10, 1982, at which both sides submitted voluminous exhibits and live testimony to detail how the O&J and RAAPO had operated over the previous six years.

In August 1982 Judge Werker held defendants in civil contempt. Although nonwhite membership in Local 28 was only 10.8% at the time of the hearing, he did not rest his contempt finding on failure to meet the 29% membership goal by the date ordered in RAAPO. Instead, he found that defendants had "failed to comply with RAAPO * * * almost from its date of entry". Specifically, Judge Werker found that "[five] separate actions or omissions on the part of the defendants have impeded the entry of non-whites into Local 28 in contravention of the prior orders of this court." Those five were (1) adoption of a policy of underutilizing the apprenticeship program to the detriment of nonwhites; (2) refusal to conduct the general publicity campaign ordered in RAAPO; (3) adoption of a job protection provision in their collective bargaining agreement that favored older workers and discriminated against nonwhites (older workers' provision); (4) issuance of unauthorized work permits to white workers from sister locals; and (5) failure to maintain and submit the records and reports required by RAAPO, the O&J, and the administrator. After discussing these points Judge Werker concluded: "Based on the foregoing violations of the orders of the court and the Administrator, I have no other recourse but to hold the defendants in civil contempt of court." He did so "without placing primary emphasis on any one of the violations of the RAAPO and O&J", and he noted, "I am convinced that the collective effect of these violations has been to thwart the achievement of the 29 percent goal of non-white membership in Local 28 established by the court in 1975."

"[T]o remedy the past noncompliance of the defendants", Judge Werker imposed a fine of $150,000 to be

placed in a training fund to be used to increase nonwhite membership in the apprenticeship program and, ultimately, in Local 28. The court directed the administrator to develop a plan detailing the purposes, funding, and operation of the training fund. Finally, the court denied defendants' cross-motion to terminate the O&J and RAAPO.

On April 11, 1983, the city brought a second contempt proceeding, this time before the administrator, charging Local 28 and the JAC with additional violations of the O&J and RAAPO, as well as orders of the administrator. By the conclusion of the hearing these charges were distilled into three categories: (1) Local 28's failure to provide the records required by the O&J and RAAPO in a timely fashion; (2) failure by both Local 28 and JAC to provide data that was accurate, and (3) Local 28's failure to serve the O&J and RAAPO on the contractors who hired Local 28's members. After a hearing, the administrator found that plaintiffs had proved the alleged violations, and he recommended that defendants again be held in civil contempt. The remedy suggested by the administrator was that defendants should pay for a computerized recordkeeping system to be maintained by outside consultants and that they should make further contributions to the training fund whose details were still under consideration.

After reviewing the arguments of the parties, the record of the hearing held before the administrator, and the objections to the findings of the administrator, Judge Werker adopted the recommendation that Local 28 and the JAC be held in civil contempt for the additional violations. He deferred ruling on the amount of fines to be imposed until the administrator could submit his recom-

mendations regarding the training fund, but he immediately ordered the JAC and Local 28 to pay the cost of outside consultants to monitor computerization of the local's records.

In September 1983 Judge Werker entered two more orders. One adopted the administrator's proposal to establish an Employment, Training, Education and Recruitment Fund (the fund). The other adopted the Amended Affirmative Action Plan and Order (AAAPO) proposed by the plaintiffs and the administrator.

The training fund was to consist of the $150,000 fine imposed in the first contempt proceeding, as well as the additional fines imposed on the local and the JAC in the second contempt proceeding. These additional fines required Local 28 to contribute $.02 per hour for each journeyman and apprentice hour worked, and further required the contractors' association and the JAC, jointly, to pay the fund's administrative expenses. The general purpose of the fund was to compensate for defendants' underutilization of the apprenticeship program by encouraging the participation of nonwhites.

Its immediate objectives were: (1) to create a pool of qualified nonwhite applicants for future apprenticeship programs; (2) to provide counseling and support services to nonwhite apprentices; (3) to provide financial support for out-of-work nonwhite journeymen to encourage them to stay in the trade and to upgrade their skills; (4) to provide financial support to any employer who cannot afford to hire additional apprentices to meet the ratio of one apprentice to every four journeymen required by the court; and (5) to provide incentive or matching funds to attract additional governmental or private job training

programs. The fund order also provided that the fund would terminate when the membership goal set out in AAAPO was achieved, and that any monies then remaining in the fund contributed by defendants would be returned to them.

AAAPO makes six significant changes to RAAPO: first, the records subject to the reporting requirements are to be computerized by the defendants and monitored by an independent advisor to the administrator; second, it extends its coverage to include the merged locals and their JACs; third, it requires that one nonwhite apprentice be indentured for every white apprentice; fourth, it requires that the contractors employ one apprentice for every four journeymen employed; fifth, it eliminates the administration of an apprenticeship aptitude examination and substitutes a selection board composed of three members, with one representative each chosen by the court, by the defendants, and by the plaintiffs; and sixth, it establishes a nonwhite membership goal of 29.23% to be achieved by July 31, 1987.

Local 28 and the JAC have appealed from all of the district court's contempt orders as well as its order adopting AAAPO. The contractors' association has appealed from the district court's first contempt order, and from the order establishing the fund. The city has cross-appealed from that part of AAAPO that establishes 29.23% as the new nonwhite membership goal, contending that the percentage should be higher. Defendants have not appealed from the denial of their cross-motion to terminate the O&J and RAAPO.

II. Discussion

A. *Liability for Contempt.*

It is well settled in this circuit that a party may be held in civil contempt for failure to comply with an order of the court if the order being enforced is "clear and unambiguous, the proof of noncompliance is 'clear and convincing,' " and the defendants have not "been reasonably diligent and energetic in attempting to accomplish what was ordered." *Powell* v. *Ward*, 643 F.2d 924, 931 (2d Cir.) (citations omitted), *cert. denied*, 454 U.S. 832 (1981). It is not necessary to show that defendants disobeyed the district court's orders willfully. *McComb* v. *Jacksonville Paper Co.*, 336 U.S. 187, 191 (1949); *Donovan* v. *Sovereign Security Ltd.*, 726 F.2d 55, 59 (2d Cir. 1984).

When we previously reviewed the district court's 1975 O&J and RAAPO, we affirmed the general provisions of each. *EEOC* v. *Local 638*, 565 F.2d at 31. After reexamining the specific provisions of those orders that defendants are now charged with violating, we are satisfied that they are clear and unambiguous. Indeed, defendants do not even claim that the burdens imposed by the O&J and RAAPO were unclear; instead they offer other defenses to excuse their admitted noncompliance.

1. *Challenges to the First Contempt Proceeding.*

As to those findings in the first contempt proceeding that relate to the issuance of unauthorized work permits, failure to propose and conduct a general publicity campaign, adoption of the older workers' provision, and the record keeping violations, Local 28 and the JAC virtually concede the facts showing those violations, but offer three

arguments to excuse their noncompliance. They first argue that, under ¶ 41(a) of RAAPO, the disputes about unauthorized work permits and failure to conduct the general publicity campaign have been resolved before the administrator and thus are moot. Next, again relying on ¶ 41(a), they argue that plaintiffs failed to complain to the administrator about the older workers' provision and the recordkeeping violations, and were thus barred from doing so after 30 days. Finally, as an alternative, they argue that laches should bar plaintiffs from complaining about any of these four violations. Not one of these arguments has merit.

Our examination of the record convinces us that defendants' disputes with plaintiffs and the administrator, with regard to the general publicity campaign and the unauthorized work permits, were never resolved. Judge Werker correctly rejected defendants' second argument when he pointed out that ¶ 41(b) provides that "the parties *may* make a complaint to the administrator", thus showing that while ¶ 41(a) provided one means to resolve disputes, it was not the only means, and its 30 day limitation period could not bar plaintiffs from complaining to the district court about the older workers' provision and recordkeeping violations.

On their alternative laches defense Local 28 and the JAC argue that plaintiffs unreasonably delayed in asserting the contempt claims, that the delay was inexcusable, and that their failure to act quickly prejudiced defendants. *Environmental Defense Fund* v. *Alexander*, 614 F.2d 474 (5th Cir.), *cert. denied*, 449 U.S. 919 (1980). Initially, although plaintiffs may have been in the best position to bring defendants' violations to the attention of the district court, it was the defendants who were

charged with reasonable diligence and making energetic efforts to comply with the orders of the court. Their attempt to shift the onus of inactivity to plaintiffs is misguided.

Even if we were to entertain the laches defense, however, it would fail, for plaintiffs did not sit quietly by while defendants refused to comply with the district court's orders. Instead, they complained, albeit informally, to defendants and to the administrator on many occasions. Defendants had ample notice that plaintiffs were dissatisfied with their efforts, and they cannot credibly claim they relied on plaintiffs' "inaction". Despite repeated urgings by plaintiffs and the administrator, defendants ignored, or at best made only minimal efforts to comply with, the district court's orders. Moreover, plaintiffs initially pursued measures less drastic than contempt in their attempt to urge defendants toward compliance. *See United States* v. *United Shoe Corp.*, 391 U.S. 244, 249 (1968). Defendants' laches defense therefore fails, and the district court's findings of contempt with regard to the issuance of unauthorized work permits, failure to propose the general publicity campaign, and record keeping violations are affirmed. For other reasons discussed below, however, we reverse the finding with respect to the older workers' provision.

Local 28 and the JAC raise a more credible challenge to the district court's finding that the apprenticeship program was underutilized. To show that the apprenticeship program was underutilized after the O&J was entered in 1975, Judge Werker sought to compare the number of apprentices indentured between 1971 and 1975 with the number indentured between 1976 and 1981. In so doing, however, he mistakenly compared the total number *en-*

rolled in all four years of the program during the period before the O&J, 1971-75 (2,164) with the number *indentured*, that is the new enrollees, during the period after the O&J, 1976-81 (334). Defendants seize upon this error to argue that the district court's entire finding of underutilization was clearly erroneous, and that the contempt order must therefore be reversed. We disagree with defendants' conclusions.

Contrary to the argument advanced by Local 28 and the JAC, Judge Werker's finding of underutilization does not hinge entirely on his mistaken statistical comparison of the pre- and post-judgment figures. That factor was only a small part of the overall evidence showing underutilization of the apprenticeship program. Other evidence showed that after the O&J was entered:

(1) There was a sharp increase in the ratio of journeymen to apprentices employed by contractors. It rose from 7:1 before the O&J to 18:1 by 1981. The ratio generally recognized by the industry was 4:1, a ratio that Local 28 indicated it would follow when it registered its apprenticeship program with the New York State Department of Labor.

(2) The average number of hours worked annually by Local 28's journeymen increased dramatically from 1,066 in 1975 to 1,666 in 1981.

(3) The percentage of unemployed apprentices decreased from 6.7% in 1977 to 0% by 1981.

(4) Between July 1981 and March 1982 the union issued more than 200 temporary work permits, predominantly to white journeymen.

(5) Defendants refused to conduct the general publicity campaign that was designed to attract nonwhites to the apprenticeship program.

In short, despite a need for more apprentices demonstrated by items (1) through (4) above, defendants refused to advertise the apprenticeship program and thereby help fill the need. This evidence solidly supports Judge Werker's conclusion that defendants underutilized the apprenticeship program. Moreover, any lack of more specific figures with respect to utilization of the apprenticeship program is attributable to defendants' failure to comply with the reporting requirements of the court's order. Defendants may not benefit from this non-compliance.

Defendants' final challenge to the first contempt proceeding focuses on the older workers' provision. They contend that the district court clearly erred in finding that provision violated the paragraphs of the O&J which enjoined defendants from doing any act with the purpose or effect of discriminating against nonwhites. Defendants contend that the older workers' provision was never implemented, and therefore did not have any effect—discriminatory or otherwise—on nonwhites. We agree.

Paragraphs 1, 7, and 21(g) of the O&J enjoin Local 28, the JAC, and the contractors' association from engaging in any act "which has the purpose or effect of discriminating [against nonwhites]". During negotiations on their collective bargaining agreement, Local 28, the contractors' association, and individual employers agreed to amend their labor agreement to provide protection for Local 28 members who were over 52 years of age. They entered into a memorandum of agreement which included the following provision:

> During periods of unemployment, there shall be a ratio of one man to every four men (1:4) to be fifty-two (52) years and older in the shop and field.

The essence of this provision was to ensure that one older worker over 52 would be employed for every four workers employed. There is no claim that its purpose was to discriminate against nonwhites. Instead, plaintiffs claim that this older workers' provision was merely discriminatory in effect, because the percentage of nonwhites in the protected age group was very small as a result of defendants' past discriminatory practices. However, defendants introduced evidence, not contested by plaintiffs, showing that the provision had never been applied in practice. Thus, although plaintiffs proved through the testimony of Dr. Harriet Zollner that, if implemented, the provision would have had a disparate impact, defendants established that no such impact had ever occurred.

Plaintiffs, therefore, failed to prove that the older workers' provision had either a discriminatory purpose or present discriminatory effect, and Judge Werker erred in holding Local 28, the JAC, and the contractors' association in contempt for merely *agreeing* to the older workers' provision. "[A] district court, in exercising the awesome power of contempt, must turn square corners". *United States* v. *Edgerton*, 734 F.2d 913, 915 (2d Cir. 1984). We therefore reverse the contempt finding against all defendants with regard to the older workers' provision. If the district court concludes that the provision will have a potentially discriminatory effect, it may strike the provision from the collective bargaining agreement and thereby insure that its discriminatory impact will never be felt.

However, on this record even such a mild injunctive remedy may be unnecessary in the absence of more facts with respect to the older workers' provision. On oral argument we were told that the provision had been, or was about to be, removed from the collective bargaining

agreement entirely. Moreover, in a motion made shortly before oral argument, defendants asserted that the version of the older workers' provision that was actually incorporated into the collective bargaining agreement had applied only to journeymen and not to apprentices. If the provision no longer exists, or alternatively, if it applies only to journeymen and if there is no evidence to suggest that the provision will have a discriminatory effect on nonwhites, then there is no reason in this action to grant any relief with respect to the provision. But without more facts in a properly developed record we can reach no final conclusion. We therefore remand this issue to the district court to determine what provision was actually adopted, and whether that provision will operate to discriminate against nonwhites. If the adopted provision will discriminate, the district court should strike it from the collective bargaining agreement unless defendants delete it voluntarily. If defendants do remove the provision, the whole issue, of course, will be moot.

Our reversal of the district court's finding with regard to the older workers' provision also compels us to vacate the relief ordered against the contractors' association in the district court's fund order. Agreement to the older workers' provision was the only alleged contemptuous conduct attributed to the contractors' association. Because of it Judge Werker ordered the contractors' association and the JAC to pay jointly for the administrative costs of the training fund. Since there was no contempt in this regard, however, there is no basis for any relief against the contractors' association. We leave it to the discretion of the district judge to determine how the contractors' association's share of those costs should be reallocated between Local 28 and the JAC.

Similarly, we reverse the court's award of attorneys' fees and costs to plaintiffs as against the contrac-

tors' association. As will be discussed in II.B., *infra*, however, the relief ordered against the JAC and Local 28 is solidly supported by the evidence, and remains unaffected by reversal of the contempt finding based on the older workers' provision.

To sum up on the first contempt proceeding, we affirm the district court's findings with regard to four of the five bases for its decision. We reverse insofar as a contempt finding was based on the older workers' provision, and we remand to the district court to determine the status and effect of that provision. We also reverse all relief granted against the contractors' association. We now turn to the second contempt proceeding.

2. *Challenges to the Second Contempt Proceeding.*

Local 28 and the JAC raise various challenges to the second contempt proceeding conducted before the administrator whose findings were adopted by the district court. They claim (a) that inadmissible hearsay was relied upon by the administrator to prove a violation of the administrator's order, (b) that their misdesignation of the race of two workers was a *de minimis* violation of RAAPO, (c) that the administrator waived any reporting requirements as to the merged locals, and (d) that the plaintiffs complaint about inaccurate man-hour reports was barred by laches.

(a) Local 28 was charged with violating an order of the administrator requiring it to serve the O&J and RAAPO on each employer by mail that was "certified, return receipt requested. Copies of the certification cards are to be provided to the parties upon their receipt by Local 28." At the second contempt hearing, plaintiffs

introduced evidence to show that before the proceedings were instituted, the plaintiffs had asked Local 28 for a list of the contractors served and proof of that service. Local 28's counsel responded that he was unable to obtain proof of service. The city then requested an affidavit "from the Local 28 official responsible for service of the O&J and RAAPO", but no affidavit was ever provided.

In addition to the foregoing evidence, plaintiffs also offered, and the administrator erroneously admitted, hearsay testimony of a contractor to prove nonservice of the O&J and RAAP. In response, Local 28 again did not produce any witness to testify about service of the O&J and RAAPO, but counsel for Local 28 sought to testify about the procedures used. The administrator correctly prevented counsel from testifying on ethical grounds and because he thought the violation was shown as soon as certification was not produced. Defendants offered no evidence to show compliance with the administrator's order. We think it clear that the administrator erroneously admitted the hearsay testimony, but the error was harmless because the improper testimony was superfluous.

(b) Local 28 next contends that the misdesignation of the race of two of its members was a *de minimis* violation of RAAPO. If this finding stood alone, we might agree. However, when examined in light of all the violations alleged in both proceedings, we are convinced that this violation further reflects defendants' unwillingness to comply with RAAPO. Thus, we reject defendants' *de minimis* argument.

(c) Defendants also argue that the administrator waived the reporting requirements as to merged locals. We find no evidence in the record to support a waiver.

On the contrary, the administrator urged Local 28 to have its records include data on the merged locals, but defendants ignored him.

(d) Finally, defendants urge laches as a bar to plaintiffs' complaints about inaccurate man-hour reports because "the city should have been aware that the JAC's apprentice manhour reports were inaccurate". Again defendants misconstrue the obligations of the parties: it is defendants who are charged with the duty to comply with the court's orders, not plaintiffs. Defendants cannot complain simply because plaintiffs did not discover defendants' errors sooner, for they disregarded the court's orders at their own peril. *See McComb* v. *Jacksonville Paper Co.*, 336 U.S. at 192. Defendants' laches defense also fails because they have pointed to no evidence showing either reliance on plaintiff's inactivity, or prejudice resulting therefrom.

In sum, on the second contempt proceeding, the district court's determination that defendants had violated several provisions of the O&J, RAAPO, and the administrator's orders was supported by clear and convincing evidence which showed that defendants had not been reasonably diligent in attempting to comply with the orders of the court and the administrator.

In his dissenting opinion, our colleague, Judge Winter, expresses the view that Judge Werker's findings of contempt were clearly erroneous because "[t]he union's only pertinent obligation under RAAPO * * * is to report on the number of apprentices indentured and to obey any decision by the Administrator altering that number * * * ", and because "there is absolutely no basis for the claim of apprenticeship under-

utilization once the economic circumstances are taken into account". We think such a view treats Judge Werker's approach to the contempt issue too narrowly. For over 15 years both the federal and state courts have sought to require Local 28 to end its unlawful discrimination against minorities. While the factor of underutilizing apprentices may in one sense be viewed, as Judge Winter describes it, as "the centerpiece of the contempt finding", it assumes that position only because it is not only a partial cause of the lack of sufficient progress in integrating the union but also a point at which the success or failure of the program can be readily measured. In other words, failure to have the apprentices employed is both an independent ground for contempt and a symptom of the effects of defendants' other kinds of contemptuous conduct.

Many of the uncertainties about underutilization that are urged by defendants are due in large part to the union's noncompliance with the reporting provisions of RAAPO. Had the union complied promptly and accurately with the recordkeeping and reporting requirements the picture as to underutilization would be clearer.

Nor are the difficult economic circumstances of the sheet metal workers an adequate justification for the union's continued discrimination. Even if it were true, as Judge Winter states, that the union "faced an excruciating reduction in demand for its services in the years in question", that circumstance would not justify the union's discriminatory favoring of journeymen over apprentices, a fact that is crystal clear from (1) the tremendous increase during the relevant period in the apprentice:journeymen ratio from 1:7 to 1:18 and (2) from

the decline in percentage of unemployed apprentices during the period 1977-1981 from 6.7% to 0%. One of the principal reasons for revising the original AAPO into RAAPO was to adjust for the "changed working and employment conditions in the sheetmetal industry in New York City, including the present severe and widespread unemployment in the industry". RAAPO ¶ 1.

Indeed, RAAPO was designed both "to assure that in light of these changed circumstances and conditions" the 29% goal would be reached by July 1, 1982, and "to assure that substantial and regular progress is made toward this goal in each year prior to 1982." *Id.* Most significantly, RAAPO provided that the goal of the revised program was "to assure that all members *and apprentices* of Local 28 share equitably in all available employment opportunities in the industry." RAAPO ¶ 1 (emphasis added). It was not RAAPO's intent, therefore, that difficult economic circumstances would permit the largely white group of journeymen to be preferred in work allocations over the racially integrated group of apprentices; yet that is precisely the effect of the combined violations of the O&J and RAAPO found by Judge Werker below. We reject the tacit premise behind Judge Winter's opinion that the burden of more difficult economic circumstances may, through changed employment patterns, be shifted to the minorities. Particularly in light of the determined resistance by Local 28 to all efforts to integrate its membership, we think the combination of violations found by Judge Werker below amply demonstrates the union's foot-dragging egregious noncompliance with the O&J and RAAPO and adequately supports his finding of civil contempt against both Local 28 and the JAC.

B. *Contempt Remedies: The Fund and the Order to Computerize Records.*

"Generally, the sanctions imposed after a finding of civil contempt serve two functions: to coerce future compliance and to remedy past noncompliance." *Vuitton et Fils* v. *Carousel Handbags*, 592 F.2d 126, 130 (2d Cir. 1979); *see United States* v. *United Mine Workers of America*, 330 U.S. 258, 303-04 (1947). "The measure of the court's power in civil contempt proceedings is determined by the requirements of full remedial relief." *McComb* v. *Jacksonville Paper Co.*, 336 U.S. at 193-94. With these principles in mind, consider Local 28's and the JAC's challenges to the relief imposed by the district court to remedy defendants' contemptuous conduct. This discussion is limited to Local 28 and the JAC because we are reversing all contempt relief ordered against the contractors' association. *See* II.A., *supra*.

At the outset, Local 28 and the JAC claim that the remedies imposed in the first contempt order are neither compensatory nor coercive, and thus must be deemed punitive. *Soobzokov* v. *CBS, Inc.*, 642 F.2d 28, 31 (2d Cir. 1981). Since punitive remedies may be imposed for only criminal contempt, whose due process requirements were not followed here, *see Cheff* v. *Schnackenberg*, 384 U.S. 373, 380 (1966), they conclude that the first contempt proceeding must be reversed. We think defendants read the first contempt decision much too narrowly, because its remedies, including the training fund, have both compensatory and coercive functions.

After finding that the evidence proved clearly and convincingly numerous violations of the O&J, RAAPO, and orders of the administrator, Judge Werker was faced

with the task of crafting appropriate relief "to remedy the past noncompliance of the defendants." He chose to aim the relief where it would be most effective—the apprenticeship program—and he embraced the idea of a fund "for the purpose of developing the apprenticeship program of Local 28, with an eye toward increasing the non-white membership of the program and the union." The fund's purpose was to compensate nonwhites, not with a money award, but by improving the route they most frequently travel in seeking union membership. Thus it was specifically intended to compensate those who had suffered most from defendants' contemptuous underutilization of the apprenticeship program, which had "impeded the entry of non-whites into Local 28 in contravention of the prior orders of [the district] court."

The fund also has coercive components. For example, paragraph 3 of the order establishing the fund provides that it will remain in existence "until the [29% membership goal] * * * is achieved". Paragraph 5 further provides that, upon termination, the remaining monies will be returned to defendants after plaintiffs are reimbursed for any contributions they might make to the fund. In addition, Local 28's contributions to the fund based on hours worked by its members will cease when the membership goal is achieved.

The JAC and Local 28 next contend that if any finding underlying the two contempt proceedings is reversed, the entire remedy must be vacated. While this might be a tenable argument if the fines had been imposed for multiple findings of criminal contempt, *see Gompers* v. *Bucks Stove & Range Co.*, 221 U.S. 418, 440 (1911), we do not think it governs our decision in these civil contempt proceedings.

In the first contempt decision the district court found that the defendants had committed five violations of prior court orders: underutilization of the apprenticeship program, reporting violations, failure to conduct the general publicity campaign, unauthorized issuance of work permits, and adoption of the discriminatory older workers' provision. We have reversed the last finding because the conduct proved does not violate a clear order of the court. However, the older workers' provision presents a problem separate from the other violations. Since that provision was not implemented, it had no past impact on the apprenticeship program, and since it will not be applied in the future no purpose would be served by permitting its reversal to undermine the fund order. Indeed, defendants virtually concede in their brief that the fund order was aimed primarily at the finding that the apprenticeship program was underutilized. Thus, we conclude that reversal on the older workers' provision is not fatal to the fund order because the remedies ordered are amply warranted by the other findings of contempt, and we affirm them on the basis of those findings.

Finally, the JAC and Local 28 have not challenged the order which requires them to pay the cost of monitoring the computerized recordkeeping system. We therefore affirm that order. We turn now to the parties' various challenges to certain provisions of AAAPO.

C. *Challenges to AAAPO.*

In November 1983 Judge Werker approved the third version of the affirmative action plan (AAAPO), which affects Local 28, its JAC, the locals that had been merged into Local 28, their JACs, and all contractors who use the union's sheet metal workers. AAAPO modified RAAPO

in six significant ways. It (1) increased the nonwhite membership goal from 29% to 29.23% to reflect the addition of the merged locals; (2) established an apprentice to journeymen ratio of 1:4; (3) created a three-member apprentice selection board; (4) imposed an indenture ratio of one nonwhite for every white admitted to the apprenticeship program; (5) permitted work to continue on developing new selection procedures, but barred their use until the membership goal could be accomplished; and (6) incorporated the order requiring defendants to bear the cost of an advisor to monitor the computerization of Local 28's records.

AAAPO was a response by the district court to three developments in this case: first, Local 28's failure to meet the 29% nonwhite membership goal by July 1, 1982; second, Local 28's contemptuous refusal to comply with many provisions of RAAPO; and third, the merger of several largely white locals outside New York City into Local 28.

Local 28 and the JAC challenge the district court's adoption of AAAPO, however, contending that: (1) AAAPO contravenes Title VII and the equal protection component of the fifth amendment; (2) AAAPO unduly interferes with union government; and (3) the district court abused its discretion by adopting five of the six provisions of AAAPO described above. On its cross-appeal the city contends that the findings underlying the district court's adoption of the 29.23% interim nonwhite membership goal were clearly erroneous, and that the figures should have been higher.

Since entry of the O&J in 1975, the district court has retained jurisdiction "to enter such orders as may be

necessary to effectuate the equal employment opportunities for non-whites and other appropriate relief"; consequently, additional violations of Title VII were not needed to trigger modifications of the remedies that were originally ordered. *See United States* v. *Local Union No. 212*, 472 F.2d 634, 635-36 (6th Cir. 1973). Any changes made by the district judge were to be guided by the sound exercise of his equitable discretion, *see Rios* v. *Enterprise Association of Steamfitters Local 638*, 501 F.2d 622, 631 (2d Cir. 1974), and our task is not to exercise our own discretion, but to determine whether the district judge has abused his. *Association Against Discrimination* v. *City of Bridgeport*, 647 F.2d 256, 279 (2d Cir. 1981), *cert. denied*, 455 U.S. 988 (1982).

Defendants' first challenge to AAAPO need not detain us long. Defendants contend that the core provisions, which constitute the affirmative action program, violate Title VII and equal protection. We disagree. This court has consistently held that appropriate affirmative action measures are not proscribed by Title VII, *see Association Against Discrimination* v. *City of Bridgeport*, 647 F.2d at 280; *EEOC* v. *Local 638*, 532 F.2d at 827; *Rios* v. *Enterprise Association of Steamfitters Local 638*, 501 F.2d at 629-31, or by the constitution. *Id.* at 628 (citations omitted). Moreover, this court has twice upheld the affirmative action provisions of RAAPO, *EEOC* v. *Local 638*, 532 F.2d at 829-33; *EEOC* v. *Local 638*, 565 F.2d at 33-36, and we therefore reject any challenge to the parallel provisions contained in AAAPO.

Finally, we believe that defendants' attempt to rely on *Firefighters Local Union No. 1784* v. *Stotts*, 104 S.Ct. 2576 (1984), is misplaced. Defendants argue that *Stotts* eliminates all race-conscious relief except that benefitting specifically identified victims of past discrimination. We

do not accept defendants' expansive interpretation of that opinion.

In *Stotts*, a federal district court enjoined the city of Memphis from laying off black fire department employees in accordance with the seniority system contained in the collective bargaining agreement governing relations between the city and its employees. The black workers had been hired pursuant to a year-old consent decree settling prior charges of employer discrimination. The consent decree did not find that Memphis had violated Title VII, and did not identify any particular employee who had suffered from the alleged discrimination. In granting the injunction, the district judge found that although the seniority provision was not adopted with discriminatory intent, it nevertheless had to give way to the consent decree because of the discriminatory effect that would result from the city's use of the seniority system. *Id.* at 2581-82. The district court's injunction was affirmed on appeal to the sixth circuit, 679 F.2d 541 (6th Cir. 1982), and the Supreme Court reversed. 104 S.Ct. at 2590.

Stotts can be distinguished from the present case in at least three ways. First, the affirmative action ordered by the district court in that case was in direct conflict with a bona fide seniority plan that was protected by § 703(h) of Title VII. *Id.* at 2587. In our case § 703(h) is not involved because there is no seniority plan in conflict with the remedies imposed by AAAPO or the fund order. Second, the court's discussion of § 706(g), particularly relied on by the defendants here, related only to the "make whole" relief ordered in the district court, *id.* at 2589, and did not address prospective relief like that ordered in AAAPO and the fund order. Third, in

Stotts there was no finding of any intent to discriminate, *id.* at 2581, whereas in this case we have affirmed the district court's finding that defendants have intentionally discriminated against nonwhites. These three factors significantly distinguish *Stotts* from the case at bar and undercut defendants' reliance on that case. Thus, defendants first challenge to AAAPO fails.

Local 28's complaint that the obligations imposed by AAAPO will interfere with its right to self-government need not detain us either. We have rejected this contention on previous appeals, *e.g.*, *EEOC* v. *Local 638*, 532 F.2d at 829, and we reiterate that the government of Local 28 will be returned to its members as soon as it ends it unlawful discrimination against nonwhites. Until that time the government of Local 28 must remain subject to the supervision of the district court and the administrator.

There being no merit to defendants' first two contentions, we turn to defendants' challenges to the specific remedial provisions added by AAAPO.

1. *The 29.23% Nonwhite Membership Goal.*

We reject defendants' attempt to characterize the membership goal as a permanent quota, because the provision at issue is clearly not a quota, but a permissible goal. *See Rios* v. *Enterprise Association Steamfitters Local 638*, 501 F.2d at 628 n.3.

This circuit has a well-established two-pronged test for the validity of a temporary, race-conscious affirmative action remedy such as a membership goal:

> There must first be a "clear cut pattern of long-continued and egregious racial discrimination". Second, the effect of reverse discrimination must not be

> "identifiable", that is to say, concentrated upon a relatively small, ascertainable group of non-minority persons.

EEOC v. *Local 638*, 532 F.2d at 828 (quoting *Kirkland* v. *New York State Dep't of Correctional Services*, 520 F.2d 420, 427 (2d Cir.), *rehearing en banc denied*, 531 F.2d 5 (1975), *cert. denied*, 429 U.S. 823 (1976)).

A race-conscious goal in AAAPO passes this test as it did in RAAPO in 1976. This court has twice recognized Local 28's long continued and egregious racial discrimination, *EEOC* v. *Local 638*, 532 F.2d at 825; *EEOC* v. *Local 638*, 565 F.2d at 36 n.8, and Local 28 has presented no facts to indicate that our earlier observations are no longer apposite. Certainly, the effects of the union's discriminatory conduct have not been eliminated, for its nonwhite membership is still only 10.8%. Therefore, *Kirkland's* first prong has been satisfied.

We think the second prong has been satisfied as well, because the effects of the affirmative action remedies incorporated in AAAPO will not unnecessarily trammel the rights of any readily ascertainable group of nonminority individuals. Indeed, Local 28 does not attempt to show that the whites who might be affected by the established goals are any more identifiable now than they were in 1976 and 1977 when we approved the same type of provision in RAAPO.

Local 28 does argue, however, that the membership goal set forth in AAAPO has become "permanent", because at its target date it will have been in effect for eleven years. Defendants' argument is faulty in two respects. First, "temporary" in the context of the imposition of affirmative action remedies means that the reme-

dies will be in place only until the effects of the past discrimination have been eliminated, *see United Steel Workers of America* v. *Weber*, 443 U.S. 193, 208-09 (1979), and because AAAPO will cease when those effects are eliminated from Local 28, the goal is, by definition, temporary, not permanent. Second, even if permanency were merely a function of time, the responsibility for this membership goal's being "permanent" would have to be laid solely at the feet of the defendants, because it has been their foot-dragging resistance to compliance with the prior orders that has caused the district court to extend the nonwhite membership goal until 1987.

On cross-appeal, the City of New York has also challenged AAAPO's goal, but for a different reason. It contends that the district court's adoption of the 29.23% figure was too low and clearly erroneous. After reviewing the record of the hearing held on this issue, we conclude that the district court's findings were not clearly erroneous, and, indeed, are amply supported by the evidence. Thus, we affirm the 29.23% figure adopted by the district court.

2. *The 1:4 Apprentice:Journeymen Ratio.*

AAAPO requires the union to refer for work, and the sheet metal employers to hire, one apprentice for every four journeymen. Defendants attack this provision hypothetically, contending that if we reverse the district court's contempt finding with regard to underutilization of the apprenticeship program, then we must also reverse this provision. Taking defendants' argument simply as posed, we would have to affirm the 1:4 apprentice:journeymen ratio because we are not reversing, but affirming, the underutilization findings by the district court.

Going further, however, the 1:4 ratio is a critical element in AAAPO because it helps insure that defendants will not underutilize the apprenticeship program in the future. Because of the ratio employers will be motivated to hire more apprentices and they will have the court's assistance in overcoming union opposition; the union faces further contempt penalties if it does not cooperate in meeting the ratio; and the JAC will have to admit more apprentices to its program in order to meet the increased demand for apprentice labor. Moreover, additional jobs available to apprentices will, in time, help to attract larger apprentice classes.

Finally, we think the 1:4 ratio requirement is reasonable and flexible—reasonable, because it reflects a ratio that the industry has historically followed; flexible, because exemption from the ratio in particular cases may be obtained upon a proper showing. Thus, we affirm the 1:4 ratio provision of AAAPO.

3. *Apprentice Selection Board.*

AAAPO, ¶¶ 13 & 14, provides for an apprentice selection board to "establish standards and procedures for the selection of apprentices." The board is composed of one designee each from the plaintiffs, the JAC, and the court. It is charged with selecting both nonwhite and white apprentices to enter the apprenticeship program.

Defendants claim that the selection board provision will have an adverse impact on the union's freedom to govern its own affairs. We have rejected this argument when raised in prior challenges to similar provisions, *EEOC* v. *Local 638*, 565 F.2d at 33-34, and we find it no more persuasive here. Since it is an interim measure,

the board can be disbanded as soon as the nonwhite membership goal is reached. Unlike a provision rejected by us in the 1976 appeal to this court, *EEOC* v. *Local 638*, 532 F.2d at 830, the racial makeup of the board under AAAPO is not prescribed. This selection board is more analogous to the board of examiners approved in RAAPO.

4. *Elimination of the Apprentice Examination.*

Paragraphs 25-28 of RAAPO ordered defendants to develop and administer apprentice entrance examinations validated by the EEOC, and in the amended affirmative action plan proposed by plaintiffs these requirements were carried forward. However, in his order adopting AAAPO, entered on September 1, 1983, Judge Werker eliminated the provisions in plaintiffs' proposal that called for administration of apprenticeship examinations. He found that many had complained of the tests' adverse impact on nonwhites, that agreement on the tests' validity was virtually impossible, and that the tests were costly to administer. AAAPO takes a new approach to the apprentice selection procedure. It substitutes the selection board discussed above, and also orders defendants to work with industrial psychologists to develop objective, nondiscriminatory selection procedures.

On appeal, the EEOC contends that paragraph 15 of AAAPO prohibits the use of the new selection procedures to be developed, even if proven nondiscriminatory, until the 29.23% membership goal is reached. Although we do not necessarily agree with the EEOC's narrow reading of AAAPO, in order to eliminate any possible confusion, we direct that paragraph 15 of AAAPO be amended to state:

> 15. Upon termination by court order of this AAAPO, *or at such earlier time as the court may order*, the defendants and the JAC's shall use selection procedures for admission to the apprentice program as developed pursuant to Paragraphs 16 through 20. Such selection procedures shall be designed to have the least adverse impact on non-whites. [New matter in italics].

With this provision the defendants may use new selection procedures at any time after they prove to the district court that they are nondiscriminatory.

5. *The Nonwhite to White Indenture Ratio.*

In order to insure that adequate numbers of nonwhites are taken into the apprenticeship program, the district court provided in AAAPO that the JAC must indenture one nonwhite apprentice for every white apprentice. Local 28 and the JAC, joined by the EEOC, challenge this 1:1 indenture ratio as an abuse of the district court's discretion. We agree.

We have recognized that temporary hiring ratios may be necessary in order to achieve integration of a work force from which minorities have been unlawfully barred. *Association Against Discrimination* v. *City of Bridgeport*, 647 F.2d at 283; *United States* v. *City of Buffalo*, 633 F.2d 643, 646-47 (2d Cir. 1980). However, such race-conscious ratios are extreme remedies that must be used sparingly and "carefully tailored to fit the violations found", *Association Against Discrimination* v. *City of Bridgeport*, 647 F.2d at 281, and we will approve such ratios only where "no other method was available for affording appropriate relief". *Vulcan Society of the New York City Fire Department, Inc.* v. *Civil Service Com-*

mission, 490 F.2d 387, 398 (2d Cir. 1973); *Bridgeport Guardians, Inc.* v. *City of Bridgeport*, 482 F.2d 1333, 1341 (2d Cir. 1973), *cert. denied*, 421 U.S. 991 (1975).

Here, other methods do seem to be available. To begin with, defendants have voluntarily indentured 45% nonwhites in the apprenticeship classes since January 1981, and there is no indication that defendants will in the future deviate from this established, voluntary practice. Moreover, should defendants abandon the practice, the district court could modify its order at that time. Finally, the district court's selection board will be fully able to watch over the process and insure that a sufficient number of nonwhite apprentices is selected. Since these alternative methods seem well-calculated to assure an appropriate nonwhite ratio in the apprenticeship program, it was an abuse of discretion for the district court to impose the 1:1 indenture ratio at this time, and we strike that provision from AAAPO.

III. Conclusion

We affirm all but one of Judge Werker's findings of contempt against the defendants. We reverse and remand for further proceedings Judge Werker's finding that agreement to the older workers' provision violated the O&J and RAAPO. Because that is the sole finding of contempt against the contractors' association, we reverse the contempt relief and the awards of administrative expenses, attorneys' fees and costs ordered against it. We affirm, however, all of the contempt relief ordered against Local 28 and the JAC. We also affirm, with two modifications, the AAAPO adopted by Judge Werker. Finally, we affirm the order, incorporated in AAAPO, establishing a temporary, nonwhite membership goal of 29.23%.

WINTER, *Circuit Judge,* dissenting:

This case, which raises sensitive constitutional issues regarding the judicial imposition of racial quotas, controversial questions of statutory interpretation concerning so-called reverse discrimination as a remedy under Title VII, and more mundane yet important legal issues as to use of the contempt power, divides this court for a third time. *EEOC* v. *Local 638*, 565 F.2d 31, 37 (2d Cir. 1977) (Meskill, J., dissenting); *EEOC* v. *Local 638*, 532 F.2d 821, 833 (2d Cir. 1976) (Feinberg, C. J., concurring). On previous occasions, we approved entry of an Order and Judgment ("O & J") and "Revised Affirmative Action Program and Order" ("RAAPO"). These constitute a complex code of conduct encompassing forty-five pages of substantive and procedural detail with regard to admission to the apprenticeship program, membership in Local 28 and job referral in the sheet metal industry. The O & J and RAAPO vest direct control over these matters in the administrator, who is in effect a receiver with power, *inter alia*, to govern Local 28 so far as the recruitment and admission of minorities to the union and the referral of apprentices to jobs are concerned. We also established, over Judge Meskill's dissent, a 29% goal for minority membership in Local 28 to be achieved through the O & J and RAAPO.

My disagreement with the majority stems largely from its failure to address the fact that Local 28 had the approval of the administrator for every act it took that affected the number of minority workers entering the sheet metal industry. The majority's tacit premise thus is that full compliance with the specific terms of the O & J and RAAPO is legally insufficient to avoid sanctions for contempt if the 29% goal is not met. This

holding transforms the 29% figure from a goal guiding the administrator's decisions into an inflexible racial quota.

Consider, for example, the alleged underutilization of the apprenticeship program by Local 28. This charge is by far the most important since that program provides 90% of the union's new members and underutilization is the only allegedly contumacious conduct of Local 28 which could have seriously diminished the number of minority workers entering the sheet metal industry. It is thus the only allegation even remotely justifying the extraordinary sanctions imposed.

In my view, Local 28's actions cannot constitute contempt under the O & J and RAAPO because the final authority with regard to the utilization of the apprenticeship program lay with the administrator, and he approved the number of apprentices indentured throughout the period in question. Paragraph 14 of the O & J, set out in the margin,[1] gives the administrator full power over

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[1] That paragraph reads:

14. In addition to the powers and duties specified in this Order and the Program, the Administrator shall be empowered to take all actions, including but not limited to the following, as he deems necessary and proper to implement and insure the performance of the provisions of this Order and the Program:

(a) establish additional record-keeping requirements;

(b) increase the frequency with which the apprentice entrance test and/or the hands-on journeyman's test described more fully *infra* are administered;

(c) devise and implement additional methods and procedures for entry by non-whites into Local 28 or the Apprentice Program;

(d) establish ratios of non-whites to whites by which individuals will be admitted to Local 28 or the Apprentice Program;

(e) establish through the Program or otherwise such interim percentage goals of non-white membership in Local 28 and/or the Apprentice Program in order to insure that the 29% goal set forth in paragraph 11 *supra* is achieved by July 1, 1981;

[Footnote continued on following page]

the apprenticeship program, including the number of persons to be admitted. The RAAPO, promulgated pursuant to the O & J, specified that no less than 36 apprentices be indentured by February, 1977, and provided that the size of future classes be determined by the following procedure:

> Upon consideration of the goals of this Revised Program, and the availability of employment opportunities in the industry, the JAC shall forward its recommendation of the number of apprentices to be indentured in each class . . . to counsel for the parties and the Administrator . . . . The Administrator shall review the recommendations . . . . Upon a finding that the JAC's recommendation does not meet the goals and objectives of the Revised Program the Administrator shall render his determination as to the appropriate number of apprentices to be indentured.

The history of the RAAPO indicates that the administrator was to determine the number of apprentices to be indentured periodically after taking prevailing

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[Footnote continued from previous page]

> (f) establish procedures and practices for work referral and employment, including but not limited to work referral and employment procedures and practices based on ratios of non-whites to whites, furloughs and/or rotation;
>
> (g) conduct an investigation into, and/or require Local 28, and/or JAC to submit reports, concerning any aspect of the operation of Local 28 and the Apprentice Program;
>
> (h) review and approve or object to the disposition of all applications for entry into Local 28 or the Apprentice Program. At such time, if ever, that the Administrator shall adopt and implement any of the procedures and requirements authorized in this paragraph, he shall do so in writing and such procedures and requirements shall thereafter be deemed included in and part of the Program described *infra* and subject to review by the Court.

economic conditions into account. The RAAPO replaced the first affirmative action plan and order ("AAPO"), which dictated fixed numbers of apprentices to be indentured periodically, but which the administrator found to be unrealistic in view of the sheet metal industry's depressed economic conditions.[2] After the district court approved the O & J and RAAPO, Local 28 appealed and challenged the provisions relating to the apprenticeship program as unduly intrusive on the union's self-government. This court rejected that argument and Judge Smith's opinion expressly stated that the "[i]ndenture of apprentices . . . is appropriately subject to administrator oversight. *The balancing of the need for training workers against existing economic conditions is appropriately left*

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[2] The AAPO, which was superseded by the RAAPO, called for: (1) the indenture of 100 apprentices in February, 1976, 200 in July, 1976, and 200 each year thereafter; (2) the rotation of apprentices through jobsites in order to equalize employment among apprentices; and (3) a ratio of one apprentice for every four journeymen.

None of these requirements were met because of an egregiously unfavorable economic climate described *infra* in the text. The JAC indentured only 53 apprentices in February, 1976, none in July, 1976, and 36 in all of 1977. In addition, the JAC stopped the rotation system on the grounds that too many apprentices were quitting the program. Nor was the ratio of one apprentice for every four journeymen observed. The Administrator was informed of these development by the JAC in a series of letters during the summer of 1976 and held a hearing on December 21, 1976. The EEOC later filed a motion to revise the AAPO. The result of the hearing and the motion papers was a report by the Administrator on the AAPO and promulgation of the RAAPO.

In view of the unfavorable economic circumstances, no sanctions were imposed for a failure to comply with the AAPO. To the contrary, the February, 1977 apprentice class size was reduced from 100 to 36 and the size of future classes was to be determined in accord with the discretion of administrator pursuant to the procedure quoted in the text, *supra*. The verb preceding the rotation plan was changed from "shall" to "may" and the 4:1 ratio was dropped altogether as not workable.

to his informed discretion." 565 F.2d at 35 (emphasis added).

The union's obligation under RAAPO, therefore, is to report on the number of apprentices indentured and to obey any decision by the administrator altering that number on his own initiative or upon objection by the plaintiffs. After final entry of the O & J and RAAPO, the union informed the administrator and the plaintiffs virtually every month of the number of apprentices in the program.[3] Those reports are in the record. On no occasion did the administrator order the union to increase the number of apprentices indentured. Nor did the plaintiffs object to the numbers submitted, as the provision for notice to them contemplated and as they had the clear power to do under Paragraph 15 of the O & J.[4]

For all that appears in the record, the level of utilization of the apprenticeship program, the centerpiece of Judge Werker's contempt finding, was never a serious issue between the parties before the district judge's

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[3] Apprentice class sizes were reported by the JAC to the Administrator and the plaintiffs on April 6, June 2, June 18, 1976; March 4, April 4, May 9, June 8, July 13, August 3, September 7, November 7, December 7, 1977; January 6, February 27, April 11, May 15, June 6, July 6, August 4, September 12, October 6, November 3, December 4, 1978; January 10, February 13, March 14, April 4, May 9, June 14, August 16, September 18, October 19, November 21, December 14, 1979; January 21, February 22, March 17, April 23, May 23, June 17, July 23, August 7, September 10, October 9, November 12, December 16, 1980; January 21, February 18, March 10, May 5, June 9, August 3, August 6, September 17, October 13, November 13, December 9, 1981; January 11, February 8, March 22, April 7, May 10, 1982.

[4] That paragraph provides that the administrator
shall hear and determine all complaints concerning the operation of this Order and the Program and shall decide any questions of interpretation and claims of violations of this Order and the Program, acting either on his own initiative or at the request of any party herein or any interested person.

decision. The claim of underutilization was not even raised by the plaintiffs in their motion for contempt. The issue literally crept into the case only when Local 28 attempted to show its good faith by relying in its brief in response to the contempt motion on its efforts to recruit minorities into the apprenticeship program and on the fact that every apprenticeship class after entry of the O & J began with 45% minority members. The plaintiffs addressed the apprenticeship issue for the first time in their reply brief and only then asserted underutilization as a ground for contempt. In the hearing before the district judge, the size of the apprenticeship program was mentioned only by the union, again to demonstrate its good faith efforts.

With the issue thus in the posture of an afterthought, the district judge seized upon certain statistics relating to total apprenticeship enrollment and found as a fact that the union deliberately reduced enrollment in the program after final entry of the O & J following our decision in October, 1977. Everyone, including the plaintiffs and the majority, concedes that these statistics were misunderstood by the district court and do not support the conclusion reached. Moreover, in drawing that conclusion, the district judge made no reference whatsoever to the elaborate procedures established in the O & J and RAAPO to determine the size of the apprenticeship program, to the administrator's plenary authority in that regard, to the fact that Local 28 was never ordered by the administrator to increase the number indentured, or to the plaintiffs' opportunity to object as contemplated by the RAAPO.

The majority now affirms the district court on the grounds that its finding is not clearly erroneous. How-

ever, it treats the finding not as one of a deliberate evasion of the O & J and RAAPO by reducing the number of apprentices enrolled after their entry but rather as a more general finding of underutilization not involving an actual reduction of apprentice enrollment. This alteration of the district court's finding is necessary because the number of apprentices enrolled after final entry of the O & J did not generally decline.[5] The majority also does not discuss the relationship of the O & J and RAAPO to the union's obligations with regard to the apprenticeship program. Since it also does not state what provision of the district court's order has been violated by the operation of the apprenticeship program, one can infer only that the contempt in its view lies not in any failure to comply with the elaborate provisions of the O & J and RAAPO but solely in the failure to reach the 29% racial goal.

Respectfully, I believe the majority is in error in so concluding because the union's obligation with regard to the apprenticeship program is clearly limited to compliance with the specific provisions of the O & J and RAAPO. Indeed, rigid enforcement of the 29% goal without regard to economic or other circumstances is not consistent with the O & J and RAAPO, with our prior decisions in this very case, with Title VII, or probably with the Constitution.

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[5] Enrollment after entry of the orders was as follows:

1977	36
1978	49
1979	30
1980	77
1981	143

Our decision affirming the RAAPO was rendered on October 18, 1977. The enrollment of 36 apprentices in 1977 was specified in the RAAPO itself.

Since the O & J and RAAPO became effective, Local 28 has essentially been in a receivership so far as admissions to membership or job referral are concerned. In the words of Judge Smith, the administrator has the power "to exercise day-to-day oversight of the union's affairs." 532 F.2d at 829. The practical function of the 29% goal is not to impose some overweening obligation on the union but to guide the administrator in determining what Local 28 is to do under the O & J and RAAPO. There is simply no reason whatsoever for a court to deprive a union of its self-governance and impose on it the costs of judicial administration of its affairs only to deny that compliance with the decisions of the court-appointed administrator fulfills the union's obligations. The majority's use of rhetorical assaults and punitive sanctions against Local 28 simply cannot be reconciled with its failure to utter even muted criticism of the administrator who repeatedly authorized the supposedly contumacious acts and continues in office to this day.

Judge Smith's second opinion also explicitly recognized that the number of apprentices indentured must be determined by the administrator in light of "existing economic conditions," 565 F.2d at 35. The majority "rejects" the so-called "tacit premise" of this dissent that difficult economic circumstances may justify reducing the number of new apprentices and thus the number of new minority members. In doing so, of course, it is rejecting Judge Smith's prior ruling in this very case.

As the record amply demonstrates, Local 28 faced an excruciating reduction in demand for its services in the years in question. In fact, the reason for the administrator's revision of the fixed enrollment requirements of the AAPO, see note 2, *supra*, was "the present changed

working and employment conditions in the sheetmetal industry in New York City, including the present severe and widespread unemployment in the industry." Because of shifting economic circumstances, the RAAPO, as proposed by the administrator and approved by us, therefore left the number of the apprentices to be determined in the administrator's discretion exercised in light of prevailing economic conditions. The contempt finding simply disregards this most pertinent history.

The record also demonstrates that the level of utilization of the apprenticeship program was consistent with existing economic circumstances. Although the majority notes a "dramatic" increase in average hours worked annually by a journeyman from 1975 to 1981, the number of journeymen in fact fell from 3,670 to 2,163 in roughly the same period. Even with this enormous decline in journeymen, the average number of forty-hour weeks worked by a journeyman in a calendar year was as follows:

1970 — 52
1971 — 51
1972 — 35
1973 — 31
1974 — 28
1975 — 26
1976 — 25
1977 — 26
1978 — 31
1979 — 37
1980 — 42

Emphasis has also been placed upon the fact that the unemployment rate among apprentices has declined. However, during 1974 and 1975, when that unemployment

rate was 20% and 40% respectively, large numbers of apprentices left the program when relatively full employment was not offered. As a consequence of that experience the administrator reduced the size of the 1977 apprenticeship class.[6] Had he not reduced the number of apprentices and thereby reduced apprentice unemployment, the high dropout rate would have made it impossible to increase significantly the percentage of minority journeymen.

Moreover, calculating the hours worked by apprentices as a percentage of total hours worked by both journeymen and apprentices indicates that the apprentices' share of total hours worked actually doubled from 1977 to 1981. Since every apprenticeship class after entry of of the O&J and RAAPO began with at least 45% minority workers and since the share of work allocated to apprentices has dramatically increased, there is absolutely no basis for the claim of apprenticeship underutilization once prevailing economic circumstances are taken into account.

The majority opinion at two points implies that the differences between us stem from "uncertainties" regarding the utilization of the apprenticeship program resulting from the union's failure to file required reports. I do not share any such uncertainties. In fact, the record contains voluminous data with regard to the admission of apprentices. *See* notes 3 and 5, *supra*, and accompanying text.

Finally, the so-called standard 4:1 ratio of journeymen to apprentices is little more than a nationwide desideratum repeated every fifteen years or so by Department of Labor periodicals. Even simple mathematics, however, reveals that such a ratio can be maintained only

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[6] See note 2 *supra*.

in a growing industry. Its use is thus also subject to prevailing economic conditions.

For these reasons, there has not been a "clear and unambiguous" order of which there is "clear and convincing" evidence of non-compliance, prerequisites to a contempt judgment. *Powell* v. *Ward*, 643 F.2d 924, 931 (2d Cir.) (per curiam), *cert. denied*, 454 U.S. 832 (1981). The frustration of the plaintiffs, the district court, and the majority at the union's failure to reach the judicially mandated racial balance even while complying with the O&J and RAAPO is perhaps understandable. However, in light of the facts that large numbers of journeymen did not work during the period in question or worked only meager hours, reactive finger pointing at Local 28 is a faintly camouflaged holding that journeymen should have been replaced by minority apprentices on a strictly racial basis. This is at odds with *Firefighters Local Union No. 1784* v. *Stotts*, 104 S. Ct. 2576 (1984), which rejected such a use of racial preference as a remedy under Title VII. Resort by a federal court to such a strict racial quota in circumstances such as this seems to me also to be of questionable constitutional validity. *See Regents of the University of California* v. *Bakke*, 438 U.S. 265, 287-320 (1978) (opinion of Powell, J.).

I also disagree with the majority's affirmance of the establishment of the "education fund." The district court ordered the union to finance the fund as part of the contempt sanction without making factual findings as to the need for the fund. As stated by the court, the fund will be used to provide tutorials and counseling for first year minority apprentices, to finance various methods of reducing dropouts among minority apprentices, and to im-

prove the curriculum at vocational and technical schools.[7]

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[7] The district judge's order reads in part:

6. The Fund shall be used for the following purposes:

a. Establishing a tutorial program of up to 20 weeks duration for nonwhite first-year apprentices.

b. Creating part-time and summer sheet metal jobs for nonwhite youths between the ages of 16 through 19 who are currently enrolled in or have successfully completed, within the past year, a sheet metal vocational or technical education program or a program in an allied trade requiring the use of tools, math or drafting, such as carpentry.

c. Paying the expenses, including any lost wages, of nonwhite members and apprentices of Local 28 for their services as liaisons to vocational and technical schools having sheet metal programs. The duties of the liaisons shall include, but not be limited to, the following: working with the schools to upgrade the sheet metal program, arranging trips to sheet metal shops and field sites, counseling the students on methods of entry into Local 28 and working with participants in the program set forth in paragraph 6(b) above. The JAC training coordinators and union officials shall cooperate fully with the liaisons in the effort to carry out this program.

d. Appointing a counselor or counselors, whose duties shall include, but not be limited to, the following: monitoring the progress of nonwhite apprentices at each JAC school and on the job, providing nonwhite apprentices with personal and job-related counseling and assisting nonwhite apprentices in adjusting to their school and work environments to help ensure their successful completion of the Apprenticeship Program. The counselor(s) shall be selected and supervised by the Administrator subject to approval by plaintiffs and the Court. Defendants and all Local 28 contractors shall cooperate fully with the counselor(s). Every two months, and at the end of each apprenticeship term, the counselor(s) shall submit to the parties, the Administrator and the Court a report detailing the progress of nonwhite apprentices and setting forth recommendations to resolve any problems nonwhite apprentices may be encountering.

e. Providing stipends to unemployed nonwhite apprentices while they attend their regular apprentice class and any additional classes that will be offered to such apprentices pursuant to the AAAPO.

f. Establishing a low-interest loan fund for nonwhite first-term apprentices who demonstrate financial need.

g. Providing stipends to unemployed nonwhite journeymen while they take advanced courses to upgrade their skills.

[Footnote continued on following page]

I do not quarrel with the potential usefulness of such a fund as social policy. However, its central factual premise seems to be the lack of qualified minority applicants able to enroll in and complete the apprenticeship program, an implicit finding by the district court that Local 28 has done all it reasonably could with regard to the training of minority apprentices. If a lack of qualified applicants exists—and if it does not, it is difficult to understand the purpose of the fund—the remedy is not to hold a private organization such as Local 28 responsible for improving the quality of public education in New York.

Many of the other claims of contempt also rest on a shaky foundation. For example, with regard to many of the alleged failures to comply with reporting requirements, Local 28 argued that the administrator had determined that it was not required or able to make such reports. The district judge rejected this argument on the grounds that the administrator had no power to grant such relief, a

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[Footnote continued from previous page]

h. Providing financial reimbursement to any employer who has demonstrated to plaintiffs' satisfaction that it cannot afford to hire an additional apprentice to meet the one-apprentice-to-every-four journeymen requirement of the AAAPO.

i. Providing incentive or matching funds to attract additional funding from governmental or private job training programs, such as the Dislocated Worker Program established pursuant to Title III of the Job Training Partnership Act. 29 U.S.C. §§ 1651-1658.

j. Additional expenditures may be made from the Fund upon a showing by any party that such an expenditure would serve to increase the nonwhite membership of the union and the Apprentice Program, or to provide support services to nonwhites. The party submitting authorization for withdrawal of monies from the Fund must first circulate a written proposal to all other parties and the Administrator detailing the amount requested and how the money would be expended. If all parties agree to such a proposal or, if the parties cannot agree, and the Administrator determines that the proposal should be funded, the Administrator shall authorize the withdrawal of an appropriate amount from the Fund.

questionable ruling in light of RAAPO § 15. Other claims of contempt are based on firmer grounds but do not warrant the extraordinary remedies invoked here. Only so much can be made, for example, of a use of first class rather than certified mail or an isolated issuance of work permits. (The majority surely makes the most of it in implying that 200 unauthorized permits were issued. The district court's finding was that 13 such permits violated the RAAPO.) The failure to undertake the publicity campaign followed the administrator's failure to respond to Local 28's request for advice on the content of the campaign in light of the limited apprenticeship spaces available. Since the administrator was to supervise the campaign under the terms of the RAAPO, the union's failure to go forward is rather less blameworthy than it seems to the majority. In any event, since each apprentice class had 45% minority membership, the lack of a publicity campaign seems inconsequential.

I would remand the case to the district court for a full reexamination of the contempt charges as well as of the newly revised affirmative action program. Regrettably the district judge failed to give careful scrutiny to the record or to the prior history of this case before reaching his conclusions. His legal and factual determinations with regard to the apprenticeship program were taken literally from the air and showed little understanding of what the O & J and RAAPO actually provide. This is evident in his disregard of the administrator's final authority as to the size of the apprenticeship program, and also in his failure to examine the administrator's rulings with regard to reporting requirements. The newly revised program approved by the majority imposes the same kind of hard and fixed numerical requirements as were found unrealistic in the AAPO, without any serious explana-

tion of why they did not work before. Affirmance requires us to enforce the 29% goal as a fixed quota requiring the replacement of journeymen by apprentices on a strictly racial basis. Believing this to be inconsistent with our prior decisions in this matter and with Title VII itself, I dissent.

71 Civ. 2877 (HFW)
AMENDED AFFIRMATIVE ACTION PROGRAM AND ORDER

United States District Court
Southern District of New York

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, and THE CITY OF NEW YORK,

Plaintiffs,

– against –

LOCAL 638 . . . LOCAL 28 OF THE SHEET METAL WORKERS' INTERNATIONAL ASSOCIATION, LOCAL 28 JOINT APPRENTICESHIP COMMITTEE . . . SHEET METAL AND AIR-CONDITIONING CONTRACTORS' ASSOCIATION OF NEW YORK CITY, INC., ETC.,

Defendants.

Introduction

1. The parties in this case are the Equal Employment Opportunity Commission ("EEOC"), the City of New York ("City"), the New York State Division of Human Rights ("State")(collectively "Plaintiffs"), Local 28 of the Sheet Metal Workers' International Association ("Local 28"), Joint Apprenticeship Committee New York City, the Joint Apprenticeship Committee Essex-Passaic Counties, New Jersey, the Sheet Metal and Air-Conditioning Contractors' Association of New York City, Inc. ("Contractors' Association"), (collectively

"Defendants"), all those contractors who were named as Respondents in the civil contempt motion that was decided on August 16, 1982 and who are listed in Appendix "A" and marked with an asterisk (collectively "Respondents"), the Joint Apprenticeship Committee Nassau-Suffolk Counties, New York, the Joint Apprenticeship Committee Hudson-Bergen Counties, New Jersey,[1] Association of Sheet Metal Contractors of Northern New Jersey ("ASMCNN"), SMACNA of Long Island, Inc. ("SMACNA"), and all individual contractors listed in Appendix "A" who are currently in contractual relationship with Local 28 or who subsequently enter into such a relationship. This Amended Affirmative Action Program and Order ("AAAPO" or "Amended Program") supersedes the Revised Affirmative Action Program and Order ("RAAPO") entered on January 19, 1977.

2. This Amended Program encompasses Local 28, former Locals 10, 13, and 55 ("former locals") which merged into Local 28, the Apprentice Program and Contractors' Associations in agreement with Local 28, as stated in the Stipulation and Order dated May 17, 1983, annexed hereto as Appendix "B". Local 28's territorial jurisdiction includes New York City, Nassau and Suffolk Counties, New York, and Hudson, Bergen, Essex and Passaic Counties, New Jersey.

3. The goal of this Amended Program is to assure that Local 28's non-white[2] membership reaches at least 29.23%, that substantial and regular progress is made toward this goal and that all members and apprentices of Local 28 share equitably in all available employment opportunities in the industry.

4. The goal shall be measured against the total membership of Local 28, including that of the former locals. For the purpose of measurement, total membership shall include: (a) all journeymen members; (b) all pensioners, reduced or limited members who, while receiving any retirement benefit from Local 28, the Sheetmetal Workers' International Association or any

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[1] "Apprentice Program" shall refer to the JACs collectively.

[2] "Non-white" as used in this AAAPO means black and Spanish-surnamed individuals.

former local's pension program have been employed as sheet metal workers by a Local 28 contractor within three (3) years prior to the date of the most recent membership census; (c) all members or participants in the Apprentice Program; and (d) all individuals who (i) have been offered admission to and membership in Local 28 but have exercised their option, pursuant to Paragraph 41 of this Amended Program or pursuant to a parallel policy adopted by Local 28, to defer such admission and membership, and (ii) at the time of measurement the aforesaid deferment option has not been exercised for more than two (2) years.

5. Defendants are to implement this Amended Program so that the goal shall be attained at the earliest possible date, but no later than August 31, 1987.

6. The Amended Program shall remain in effect until such time as the membership of Local 28, including the former locals, has reached 29.23 percent and the Court, upon motion of the defendants issues an order terminating AAAPO.

7. Until the non-white membership of Local 28 reaches 29.23%, admission to membership in Local 28 shall be attained only through:

a) successful completion of a hands-on journeyman test administered pursuant to Paragraphs 33 through 40; or

b) completion of the Apprentice Program pursuant to Paragraphs 8 through 27; or

c) transfer in accordance with the International Union Constitution and Ritual; or

d) organization of non-union shops; or

e) the deposit of a previously obtained withdrawal card with the Executive Board of Local 28 and compliance with the relevant provisions of the International Union Constitution and Ritual.

Apprentice Programs

8. No JAC shall maintain an apprentice program longer than four years. Each JAC shall maintain an apprentice program which shall be equivalent to the program conducted by JAC-New York City. The terms and conditions of such apprentice program shall be as set forth in the Collective Bargaining Agreement ("Standard Form of Union Agreement . . . between Local 28 . . . and Sheet Metal Contractors"), and the Sheet Metal Workers' Joint Apprenticeship Committee Essex-Passaic Counties Trust and Indenture, the Sheet Metal Workers Joint Apprenticeship Committee Hudson-Bergen Counties Trust and Indenture, the Local 28 Joint Apprenticeship Committee Trust and Indenture, the Sheet Metal Workers' Local 28 Joint Apprenticeship Committee Nassau-Suffolk Counties Trust and Indenture, and the rules and regulations thereunder except as modified by the Order and Judgement ("O&J"), the provisions of this Amended Program, or orders of the Administrator pursuant to his powers under the O&J and this Amended Program.

9. a) The JACs shall utilize the standardized application form, a copy of which is annexed hereto as Appendix C. Applications for each apprentice program shall be made available to all interested persons and accepted from any qualified candidate. A qualified candidate is defined as: any person who is physically fit for sheet metal work and who has or will have attained the age of 17 by the date of indenture of the next scheduled apprentice class, is not older than 35 years of age, and is a citizen or permanent resident alien.

b) Consecutively numbered application forms for each Apprentice Program shall be available at the offices of each JAC and any union office during normal business hours and at the offices of the organizations and institutions listed in Appendix D. Application forms shall be provided automatically to the groups in Appendix D at least 30 days before the opening date for applications for each apprentice class. Defendants shall update Appendix D yearly by adding groups, including those suggested by the plaintiffs, and correcting addresses if new addresses are known. An updated Appendix D shall be submitted by the

defendants to the plaintiffs and the Administrator by September 15th of each year. Application forms shall also be made available upon request to any government employment office or minority community organization. Application forms also shall be available by mail upon written request. Completed applications shall be accepted in person or by mail at the offices of each JAC or any union office. The time for filing applications for a particular apprentice class may be closed by the Apprentice Selection Board at a reasonable time; the closing date for filing of applications shall be clearly stated on the application form and shall be uniform for all JACs. There shall be no filing fee.

10. a) Each JAC shall indenture a minimum of two classes of apprentices each year until such time as the non-white membership of Local 28 reaches 29.23%. The classes shall be indentured in February and August of each year. Each JAC shall indenture no fewer than the number of apprentices necessary to ensure that Local 28 contractors working in the respective geographical jurisdications of the former locals and in New York City maintain a rate of one (1) apprentice for every four (4) journeymen employed in those respective territorial areas, subject to the procedures set forth in Paragraph 22.

(b) Until such time as the 29.23% non-white goal is met, selection of apprentices pursuant to Paragraph 12 shall be on the basis of one non-white apprentice for each white apprentice so indentured. Each apprentice who drops out or is terminated during the first term shall be replaced by another apprentice of the same race/national origin or, if this not possible, an additional apprentice of the same race/national origin shall be indentured in the next apprentice class.

11. Until such time as the non-white membership of Local 28 reaches 29.23%, each JAC shall maintain separate white and non-white lists of apprentices and shall indenture apprentices on the basis of one non-white for each white.

12. Until such time as the non-white member of Local 28 reaches 29.23%, selection of apprentices shall be made by a Selection Board composed of one designee each from plaintiffs, the JACs and the Court. The Selection Board shall be chaired by

the Court's designee, act by majority vote and be compensated by the JACs at an hourly rate plus expenses as determined by the Administrator and approved by the Court.

13. The Selection Board shall establish standards and procedures for selection of apprentices and shall submit such standards and procedures to the plaintiffs, Local 28, all JACs and the Contractors' Associations for their comment. Any disputes or differences regarding the standards and procedures shall be brought before the Administrator by the parties and/or any member of the Selection Board within 5 days of such dispute or difference.

14. The standards and procedures established by the Selection Board shall include, but not be limited to, review and verification of a candidate's work experience and/or technical/trade education. These standards and procedures for the selection of non-white and white apprentices shall be uniformly applied to all candidates for membership in each JAC apprentice program.

Development of Permanent Selection Procedures

15. Upon termination by court order of this AAAPO, the defendants and the JACs shall use selection procedures for admission to the Apprentice Program as developed pursuant to Paragraphs 16 through 20. Such selection procedures shall be designed to have the least adverse impact on non-whites.

16. The JACs shall consult with an industrial psychologist designated by plaintiffs on the development of the new selection procedures. Plaintiffs' designated industrial psychologist will provide input in the development, review of the results, and implementation of the new selection procedures.

17. Plaintiffs' designated industrial psychologist's comments, shall be advisory only and in no way binding on defendants, their officers, employees and agents or their successors. The JACs' and plaintiffs' designated industrial psychologist shall cooperate in order to effectuate development and implementation of the new selection procedures in an efficient manner. Defendants shall furnish plaintiffs' designated industrial psychologist with

appropriate materials in a timely fashion and shall provide the industrial psychologist with a reasonable amount of time to provide his/her input.

18. Plaintiffs' designated industrial psychologist shall be paid jointly by JAC-New York City, JAC-Essex/Passaic Counties, New Jersey, JAC-Hudson/Bergen Counties, N.J. and JAC-Nassau/Suffolk, Counties, N.Y., at an hourly rate, plus expenses, as determined by the Administrator and approved by the Court.

19. The new selection procedures to be developed pursuant to Paragraphs 15 through 18 above, shall be designed to obtain quality apprentice applicants and to assure that the selection system has the least adverse impact on non-whites. The specific measures outlined below are intended to achieve this goal:

a) The selection procedures shall be as content valid as feasible.

b) The selection procedures shall, consistent with selection standards such as those of the American Psychological Association and the EEOC guidelines, eliminate or minimize adverse impact on non-white candidates.

c) In developing the new selection procedures, the JACs shall consider the possibility of alternatives or supplements to written examinations, including use of oral examination or assessment center techniques.

d) In the event that a written examination is used as part of the new selection procedures, the JACs shall consider application of one or more of the following techniques to minimize or eliminate adverse impact on non-white candidates should such adverse impact result:

   i. Separate frequency distribution for non-white and white candidates;

   ii. Elimination of particular items that result in statistically significant adverse racial/national origin impact among candidates of substantially equivalent ability.

iii. Addition of items to off-set the adverse impact of other items.

e) Any selection procedure that is adopted, including the setting of cut-off scores or rank ordering features, shall be used in a manner that, consistent with validity and utility, reduces or eliminates adverse racial/national origin impact.

20. During the temporary period that the ratio in paragraph 11 is in effect, the JACs shall conduct trial runs of various selection techniques to obtain empirical data as to which valid selection method has the least adverse impact. This provision is intended to assure that when the goal is reached, there will be a valid selection method available which has, by actual usage, been shown to have the least adverse impact upon non-whites.

Apprentice Indenture

21. Prior to indenturing an apprentice class each JAC shall hold a one-day orientation for all new apprentices. Such orientation shall include discussion of the need for punctuality and reliability on the job, safety, job readiness skills and a general description of the tasks and duties apprentices will be expected to perform.

22. To ensure that it indentures the largest possible apprentice class each JAC shall assign apprentices for employment in a ratio of not less than one apprentice for every four journeymen working of the aggregate journeymen employed by Local 28 contractors in each respective JAC's territorial jurisdiction. Towards that end, each JAC shall take the following steps prior to indenturing an apprentice class:

a) notify each employer who maintains a ratio of apprentice to journeymen of greater than one to four that it will be assigned a sufficient number of apprentices to reduce its apprentice to journeymen ratio to one to four, unless the employer, pursuant to Paragraph 43(b), obtains an exemption from the 1:4 ratio; and

b) mail notice of apprentice assignment to contractors 45 days before a class is to be indentured; and

c) within 5 days of the mailing of apprentice assignment notices, submit to plaintiffs and the Administrator copies of such notices; and

d) within 15 days after the notices are mailed any employer requesting an exemption from the 1:4 ratio must do so pursuant to Paragraph 43(b).

These procedures are a minimum; the JACs shall take any additional steps necessary to ensure that the largest possible apprentice class is indentured.

23. Within 5 days of indenture, the Training Director shall submit to the plaintiffs the name, race/national origin, address, and social security number of each individual admitted into the JAC's apprentice program and the name, race/national origin, address and social security number of each individual who was rejected during the selection period and the reason(s) therefor.

24. Persons selected for an apprentice program may be required to appear for a physical examination prior to being indentured. The cost of physical examinations are to be borne one-half by successful applicants and one-half by the particular JAC. Persons selected in accordance with the above procedures shall be indentured as apprentices unless such indenturing is declined by them, or they are certified physically unable to perform sheet metal work by a medical practitioner licensed in New York or New Jersey.

25. Each JAC shall take all reasonable steps to insure that all apprentices indentured receive adequate employment and training opportunities. Such steps shall include, but not be limited to, providing apprentices with classroom instruction, including evenings and Saturdays where necessary, during periods of unemployment, and shall credit such hours toward fulfillment of apprenticeship requirements. Each JAC shall provide to plaintiffs, on a weekly basis, the names and attendance records of all unemployed apprentices enrolled in these classes. Advanced placement, accelerated advancement or graduation of

any apprentice may be authorized by any JAC, as it deems proper.

26. a) Each JAC shall establish an employment referral system which shall incorporate the following elements:

(i) A list of all apprentices shall be established in three groupings. Group one shall contain apprentices in terms 1, 2, 3; Group two shall contain apprentices in terms 4, 5, 6; and Group three shall contain apprentices in terms 7 and 8.

(ii) A record shall be kept for each apprentice of the actual number of hours worked[3] within each group and each JAC shall refer out apprentices in inverse order to the number of hours worked (so that apprentices with the lowest number of hours shall receive referrals first).

(iii) To the extent feasible, each JAC shall rotate the groupings to insure that no one grouping or persons therein receive a disproportionate amount of work.

(iv) Each JAC shall provide counsel for the parties and the Administrator with monthly reports. Such reports shall include but not be limited to: A) all apprentices by name, race/national origin, term, grouping, actual number of hours worked, and name of contractor(s) to which the apprentice is assigned; and B) summary of manpower reports showing the number of journeymen and apprentices working for all employers.

b) Seniority among apprentices shall not be a criterion for employment.

27. Upon successful completion of an apprentice program, apprentices shall be promptly admitted to full journeyman membership upon payment of any balance due of the initation fee. Upon application to the Executive Board of Local 28, the initation fee may be paid on an installment basis for good cause

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[3] The listing of the hours worked shall be derived from the weekly reports that each employer must file pursuant to Paragraph 52.

shown and subject to the procedures contained in Paragraph 42(b).

28. Each JAC shall designate a Training Coordinator who shall be responsible for the conduct of the particular JAC's apprentice program and for all reports required to be maintained and/or filed by the O&J, this AAAPO or such further orders of the Court or the Administrator.

29. Defendants shall appoint a person to serve as the Training Director. The Training Director shall be responsible for insuring that all training programs are equivalent to JAC-New York City's program and that the Training Coordinators meet their obligations as set forth in this Amended Program.

Advanced Apprentices

30. Those non-whites who scored above 55 on the July, 1982 journeyman hands-on test but who were unsuccessful in attaining journeyman membership shall be immediately offered advanced standing in the JAC-New York City's next apprentice class.

31. Those individuals who have successfully completed a sheet metal program in a vocational high school or have two years verifiable trade experience shall be considered for advanced standing in the Apprentice Program.

32. The Training Coordinator of each JAC shall evaluate the experience of all individuals who apply for advanced standing in his/her apprentice program pursuant to Paragraphs 30 and 31 and shall make placement at the appropriate grade level. The grade level assigned shall be conditional for a period to be determined by the Coordinator, not exceeding three months, based upon classroom work and on-the-job performance. If any individual cannot succeed at the advanced level, s/he shall have the option to remain in the program at a lower term. Eligible individuals who challenge the grade level assigned shall be advised in writing of their right to appeal to the Administrator.

Journeyman Test

33. Local 28 shall administer a validated, non-discriminatory, hands-on journeyman's test on the third

Saturday in October of each year for applicants residing in New York State and on the fourth Saturday in October of each year for applicants residing in New Jersey. Consistent with the requirements of the O&J and Paragraph 3 above, the Administrator or any party may apply to the Court to increase or decrease the frequency of the tests to be administered pursuant to this paragraph.

34. The 'hands-on' journeyman's test shall be graded by a Board of Examiners consisting of three members knowledgable in sheet metal. The Board shall be comprised of a representative chosen by Local 28, a representative chosen by the Court, and a representative chosen by the plaintiffs. The Board shall act by majority vote and shall employ a passing grade level to be developed pursuant to the validation procedures. All applicants shall be advised of their status by first class mail within 30 days of the test. Applicants who fail the test shall be advised of the methods of application for the Apprentice Program.

35. The Board shall be compensated by the defendants at an hourly rate, plus expenses as determined by the Administrator and approved by the Court.

36. All qualified applicants who pass the test and are physically fit to perform sheet metal work shall be admitted to journeyman status in Local 28 within 60 days of the test.

37. Local 28 shall utilize the standardized application form, a copy of which is annexed hereto as Appendix E. Applications for each hands-on test shall be made available to all interested parties and accepted from any qualified candidate. A qualified candidate is defined as follows: any person who

a) has or will have attained the age of 18 by the date of the test, and

b) is a citizen or lawful permanent resident alien legally entitled to work in the United States; and

c) has one year of sheet metal work experience as defined by the Board. Such experience shall include but be not limited to sheet metal experience in the Armed Forces, or vocational education or training related to

the skills of a journeyman sheet metal worker. Persons presently registered in the Local 28 Apprentice Program or any other recognized apprentice program affiliated with the Sheet Metal Workers' International Association are not eligible.

38. Application forms for each hands-on test shall be available at any office of Local 28 during normal business hours and at the offices of the organizations and institutions listed in Appendix D. Application forms shall be provided automatically to the groups listed in Appendix D at least 30 days before the opening date for applications for each journeyman's test. Application forms shall also be made freely available upon request to any government employment office or minority community organization. Application forms also shall be available by mail upon request. Completed applications shall be accepted in person or by mail at any office of Local 28. Local 28 shall establish a reasonable cut-off date for filing applications for the hands-on test. The closing date shall be clearly stated on the application form.

39. Within 30 days of the journeyman's test Local 28 shall submit to the plaintiffs and the Administrator the name, race/national origin, address and social security number of each individual who took the test, their score and list of the individuals who passed the test.

40. The fee for taking a hands-on journeyman's test shall be $25.00. Local 28 may apply to the Administrator for an increase in this fee, which will be granted only upon a showing of good cause. Applicants shall be informed, in writing, as to the place of examination with instructions as to how to reach the place and/or a map indicating its location.

41. A person eligible for admission pursuant to passing a hands-on test shall be permitted to defer such admission for a reasonable time, not to exceed two (2) years. The name and race/national origin of each person who a) applies for deferral status and b) the date each deferral status is granted shall be provided the plaintiffs within ten days of the application.

Admission Fees

42. a) Upon written application, a non-white eligible for admission to journeyman membership in Local 28 pursuant to Paragraph 7 of this Amended Program may request of the Executive Board of Local 28 ("Executive Board") that the Local 28 initiation fee be paid pursuant to the provisions of Paragraph 22(d) of the O&J. Within 5 days of receipt of such application, the Executive Board shall render a decision on the application in writing and notify the applicant, and the parties of the disposition of the application. If such application is denied in whole or in part, or is not acted upon within five days of its receipt by the Executive Board, an application may be made to the Administrator who shall either grant or deny the request in writing after duly considering all the factors set forth in Paragraph 22(d) of the O&J and such additional information, documents, or other data from either Local 28 or the applicant as they wish to submit.

b) Upon written application a non-white eligible for admission to journeyman membership in Local 28 pursuant to passing a hands-on test may request of the Executive Board that payment of the Local 28 initiation fee commence with employment and be payable on a pro rated basis, each payment not exceeding 10% of the net pay check, and payable only during periods of employment until the fee is paid. Within 5 days of the receipt of such application the Executive Board shall render a decision on the application in writing and notify the applicant, and all parties of the disposition of the application. If such application is denied in whole or in part or not acted upon within 5 days of its receipt by the Executive Board an application may be made to the Administrator who shall either grant or deny the application in writing.

Apprentice/Journeymen Ratio

43. a) In order to reach the 29.23% non-white membership goal as soon as practicable, each Local 28 employer shall be required to maintain a ratio of one apprentice for every four journeymen. Pursuant to this ratio, an employer would not be

required to employ a second apprentice until the employer employs an eighth journeyman.

b) An employer may be relieved of its obligation, under Paragraph 43(a), if the employer submits to the plaintiffs and the Administrator a sworn affidavit detailing the reasons for being unable to comply with Paragraph 43(a) and the plaintiffs consent in writing to a different ratio. If plaintiffs refuse to consent, they must state their reasons in writing. Any party aggrieved by actions taken under the provisions may apply to the Administrator for relief.

c) Each JAC shall immediately notify in writing any employer in its territorial jurisdiction maintaining a ratio of apprentice to journeymen greater than one to four for six consecutive weeks, that unless it files for and receives an exemption pursuant to Paragraph 43(b) that the employer will be assigned additional apprentices in order to bring its ratio down to one to four. Copies of the notices shall be mailed simultaneously to plaintiffs and the Administrator.

Permits

44. Local 28 may not issue "permits" or "identification slips" unless:

a) a written request, Appendix "F", has been made to the plaintiffs justifying the issuance. Such request must be certified and affirmed by a union officer and the contractor subject to penalty for perjury;

b) plaintiffs have consented in writing to the issuance, and have submitted a copy of the written request and written consent to the Administrator;

c) if plaintiffs refuse to consent, they must state their reasons for doing so in writing; and

d) any party aggrieved by actions taken under this provision may apply to the Administrator for resolution.

Publicity-Recruitment

45. Local 28 and the JACs shall hire an individual, individuals, or agency approved by the plaintiffs to serve as an out-reach worker(s) to the non-white community and to assist defendants in developing out-reach and recruitment programs.

46. By October 1, 1983, Local 28 and the Training Director shall provide to plaintiffs and the Administrator a written plan for an effective general publicity and recruitment campaign to inform the non-white community in Local 28's geographical jurisdiction of nondiscriminatory opportunities in Local 28 and the Apprentice Program and to ensure an available pool of non-white applicants for journeyman and apprentice membership in Local 28. This plan, which shall be in addition to the recruitment and publicity campaign defendants are required to conduct before each hands-on test and the indenturing of each apprentice class, shall include but not be limited to the following steps:

a) during the third and fourth week of each September send a representative, and a non-white apprentice or journeyman, to all vocational and technical schools in Local 28's jurisdiction and to the organizations listed in Appendix D which in the past have provided non-white applicants to discuss what sheet metal work involves and all the procedures for admission to Local 28 and to distribute copies of the brochure/flyer developed pursuant to Paragraph 47(e); and

b) at least once a year, hold an Apprentice Program open house at the JAC schools in New York City and Nassau-Suffolk Counties, and the union's branch offices or JAC Schools in New Jersey;

c) at least once a year, prior to the Apprentice Program's Open House, place advertisements in the media listed in Appendix G announcing the Open House and describing sheet metal work and all the procedures for admission to Local 28 and the JACs, including the schedule for indenturing apprentice classes and the hand-on test; and

d) on an on-going basis, advise non-whites working in non-union shops within Local 28's jurisdiction of the procedures for admission to Local 28.

Plaintiffs shall have 30 days to comment upon the written plan and to develop reporting requirements for monitoring it. The Administrator shall consider all submissions, shall revise the plan if he deems it necessary and shall order it into effect by December 1, 1983. Thereafer, the plan may be changed upon application by any party and approval thereof by the Administrator.

47. Prior to the application cutoff date for apprentice selection and the journeyman hands-on test, Local 28 and the Apprentice Program shall undertake an eight week recruitment campaign informing the non-white community of the date, location and nature of such selection methods, and the qualifications therefor. Such a recruitment campaign shall include but not be limited to:

a) advising non-whites working in non-union shops within Local 28's jurisdiction of the procedures for admission into Local 28;

b) visits by a representative of the Apprentice Program and a non-white Local 28 journeyman or apprentice to each of the vocational or technical schools listed in Appendix D;

c) advertisements in the print media listed in Appendix G;

d) requests for weekly Public Services Announcements ("PSAs") on each of the radio stations listed in Appendix G; and

e) developing, with the approval of the plaintiffs and the Administrator, a brochure/flyer describing in some detail what sheet metal work involves and all procedures for admission into Local 28 and the JACs. During each publicity campaign the defendants shall distribute this brochure to the organizations listed in

Appendix D, and upon request to all other interested individuals and organizations.

48. Six weeks prior to the start of a recruitment campaign under Paragraph 47 defendants, with the assistance of the out-reach worker(s), shall submit to the plaintiffs for approval a written plan detailing the particulars of defendants' proposed recruitment campaign.

49. The defendants shall submit to the plaintiffs and the Administrator weekly progress reports detailing their recruitment efforts. These reports shall include, but not be limited to:

a) the number of non-white and white applicants for the journeyman hands-on test and for each apprentice class;

b) the name of each non-white and white applicant who claims to have completed a sheet metal program in a vocational or technical high school;

c) the name of each non-white and white applicant who claims to have two or more years trade experience; and

d) a listing of the sources by which applicants for the various entry methods have heard of Local 28.

Record Keeping/Reports

50. An independent statistical expert ("Advisor") may be appointed by the plaintiffs. Such advisor shall assist defendants in devising a computerized record keeping system which will generate all reports and records required pursuant to the O&J and this Amended Program. The advisor shall also, on a monthly basis, check the integrity of the data base, verify the software program, and authenticate proper entry of the raw data. The advisor shall report to plaintiffs and the Administrator on a monthly basis if that is found to be necessary for the functioning of the system and for compliance with the O&J and the AAAPO. The compensation and expenses of the advisor shall be paid by defendants.

51. On March 15th and September 15th of each year, Local 28 shall submit to the plaintiffs and the Administrator both a geographical census, by former local, and a master census of its membership which shall include the following data:

a) the total number of journeymen of Local 28;

b) the total number of apprentices;

c) the percentage of non-whites; and

d) the name, address, race/national origin, social security number and number of hours worked in the prior six (6) months by each Local 28 journeyman and apprentice.

52. Each week each contractor shall submit to Local 28 and the appropriate JAC manpower reports, Appendix "H", showing, among other things, the name and social security number of each apprentice, by term, and journeyman it employed and the actual number of hours each apprentice and journeyman has worked, identification of new contracts, including start and estimated completion dates and estimated number of work-hours for: (a) apprentices; and (b) journeymen. By the 15th day of each month, Local 28 shall provide to plaintiffs and the Administrator a compilation, in summary form, of the manpower reports it receives from the employers during each week.

53. On March 15th and September 15th of each year, Local 28 shall submit to plaintiffs and the Administrator reports containing the name, address, race/national origin and social security number of apprentice graduates who obtain journeyman status.

54. On the 15th day of each month, Local 28 shall submit to plaintiffs and the Administrator reports containing the name, address, social security number, race/national origin and employer of each permit holder and for each, the date such permit was issued.

55. On March 15th, June 15th, September 15th and December 15th of each year Local 28 shall submit to the plaintiffs and the Administrator the following data:

a) the name and race/national origin of individuals who apply to transfer into Local 28 from an affiliated sister local union;

b) the name and race/national origin of individuals who contact Local 28 or any JAC seeking sheet metal work;

c) the name, race/national origin and name of employer of individuals working in a sheet metal shop at the time the shop is organized by Local 28, and the date the shop was organized;

d) the name and race/national origin of individuals who are reinstated to journeyman membership or membership in any JAC's apprentice program; and

e) the name, race/national origin, social security number, dates of employment and hours worked during the months preceding each reporting date for each journeyman, apprentice and permit holder.

56. Each JAC shall maintain complete records of all applications and other material concerning the selection and work records of apprentices. These records shall include, but not be limited to, an applicant log for each selection showing the name, race/national origin, social security number of each applicant, dates of completion of each step in the application procedure, and disposition of each application.

57. By the 15th of each month each JAC shall submit to the plaintiffs and the Administrator the names of all apprentices who are: (a) terminated from, (b) held back, (c) suspended from, (d) laid off, (e) quit, or (f) advanced in its apprentice program or who have appeared before the JAC and the reason(s) therefor. The report shall contain the reason(s) for the action taken or the reason(s) the apprentice has quit the apprentice program as ascertained by an exit interview. Each JAC must make diligent efforts to conduct an exit interview or explain in writing the reasons why it was not conducted.

58. Defendants shall maintain all records and/or lists in the computer base which are necessary to produce all the reports required pursuant to the O&J and this Amended Program. In addition, Local 28 and the JACs, as the case may be, shall maintain separately for whites and non-whites records and lists containing the following information:

a) applications for journeyman 'hands-on' tests;

b) persons who apply to transfer into Local 28 from an affiliated sister local union;

c) persons working in sheet metal shops at the time they are organized by Local 28;

d) persons who are reinstated to journeyman membership or membership in the Apprentice Program; and

e) persons reinstated to journeyman membership after having previously exercised withdrawal privileges.

The records and lists specified in subsections (a) through (e) of this paragraph shall contain the name, address, race/national origin, or union affiliation, if any, of each individual listed therein, as well as the date of the application, or employment (and the name of the contractor, where applicable), and the disposition with reasons, of each such application.

59. a) Should defendants or any contractors fail to mail any report required by this Amended Program within five (5) days following the date it is due, the defendant or contractor responsible for submitting the report shall be assessed a fine of $200 per day until and including the day the required report is mailed to the plaintiffs and/or the Administrator. Any fine(s) assessed for failure to make timely reports shall be paid into the remedial Fund established pursuant to the Court's August 16, 1982 Contempt Decision and the Order dated August 31, 1983 annexed as Appendix "I".

b) In the event that a reporting requirement cannot be met, a defendant or contractor may seek an extension of time not to exceed five (5) days by sending a written request to plaintiffs

setting forth the extension sought and, in detail, the reason(s) for seeking the extension. The request for an extension must be mailed at least ten working days prior to the first due date of the report. No extension may be granted if requested after this time. A denial of a timely request for an extension may be submitted to the Administrator for determination.

60. All records and lists required to be compiled by the O&J and this Amended Program shall be maintained until such time as the Court terminates this Amended Program and shall be made available for inspection and copying by plaintiffs and the Administrator on reasonable notice during regular business hours or at any other mutually covenient time without further order of the Court. Plaintiffs and the Administrator shall be permitted access to all computer tapes containing records or reports required by the O&J or this Amended Program.

Resolution of Disputes

61. a) David Raff, Esq. shall be the Administrator under this Amended Program

b) The Administrator shall be compensated at a rate of $150.00 per hour and such out-of-pocket expenses as the Court may approve. These fees and expenses shall be paid by Local 28, the Contractors' Association, JAC-New York City, JAC Essex/Passaic Counties, New Jersey, and such other parties and respondents as the Court deems proper.

62. Acting at the request of any party, contractor or any interested person, the Administrator shall hear and determine all disputes concerning the operation of this Amended Program and any claim of violation of this Amended Program.

63. Any party, employer or any individual affected by this Amended Program may make a complaint to the Administrator. The Administrator shall have all parties notice of such a complaint within five days and, where a hearing is warranted, expeditiously schedule such hearing.

64. Any party may apply to the Administrator to modify, amend or add to any form contained in the appendices. Upon

good cause shown the Administrator shall take such action as he deems appropriate.

65. All Administrator's decisions shall be in writing and shall be appealable to the Court.

66. At the first apprentice class meeting of each term, all non-white apprentices shall be provided with written notice that s/he has the right to make a complaint about any matters affecting his or her employment, training, or classroom instruction to the administrator if such matters cannot be resolved by the apprentice directly with the employer or apprentice training coordinator. The notice shall further state that any employer or other person who retaliates against an apprentice for exercising any rights under this Amended Program shall be subject to a contempt of court proceeding.

Miscellaneous

67. Within 15 days following the Court's approval of this Amended Program, Local 28 shall send a copy of this Amended Program by certified mail to each contractor who currently employs Local 28 members, all Contractors' Associations, each officer, director, trustee, committee member or business agent of Local 28, JAC-New York City, JAC-Hudson/Bergen Counties, New Jersey, JAC-Essex/Passaic Counties, New Jersey, and JAC-Nassau/Suffolk Counties, New York. Service by certified mail of the O&J and this Amended Program also shall be made on any contractor who in the future employs Local 28 members. Within 10 days after such service, proof of service shall be provided to plaintiffs and the Administrator and the original thereof filed in court.

68. Pursuant to this court's Orders dated February 1, 1980, November 25, 1981 and March 24, 1982, the Administrator shall, to the extent feasible, integrate any governmentally funded training program into this Amended Program. The Administrator shall be responsible to the court for the proper implementation of both this Amended Program and any governmentally funded training program.

69. Within 30 days of the Court's approval of this Amended Program defendant Contractors' Association shall prepare an "abridged and plain English" version of the Amended Program setting forth the obligations applicable to the contractors covered hereunder. A draft shall be submitted to all the parties and the Administrator. All plaintiffs, defendants, JACs and Contractors' Associations shall have 15 days to comment thereon. Any disputes shall be resolved by the Administrator and the final version shall be mailed by defendant Local 28 to each contractor within 20 days of the Administrator's approval.

70. Nothing contained in this Amended Program should be construed as preventing Local 28's Executive Board from adopting portions of the Amended Program for the benefit of white and other minorities provided that such plans do not interfere with the operation of this Amended Program.

Dated: New York, New York
1983

SO ORDERED:

.....
U.S.D.J

Dated: New York, New York
1983

SO ORDERED:

.....
U.S.D.J

APPENDIX A

° 1. Abbott-Sommer, Inc.
° 2. A.A.B. Co. Sheet Metal Co.
° 3. A Coustechs Sheet Metal Co.
° 4. Air Damper Mfg. Corp.
° 5. Airite Ventilating Co. Inc.
° 6. Allen Sheet Metal Works, Inc.
° 7. Allied Sheet Metal Works, Inc.
° 8. Alpine Sheet Metal & Ventilating Co., Inc.
° 9. Archer Sheet Metal Inc.
°10. Arrow Louvre & Damper Co.
°11. Baychester Roofing & Sheet Metal, Inc.
°12. Bayside Roofing Co., Inc.
°14. Brook Sheet Metal, Inc.
°15. Brumar Sheet Metal Corp.
°16. Builders Sheet Metal Works, Inc.
°17. Bunker Industries, Inc.
°18. Center Sheet Metal
°19. Costal Sheet Metal Corp.
°20. Colonial Roofing Co., Inc.
°21. Columbia Ventilating Co., Inc.
°22. Contractors Sheet Metal, Inc.
°23. Craft Sheet Metal Works, Inc.
°24. Delta Sheet Metal Corp.
°25. Dorite Sheet Metal
°26. Essex Metal Works, Inc.
°27. Fasano Sheet Metal Co., Inc.
°28. J.J. Flannery, Inc.
°29. General Fire Proof Door Corp.
°30. General Sheet Metal Works, Inc.
°31. Gentleman Sheet Metal Limited
°32. Global Services & Installation, Inc
°33. Harrington Associates, Inc.
°34. Howard Martin Co., Inc.
°35. Imperial Damper & Louver Co.
°36. Industrial Metal Fabricators
°37. Karo Sheet Metal Corp.
°38. Kay Roofing Co., Inc.
°39. Kenmar Sheet Metal Corp.

°40. K.G. Sheet Metal, Inc.
°41. L. P. Kent Corp.
°43. A. Munder & Son, Inc.
°44. National Roofing Corp.
°45. Nationwide Acoustic Foil Noise Control Products
°46. New York Sheet Metal Work, Inc.
°48. Penta Sheet Metal Corp.
°49. Perfect Cornice & Roofing Co., Inc.
°50. Pheonix Sheet Metal Corp.
°51. Daniel J. Rice Inc.
°52. Hugh Richards Associates, Inc.
°53. Romar Sheet Metal, Inc.
°54. John Schneider Roofing Contractors, Inc.
°55. Shapiro Equipment Co., Inc.
°56. Simpson Metal Industries, Inc.
°57. Sobel & Kraus, Inc.
°58. Springfield Sheet Metal Works, Inc.
°59. Steeltown Sheet Metal & Iron Works, Inc.
°60. Sumar Sheet Metal, Inc.
°61. A. Suna & Co., Inc.
°62. Louver Lite Corp.
°63. Asco Roofing Corp.
°64. Supreme Fireproof Door Co., Inc.
°65. Swift Sheet Metal Co. Inc.
°66. Swift Sheet Metal Corp.
°67. Tempo Co. Inc.
°68. Herman Thalman Co.
°69. Triangle Sheet Metal, Inc.
°70. Tropical Roofing Co., Inc.
°71. Tuttle Roofing Co., Inc.
°72. Universal Sheet Metal Corp.
°73. Universal Enclosures
°74. Wolkow-Braker Roofing, Corp.
°75. Air-Balancing & Testing, Co.
°76. Air-Conditioning & Balancing Co. Inc.
°77. All Types Stacks & Chutes
°78. Amsco Systems (American Sterilizer)
°79. Architectural Acoustics
°80. Associated Testing & Balancing, Inc.

°81. Bal Test Corps.
°82. Chimney & Chutes, Co.
°83. Circle Acoustics Corp.
°84. Collyer Associates, Inc.
°85. Eastern Acoustic Corp.
°86. Efficient Towers, Inc.
°87. Enslein Bldg. Specialities, Inc.
°88. Ess & Vee Acoustical Contractor, Inc.
°89. Fisher Skylights, Inc.
°90. International Testing & Balancing Corp.
°91. Jacobson & Company, Inc.
°92. Jermiah Burns Interior Systems, Inc.
°93. Johnson Controls
°94. Mechanical Balancing Corp.
°95. John Melen, Inc.
°96. Morse Boulger, Inc.
°97. R. H. McDermott Corp.
°98. Nab Tern Construction
°99. National Acoustics
°100. Quality Erectors
°101. William J. Scully Acoustic Corp.
°102. Superior Acoustics
°103. Systems Testing & Balancing, Inc.
°104. U. S. Chutes
°105. Wetzel Contracting Corp.
°106. Willopee Enterprises
°107. Wolff & Munier, Inc.
°108. Apex Chutes & Manufacturing, Inc.
°109. Modern Sheet Metal Works, Inc.
°110. Calmac Manufacturing, Co.
°111. Coolenheat
°112. De Saussure Equipment, Co.
°113. Industrial Acoustics, Co. Inc.
°114. Industrial Iron & Steel
°115. Insulcoustic/Berma Corp.
°116. Jersey Steel Drum Mfg. Corp.
°117. Kenco Products Corp.
°118. Marathon Industries, Inc.
°119. Phoenix Steel Container Corp.

°120. Rich Manufacturing Corp.
°121. Sternvent Co.
122. Air Balance N.Y.C.
123. Brisk Waterproofing
124. County Sheet Metal Constructors
125. 85/SMI-DNS
126. D.N.S. Sheet Metal Co. Inc.
127. Elgen Manufacturing Company
128. F.S.R. Sheet Metal Corp.
129. Governor Metal Works
130. Intrepid Sheet Metal & Mechanical Inc.
131. Modern Kitchen Equipment Corp.
132. Munro Waterproofing Inc.
133. Pike Industries
134. Peter Quanci
135. W.H. Peepels Company, Inc.
136. Techno Acoustics Inc.
137. Temp-Rite Air Conditioning Corp.
138. Tropical Ventilating Co., Inc.
139. Vern Air Contracting Co., Inc.
140. Weickert Sheet Metal Inc.
141. Wilmar Sheet Metal Corp.
142. Acre Sheet Metal Inc.
143. Air Balancing & Testing Corp.
144. Airmet, Inc.
145. Alco Sheet Metal Fabricators
146. Atlantic Sheet Metal Co.
147. B & F Heating
148. Bonland Industries, Inc.
149. B.S.R. Construction
150. Century Sheet Metal
151. Enviornmental Testing & Balancing Inc.
152. G.P. Systems
153. Haenssler Sheet Metal
154. Hart Mechanical Corp.
155. Midway Sheet Metal
156. Nationwide Installers
157. John P. O'Hara, Inc.
158. Schtiller & Plevy

159. Stevens Contracting Company
160. Tech Associates (Air Balancing)
161. Trinity Roofing Inc.
162. Quality Roofing
163. Ace Sheet Metal Co., Inc.
164. Adams Sheet Metal Co., Inc.
165. Air Control Experts
166. Arctic Sheet Metal
167. Allied Sheet Metal
168. Avon Sheet Metal Co.
169. Bannekar Acoustical Inc.
170. Benmar Conditionaire Corp.
171. Breure Sheet & Metal Co., Inc.
172. Capital Sheet Metal Co., Inc.
173. Effective Air Balance, Inc.
174. Folander Sheet Metal Co., Inc.
175. Max Gurtman & Sons
176. Halo Sheet Metal
177. Frank A. McBride Co.
178. J. Murphy Roofing & Sheet Metal, Inc.
179. Northeastern Air Conditioning Co.
180. Peters & Smith
181. Standard Stainless
182. Sweetwood, Inc.
183. Totowa Metal Fabricators
184. True Air Sheet Metal
185. ABC Sheet Metal Inc.
186. Advanced Roofing & Sheet Metal Company
187. Arkay Company
188. Max Bayroof Company
189. Beers Steel Erecting Corp.
190. Braun Equipment
191. Brisk Waterproofing Company
192. Curtis Equipment Corp.
193. J.B. Eurell Company
194. Haywood-Gordon
195. Hudson Food Company
196. In-Line Metal Fabricators
197. Jansons Associates

198. Mac Sheet Metal Co.
199. Monmec Incorporated
200. N & N Heating & Air Conditioning
201. Pal Sheet Metal
202. President Food Equipment
203. Sanymetal Products
204. Shaw Kitchen Equipment
205. Town Engineering Co.
206. A.C. Associates
207. A & P Sheet Metal
208. Battle Cloud Sheet Metal
209. Bayonne Stainless Products
210. B & P Kitchen Equipment
211. Crown Sheet Metal Co.
212. D & M Sheet Metal Co.
213. Gem Roofing & Waterproofing Co.
214. Hudson Sheet & Metal Inc.
215. Hutcheon & Simon Inc.
216. Jab Construction Enterprises, Inc.
217. K.L.M. Mechanical Construction
218. B. McGirl Inc.
219. National Construction Products
220. Owens Corning Interior Systems
221. J. P. Patti Company, Inc.
222. Henry Rader & Son
223. Schreck & Waelty Inc.
224. Tischler Brothers
225. A & D Steel Equipment Co., Inc.
226. Aberdeen Heating & Air Conditioning
227. Alpat Sheet Metal Corporation
228. Arlan Damper Corporation
229. Berjen Metal Industries
230. Botto Mechanical
231. Bryant Air Conditioning Contr. Inc.
232. Command Construction Corporation
233. Dunwell Heating & A/C Contr. Corp.
234. Echo Roofing
235. Envirotab
236. F.R.P. Sheet Metal Contr. Corp.

237. GFC Contracting Corporation
238. Grantom Mechanical
239. Heritage Sheet Metal Fabricators
240. Imperial Equipment Corporation
241. International Testing & Balancing
242. Jacobson & Co. Incorporated
243. H. Klien & Sons Incorporated
244. Lynbrook Glass & Architectural Metals Corp.
245. L. Martone & Sons Incorporated
246. ABC Mechanical Systems Corporation
247. Alpat Sheet Metal Corporation
248. Anron Air Systems Incorporated
249. Associated Test & Balancing, Inc.
250. Bass Sheet Metal Company, Inc.
251. Brandt-Airflex Corporation
252. C.A.L. Roofing Corporation
253. Craft Roofing Corporation
254. Eastern Metalworks Incorporated
255. Empire Deck & Siding Erectors Inc.
256. Exterior Building Redress Corporation
257. Global Partition Corporation
258. Hamilton Roofing & Sheetmetal Co. Inc.
259. Holbrook Metal Sales Corporation
260. Independent Metal System
261. Island Acoustics Incorporated
262. Jets Sheet Metal Incorpoated
263. Knickerbocker Partition Corporation
264. Marlyn Refrigeration Corp.

M & F Sheet Metal Corporation
Masic Roof Maintenance Limited
Nassau Roofing & Sheet Metal Co.
New York Metal Erectors Incorporated
Oyster Bay Roofing & Sheet Metal Inc.
Park Row Roofing & Sheet Metal Contr.
Quality Sheet Metal Incorporated
Santo J. Ruisi Roofing Co. Inc.
Sefi Fabricators Incorporated
Striker Sheet Metal Incorporated
Suffok Mechanical Corporation

Tric Sheet Metal Incorporated
Triple S. Sheet Metal Co., Inc.
Twin County Sheet Metal Incorporated
Universal Sheet Metal Incorporated
Carl H. Weber Incorporated
A. R. Nelson Company Incorporated
Nicholson & Galloway Incorporated
Pace Sheet Metal Incorporated
Prospect Roofing Company Incorporated
Rosenblatt & Thompson
R. & S. Metal Products & Fireplace Company
Spanos Acoustics Co., Inc.
Suffolk Mechanical Corporation
Town Metal Works Incorporated
Triple M Roofing Corporation
Triple State Sol-Aire Corporation
United Metal Systems Incorporated
A. Wachsberger Roofing & Sheet Metal

APPENDIX B

71 CIV. 2877 (HFW)
STIPULATION AND ORDER
DATED MAY 17, 1983

United States District Court
Southern District of New York

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, and
THE CITY OF NEW YORK,

Plaintiffs,

– against –

LOCAL 638 . . . LOCAL 28 OF THE SHEET METAL WORKERS' INTERNATIONAL ASSOCIATION, and LOCAL 28 JOINT APPRENTICESHIP COMMITTEE . . . SHEET METAL and AIR CONDITIONING CONTRACTORS' ASSOCIATION OF NEW YORK CITY, INC.

DEFENDANTS.

WHEREAS, former Locals 10, 13, 55 and 559 have merged into Local 28 pursuant to directive of General President of the Sheet Metal Workers' International Association AFL-CIO; and

WHEREAS, an order dated April 25, 1983, has been entered in a certain Civil Action No. 487-69(MHC) in the United States District Court, District of New Jersey, entitled "United States Department of Justice-against-Sheet Metal Workers' International Association, Local Union 10, The Joint Apprenticeship and Training Committee of the Sheet Metal

Contractors' Association of Essex and Passaic Counties, New Jersey and Local 10 of the Sheet Metal Workers' International Association" transferring jurisdiction over same to the United States District Court, Southern District of New York (Judge Henry F. Werker); and

WHEREAS, collective bargaining agreements between former Local 10 of Essex/Passaic Counties, New Jersey, former Local 13 of Hudson/Bergen Counties, New Jersey and former Local 55 of Nassau/Suffolk Counties, New York and their respective signatory employers were assumed by Local 28; and

WHEREAS, the terms of these collective bargaining agreements provided for the creation and continuance of Joint Apprenticeship Committees ("JACs") in the geographical areas served by each of these former locals, being comprised of employer and union representatives; and

WHEREAS, by reason of the existing collective bargaining agreements Local 28's Apprentice Program consisting of JAC-New York City, JAC-Nassau/Suffolk Counties, and JAC Essex/Passaic Counties, New Jersey (the latter three herein referred to as the "merged JACs") is entrusted with the operation of an apprentice training program to meet the needs and requirements of the sheet metal trade; and

WHEREAS, it has been represented that JAC-Essex/Passaic Counties, New Jersey, and JAC-Hudson/Bergen Counties, New Jersey neither maintain apprentice schools nor formally indenture apprentice classes at regular intervals, but instead place apprentice applicants in an on-going sheet metal course given at the Essex County Vocational School and the Hudson County Vocational School, respectively, for training as job opportunities become available; and

WHEREAS, it has been represented that JAC-Nassau/Suffolk Counties New York does not formally indenture apprentice classes at regular intervals, but instead trains applicants in an on-going sheet metal course at its own facility as job opportunities become available; and

WHEREAS, it has been represented that the merged JACs cannot strictly comply with the provisions of the Order and

Judgment ("O&J") and the Revised Affirmative Action Program and Order ("RAAPO").

It is hereby Stipulated and Agreed by, between and among the undersigned that the O&J and the RAAPO are binding upon Local 28, JAC-New York City, JAC-Essex/Passaic Counties New Jersey, JAC-Hudson/Bergen Counties New Jersey, JAC-Nassau/Suffolk Counties New York, the Sheet Metal and Air-Conditioning Contractors' Association of New York City, Inc., SMACNA of Long Island, Inc., and the Association of Sheet Metal Contractors of Northern New Jersey.

It is further Stipulated and Agreed that Local 28's Apprentice Program ("Program") is comprised (i) JAC-New York City (ii) JAC-Nassau/Suffolk Counties, New York (iii) JAC-Essex/Passaic Counties, New Jersey. Except as provided in this Stipulation and Order, a Class to be indentured by the Program shall consist of apprentices placed in the various JAC's training courses as set forth herein.

It is further Stipulated and Agreed that until the effective date of a new affirmative action program approved by the Court or unless otherwise indicated herein, the O&J and RAAPO are modified as follows

1. Pursuant to RAAPO Section 18 each merged JAC shall maintain an apprentice program of four (4) years duration or less. The terms and conditions of each apprentice program shall be set forth in each collective bargaining agreement between Local 28 and sheet metal contractors, in the Joint Apprenticeship Trust and Indenture and the rules and regulations thereunder except as modified by the O&J, the RAAPO or order of the Administrator and as further modified in this Stipulation and Order.

2. a) Upon the effective date of this Stipulation and Order and until the next Class of the Program is indentured, the merged JACs shall continue to maintain their respective on-going training courses and to place applicants in those courses as job opportunities become available. Apprentice applicants shall be selected on the basis of one non-white to one white.

b) Until the next Class of the Program is indentured, as jobs become available with employers of the merged locals, before indenturing any new apprentices, each merged JAC must first offer the job to unemployed JAC-New York City apprentices, who must reject the offer.

c) Until the next Class of the Program is indentured, no merged JAC shall indenture more than ten (10) apprentices without the prior written approval of the Administrator.

3. RAAPO Sections 19(b) and (c) are modified to provide that each merged JAC shall forward its recommendation for the number of applicants to be indentured in its on-going training course no later then ten (10) days before the date of indenture to counsel for the parties and the Administrator. Any objections to the recommendations shall be submitted to all other parties and the Administrator no later then five (5) days after the receipt of the JAC's recommendations.

4. RAAPO Section 20(b) is modified to provide that the merged JACs shall make every effort to provide classroom instruction during periods of unemployment and shall credit such hours toward fulfillment of apprenticeship requirements.

5. RAAPO Section 20(c)(iv) is modified to provide that commencing June 1983 the merged JACs shall submit monthly reports which shall include all apprentices by name, ethnic status, term, grouping and name of contractors that the apprentices are assigned to.

6. RAAPO Sections 20(d)(i) and (iii) shall not be applicable to the merged JACs.

7. RAAPO Sections 23 and 24 and O&J Section 21(b) and (c) are modified to provide that until the next Class of the Program is indentured, the procedure for the use and distribution of the merged JACs respective application forms for applicants to their on-going training courses shall remain in effect.

8. RAAPO Sections 25(a), (b), (c), 26 and 27 shall not be applicable to the merged JACs.

9. RAAPO Sections 29, 30, 31 (a) - (f) and 32 and O&J Section 22(c) shall not be applicable to the merged JACs.

10. RAAPO Sections 35(b) and (c) are modified to provide that six (6) months after the effective date of this Stipulation and Order and at intervals of six (6) months thereafter, each merged JAC shall furnish a report giving the names of all non-white apprentices and the names of the contractors to which each was referred. Such report shall be a summary of the reports required to be filed monthly pursuant to RAAPO Section 20(c) as modified herein.

11. O&J Section 21(j) as modified to provide for such amendments or modifications as set forth in this Stipulation and Order.

12. Commencing June 1983, Local 28 and the JACs shall maintain and submit such information as set forth in RAAPO Sections 33(a) - (p) and O&J Section 21(e).

13. Apprentices who have completed or shall complete their respective training courses in the merged JACs are considered journeymen members of Local 28 upon the payment of their initiation fees.

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14. The parties hereto reserve their right to appeal from any order or judgment of the Court including but not limited to a modification of the RAAPO or a new affirmative action plan.

Dated: New York, New York
May 17, 1983

FREDERICK A. O. SCHWARZ, JR.
Corporation Counsel
Attorney for Plaintiff
City of New York
100 Church Street
New York, New York 10007

By: .....
CHARLES R. FOX

LOCAL 28
SHEET METAL WORKERS'
INTERNATIONAL ASSOCIATION

By: .....

SPENCER H. LEWIS
Acting Regional Attorney
E.E.O.C.
90 Church Street
New York, New York 10007

By: .....
RICARDO CUEVAS

JOINT APPRENTICESHIP
COMMITTEE–NEW YORK CITY –

By: .....

ROBERT ABRAMS
Attorney General
2 World Trade Center
Room 45-08
New York, New York 10047

By: .....
SHEILA ABDUS-SALAAM

JOINT APPRENTICESHIP
COMMITTEE – ESSEX – PASSAIC
COUNTIES, NEW JERSEY

By: .....

JOINT APPRENTICESHIP
COMMITTEE
– HUDSON – BERGEN
COUNTIES, NEW JERSERY

By: .....

JOINT APPRENTICESHIP
COMMITTEE
– NASSAU – SUFFOLK
COUNTIES, NEW YORK

By: .....

SMACNA OF LONG ISLAND,
INC.

By: .....

APPENDIX C

JOINT APPRENTICESHIP COMMITTEE & TRUST APPLICATION FOR APPRENTICE PROGRAM

No. _____

How did you hear about Local 28?

_____

(Community Center, Flyer, Friend, Local 28 — Please circle or write in others.)

All information will be held in strictest confidence.

PLEASE PRINT

1. Name _____ 2. Soc. Sec. # _____
3. Address _____

   c/o _____ Apt. # _____
4. City _____ State _____ Zip Code _____
7. Date of Birth ____ Age _____ 8. Telephone No. ____
9. Race/National Origin (Check One) _ Black _ Caucasian
   (To comply with Federal Court Order)
   _____ Spanish-Surnamed _____ Asian
   _____ American Indian _____ Other
10. Have your ever served in the armed services? _____
    If yes, date entered _____ Date discharged _____

What was your job in the service? _____

_____

What is your present condition of health? _____

_____

12. Describe any physical disabilities _____

_____

13. Are you a U.S. citizen or resident alien who is allowed to work (green card.)? _____

_____

14. Trade work experience, if any. (Add additional pages, if needed.)
Employer: _____ Telephone #: _____
Address: _____
Description of your job: _____
_____
Types of tools or equipment you used: _____
_____
Dates of employment: From _____ To _____

15. Formal vocational education, if any.
School: _____
Address: _____
Description of course: _____
_____
Dates attended: From _____ To _____
School: _____
Address: _____
Description of course: _____
_____
Dates attended: From _____ To _____

16. List any math, blue printing reading, mechanical drawing, or drafting classes you completed after the 9th grade. _____
_____

17. If you have six months or more of either previous experience or vocational education in sheet metal construction work, do you wish to apply for advanced placement? The age for advanced placement is extended to thirty-five (35)?

YES _____ NO _____

18. Are you enrolled or have recently been enrolled in an apprenticeship program? _____

_____

19. Is there anything else about yourself that you would like to tell us, such as: special skills, hobbies, crafts, community work, etc.?

_____

_____

_____

I authorize investigation of all the statements contained in this application. I understand that willful misrepresentation of information or intentional deletion of pertinent information called for in this application will be sufficient cause for rejection from consideration as an applicant or immediate dismissal from the Apprentice Program. Further, I understand and agree, if I am accepted into the Apprentice Program, that my employment is for no definite period. I agree, if an apprentice, that I shall comply with all the terms and conditions set forth by the J.A.C. I certify that the information given above is correct and true.

_____ _____

Date Signature of Applicant

SEND APPLICATION BY _____, 1983

APPENDIX D

New York State Division of Employment (Department of Labor)

Department of Employment of the City of New York

Bureau of Labor Services of the City of New York

Recruitment and Training Program Inc. (RTP)

Fight Back

Black Economic Survival

Regional Neighborhood Manpower Services Centers of New York City

New York City Board of Education (Public High School and Evening Trade Divsion)

New York Urban League

National Association for the Advancement of Colored People

National Association for Puerto Rican Civil Rights

New York Project Equality

Commonwealth of Puerto Rico

Opportunities Industrialization Center of New York, Inc.

Bedford Stuyvesant Restoration Corp.

New York City Human Rights Commission

New York State Division of Human Rights

Commonwealth of Puerto Rico Department of Labor, New York City

All-Craft Foundation

New York City Association of Women in Construction

State Communities Aid Association

Non-traditional Employment for Women

National Puerto Rican Forum

New York Urban Coalition

Aspira

Private Industry Council

Economic Opportunity Center of Nassau, Inc.

Economic Opportunity Center of Suffolk, Inc.

Local Action Center of Riverhead

Ms. Mary Treadwell

La Union Hispanica de Suffolk

North Hempstead Community Development

Wyandach Community Development Corporation

Rural New York Farmworkers, Inc.

Circulo de la Hispanidad, Inc.

Urban League of Long Island

L.I. P.R.E.P.

Long Island Affirmative Action Programs, Inc.

Ralph McKee Evening Trade School

Bergan Vocational Technical School

Chelsea Vocational High School

Manhattan Vocational-Technical High Schools

William Grady Vocational High School

Thomas Edison Vocational

William Grady Vocational

Queens Evening Trade School

Manhattan Trade School

Brooklyn Technical Evening Trade School

Boards of Cooperative Educational Service

Bureau of Apprenticeship and Training (N.Y.S. Department of Labor)

Union Free School District of Mineola

National Organization of Women — South Shore Chapter

National Organization of Women — Nassau Chapter

Human Resources Development Institute

Apprenticeship Outreach Program

APPENDIX E

LOCAL 28 OF THE SHEET METAL WORKERS' INTERNATIONAL ASSOCIATION APPLICATION FOR JOURNEYMAN "HANDS-ON" EXAMINATION

No. _____

How did you hear about Local 28?

_____

(Community Center, Flyer, Friend, Local 28 — Please circle or write in others.)

All information will be held in strictest confidence.

PLEASE PRINT

1. Name _____ 2. Soc. Sec. # _____
3. Address _____
4. City _____ State _____ Zip Code _____
5. Date of Birth _____ Age _____ 6. Telephone No. _____
7. Race/National Origin (Check One) _ Black _ Caucasian

   (To comply with Federal Court Order)

   _____ Spanish-Surnamed _____ Asian
   _____ American Indian _____ Other
8. Have your ever served in the armed services? _____

   If yes, date entered _____ Date discharged _____
9. Describe any physical disabilities _____

_____

_____

10. Are you a U.S. citizen or resident alien who is allowed to work (green card.)? _____

_____

11. Trade work experience or vocational experience, if any.

Employer or Vocational School	Address/ Phone #	Date Employed or Attended	Kind of Work tools used

13. Please describe any other related experience or training in construction _____

14. Are you enrolled in an Apprenticeship Program affiliated with the Sheet Metal Workers' Association? _____

I authorize investigation of all the statements contained in this application. I understand that willful misrepresentation of information or intentional deletion of pertinent information called for in this application will be sufficient cause for rejection from consideration as an applicant or immediate dismissal from the Union. Further, I understand and agree, if I am accepted into the Local 28, that my employment is for no definite period. I agree, that I shall comply with all the terms and conditions set forth by the Local Union 28 and the Sheet Metal Workers' International Association's Constitution and Ritual. I certify that the information given above is correct and true.

Date _____ Signature of Applicant _____

SEND APPLICATION BY _____, 1983

APPENDIX F

SHEET METAL WORKERS' INTERNATIONAL
ASSOCIATION
LOCAL UNION NO. 28
1790 BROADWAY
NEW YORK, NY 10019

REQUEST FOR PERMIT MEN

1. NAME OF EMPLOYER: _____

   ADDRESS: _____

   PERSON TO CONTACT: _____

   PHONE: _____

2. CURRENT EMPLOYEES: Number of Journeymen _____

   Number of Apprentices _____

3. *EFFORTS TO OBTAIN JOURNEYMEN:*

Name and race/ national origin of each Local 28 Unemployed Journeyman	Period Unemployed	Date(s) Local 28 Contacted Unemployed Local 28 Journeyman Re. Job	Date(s) Contractor Contacted Local 28 Re. Job	Date Offer of Work Was Rejected

4. a) Number of apprentices requested in past six months: ___

   b) Number of apprentices hired in past six months: _____

5. NUMBER OF PERMIT MEN REQUESTED: _____

6. IS A SPECIAL SKILL NECESSARY FOR THE JOB THE PERMIT MAN IS TO BE ASSIGNED TO? IF SO, WHAT IS THAT SPECIAL SKILL?

_____

_____

_____

7. APPROXIMATE LENGTH OF TIME PERMIT MEN WILL BE EMPLOYED: _____

_____

8. APPROXIMATE DATE WHEN COMPANY FIRST EXPERIENCED DIFFICULTY OBTAINING JOURNEYMEN FOR JOBS: _____

9. LIST MAJOR JOBS UNDER CONTRACT:

_____

_____

_____

The undersigned hereby certify and affirm under penalty of perjury that diligent efforts were made by this employer and union to hire Local 28 members to fill the positions requested and these efforts have failed.

_____ _____

SIGNATURE OF EMPLOYER DATE

TITLE: _____

_____ _____

SIGNATURE OF UNION OFFICER DATE

TITLE: _____

APPENDIX G

Non-White Media in Local 28s Jurisdiction

Amsterdam News
2340 Frederick Douglas Boulevard
New York, New York
678-6000

El Diario-La Prensa
181 Hudson Street
New York, New York 10013
966-5040

New Jersey Afro American Newspaper
11 Hill Street
Newark, New Jersey
(212) 622-2043

Impacto Latin News
1247 A St. Nicholas Avenue
568-7957

El Mundo Newspaper De Puerto Rico
41 East 42nd Street
682-0886

Harlem Weekly
401 5th Avenue
New York, New York
532-8300

Big Red
200 West 57th Street
New York, New York
944-2233

The Black American
41 Union Square
New York, New York
255-5046

WBGO FM Newark
WNJR AM Newark

New York City

WLIB (FM)(AM)
WWDJ (FM)
WWRL (FM)
WYSR Stamford, Conn. (FM)
WADO (AM)
WBNX (AM)
WHOM (AM)
WBLS (FM)

APPENDIX II

WEEKLY CONTRACTOR REPORT

Date: _____

1. NAME OF EMPLOYER: _____

   ADDRESS: _____

   PERSON TO CONTACT: _____

   _____ PHONE: _____

2. **JOURNEYMAN EMPLOYMENT CHART:**

Name of each journeyman	Race or National Origin*	Hours Worked**

3. **APPRENTICE EMPLOYMENT CHART:**

Name of each apprentice	Term	Race or National Origin*	Hours Worked**

4. **PERMIT EMPLOYMENT CHART:**

Name of each Permit Holder	Original Local	Race or National Origin	Hours Worked

5. During the past week, have you bid for any new contracts:

   Yes: ____ No: ____

---

* White = "W"
  Black = "B"
  Spanish Surnamed = "SS"
  Other = "O"

** Include *all* overtime

6. During the past week, have you been awarded any new contracts:

Yes. _____ No: _____

If yes, list below the name, address, and telephone number of the awarding agency or company, the contact person at each, and the location of the construction site:

_____

_____

_____

_____

_____

7. How many hours of work will the job take for:

Journeymen _____

Apprentices _____

Number of Journeymen needed: _____

Number of apprentices needed: _____

8. On what date will the work begin: _____

What date is completion of work expected _____

9. Has there been a change on any of the above items on a contract previously awarded and for which a Contractor's Report was filed:

Yes: ____ No: ____

If yes, attach an amended report to this report.

10. List all jobs now under contract:

_____

_____

_____

_____

_____

The undersigned hereby affirms under penalty of perjury that the above information is true and accurate.

. . . . . .

Date Signature of Employer

. . . . . .

Title

71 CIV. 2877 (HFW)
AMENDED PROCEDURES
FOR IMPLEMENTING THE
ORDER ESTABLISHING
AN EMPLOYMENT,
TRAINING, EDUCATION
AND RECRUITMENT FUND

United States District Court
Southern District of New York

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION and
THE CITY OF NEW YORK,

Plaintiffs,

– against –

LOCAL 638 . . ., LOCAL 28 OF THE SHEET METAL WORKERS' INTERNATIONAL ASSOCIATION, LOCAL 28 JOINT APPRENTICESHIP COMMITTEE... SHEET METAL and AIR CONDITIONING CONTRACTORS' ASSOCIATION OF NEW YORK CITY, INC., *et al.*,

Defendants.

HENRY F. WERKER, D.J.

By order dated August 31, 1983, this Court established the Local 28 Employment, Training, Education and Recruitment Fund (the "Fund Order"). To carry out the directives of the Fund Order,

It is hereby ORDERED that:

1. The Fund account is to be a separate account of the Sheet Metal Workers' Union, Local 28 Education Fund. The sole purpose of this account shall be for the receipt of monies to be paid into the Fund pursuant to the Fund Order, and disbursement of such monies as are permitted by the terms of the Fund Order and the Procedures established herein.

2. In order to effectuate the Fund Order or these procedures, the Trustees of the Education Fund shall take any action directed by the Administrator, including but not limited to, issuing any necessary resolutions or making any amendments to the Trust Indenture.

3. Pursuant to terms of the Fund Order, monies may be drawn from the Fund account only upon a two-signature authorization with the Administrator being a necessary signatory.

4. The Administrator shall establish a separate operating checking account to carry out the day-to-day operations of the Fund. Monies shall be transferred from the interest-bearing Fund account to the operating account pursuant to the following:

A. The Administrator shall develop and submit to the City, State and EEOC an annual line item budget detailing the sums of monies to be spent for each of the Fund's functions, staff, administrative and overhead costs. Copies of the budget shall be provided to all other parties.

B. Upon receipt of the Administrator's proposed budget, the parties shall have twenty (20) days to submit to the Administrator their comments and/or objections. After review of the comments and/or objections, the Administrator shall issue a final budget. Any party may appeal the Administrator's final budget, within ten (10) days of its issuance, to the Court.

C. Upon issuance of the final budget, monies shall be transferred from the Fund account to the operating account on a semi-annual basis.

D. In the event that either the Administrator or a party believes that monies in addition to the final budget need to be drawn, or a new item must be added to the budget, or

there is a need for an adjustment within the budget, the Administrator or requesting party shall submit to all other parties a proposed budget modification. The other parties shall offer their comments and/or objections to the Administrator within twenty (20) days of receipt of the proposed budget modifications. The right of appeal shall be pursuant to subparagraph B above.

E. The fidelity bond required by the Fund Order shall be in an amount of not less than $400,000 for each individual covered by such bond.

5. The City, State and EEOC shall monitor the operations of the Fund and shall have access to the Fund's staff to discuss any matters related to the Fund's operation. The City, State and the EEOC shall also have the right, at any time, to inspect the books and records of both the Fund account and the operating account.

6. A certified accounting firm shall be retained by the Administrator to thoroughly review the bookkeeping for the Fund and such firm shall conduct an annual audit of the Fund's financial records. A financial statement of the annual audit shall be submitted to the court and all parties once each year for every year that the Fund remains in existence.

Dated: New York, New York /s/ HENRY F. WERKER
October , 1983 U. S. D. J.

MEMORANDUM & ORDER
71 CIV. 2877 (HFW)

United States District Court
Southern District of New York

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, and
THE CITY OF NEW YORK,

Plaintiffs,

– against –

LOCAL 638 . . . LOCAL 28 OF THE SHEET METAL WORKERS' INTERNATIONAL ASSOCIATION, LOCAL 28 JOINT APPRENTICESHIP COMMITTEE. . . SHEET METAL and AIR CONDITIONING CONTRACTORS' ASSOCIATION OF NEW YORK CITY, INC., *et al.*,

Defendants.

HENRY F. WERKER, D.J.

Pursuant to the court's directive in its Memorandum & Order dated April 11, 1983, plaintiffs, the Equal Employment Opportunity Commission ("E.E.O.C.") and the City of New York ("City"), have submitted a proposed Amended Affirmative Action Program and Order ("AAAPO"). As required by the court's Memorandum & Order, the Administrator participated in the preparation of the AAAPO. The State of New York ("State"), which originally was named as a defendant in this action, but subsequently was realigned with plaintiffs, also took part in the formulation of the AAAPO. The E.E.O.C. and the City now move for an order approving the AAAPO. In response,

defendants have submitted and seek approval of their own Amended Affirmative Action Program and Order.

The court approves plaintiffs' AAAPO, subject to the changes that the court has made on its copy of the AAAPO, and rejects defendants' proposed Amended Affirmative Action Program and Order. In reaching that decision, the court has read and considered the papers submitted by the E.E.O.C. and the City, the Administrator, the State and defendants. The court also has made use of the twelve years of experience it has had in this case.

The major change that the court has made to the AAAPO is to eliminate the provisions for apprenticeship examinations. It repeatedly has been claimed that these tests impact adversely on non-whites. Any agreement as to their validity appears to be impossible. Moreover, the examinations are costly to administer. The court finds that the violations that have occurred in the past have been so egregious that a new approach must be taken to solve the apprentice selection problem. Therefore, the court has adopted a selection method that should provide credible results without the need for formal examinations.

It is the court's hope that, as a result of the fines that it has and will assess, defendants will conclude that it is too expensive to continue to violate the court's orders and will make a real and substantial effort to bring an end to the obvious and pernicious discriminatory practices that permeate this trade.

Plaintiffs, together with the State and the Administrator, are directed to revise the AAAPO in accordance with the changes made on the court's copy of the AAAPO and to submit it to the court within ten (10) days of the entry of this Order.

SO ORDERED.

Dated: New York, New York
August 31, 1983

/s/ HENRY F. WERKER
U. S. D. J.

ORDER ESTABLISHING AN EMPLOYMENT, TRAINING, EDUCATION AND RECRUITMENT FUND
71 Civ. 2877 (HFW)

United States District Court
Southern District of New York

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION and THE CITY OF NEW YORK,

Plaintiffs,

– against –

LOCAL 638 . . . LOCAL 28 OF THE SHEET METAL WORKERS' INTERNATIONAL ASSOCIATION, LOCAL 28 JOINT APPRENTICESHIP COMMITTEE . . . SHEET METAL AND AIR CONDITIONING CONTRACTORS' ASSOCIATION OF NEW YORK CITY, INC., *et al.*,

Defendants.

HENRY F. WERKER, D. J.

The Court, on August 16, 1982, having held defendants Local 28, the Joint Apprenticeship Committee ("JAC") and the Sheet Metal and Air Conditioning Contractors' Association of New York City, Inc. ("Contractors' Association") in civil contempt ("contempt decision") for their failure to comply with the Order and Judgment entered on August 28, 1975 ("O&J") and the Revised Affirmative Action Program and Order entered on January 19, 1977 ("RAAPO"), and

The Court having imposed a fine upon defendants, and having directed that such fines be placed in a Fund "for the purpose of developing the apprenticeship program with an eye toward increasing the non-white membership of the program and the union," and

The Court having found that an additional fine was necessary to coerce future compliance, and

The Court having determined that additional fines should be imposed upon Local 28 and the JAC as the result of the Court's adoption on August 21, 1983 of the Administrator's Memorandum Decision dated May 18, 1983 ("memorandum decision"), in which he found that these defendants further had violated the O&J and the RAAPO,

It hereby is ORDERED that:

1. There shall be established an interest-bearing account at the Manufacturers Hanover Trust Company located at 277 Broadway, New York, New York to be called "the Local 28 Employment, Training, Education and Recruitment Fund" ("Fund"). This Fund shall be used for the purpose of remedying discrimination. The Fund shall be administered by plaintiffs and the Administrator jointly with two-signature control. This Fund shall be in addition to any funds already established by defendants for the purpose of promotion, employment, training, education and recruitment, and shall be used solely for the benefit of nonwhites.

2. A fidelity bond shall be filed on behalf of plaintiffs and the Administrator to cover the administration of the Fund. The expense therefor shall be paid by defendants annually in addition to any other expenses or fines imposed.

3. The Fund shall remain in existence until the goal set forth in the Amended Affirmative Action Program and Order ("AAAPO"), which the Court today has approved, is achieved and until the Court determines that it is no longer necessary.

4. The monies for the Fund shall come from the following sources:

a. Defendant Local 28, which was found in contempt by the Court's August 16, 1982 contempt decision, shall pay into the Fund on a quarterly basis two cents ($0.02) for each journeymen and apprentice hour worked, including overtime. This amount shall increase, on each anniversary date of this Order, at a rate of two-tenths of one cent ($0.002) per year until the Fund is terminated by the Court. Such payment shall be in lieu of both the coercive fines ordered by this Court in the contempt decision, and a fine for the violations of the O&J and RAAPO as found in the Administrator's May 18, 1983 memorandum decision.

b. The Contractor's Association and the JAC, which were found in contempt by the Court's August 16, 1982 contempt decision, shall pay, on a monthly basis, all staffing, out-of-pocket and overhead costs related to the administration of the Fund and the programs created thereunder, and any governmentally funded training program. Such payment for the Contractor's Association and the JAC shall be in lieu of the coercive fines ordered by the Court in the contempt decision. In addition, the JAC's share shall be in lieu of a fine for the violation of the RAAPO as found in the Administrator's May 18, 1983 memorandum decision.

c. The fines previously imposed upon any defendant shall be paid into the Fund.

d. Any fines that may be imposed after the date of this Order against any defendant, employer or respondent for violation of any provision or term of the Court's or the Administrator's orders shall be paid into the Fund.

e. Plaintiffs may elect to pay into the Fund any attorney's fees awarded in this case.

f. Contributions from any Local 28 employer who wish to contribute towards the advancement of the AAAPO shall be paid into the Fund.

5. Upon termination of the Fund:

   a. plaintiffs shall recover any remaining funds, up to the amount paid in, pursuant to paragraph 4(e) above; and

   b. defendants, upon approval of the Court, may recover any remaining funds over the amount returned to plaintiffs.

6. The Fund shall be used for the following purposes:

   a. Establishing a tutorial program of up to 20 weeks duration for nonwhite first-year apprentices.

   b. Creating part-time and summer sheet metal jobs for nonwhite youths between the ages of 16 through 19 who are currently enrolled in or have successfully completed, within the past year, a sheet metal vocational or technical education program or a program in an allied trade requiring the use of tools, math or drafting, such as carpentry.

   c. Paying the expenses, including any lost wages, of nonwhite members and apprentices of Local 28 for their services as liaisons to vocational and technical schools having sheet metal programs. The duties of the liaisons shall include, but not be limited to, the following: working with the schools to upgrade the sheet metal program, arranging trips to sheet metal shops and field sites, counseling the students on methods of entry into Local 28 and working with participants in the program set forth in paragraph 6(b) above. The JAC training coordinators and union officials shall cooperate fully with the liaisons in the effort to carry out this program.

   d. Appointing a counselor or counselors, whose duties shall include, but not be limited to, the following: monitoring the progress of nonwhite apprentices at each JAC school and on the job, providing nonwhite apprentices with personal and job-related counseling and assisting nonwhite apprentices in adjusting to

their school and work environments to help ensure their successful completion of the Apprenticeship Program. The counselor(s) shall be selected and supervised by the Administrator subject to approval by plaintiffs and the Court. Defendants and all Local 28 contractors shall cooperate fully with the counselor(s). Every two months, and at the end of each apprenticeship term, the counselor(s) shall submit to the parties, the Administrator and the Court a report detailing the progress of nonwhite apprentices and setting forth recommendations to resolve any problems nonwhite apprentices may be encountering.

e. Providing stipends to unemployed nonwhite apprentices while they attend their regular apprentice class and any additional classes that will be offered to such apprentices pursuant to the AAAPO.

f. Establishing a low-interest loan fund for nonwhite first-term apprentices who demonstrate financial need.

g. Providing stipends to unemployed nonwhite journeymen while they take advanced courses to upgrade their skills.

h. Providing financial reimbursement to any employer who has demonstrated to plaintiffs' satisfaction that it cannot afford to hire an additional apprentice to meet the one-apprentice-to-every-four journeymen requirement of the AAAPO.

i. Providing incentive or matching funds to attract additional funding from governmental or private job training programs, such as the Dislocated Worker Program established pursuant to Title III of the Job Training Partnership Act. 29 U.S.C. §§1651–1658.

j. Additional expenditures may be made from the Fund upon a showing by any party that such an expenditure would serve to increase the nonwhite membership of the union and the Apprentice Program, or to provide

support services to nonwhites. The party submitting authorization for withdrawal of monies from the Fund must first circulate a written proposal to all other parties and the Administrator detailing the amount requested and how the money would be expended. If all parties agree to such a proposal or, if the parties cannot agree, and the Administrator determines that the proposal should be funded, the Administrator shall authorize the withdrawal of an appropriate amount from the Fund.

7. The Administrator is empowered to take appropriate action to assure the implementation of this Order and to hear and decide any complaints thereunder.

8. This Order is supplementary to the relief mandated by the O&J and the RAAPO and shall be included, by reference, in the AAAPO and in any new affirmative action program that may be entered in this action.

SO ORDERED.

DATED: New York, New York /s/ HENRY F. WERKER
August 31, 1983 U.S.D.J.

MEMORANDUM & ORDER
71 CIV. 2877 (HFW)

United States District Court
Southern District of New York

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION and THE CITY OF NEW YORK,

Plaintiffs,

– against –

LOCAL 638 . . ., LOCAL 28 OF THE SHEET METAL WORKERS' INTERNATIONAL ASSOCIATION, and LOCAL 28 JOINT APPRENTICESHIP COMMITTEE . . . SHEET METAL and AIR CONDITIONING CONTRACTORS' ASSOCIATION OF NEW YORK, INC., *et al.*,

Defendants.

HENRY F. WERKER, D.J.

After trying this case from January 13, 1975 through February 3, 1975, the court concluded that the imposition of a nonwhite membership goal was necessary to correct defendants' past discriminatory practices and set the goal at 29%. *E.E.O.C. v. Local 638*, 401 F. Supp. 467, 488–89 (S.D.N.Y. 1975), *aff'd as modified*, 532 F.2d 821 (2d Cir. 1976). Subsequently, Locals 10, 13 and 55 were merged into Local 28. The court therefore directed the parties to submit information on any impact that the merger had on the goal originally set by the court. The parties have done so and have employed the services of experts to

support their respective contentions. Based upon the studies conducted by Dr. Harriet Zellner, plaintiffs assert that the goal should be adjusted to somewhere between 33% and 41%. Defendants, on the other hand, claim that the goal should be reduced to 21.7%, relying on the conclusions of Dr. Richard G. Buchanan.

Turning first to defendants' position on the goal, the court finds that Dr. Buchanan's studies are so infested with improper calculation methods that his findings must be rejected. To begin with, Dr. Buchanan has defined the relevant labor pool in terms of males 25 years of age and older possessing sheetmetal work skills. With respect to the age group, the court determined in its post-trial opinion that the starting age of the relevant labor pool was 18. 401 F. Supp. 467, 488–89. Nothing has happened since that time that would justify a change in that determination. Indeed, it was established long ago that 90% of Local 28's journeymen enter through the apprentice program. Under the rules of that program, the applicant must be 18 to 25 years of age at the time of admission. The court therefore finds that the age of entry into the pool should remain at 18. Furthermore, because the overwhelming majority enter through the apprentice program where they acquire the requisite skills, the relevant labor pool cannot be restricted to those already possessing sheetmetal work skills. Rather, the pool must include those most likely to enter the apprentice program, who, in this case, are blue collar workers (operatives and laborers).

In addition, Dr. Buchanan improperly has employed a weighting procedure to determine what the goal should be. What he did was to ascertain the percentage of nonwhites to the total number of persons within his defined labor pool for each of the 25 counties from which the merged locals draw their members. He then gave each county a weight that was premised upon the number of journeymen and apprentices residing in that county. The nonwhite ratio for each county was then multiplied by the weight assigned to that county. The goal, as determined by Dr. Buchanan, constitutes the total of the weighted ratios for each county.

Without addressing the validity of weighting in general, the court finds that the procedure is inappropriate in this case because of the notorious history of racially discriminatory recruiting practices on the part of the locals. *See Clark v. Chrysler Corp.*, 673 F.2d 921, 928 (7th Cir.), *cert. denied*, 103 S. Ct. 161 (1982). Moreover, there are extreme differences in the size of the nonwhite populations of each county and the number of members living in each county. The result is that, in many instances, a county with a high nonwhite population is accorded less weight than a county with a low nonwhite population. For example, as illustrated by Dr. Zellner, black males over the age of 25 constitute 21% of the population of New York county but only 3.5% of the population of Nassau. Yet, only 7% of the merged locals' apprentices live in New York county while 21% live in Nassau. This means that, under Dr. Buchanan's weighting approach, New York county's relatively high black population is given one-third the weight that is given to the relatively low black population of Nassau. This obviously is unacceptable.

For these and other reasons that will not be elaborated upon, the court finds that the methods employed by Dr. Buchanan are so clearly misdirected as to lead to the conclusion that they were used in a conscious effort to result in depressed findings. The court is not at all persuaded by his conclusions, which are abitrary and lack any rational basis.

As to plaintiffs' stand on the goal, the court finds that Dr. Zellner's methods and analyses are more appropriate for this case. Yet her ultimate conclusion that the goal should be increased to somewhere between 33% and 41% is unacceptable. One of the reasons why Dr. Zellner has determined that the goal should be increased is her opinion that women should be included in the relevant labor pool. The court sees no reason whey women should be excluded from the pool especially since the merged locals currently contain female members. The inclusion of women, however, does not justify the increases suggested by Dr. Zellner.

In her affidavit sworn to on June 3, 1983, Dr. Zellner has separated her conclusions based upon the 1970 census into the following age groups: 18–24, 18–29 and 18–34. Her findings

under the 1980 census have been made for the 16 years of age and older category. She has determined that the minority availabilty rate for the relevant labor pool is 32.53% in the 18–24 year age group (Table 5), 37.34% in the 18–29 year age group (Table 6) and 39.29% in the 18–34 year age group. (Table 7), using the 1970 census. Under the 1980 census, Dr. Zellner has found that the minority availability rate is 40.70% in the 16 years of age and older category. The Appendix Tables of her affidavit, however, show different and lower results for the data based on the 1970 census. According to the Appendix Tables, the minority availability rate in the 18–24 year age group is 29.23% (Appendix Table 12), 33.73% in the 18–29 year age group (Appendix Table 15) and 35.65% in the 18–34 year age group. (Appendix Table 18).

Dr. Zellner has not explained the disparities in the results of her Tables and those of her Appendix Tables. They are not justified by the use of the educational formula employed by the court when it set the goal at 29%, 401 F. Supp. 467, 489 n.27 & 493, because Dr. Zellner specifically states that she did not perform that precedure with respect to Tables 5–7 and 10. Affidavit of Harriet Zellner sworn to June 3, 1983 at pp. 20 & 21. In any event, since the Appendix Table contain population statistics, the court finds that they are more reliable and adopts the minority availability rates contained therein.

The Appendix Tables provide different rates depending upon the oldest age to be used for the relevant labor pool. The court therefore must determine the cutoff age for the pool. Since most of Local 28's journeymen began in the apprentice program, the rules of which require the apprentice to be between the ages of 18 to 25 upon admission, it seems that the most reasonable age group to be used is the 18–25 year group. Dr. Zellner, however, has given no breakdown for the 18–25 year age group, which is surprising in light of the apprentice program rules and in light of Dr. Buchanan's use of age 25 as the starting base. The court therefore must rely on the nearest estimate, which is the 18–24 year age group. As noted above, the minority availability rate for that category is 29.23%. Accordingly, that is the goal that the merged locals must attain.

The court is aware, as it was in 1975, that, in setting an employment affirmative action goal based upon statistical information, certain criteria that do not readily lend themselves to statistical quantification may not be given the proper weight. In this case, these amorphous concepts include overqualification, job preference and trends toward clerical rather than manual labor. Yet the court also is required to "do the best it can" to remedy prior discrimination. *Rios v. Enterprise Ass'n Steamfitters Local* 638, 501 F.2d 622, 632 (2d Cir. 1974). Here, the court has been given two completely conflicting sets of materials upon which to base its decision on the impact that the merger has had on the goal. Since the underlying analyses of plaintiffs' studies are more acceptable than those of defendants, the court has no choice but to adopt plaintiffs' findings.

The new goal of 29.23% essentially is the same as the goal set in 1975. Although defendants were given seven years to attain that goal, see Revised Affirmative Action Program and Order, entered on January 19, 1977, ¶2, they have not. Indeed, they have a long way to go. In addition, they consistently have violated numerous court orders that were designed to assist in the achievement of that goal. The court therefore sees no reason to be lenient with defendants, for whatever reason, and orders that the combined union and apprentice program membership of the merged locals must reach a nonwhite membership of 29.23% by August 31, 1987. If the goal is not attained by that date, defendants will face fines that will threaten their very existence.

SO ORDERED.

DATED: New York, New York
August 31, 1983

/s/ HENRY F. WERKER
U. S. D. J.

NOTES

1. The term nonwhite includes Black and Spanish surnamed individuals. 401 F. Supp. 467, 470 n.1 (S.D.N.Y. 1975).

2. It is the court's opinion that the use of Standard Metropolitan Statistical Areas ("SMSAs") is the proper method of defining the geographical dimensions of the relevant labor pool. Dr. Buchanan's breakdown of population statistics by county contributes little to his analysis. While Dutchess, Sullivan and Ulster counties do not fall within the relevant SMSA, they contain less than 1% of the journeyman membership of the merged locals and 0% of the apprentices. Monmouth and Middlesex counties also are not included in the relevant SMSA, but they account only for approximately 4% of the journeymen and 2% of the apprentices. Only two journeymen and no apprentices live in Atlantic county, which again is outside the relevant SMSA, but also is relatively far removed from the relevant labor market.

3. Since there is no Appendix Table for the 1980 census, the court does not accept Dr. Zellner's conclusions with respect to that census.

ORDER
71 Civ. 2877 (HFW)

United States District Court
Southern District of New York

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, and
THE CITY OF NEW YORK,

Plaintiffs,

– against –

LOCAL 638 . . ., LOCAL 28 OF THE SHEET METAL WORKERS' INTERNATIONAL ASSOCIATION, LOCAL 28 JOINT APPRENTICESHIP COMMITTEE . . . SHEET METAL AND AIR CONDITIONING CONTRACTORS' ASSOCIATION OF NEW YORK CITY, INC., *et al.*,

Defendants.

HENRY F. WERKER, D. J.

Plaintiff the City of New York ("City") having moved before the Administrator by order to show cause dated April 11, 1983 for an order determining that defendants Local 28 and the Joint Apprenticeship Committee ("JAC") have violated various provisions of the Order and Judgment ("O&J") entered on August 28, 1975 and the Revised Affirmative Action Plan and Order ("RAAPO") entered on January 19, 1977, and

the Court having read the papers submitted by the parties to the Administrator in support of their respective contentions on the motion and the transcript of the hearing on the motion held before the Administrator on April 29, 1983, and

the Court having read the Administrator's Memorandum Decision dated May 18, 1983 in which he found that Local 28 and the JAC have violated the O&J and RAAPO, and

the Court having read the objections submitted by Local 28 and the JAC to the Administrator's Memorandum Decision dated May 18, 1983 and various other relevant documents, it is

ORDERED that the Administrator's finding, as contained in his Memorandum Decision dated May 18, 1983, that Local 28 and the JAC have violated the O&J and RAAPO is adopted by the Court, and Local 28 and the JAC hereby are held in civil contempt. The imposition of fines will await the Court's determination with respect to the issue of the establishment of an employment, training, education and recruitment fund, and it further is

ORDERED that the Administrator's recommendation, as set forth in his Memorandum Decision dated May 18, 1983, that a computerized record-keeping system be developed and maintained by an independent management firm and that Local 28 and the JAC be required to pay for the system is approved, and it further is

ORDERED that Local 28 and the JAC forthwith comply with that recommendation, and it further is

ORDERED that Local 28 and the JAC pay the City the costs and attorney's fees expended on bringing on the order to show cause before the Administrator, and it further is

ORDERED that the City submit to the Court, on notice to the Administrator, Local 28 and the JAC, a detailed schedule of the costs and attorney's fees expended on the order to show cause within twenty (20) days of the entry of this Order.

SO ORDERED.

Dated: New York, New York
August 21, 1983

/s/ HENRY F. WERKER
U.S.D.J.

71 CIV. 2877 (HFW)
MEMORANDUM DECISION

United States District Court
Southern District of New York

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, and
THE CITY OF NEW YORK,

Plaintiffs,

– against –

Local 638 . . . Local 28 of the Sheet Metal Workers' International Association, Local 28 Joint Apprenticeship Committee . . . Sheet Metal and Air-Conditioning Contractors Association of New York City, Inc., etc.,

Defendants.

APPEARANCES: *(See last page)*

DAVID RAFF, ADMINISTRATOR

By Order to Show Cause dated April 11, 1983, plaintiff City of New York ("City") brought on a proceeding, pursuant to paragraph 15 of the Order and Judgment (O&J) and section 41(a) of the Revised Affirmative Action Program and Order ("RAAPO"), against defendant Local 28, defendant Joint Apprenticeship Committee ("JAC") and eleven named contractors for alleged violations of various provisions of the O&J and RAAPO.

The Administrator having read the City's Affidavit In Support dated April 11, 1983, Local 28's Affidavit in Opposition dated April 13, 1983, the JAC's and Contractor's Affidavit In Opposition dated April 14, 1983, and the City's Supplemental Affidavit dated April 25, 1983, and having conducted a hearing on April 29, 1983, at which all parties, except DNS, appeared and had the right to submit further evidence, and having reviewed the record, it is my conclusion that defendant Local 28 and defendant JAC have violated the O&J and RAAPO.[1]

VIOLATIONS BY LOCAL 28

At the time of the hearing, the parties broke the alleged violations regarding Local 28 into three categories. I will address each in turn.

1. Failure By Local 28 to Provide Required Records In a Timely Fashion

Local 28 is required to maintain and submit various records which set forth its membership population by, among other

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[1] At the hearing, the City withdrew all allegations of violation against the eleven named contractors. In addition, the City withdrew its allegation against the JAC that it failed to submit proper manpower summary reports with all employer data listed. Subsequent to the hearing, and subsequent to an agreement by all parties on the merger issue, the City withdrew its allegation that Local 28 violated O&J ¶ 21(j) by admitting persons to membership in Local 28 by means other than those provided for by RAAPO. *See* Stipulation of Withdrawal attached hereto as Appendix A.

things, racial and ethnic identification. (*See* RAAPO §33(k) and O&J ¶¶ 21 (e)(xii) (record of "whites and non-whites who are employed as sheet metal workers by Local 28 contractors ... shall be submitted to counsel for the parties herein and the Administrator at least once every three months"), 21(i) ("at least once a year .... Local 28 ... shall submit to the Administrator and the parties herein, a list of *all* members and apprentices of Local 28, with race identification, broken down into the following categories (i) active members; (ii) Pensioners; (iii) apprentices") (emphasis added)). In addition, Local 28 is required to maintain and submit various records which contain information about people entering Local 28 as journeymen or apprentices. With particular relevance is RAAPO § 33(f), which requires Local 28 to submit information regarding "Persons who seek or apply to transfer into Local 28 from an affiliated sister local union ... at least once every three months", and RAAPO § 34(a) which requires Local 28 to submit "the names and ethnic identities of persons admitted into (i) journeyman status in Local 28 ... within 5 days of such admission". (*See also* RAPPO § 34(b) which requires a semi-annual *total membership* census report.)

Effective November 1, 1981, Locals 10, 13, 22,[2] and 559[3] were merged into Local 28 by a merger order, dated October 16, 1981, from the International's President, Edward J. Carlough. On March 23, 1982, a similar merger order was imposed upon Local 55. As a result of those mergers, the former Locals' members were fully integrated into Local 28 and were afforded the full rights and privileges of Local 28 members. (Plaintiffs' Ex. 3 and 4.) Such rights included the right to work anywhere in the expanded geographical area without the need of a work permit from Local 28.

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[2] Local 22 has, by virtue of an election conducted by the National Labor Relations Board, become an independent union, and is no longer affiliated with either Sheet Metal Workers' International Association or Local 28.

[3] Local 559 is a one shop local comprised solely of production workers who perform no work in the construction industry.

Local 28 made no independent effort to inform the parties, the Administrator or the court of the merger orders, despite the fact that such a merger would clearly have an impact upon numerous provisions of the O&J and RAAPO. Moreover, between October 16, 1981 and April 7, 1982 (when Local 28 finally responded to a March 24, 1982 inquiry about the merger from the City, and a follow-up March 30, 1982 letter from the Administrator), no information about the merger was provided. Since the individuals that were merged into Local 28 were given full Local 28 membership status, and were working for contractors who were now dealing with Local 28 as the successor contract administrator, the terms of the O&J and RAAPO applied with full force and effect. However, the data filed by the defendants which was required under the O&J and RAAPO did not contain any reference to the merged unions or note the new membership statistics during this period of time. (*See* RAAPO § 34(b).)

Subsequent to the mergers, the JACs of Locals 10, 13 and 55 continued to operate and graduated a number of apprentices into full Local 28 journeyman status.[4] Nonetheless, the names and racial or ethnic identities were not provided to the parties or the Administrator, even after this court made it clear, at its May 25, 1982 conference (Tr. 10) and restated it at its June 10, 1982 hearing (Tr. 187-188), that the merged locals were to be considered part of Local 28.

In May and July 1982, Local 28 submitted, literally, volumes of data and statistics about the merged unions. Local 28 argues that this data contains all the information required by the O&J and RAAPO, and that later responses to the plaintiffs' discovery on the merger made up for any deficiencies that might have existed. Thus, it is contended, that there is no violation or, if a violation occurred, it was merely technical and defendant has, in effect, now purged itself of the violation. This data was not provided by Local 28 in order to meet its obligations under the O&J and RAAPO; rather, it was supplied in response to the City's

[4] During this period, former Locals 13 and 55 also admitted into their membership persons working for a contractor whose work was found to be satisfactory by such contractor.

March 1982 inquiry about the merger, my follow-up letter, and my demand for the data as contained in my June 28, 1982 Memorandum and Order. Moreover, neither Local 28's December 7, 1982 membership census report nor its census report submitted on February 25, 1983, contained the data for the total membership.

Local 28 appears to be of the belief that, because the merger was a complex internal matter and because it did, eventually, supply the necessary data, and is now making efforts to complete the court authorized membership survey, no finding of violation should be made. (Tr. 40-49.) Such a position is without merit. Defendants' obligation is to comply with the court's orders in the manner prescribed, *and at the time mandated.* Anything less is non-compliance, and thus violates the O&J and RAAPO.

In *Maness v. Meyers*, 419 U.S. 449 (1975), the Supreme Court made it explicitly clear

> [t]hat all orders and judgments of the courts must be complied with promptly. If a person to whom a court directs an order believes that order is incorrect, the remedy is to appeal, but, absent a stay, he must comply promptly with the order pending appeal. Persons who make private determinations of the law and refuse to obey an order generally risk criminal contempt, even if the order is ultimately ruled incorrect.

Id at 458. *See also* this court's August 16, 1982 Contempt Decision ("Contempt Decision".) Slip Op. at 5, 29 FEP Cases 1143, 1145.

As a result of Local 28's failure to provide complete, accurate and timely data, I find that Local 28 violated paragraphs 21(e)(xii) of the Order and Judgment and sections 33(f)[5], 33(k)

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[5] I reject defendant Local 28's argument that the merger was not a transfer from a sister local or that the terms of RAAPO do not apply to a mass transfer situation. The requirements are unequivocal; nonetheless, if Local 28 had doubts about its obligations or wished to be relieved from some part of the

Footnote continued on following page

and 34(a) and (b) of RAAPO, and that such record keeping violations are in addition to those previously found by this court in its Contempt Decision. Slip Op. at 7-8, 29 FEP Cases at 1146.

2. Local 28's Failure to Provide Accurate Data

There can be no doubt that the foundation of the reporting obligation is the submission of *accurate* data. Data that is not independently verifiable or which is inaccurate undermines the intent of the reporting provisions and cannot be countenanced under any circumstances. It follows, therefore, that defendants must insure, to the greatest degree possible, that the data submitted to the parties are true and correct.

Local 28's census report, dated December 7, 1982, showed its non-white journeyman membership at 181; however, its February 25, 1983 census showed a non-white membership of 200. Despite the fact that the only admissions to journeyman status, in the intervening time, was the graduating apprentice class, which had only six non-whites in it, and a few individuals from recently organized shops, Local 28 offered no explanation of how the non-white membership gained 19 members in just ten weeks. After I inquired of Local 28 about this (Plaintiffs' Ex. 15), I received a listing of the additional non-whites in a letter dated March 7, 1983 (Plaintiffs' Ex. 16). Of particular interest was the inclusion of one Arnold Kaplan, a member of Local 28 since 1957, who portrayed himself as Spanish surnamed in response to the membership survey sent to all members (Def. Ex. 1). Based upon Mr. Kaplan's submission, Local 28 moved him from white to non-white. After inquiry from the Administrator, Local 28 followed up and ascertained that Mr. Kaplan was, in fact, white. (Def. Ex. 2, Tr. 52-55).

Footnote continued from previous page

orders, it was certainly free to apply for a modification or clarification of the orders. *See* RAAPO § 45, O&J ¶ 27. Local 28 was not free, however, to disregard the order. *See, McComb v. Jacksonville Paper Co.*, 336 U.S. 187, 192 (1949) (a defendant acts at its own peril in taking steps without asking the court to clarify any perceived ambiguities in its order); *Maness v. Meyers, supra.*

It is evident on its face that Arnold Kaplan is not a Spanish surname; and his response to the membership survey should have caused alarm bells to ring long before his name was submitted to the parties and Administrator as non-white. (*See* Tr. 75.) I find that Local 28's submission of Arnold Kaplan as a non-white was either the result of gross negligence or wanton disregard of this court's orders. In either event, a finding of violation is warranted.

Local 28's inability to provide accurate data is further shown both by its reporting of Jose Marquez as a white, until Local 28's clarification letter of March 7, 1983 (Plaintiffs' Ex. 16), and the testimony of Daniel Wilton, defendant Local 28's Treasurer. From at least 1976 through the end of 1982, there was no formal system to verify the racial and ethnic composition of Local 28's membership. Such verification that was done, was done on a totally haphazard basis. (Tr. 63, 67-69, 72-76.) It is inconceivable that the officers of Local 28 did not understand the importance of accurate record keeping and that all submissions to the parties, the Administrator, and the court had to be as correct as possible.

In light of defendants' record keeping problems, as found by the court in its Contempt Decision, and the explicit record keeping requirements contained in the O&J, AAP and RAAPO, I reject any argument that the most recent problems were simply the result of human error. The lack of any proper verification controls confirms my opinion that Local 28 has not acted in the affirmative manner contemplated by the court. I therefore conclude that Local 28 has, by its submission of inaccurate data, violated both the letter and the spirit of the court's record keeping and reporting obligations. *See* O&J ¶¶21(e)(xii) and 21 (i); and RAAPO § 2, 33(k) and 34(b).

3. Local 28's Failure to Serve the O&J and RAAPO on Local 28 Contractors

By Memorandum and Order dated July 30, 1979 and later amended on March 12, 1980, I ordered, *inter alia*, that plaintiffs serve the O&J and RAAPO upon all employers in contractual agreement with Local 28. The purpose was to be certain that the individual contractors were aware of the terms of the court's orders, and to be able to hold any contractor directly accountable

for any conduct which proved to impede or impair the effectuation of those orders. To insure that any new contractors were also aware of their obligations, I directed Local 28 to send to such employers "copies of both the Order and Judgment and RAAP&O, certified, return receipt requested. Copies of the cerification cards are to be provided to the parties upon their receipt by Local 28." (Plaintiffs' Ex. 2, Raff letter of November 20, 1981). No certification cards were provided to the parties, and no proof of service was provided in response to the City's letters of January 6, 1983 (Plaintiffs' Ex. 19) and March 22, 1983 (Plaintiffs' Ex. 17).

At the time of the hearing on this matter, counsel for Local 28 attempted to testify as to Local 28's practice and procedure in providing the O&J and RAAPO to contractors. (Tr. 76-78.) This attempt was clearly improper. *See* Disciplinary Rules of the American Bar Association's Code of Professional Responsibility, D.R. 5-102(A). Had such attempt been pursued, it would have been appropriate to disqualify Local 28's counsel from continuing to represent it. *See, e.g., United States ex rel Sheldon Electric Co. v. Blackhawk Heating & Plumbing, Inc.*, 423 F. Supp. 486, 489 (S.D.N.Y. 1976); *General Mills Supply Co. v. SCA Services, Inc.*, 505 F. Supp. 1093, 1098 (E.D. Mich. 1981).

Thereafter, counsel requested an adjournment to bring in the Recording Secretary to testify as to Local 28's procedures. Counsel was well aware that a formal proceeding on the violations was to be held and had ample opportunity to produce any necessary witnesses. Consequently, the request was denied. Finally, I noted that even if the witness had been produced, I would have precluded any testimony of such witness.

By letter dated January 6, 1983, the City requested "a list of all contractors Local 28 has served copies of the O&J and the RAAPO upon and proof, if any, of such service". (Plaintiff Ex. 19.) On February 23, 1983, counsel for Local 28 responded by saying that he had not been able to secure proof of service. (Plaintiffs' Ex. 20.) On March 22, 1983, the City requested information regarding service in the form of an affidavit "from the Local 28 official responsible for service of the O&J and RAAPO". (Plaintiffs' Ex. 17.) No such affidavit was provided.

Furthermore, Local 28's Affidavit in Opposition to the Violation Order to Show Cause is merely an attorney's affidavit; and it makes no mention of the specific person(s) who allegedly served the O&J and RAAPO. The Second Circuit has noted that the Federal Rules of Civil Procedure transformed "the sporting trial-by-surprise into a more reasoned search for truth." *Cine Forty-Second Street Theater v. Allied Artists*, 602 F.2d 1062, 1063 (2nd Cir. 1979); *See also, In Re Professional Hockey Antitrust Litigation* 63 F.R.D. 644, 656 (E.D. Pa. 1974), *aff'd* 427 U.S. 639 (1976) ("Courts today do not condone the 'surprise' approach to discovery whereby at the latest possible moment the parties reveal the substance of their cases"). Certainly, to have allowed Local 28 an adjournment or to have allowed testimony from a witness whose alleged personal knowledge was not revealed until the actual moment of inquiry at trial would be to condone the "trial-by-surprise" tactic condemned by the courts.

Local 28 also argues that the City had the burden of making its case and that the transcript of Robert Sinkler's testimony (Plaintiffs' Ex. 18) does not show that he was not served with the O&J and RAAPO. This argument has no merit. Sinkler, responding to an Order to Show Cause (which was sent to all parties), testified that he had not received the O&J and RAAPO from an official of Local 28 (Sinkler Tr. 4-6.) Finally, Local 28 argues that it was denied due process because it could not cross examine Robert Sinkler. Local 28 was not deprived of that right. Local 28 had an opportunity to appear at the hearing involving County Sheet Metal, Inc. and examine any witnesses. It did not so appear. Moreover, the relevant portion of the Sinkler transcript was contained in the City's exhibits. Consequently, Local 28 was on notice that the City intended to use Sinkler's testimony. If Local 28 wanted to challenge Sinkler's testimony, it had the obligation to introduce contrary evidence.

Local 28 has provided no evidence that it obeyed my November 20, 1981 directive as to either the actual service required or, separately, the required proof of service. Thus a finding of violation on both counts is warranted.

VIOLATIONS BY THE JAC

The City alleged that the JAC violated sections 20(c)(iv)(A) and 35(c) of RAAPO by failing to provide the parties and the Administrator with records that contain accurate reporting of manhours worked by apprentices. *See also* RAAPO §20(c)(ii). A failure to provide accurate manhour records prevents the plaintiffs and the Administrator from independently assuring "that all members and apprentices of Local 28 share equitably in all available employment opportunities in the industry." (RAAPO § 1. *See also* O&I ¶ 21(g).) The JAC does not deny that its monthly manpower reports are not accurate reflections of actual time worked. It argues, however, that the parties and the Administrator have been aware, since at least 1977, that the manhour reports come from the employer records submitted to the welfare funds, and that the JAC must rely upon those reports since there is no report to the JAC directly. (Tr. 15.)

The JAC also argues that even if the records are not completely accurate, the fact that an apprentice may have missed a day of work or comes in late does not really affect anything of substance. (Tr. 17.) Like the discussion about Local 28's records, *supra*, the JAC interprets the requirements of RAAPO at its peril. *See McComb v. Jacksonville Paper Co.*, *supra*, at n.5. The parties are not free to impose their views of what is required over clear and unambiguous language. RAAPO requires that apprentice manhours be reported and it requires the JAC to provide those reports. To suggest that anything less than a reporting of accurate manhours is acceptable is to render meaningless the court's order in this regard.

The JAC suggests that I have "a moral obligation to carry out the terms of RAAPO and meet its objectives" (Tr. 28), and that I have broad parameters of power in how RAAPO should be construed. (Tr. 29.) The logical extension of that argument is that the JAC should be found in substantial compliance by the method of reporting it has used and that, in effect, the parties and, indeed, the Administrator should be stopped from contending otherwise at this late date. I decline to accept the implicit invitation contained in that contention. I do have broad powers of interpretation, but that does not allow me to "modify

or change the substantive terms of. . . the Program." (O&J ¶ 18.) To permit any reporting which is less than that called for by RAAPO or to permit "estimate" or inaccurate reporting goes beyond the scope of my powers. *See* Contempt Decision, Slip Op. at 5, 29 FEP Cases at 1145.

The JAC further argues that the JAC should be held blameless because the employers do not report hours to the JAC (Tr. 15 and 23), and moreover, to require reporting of exact hours would be a "gross burden" upon the employers and have a "chilling effect upon the employers hiring apprentices when there is no reason for it." (Tr. 28.) I reject this argument out of hand. RAAPO §§ 20(c)(ii), 20(c)(iv)(A) and 35(c) state that it is the JAC which *shall* provide or furnish records which include manhours. If the JAC could not furnish accurate manhours, it had an obligation to seek relief from these provisions, not unilaterally decide that what it had been providing was sufficient. (*See* discussion of defendants' history of making unilateral decisions *infra* at 20.)

The "gross burden" upon employers to report accurate manhours does not exist. Employers hiring CETA apprentices have been reporting exact hours for over a year. (*See* Plaintiffs Ex. 9.) Nor do I find any support for the idea that employers may be "chilled" in hiring apprentices because they must report accurate hours. Local 28 members and apprentices are paid on an hourly basis. Thus, the employers' payroll records must, necessarily, contain the required information. It takes no great effort to transcribe these records to a weekly reporting form.

Finally, the JAC argues that its conduct was not willful or done with intent to deprive the parties of information. The law on this point is clear. It is not necessary for a finding of violation that such violation be willful, *Farber v. Rizzo,* 363 F. Supp. 386 (E.D. Pa. 1973) or that there be intent to violate the court order. *McComb v. Jacksonville Paper Co.,* 336 U.S. 187 (1949); *Woolfolk v. Brown,* 358 F. Supp. 524 (E.D. Va. 1973); *United States v. Ross,* 243 F. Supp. 496 (S.D.N.Y. 1965). Indeed, the fact that the conduct was done inadvertently or in good faith does not, in and of itself, preclude a finding of violation. *Doe v.*

General Hospital, 434 F. 2d 427 (D.C. Cir. 1970); *Coca-Cola Co. v. Bisignano*, 343 F. Supp. 263 (S.D. Iowa 1972).

The facts leave me no alternative but to find that the JAC has violated RAAPO ¶¶ 20(c)(ii), 20(c)(iv)(A) and 35(c).

DISCUSSION

The violations found herein cannot be viewed in isolation, rather they must be seen as part of a pattern of disregard for state and federal court orders and as a continuation of conduct which led the court to find defendants in contempt on August 16, 1982. This case is very much like a 1,000 piece jigsaw puzzle. No piece, by itself, provides any idea of what the entire picture looks like. But as the pieces begin to fall into place, the essential nature of each piece becomes more and more apparent, until, finally, a recognizable picture begins to emerge. The court orders contain a variety of little pieces which are essential for the plaintiffs, the Administrator and the court to understand how defendants are complying with or thwarting the court's mandate. Each piece has its importance. To dismiss any piece as inconsequential or as merely technical is to take away a necessary tool for monitoring a union and an industry that has been under one court order or another for nearly 20 years.

Defendants have been before either human rights agencies (New York State Commission on Human Rights and New York City Commission on Human Rights), the New York State Supreme Court or the federal court since January 2, 1963. After more than 20 years of litigation, Local 28's February 25, 1983 pre-merger census shows a non-white journeyman membership of only 10 per cent.

Throughout the history of the litigation, defendants have sought to portray themselves as innocents caught in a web of onerous and burdensome orders, economic conditions beyond their control, "nit picking" by plaintiffs, ineffective monitoring by plaintiffs and the Administrator, and undue and unproductive concern by plaintiffs and the Administrator with the details of the affirmative action programs rather than the true objectives of the court orders. Defendants cloak themselves in righteous indignation about the cost of the litigation and the intrusion of

the court into what they perceive as strictly internal affairs of the union and industry.

Glib of tongue and fleet of argument, defendants have, over the years, managed to raise what appear, on the surface, to be rational and responsible arguments why certain records cannot be kept, why mandatory time periods cannot be met, why new procedures are unworkable, why the record keeping requirements are "grossly" burdensome, why apprentices could not receive proper training if the numbers are increased, why employers cannot afford additional apprentices, why a general publicity campaign would not be productive, and why they should not be held liable for their lapses in conforming to the requirements of the court orders. However, beneath the surface of those arguments rests a pattern of delay, obstructionism and blatant disregard for court orders that goes back as far as 1965.

In *Commission of Human Rights v. Farrell*, 43 Misc. 2d 958, 252 N.Y.S. 2d 649, 57 LRRM 2005 (Sup. Ct., N.Y. Cty. 1964), Mr. Justice Markowitz praised the parties, including defendants, for their complete cooperation in working out a non-discriminatory apprenticeship training program. 57 LRRM at 2010–11. However, by 1965, Justice Markowitz' praise had turned to fury and he soundly castigated defendants for taking unilateral action to delay apprenticeship indenture and limit the size of a previously agreed upon apprentice class. Indeed, recent conduct of the defendants, regarding their failure to inform the court about the merger, is an echo of their 1965 conduct when they did not advise the court of their failure to indenture the agreed upon apprentice class. In his 1965 decision, Mr. Justice Markowitz noted that "it was incumbent upon the parties to expeditiously bring this matter to the court's attention." 59 LRRM 3050, 3051. *See also,* Mr. Justice Markowitz' opinion on defendants' motion for reconsideration. 60 LRRM 2178, 2179, *aff'd* 60 LRRM 2509 (First Dept., App. Div. 1965).

It cannot be stated too strongly that the burden is not upon plaintiffs or the Administrator, but is upon defendants to act in a forthright and affirmative manner to comply with the letter and spirit of the court orders. If defendants object to certain requirements, they may apply to the court for relief. However, a

unilateral decision that various provisions cannot or will not be met will continue to lead to findings of violation.

One of the patterns that has emerged upon review of the aforementioned state court decisions, defendants' papers filed in the federal court action, defendants' response to the contempt motion, defendants' motion to be relieved of the court orders, and, finally, the colloquy which took place before me on April 29, 1983, *leads to the inescapable conclusion that there is an inherent conflict of interest among the defendants which is exacerbated by the roles of counsel.* This has, in my opinion, been a contributing factor to the slow pace of this case.

The union has indicated in no uncertain terms that its obligation is to protect the economic interests of its members over the interests of apprentice applicants. 59 LRRM at 3051, 60 LRRM at 2179. *See also* Defendants' Memorandum In Opposition to Plaintiffs' Motion For Contempt, etc. at 32–39, 72–79; Defendants' Reply Memorandum at 22. The JAC's obligation is to provide adequate training to achieve journeyman status and to serve as a workforce feeder into the industry, thereby insuring a sufficiently trained group of people to meet the employers' needs. The two concepts come in conflict when there are difficult economic times for the industry and full union members, who elect union officials, are in danger of being laid off while at the same time the pressure, exerted by the court order, is to keep the apprentice numbers up. The defendants' reaction in 1965 and again between 1976 and 1982 was to protect the members' interests by keeping the apprentice numbers low. In 1982, this conduct led to the court's finding that defendants had underutilized the apprenticeship program. Contempt Decision, Slip Op. at 2–3, 29 FEP Cases at 1144–45.

Counsel for the union is also co-counsel for the JAC. Thus, the question of divided loyalty.[6] The JAC, a separate legal entity from the union, recruits, selects, indentures and trains apprentices. The court orders require that the JAC indenture as

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[6] An indicia of this problem was counsel's attempt to testify, thereby assuming the role of a principal in speaking about the union's practices. *See* discussion, *supra*, at 11.

many apprentices as can be properly trained and engage in other conduct that may not coincide with the interests of the union members, as the Executive Board of Local 28 sees the matter. The record of this case both in 1965 and the present clearly shows that the union's interests become dominant and the JAC acts in response to those pressures. Thus, the question of how counsel can properly represent both interests.

This conflict is also evident with regard to the counsel for the Contractor's Association, since he happens to be its Executive Director and co-counsel for the JAC. Sections 20(c)(ii), 20(c)(iv)(A) and (B), and 35(c) of RAAPO are mandatory. The JAC, if it could not comply with RAAPO because of the failure of employers to provide the necessary data, was required to act affirmatively to obtain that data, including, if necessary, bringing an action against the recalcitrant employers. Its failure to do so left it open to the violations found herein. However, under the circumstances, it is unlikely that co-counsel for the JAC would take action against a member employer of the Contractor's Association or, in effect, against himself.

The transcript of the April 29, 1983 hearing certainly points to the conflict. Counsel attempted to intermingle the interests of the JAC and the employer; and, to a large extent, the interests do overlap. But, the interests diverge when counsel talks about the required record keeping as a "gross burden" upon the employers. Such argument best serves the employers' interests and does not, in my opinion, serve the JAC's interest which is to obey the mandate imposed upon it by the court.

As long as defendants maintain a situation where counsel have conflicting loyalty, it is the client who will suffer the consequence.

CONCLUSION

The arguments made by defendants in response to the City's motion are similar to those made before the court during the June 10, 1982 Contempt proceeding. The court summarily rejected those arguments. *See* Contempt Decision, Slip Op. at 7–8, 29 FEP Cases at 1146. Moreover, the court made it clear that defendants are to obey its orders and "it is not for the

defendants to evaluate the wisdom of aspects of the court's orders". *Id* at 5, 29 FEP Cases at 1145. Notwithstanding this admonition, and the imposition of a substantial fine, defendants continue to follow the path of passive, if not overt, resistence. This conduct was made manifest by the failure to file required data, the filing of inaccurate data, the failure to provide for a proper record keeping system, and the continuing representation that plaintiffs, the court and I have lost sight of the true objectives of the O&J and RAAPO, even after the court found defendants in Contempt.

Based upon the foregoing, I find that defendants have violated the O&J and RAAPO and recommend that the court hold defendants in civil contempt.

REMEDY

Plaintiff City of New York requests two forms of relief. First, that a computerized record keeping system be developed and maintained by an independent management firm; and second, that defendants be required to pay for such a system. The City also requests it be awarded attorney's fees and costs.

As a result of the merger, Local 28 has 3,295 journeymen members and 530 apprentices.[7] There are now in excess of 225 individual contractors employing Local 28 members or apprentices, four separate Joint Apprenticeship Committees, three separate Contractor's Associations, and the geographical jurisdiction covers all of New York City, Nassau and Suffolk Counties, New York; and Essex, Passaic, Hudson and Bergen Counties, New Jersey. Thus, the record keeping and monitoring problem has expanded enormously.

Defendants represent that they are moving toward a computerized record keeping system and that they will be able to provide any data requested by plaintiffs. The problem with that approach is that the data out is only as good as the data in, and the raw data would remain under the direction and control of

[7] The non-white membership of both journeymen and apprentices was 11 percent of the total membership as of November, 1982.

defendants, who have been found in contempt of court for record keeping violations, and who are, once again, being found in violation. The fact is that defendants' data has been insufficient, incomplete, untimely and inaccurate. The plaintiffs cannot adequately insure compliance with the court's order under these conditions, and are entitled to a record keeping system which is both accurate and is subject to independent verification. Moreover, plaintiffs should not, with the history now before us, have to continually bear the burden of monitoring the record keeping.

As a result, I endorse the City's proposed remedy and recommend that the court accept it.[8]

I further recommend that additional fines be imposed upon defendants. My recommendation as to the nature and the amount of such fines will be made as part of the report to the court on the issue of the imposition of fines to coerce future compliance. *See* Contempt Decision, Slip Op. at 11, 29 FEP Cases at 1147. ("In view of the defendants' past recalcitrance, I am of the opinion that it is also necessary for the court to impose a fine to coerce future compliance. . . However, the imposition of the coercive fine must await the submission of a report by the Administrator. . .").

Finally, I recommend that the City be awarded attorney's fees and costs.

Respectfully Submitted,

Dated: New York, New York
May 18, 1983

David Raff
Administrator

[8] Precedent for the record keeping system requested by the City can be found in paragraph 12 of the 1970 Consent Decree in *U.S. v. Wood, Wire and Metal Lathers, Local 46*, (unreported) Contempt Dec. at 328 F. Supp. 429 (S.D.N.Y. 1971).

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STIPULATION OF SETTLEMENT AND WITHDRAWAL
71 CIV. 2877 (HFW)

United States District Court
Southern District of New York

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, and
THE CITY OF NEW YORK,

Plaintiffs,

–against–

LOCAL 638 . . .
LOCAL 28 OF THE SHEET METAL WORKERS' INTERNATIONAL ASSOCIATION, LOCAL 28 JOINT APPRENTICESHIP COMMITTEE . . . SHEET METAL AND AIR-CONDITIONING CONTRACTORS' ASSOCIATION OF NEW YORK CITY, INC., ETC.,

Defendants.

WHEREAS, paragraph 21(j) of the Order and Judgment ("OJ") entered in the instant action on September 7, 1975, provides that "except as modified, changed or amended by the terms of this Order, (the RAAPO) or order of the Administrator, Local 28 and JAC shall not change, modify or amend any aspect of the operation or content of the Apprentice Program, or the conditions or terms upon which an individual shall become a member of the Apprentice Program or Local 28 or entitled to work within the jurisdiction of Local 28;", and

WHEREAS, Edward Carlough President of the Sheet Metal Workers' International Association ("International") issued orders dated October 16, 1981, and March 23, 1982, ("merger

orders") requiring former Locals 10, 13, 55 and 559 to merge into Local 28; and,

WHEREAS, the City of New York ("City"), by an Order to Show Cause, dated April 11, 1983, brought a motion alleging, *inter alia*, that Local 28 violated paragraph 21(j) of the OJ and it granted membership in Local 28 to graduates of the former locals Joint Apprenticeship Committees ("JACs"), and permitted members of the former locals to work within Local 28's jurisdiction: and

WHEREAS, a Stipulation ("Stipulation") is to be executed wherein JAC Essex Passaic Counties, New Jersey, JAC Hudson/Bergen Counties, New Jersey, JAC Nassau/Suffolk Counties, New York, SMACNA of Long Island and Local 28 shall thereby be bound by the OJ and the RAAPO; and further the Sheet Metal Contractors' Association of Northern New Jersey shall set forth in writing its consent not to appeal upon the approval of the Court of the Stipulation.

IT IS HEREBY STIPULATED AND AGREED, by and between the undersigned that subject to the execution and entry of the Stipulation, the City shall withdraw with prejudice that portion of its motion dated April 11, 1983, which alleged that Local 28 violated paragraph 21(j) of the OJ. The E.E.O.C. and the Attorney General of the State of New York concurs and agrees not to bring a motion on the same facts. Nothing contained in this Stipulation of Settlement and Withdrawal shall be deemed to

be an endorsement of the merits of the legal claims of any party hereto, or an admission of liability by any party.

DATED: New York, New York
May 17, 1983

LOCAL 28 SHEET METAL
WORKERS' INTERNATIONAL
ASSOCIATION

By: /s/ JOSEPH P. CASEY

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By: /s/.....

SO ORDERED

/s/ DAVID RAFF
.....
Administrator
DAVID RAFF

MEMORANDUM DECISION
71 CIV. 2877 (HFW)
DATED: 8/16/82
#925

United States District Court
Southern District of New York

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, and
THE CITY OF NEW YORK,

Plaintiffs,

– against –

LOCAL 638 . . . LOCAL 28 OF THE SHEET METAL WORKERS' INTERNATIONAL ASSOCIATION, INC. and LOCAL 28 JOINT APPRENTICESHIP COMMITTEE, *et al.*,

Defendants.

APPEARANCES: *(See last page).*

HENRY F. WERKER, D.J.

Plaintiffs, the City of New York (the "City") and the New York State Division of Human Rights (the "State") jointly move for an order holding the defendants, Local Union No. 28 of the Sheet Metal Workers' International Association ("Local 28"), Local 28 Joint Apprenticeship Committee ("JAC"), the Sheet Metal and Air Conditioning Contractors' Association of New York City, Inc. ("Contractors' Association") in contempt of court for failing to comply with the Order and Judgment (the "O&J") entered on August 28, 1975 and the Revised Affirmative Action Program and Order (the "RAAPO") entered on January 19, 1977. Plaintiffs have named as respondents in this action one hundred and twenty-one private sheet metal contractors who have dealings with Local 28 (the "Contractors").[1] The defendants have cross-moved for an order terminating the O&J. The history of this litigation, except to the extent necessary, need not be repeated here. *See Equal Employment Opportunity Comm'n.* v. *Local 638*, 565 F. 2d 31 (2d Cir. 1977); *Equal Employment Opportunity Comm'n* v. *Local 638*, 401 F. Supp. 467 (S.D.N.Y. 1975) and *Equal Employment Opportunity Comm'n.* v. *Local 638*, 421 F. Supp. 603 (1975)(the first AAPO), *aff'd as modified*, 532 F. 2d 821 (2d Cir. 1976).

In support of their motion seeking to have the defendants held in civil contempt, plaintiffs introduced at a hearing before the court on June 10, 1982 "clear and convincing evidence" that the defendants have not been "reasonably diligent and energetic in attempting to accomplish what was ordered" by this court. *Powell* v. *Ward*, 643 F. 2d 924, 931 (2d Cir.), *cert. denied*, U.S. , 102 S. Ct. 131 (1981) quoting *NLRB* v. *Local 282, International Brotherhood of Teamsters*, 428 F. 2d 994, 1001–02 (2d Cir. 1970) and *Aspira of New York, Inc.* v. *Board of Education*, 423 F.Supp. 647, 654 (S.D.N.Y. 1976). Specifically, as discussed seriatim below, I find that six separate actions or ommissions on the part of the defendants have impeded the entry of non-whites[2] into Local 28 in contravention of the prior orders of this court.

Plaintiffs presented evidence at the hearing demonstrating that since 1976 the defendants have adopted a policy of underutilizing the apprenticeship program[3] administered by the JAC, thereby retarding the entry of non-whites into Local 28. The size of the apprenticeship program is of particular significance since historically a vast majority of Local 28 members gained admission to the union through graduation from the apprenticeship program. *Equal Employment Opportunity Comm'n* v. *Local 638*, *supra*, 401 F. Supp. at 474.

In the years 1977–1981, while the unemployment rate for apprentices was respectively 6.7%, 4%, 3.6%, .059% and 0%, Local 28 indentured a total of 334 apprentices. Pl. Exs. 8, 11 and 19; Def. Mem. in Opp. at 22. By comparison, in the years 1971–1975, when the unemployment rates for apprentices were respectively 3%, 6%, 7%, 20% and 40%, Local 28 indentured 2,174 apprentices. *Id.* Concomitantly, throughout the same period that the size of the apprenticeship classes was reduced, the average number of hours worked per year and the average number of weeks of employment per year for each journeyman was significantly increased. Def. Mem. in Opp. at 18 and 38. Of course, the journeymen benefiting from this policy of underutilizing the apprenticeship program comprise Local 28's white incumbent membership. Indeed, as of April, 1982, 6% of Local 28's journeymen membership was non-white. Pl. Ex. 45.

Not only has the apprenticeship program been underutilized since 1976, but the number of non-whites in the apprenticeship program could hardly have been enhanced by the defendants' refusal, in the face of the court orders, to implement a general publicity campaign designed to inform the non-white community in New York City of non-discriminatory opportunities in Local 28. The O&J ¶ 21(h) in part provides:

> In order to dispel Local 28's and JAC's reputations for discrimination in non-white communities, Local 28 and JAC shall implement, under the supervision of the Administrator, a program of advertising and publicity, through the use, inter alia, of non-white media including newspapers and radio stations directed primarily

> toward non-white communities, designed to inform the non-white community in New York City of the non-discriminatory opportunities to join Local 28 and the Apprentice Program. Such a program shall include, but not be limited to, provisions to inform the non-white communities of the specifications and qualifications for the hands-on journeyman's test and the apprentice entrance tests, *and generally of opportunities available on a non-discriminatory basis in Local 28 and the Apprentice Program.* (Emphasis added.)

Moreover, the RAAPO also clearly provided for a general publicity campaign in addition to the advertising of the specific journeyman and apprentice entrance tests:

> By April 1977, Local 28 and JAC shall provide to the Administrator and the other parties a written plan of an effective general publicity campaign designed to inform the non-white community in New York City of non-discriminatory opportunities in Local 28 and the Apprentice Program . . ."

RAAPO ¶ 39. Thus, the general publicity campaign was intended to supplement the specific advertising for each "hands-on" journeyman's test and apprentice entrance test in order to dispel the defendants' reputation for discriminatory practices. There is absolutely no evidence before this court that the defendants undertook a general publicity campaign of the nature expressly contemplated by the RAAPO and O&J, much less that they submitted a written plan to the Administrator detailing such a campaign. *See* Tr. at 81–119, Def. Exh. 2A–2D, 2F–2H. Defendants attempt to justify their failure to undertake a general publicity campaign by arguing that a "campaign which was not tied to a particular event would lack . . . force." Def. Mem. in Opp. at 55. However, it is not for the defendants to evaluate the wisdom of aspects of the court's orders. Def. Ex. 1–A. Incidentally, defendants' contention that the "Administrator placed the burden of pursuing the issue of publicity compliance

on plaintiffs" is frivolous. Defendants' Proposed Findings of Fact and Conclusions of Law at 25 [hereinafter cited as Def. PFF&CL]. The Administrator is powerless to either modify an order of the court or to relieve the defendants from compliance with its terms.

Perhaps the two most clear-cut violations by the defendants of the orders of this court are (1) the failure by Local 28 and the JAC to maintain and submit to the parties and the Administrator lists and records as required by the O&J, the RAAPO and orders of the Administrator and (2) Local 28's issuance of work permits to members of sister locals without prior authorization of the Administrator. With respect to the issuance of the work permits, the O&J provided in part:

> Defendant Local 28 is permanently enjoined from denying, withholding, discouraging, obstructing or otherwise interfering with direct access by non-whites to membership in Local 28 by relying on, using a system of, or issuing "identification slips" or "permits" to white members and/or apprentices of affiliated sister local unions or allied construction unions.
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> ° ° °
>
> Local 28 shall issue "permits" or "identification slips" only with the express written consent of the Administrator, and only on such terms and conditions as the Administrator, in his discretion, shall require . . .

O&J ¶¶ 6, 22(f). In addition, the RAAPO provides in part:

> Local 28 shall issue "permits" or "identification slips" only with the express written consent of the Administrator, and pursuant to Paragraph 22(f) of the Order and Judgment.

The procription of permits, without prior approval by the Administrator, was necessitated by this court's finding in 1975 that Local 28 had utilized the issuance of permits to purposefully discriminate against non-whites. *Equal Employment*

Opportunity Comm'n v. Local 638, supra, 401 F. Supp. at 486. Nonetheless, between March and June, 1981 Local 28 issued 13 permits without prior written authorization of the Administrator. Tr. at 178 and 182. Only one of these thirteen unauthorized permits was issued to a non-white. Pl. Exh. 14 at ¶ 9.

The thirteen unauthorized permits were issued by the Recording Secretary for Local 28, Joseph Casey. Mr. Casey's self-serving testimony that he did not intentionally violate the order of the court is of no moment to the issue of civil contempt here. Tr. at 182. While Mr. Casey's actions may not have been purposely designed to contravene the court orders, they certainly were not "reasonably diligent and energetic in attempting to accomplish what was ordered." *Aspira of New York, Inc. v. Board of Education*, 423 F.Supp. 647, 654 (S.D.N.Y. 1976).

With regard to the record keeping and reporting provisions of the RAAPO and the O&J, compliance with these requirements is absolutely vital to the effective monitoring and implementation of the RAAPO by the Administrator, the parties and the court. Nevertheless, the record is clear that the defendants have failed to maintain and supply vital information as required by the RAAPO ¶¶ 19(b), 20(c)(iv), 21(a), 33(a)-(p) and 34(b), the O&J ¶ 21, and a number of the orders of the Administrator. For example,[4] the defendants failed to submit to counsel for the parties herein and the Administrator the quarterly records and lists containing separate data for the white and non-white membership of Local 28 as required by the O&J ¶ 21(e) and RAAPO ¶¶ 33(a)-(p). Defendants do not deny this failure. Instead, defendants argue that their failure may be excused for two reasons; first, because they submitted some "voluminous" reports to the parties and the Administrator, and second, because the plaintiffs failed to register complaints with the Administrator concerning the defendants' non-compliance. Def. PFF&CL at 27-28. These arguments are specious and merit little discussion.

Compliance with the quarterly reporting requirements is not satisfied by anything less than four complete reports each year. The defendants' contention that two reports in 1979, two reports in 1980 and no reports in 1981 is sufficient does nothing more than evince their blatant disregard for their obligation to provide

the appropriate parties to this suit with information pertinent to the enforcement of the O&J and RAAPO. *See* Pl. Exs. 28, 34–37; Def. PFF&CL at 27–29. Furthermore, ¶ 41(b) of the RAAPO merely provides for a mechanism whereby the parties "may make" complaints to the Administrator, it does not negate or override the other terms of the RAAPO. To be sure, the mere fact that plaintiffs did not register a complaint under ¶ 41(b) cannot be utilized by defendants to relieve themselves from compliance with the other terms of the RAAPO and O&J.

On June 29, 1981, Local 28 and the Contractors' Association entered into a Memorandum of Agreement which set forth certain amendments to their Collective Bargaining Agreement. In particular, the Memorandum of Agreement added to Article V of the Collective Bargaining the following provision:

> During periods of unemployment, there shall be a ratio of one man to every four men (1:4) to be fifty-two (52) years and older in the shop and field.

Pl. Ex. 10. This amendment is not only age discriminatory on its face, but more relevant here, discriminates against non-white members of Local 28. The unrefuted expert testimony of Dr. Harriet Zellner clearly established the disparate impact that this provision would have on non-white members of Local 28. Tr. at 24–70. By entering into this provision of the Collective Bargaining Agreement, Local 28, the Contractors' Association and the respondents (who had been served with the O&J and the RAAPO) contravened the O&J ¶¶ 1, 7 and 21(g) which enjoined them from engaging in any act which has the purpose or effect of discriminating on the basis of race, color or national origin.

Based on the foregoing violations of the orders of the court and the Administrator, I have no other recourse but to hold the defendants in civil contempt of court. I note that while I am *not* holding the defendants in contempt for their failure to attain the 29% goal, and without placing primary emphasis on any one of the violations of the RAAPO and O&J discussed above, I am convinced that the collective effect of these violations has been to thwart the achievement of the 29% goal of non-white

membership in Local 28 established by the court in 1975. In reaching this conclusion, the court has not overlooked the obstacles or problems with which the defendants have had to contend. In particular, I have given much consideration to the economic condition of the sheet metal trade in particular and the construction industry in general over the past six years.

Defendants have failed to comply with the RAAPO in the manner discussed above almost from its date of entry. (For example, the defendants failed to provide the Administrator with a "written plan of an effective general publicity campaign" by April 1977 as required by the RAAPO ¶ 39). In order to remedy the past noncompliance of the defendants, I hereby direct that the defendants pay a fine of $150,000. The fine is to be paid within 30 days from entry of this order. Before deciding upon the magnitude of this fine, I considered the "consequent seriousness of the burden" to the defendants. *United States v. United Mine Workers*, 330 U.S. 258, 304 (1947). The proceeds from this fine will be placed in a fund (the "Fund") to be administered by the court (through the Administrator) for the purpose of developing the apprenticeship program of Local 28, with an eye toward increasing the non-white membership of the program and the union. The Administrator is directed to submit a report to the court as soon as practicable, after inviting comment from the parties, as to an effective program for utilizing the Fund.

After considering "the character and magnitude of the harm threatened by continued contumacy, and the probable effectiveness of any suggested sanction in bringing about the result desired", *Perfect Fit Industries, Inc. v. Acme Quilting Co.*, 646 F. 2d 800, 810 (2d Cir. 1981), and in view of the defendants' past recalcitrance, I am of the opinion that it is also necessary for the court to impose a fine to coerce future compliance with the orders of the court and the Administrator. However, the imposition of the coercive fine must await the submission of a report by the Administrator, as discussed below, concerning any necessary modification of the RAAPO.

The plaintiffs' motion for expenses and reasonable attorneys' fees is granted. In view of the defendants' willful disobedience of the RAAPO and O&J, I believe an award is justified. *See*

Fleischmann Corp. v. Maier Brewing, 386 U.S. 714, 718 (1967). *See also* 42 U.S.C. § 2000–e 5(k). Plaintiffs' should submit on notice appropriate affidavits in support of their expenses and reasonable attorneys' fees.

The defendants' cross-motion for an order terminating the RAAPO is denied. The purposes of the RAAPO have not been achieved and it has not caused the defendants any unexpected or undue hardship. However, in view of the fact that the 29% goal for non-white membership in Local 28 is no longer viable on the present timetable, especially in view of the merger into Local 28 of five other locals with predominantly white membership, the court contemplates further modification of the RAAPO upon receipt of the Administrator's report respecting the impact of the merger upon the RAAPO. The Administrator's report should include a recommendation for appropriate modification of the RAAPO.

SO ORDERED.

DATED: New York, New York
August 16, 1982

/s/ HENRY F. WERKER
U.S.D.J.

NOTES

1. By orders dated July 30, 1979 and March 12, 1980, the Administrator directed that the plaintiffs serve upon all private contractors who have contracts with Local 28 copies of the O&J and the RAAPO. A number of the respondents apparently were not served however.

2. The term non-white is used to refer to black and Spanish surnamed individuals.

3. The apprenticeship program is one of four methods by which a person may become a member of Local 28. The other three methods are: (1) members of sister unions to Local 28 in the construction industry may transfer in through the issuance of permits; (2) by passing a battery of journeyman tests, a person may be admitted to Local 28 as a journeyman; (3) through the organization of nonunion shops by Local 28.

4. The record is replete with examples of the defendants' failures to comply with the recordkeeping and reporting provisions of the RAAPO, the O&J, and the orders of the Administrator. *See* Pl. PFF&CL at 24–28.

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EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, and the City of New York,

Plaintiffs-Appellees,

v.

LOCAL 638 ... Local 28 of the Sheet Metal Workers' International Association and Local 28 Joint Apprenticeship Committee,

Defendants-Appellants,

Sheet Metal and Air-Conditioning Contractors' Association of New York City, Inc., etc.,

Defendants.

LOCAL 28,

Third-Party Plaintiff,

v.

NEW YORK STATE DIVISION OF HUMAN RIGHTS,

Third-Party Defendant.

LOCAL 28 JOINT APPRENTICESHIP COMMITTEE,

Fourth-Party Plaintiff,

v.

NEW YORK STATE DIVISION OF HUMAN RIGHTS,

Fourth-Party Defendant.

No. 1302, Docket 76-6003.

United States Court of Appeals,
Second Circuit.

Argued April 28, 1977.
Decided Oct. 18, 1977.

Local sheetmetal workers union and the local joint apprenticeship committee appealed from affirmative action program order of the United States District Court for the Southern District of New York, Henry F. Werker, J. The Court of Appeals, J. Joseph Smith, Circuit Judge, held that: (1) there was ample evidence to support district court's findings of discrimination against nonwhites by union local; (2) substitution of a new board of examiners for admission of journeymen for the former examining board was an appropriate measure; (3) portion of order allowing direct admission to union based on experience after screening by board of examiners was appropriate as was provision for reduction and deferment of intitiation fees, and (4) those portions of plan providing for indenturing of and work rotation by apprentices without a New York City residence requirement and providing for indenturing of and work rotation by apprentices without a New York City residence requriement and providing for a nonwhite membership goal of 29% were alsc approved.

Affirmed.

Meskill, Circuit Judge, filed a dissenting opinion.

Sol Bogen, New York City, for defendants-appellants.

Mary-Helen Mautner, Atty., Equal Employment Opportunity Comm'n, Washington, D.C. (Robert B. Fiske, Jr., U.S. Atty., Southern District of New York, Taggart D. Adams and Louis G. Corsi, Asst. U.S. Attys., New York City, Abner W. Sibal, General Counsel, Equal Employment Opportunity Comm'n, Washington D.C., Joseph T. Eddins, Jr., Associate Gen. Counsel, Beatrice Rosenberg, Asst. Gen. Counsel, EEOC, Washington, D.C., of counsel), for plaintiff-appellee Equal Employment Opportunity Commission.

Ellen Kramer Sawyer, New York City (W. Bernard Richland, Corp. Counsel of the City of New York, Gerald J. Dunbar, New York City, of counsel), for appellee City of New York.

Before SMITH, OAKES, and MESKILL, Circuit Judges.

J. JOSEPH SMITH, Circuit Judge:

Local 28 of the Sheet Metal Workers' International Association ("Local 28") and the Local 28 Joint Apprenticeship Committee ("JAC") appeal from an Affirmative Action Program and Order ("AAP & O") entered in the United States District Court for the Southern District of New York, Henry F. Werker, *Judge*, following a finding that Local 28 and JAC had violated Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*, by discriminating against non-whites in various membership practices.

Local 28 and JAC appealed the finding of liability and the remedies initially imposed by the district court.[1] We affirmed the finding of liability and approved the AAP & O subject to two modifications. 532 F.2d 821 (2d Cir. 1976). A revised plan and order, pursuant to our opinion, was entered by the district court on January 19, 1977.[2] The instant appeal challenges six provisions of this revised affirmative action plan. Our previous opinion covers the factual and legal background of the appeal, and we turn directly to the questions now before us.

For the reasons outlined below, we affirm the district court's order.

The Examining Board

In accord with Judge Werker's order, a court-appointed administrator was granted extensive supervisory power over Local 28 and the JAC. The administrator is responsible for developing and enforcing detailed plans for achieving the goals outlined in Judge Werker's decree. As part of this responsibility the

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[1] While the initial appeal to this court was pending, the AAP & O was modified by the district court upon motion of the Equal Employment Opportunity Commission and the New York State Division of Human Rights in the light of changed working and employment conditions in the sheet metal industry in New York City.

[2] The district court's findings and conclusions of law are reported at 401 F.Supp. 467 (S.D.N.Y. 1975); the first AAP & O is reported at 421 F.Supp. 603 (S.D.N.Y.1975).

administrator drafted the revised affirmative action plan finally approved by the district court. The plan calls for replacing the established Local 28 Examining Board, responsible for administering a practical test designed to evaluate the ability of applicants to perform duties required of sheet metal journeymen ("the 'hands-on' journeymen's test") with a Board of Examiners, knowledgeable in sheet metal work, consisting of one union representative, one representative selected by the plaintiffs, and one member selected by the administrator. The former Examining Board had consisted of three white members of Local 28 and a chairman. Two of the three members named to the new three-member board are non-white. Appellants challenge the provisions for a three-person board as unnecessary and improper, as reverse discrimination, and as an abridgment of union self-government.

[1-3] Between 1959 and 1975 entry of judgment below the established Local 28 Examining Board had conducted only two journeymen tests, one in 1963 and one in 1969, both under constraint of arbitration awards won by the employers' Contractors' Association to force the union to increase its manpower. Only 24 men, all white, were admitted from among 339 applicants of whom about 15% were non-white, following the 1968 test. The district court concluded that "the test served more as an obstacle to, than a vehicle for, the admission of new journeymen. ... [T]he exam clearly had an adverse impact on non-whites, and as such, without validation, was violative of Title VII." 401 F.Supp. 484. There is ample support for the district court finding in the record. The scope of a district court's remedial powers under Title VII is determined by the purposes of the Act. *International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 97 S.Ct. 1843, 52 L.Ed.2d 396 (1977). Having found a violation of the Act, the district court was not only within its power but under an obligation to fashion a remedy for the violation. *Albermarle Paper Co. v. Moody*, 422 U.S. 405, 418, 95 S.Ct. 2362, 45 L.Ed.2d 280 (1975). The substition of the Board of Examiners for the former Examining Board was an appropriate measure designed to assure impartial administration of the journeyman test. The court order did not

specify any particular racial makeup of the new board, and the charge of "reverse discrimination" raised by appellants is entirely unfounded.

Direct Admission Based on Experience

[4] The revised affirmative action plan permits persons who have had four years' experience in sheet metal work or reasonably related experience to apply for direct admission to the union. Applicants must satisfy the Board of Examiners that they have the requisite sheet metal experience. Direct admission was contemplated by this court in its earlier decision where we stated that

> [A] heavy burden may be placed upon direct qualification and admission and transfer from allied unions as the means of reaching the 29 percent membership goal. This however seems most appropriate under the circumstances. The persons who are presently eligible for transfer into Local 28 are the persons who have felt the brunt of the union's past discriminatory practices. They are largely older individuals who have been denied entry into Local 28 in the past or who have been forced into essentially segregated unions as a result of Local 28's practices.

532 F.2d 832. Only one year's experience is required to qualify for the journeyman test. There is no reason why persons with substantially more experience, those previously exluded from Local 28 for racial reasons, should be forced to take the journeyman test. Screening by the Board of Examiners provides adequate assurance that unqualified applicants will not be admitted to the union. We find other objections to direct admission raised by appellants to be wholly without merit.

Reduction and Deferment of Initiation Fees

Appellants object to provisions in the affirmative action plan which permit persons admitted to apprentice or journeyman status to apply for payment of reduced or deferred inititation

fees. Application for reduction or deferment must be approved by the union Executive Board or the administrator. Where granted it is designed to permit new members to pay initiation fees which do not exceed the amount of the lowest initiation fee charged to any white individual who was admitted to membership at the time the non-white would have been eligible for membership absent discrimination. This provision was part of the AAP & O approved by us on the previous appeal and at that time was not challenged by appellants. Since we find the provision to be an appropriate remedy designed to eliminate the vestiges of past discrimination, *Rios v. Enterprise Association Steamfitters, Local 638, 501 F.2d 622, 629* (2d. Cir. 1974), we reaffirm our earlier approval of this provision.

Indenturing of Apprentices and Work Rotation by Apprentices

[5] Under the plan approved by the district court, the JAC is required to indenture two classes of apprentices each year through July 1982, the number to be indentured to be determined by the JAC, subject to review and revision by the administrator in the light of the goals and objectives of the revised affirmative action plan.[3] Appellants challenge this provision on the ground that it interferes with union self-government, and that it is improper because it denigrates the apprenticeship examination and will not further the affirmative action goal. We reject the union's challenge on all grounds. The authority to require the regular indenture of a minimum number of apprentices is established. *Rios, supra*, 501 F.2d 626, 634. The administrator was justified in concluding that the long litigation history of Local 28, dating back to 1964, which resulted in a non-white population of only 3.19% in July 1974 and 5.77% in December 1976, required vigorous efforts to assure non-white union membership. Indenture of apprentices is a major route of entry to union membership and as such is appropriately subject to administrator oversight. The balancing of the need for

[3] The plan also called for indenturing no less than 36 apprentices by February 1977, and another class of apprentices by July 1977. § 19, Appendix 1846.

training workers against existing economic conditions is appropriately left to his informed discretion. The number of employees ultimately hired is left to the collective bargaining process, and the indenture provision is designed to assure that non-white apprentices will be available for hire when openings occur.

To insure equal opportunity for employment of apprentices a formal referral system has been incorporated in the affirmative action plan. Apprentices are grouped according to classes with a record kept for each apprentice of the number of manhours worked. Apprentices are to be referred out in inverse order of the number of hours worked, and the JAC is directed to rotate the groupings as far as feasible to assure that no one grouping receives a disproportionate share of the work. It is essential that all apprentices have some opportunity to work in order to keep them from dropping out of the program. The rotation system does not abrogate an existing seniority system. Furthermore, counsel for the Contractor's Association conceded that job seniority "has never been the practice in the industry." (Appendix at 1493.) The forced rotation plan is a reasonable method for assuring that all apprentices get a fair allocation of work, especially in a depressed labor market where there are relatively few work opportunities.

The Residence Requirement

The revised AAP & O provides two routes for direct admission to the union, the "hands-on" journeyman test and admission based on four years' experience. Both routes require candidates to be residents of New York City or of one of specified nearby counties.[4] The union challenges this residence requirement on the ground that the jurisdiction of Local 28 is restricted

[4] For the "hands-on" journeyman test the counties listed are Nassau, Suffolk and Westchester in New York, and Essex and Passaic in New Jersey. Residence for the direct admission based on four years' experience includes the above counties, plus Bergen, Hudson and Union counties, New Jersey. ¶ 7 (c), Appendix 1839; ¶ 12 (a), Appendix 1842. No explanation is apparent for differing residence eligibilities for the two routes of entry.

to New York City and that is is therfore inappropriate to permit non-City residents to qualify for direct admission. Appellees counter by pointing out that Local 28 never had a residence requirement and that some of its officers and members reside outside of New York City.[5] For this reason, appellees argue, it is reasonable to permit non-New York City residents to qualify for the direct admission programs. Since current union members are drawn from counties outside of the City, we see no valid reason for restricting the direct admission programs to City residents, and approve the residence requirements of the AAP & O.

The Non-White Membership Goal

The union attacks the use of a membership goal computed on the basis of the white/non-white ratio of the labor pool in New York City, while permitting the drawing of new members from a wider area which, if used as the labor pool, arguably could substantially alter the ratio. We think this attack not well founded under the circumstances of this case. On the showing made on the first appeal we approved the 29% ratio as a goal. The district court has now sanctioned drawing applicants from a wider area on a showing that some of the present membership in fact resides in the wider area. On this record we think the jurisdiction of the union is a permissible boundary of the labor pool for setting the goal initially, absent any indication that the jurisdictional boundary is set or manipulated for purposes of discrimination. Some flexibility in permitting nearby residence is in accord with present practice and unlikley greatly to change the ratios. We note that the City of New York does not object, indeed supports the plan as approved.

It is true that we have recently held that "where a significant number of union members come from outside the union's geographic jurisdiction, the court must widen its sights; the appropriate reference area then should be that region from which

[5] EEOC brief at 19; City of New York brief at 20; Appendix at 968; Appendix at 971-972.

the union draws its members." *EEOC v. Local 14*, 553 F.2d 251, 254 (2d Cir. 1977). See also *Hazelwood School District v. United States*, __ U.S. __, n. 17, 97 S.Ct. 2736, 53 L.Ed.2d 768 (1977). In *Hazelwood* and in *Local 14*, however, the court was concerned with a statistical basis for a finding of discrimination. Here we have no such problem, discrimination having been established by direct evidence of long-standing practices. See *EEOC v. Local 638*, 532 F.2d 821, 826.[6]

Judge Werker carefully analyzed the available statistics as to the make-up of the labor pool in the jurisdictional area in arriving at the 29% ratio. If an insignificant number of union members live in New Jersey and the outlying New York counties we see no inconsistency between using a membership goal based on a New York City labor pool and permitting individual applicants for union admission to live outside the City. *EEOC v. Steamfitters*, 542 F.2d 579, 591 (2d Cir.), *cert denied*, 430 U.S. 911, 97 S.Ct. 1186, 51 L.Ed.2d 588 (1977). Had it been established that a "significant number" of Local 28 members resided outside of New York City, it might have been necessary to redefine the relevant labor pool for Local 28 accordingly.[7] In the absence of a reliable basis for such findings we are satisfied that it was not error for Judge Werker to approve the application of the jurisdictional territory ratio to a membership drawn

Affirmed.

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[6] The argument that the union clearly had no control over the racial composition of transfers from sister locals or men in newly organized shops is refuted by the record in the earlier appeal, where there was evidence that Local 28 denied transfer to blacks while admitting whites from the same union with no greater qualifications.

[7] The labor pool figures would then be adjusted to include the entire area from which current members and applicants are drawn. If this were done, a new goal could be set based on the enlarged area but adjusted to reflect the relatively smaller number of union members drawn from the outlying areas rather than New York City as a result of the effect of distance, cost and time of travel, and other related factors.

from a somewhat wider permissible residential area.[8]

MESKILL, Circuit Judge, dissenting:

I respectfully dissent. The majority opinion fails to apply the principles set out in the recent decision of the Supreme Court in *Hazelwood School District v. United States*, __ U.S. __, 97 S.Ct. 2736, 53 L.Ed.2d 768 (1977), and our own decision in *Equal Employment Opportunity Commission v. Local 14*, 553 F.2d 251 (2d Cir. 1977). These decisions cast substantial doubt on the existence of illegal discrimination by these unions; there is no question that they require a remand to fix the hiring goal at a more reasonable figure.

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[8] We fear that our dissenting brother has misconceived the basis for our earlier opinion in this case, 532 F.2d 821 (1976). It was based on direct and overwhelming evidence of purposeful racial discrimination over a period of many years. It did not rely on inferences from racial ratios of population and employment in the area to establish a prima facie case of discrimination.

We pointed out, 532 F.2d at 825-27, some examples of the direct methods employed to deny members of racial minorities entrance to the union, including discriminatory examinations for entrance to the apprenticeship program, cram courses paid for by union funds for sons and nephews of members, unavailable to minority applicants, refusal to accept the blowpipe workers for membership because of their predominantly minority make-up, consistent discrimination in favor of white applicants for transfer from sister construction unions while denying transfer to blacks with equivalent qualifications, issuance of temporary work permits to white members of allied construction unions, some from far away, while denying them to minority group sheet metal workers already residing in the New York City area.

We are not limited here, therefore, in determining proper relief by *Local 14*, 553 F.2d 251 (2d Cir. 1977), nor by *Hazelwood School District v. United States*, — U.S. —, 97 S.Ct. 2736, 53 L.Ed.2d 768 (1977), which were concerned with ratios as prima facie proof of discrimination. We see no need, therefore, to discuss the doctrine of the law of the case in relation to "self correction of judicial error." Nor do we see the necessity for a retrial of the issue of racial discrimination, further prolonging this litigation after more than thirteen years of effort by state and federal tribunals to end the thoroughly proven discrimination.

I.

The majority opinion suggests that the finding of discrimination and the fixing of the hiring goal are insulated from review by our prior holding in *Equal Employment Opportunity Commission v. Local 638*, 532 F.2d 821, 830 (2d Cir. 1976). To the contrary, the doctrine of law of the case does not bar us from reconsidering and correcting our prior erroneous holding.

It is hornbook law that an appellate court must apply the law as it stands at the time of its decision. *Vandenbark v. Owens-Illinois Glass Co.*, 311 U.S. 538, 61 S.Ct. 347, 85 L.Ed. 327 (1941); *United States v. Schooner Peggy*, 5 U.S. (1 Cranch) 103, 2 L.Ed 49 (1801). When an appellate court has previously passed on some of the questions presented, but remanded for reconsideration of others, the general practice is to avoid reexamination of the issues determined by the first appeal. However, this is not a question of judicial power, but of judicial economy. *Banco Nacional de Cuba v. Farr*, 383 F.2d 166, 178 (2d Cir. 1967), *cert denied*, 390 U.S. 956, 88 S.Ct. 1038, 20 L.Ed.2d 1151 (1968). As Professor Moore notes, this doctrine of law of the case is not a barrier to "self-correction of judicial error." 1B Moore's Federal Practice ¶ 0.404[1], at 401 (2d ed. 1974). Thus, a court is always free to exercise its discretion to reconsider its previous rulings in a case before it. [1] *Messenger v. Anderson*, 225 U.S. 436, 444, 32 S.Ct. 739, 56 L.Ed 1152 (1912) (Holmes, J.); *Perrone v. Pennsylvania R. Co.*, 143 F.2d 168, 169 (2d Cir. 1944) (Frank, J.); *White v. Higgins*, 116 F.2d 312, 317 (1st Cir. 1940) (Magruder, J.); *Higgins v. California Prune & Apricot Grower, Inc.*, 3 F.2d 896 (2d Cir. 1924) (L. Hand, *D.J.*).

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[1] Of course, the Supreme Court is not bound by our law of the case. 1B Moore's Federal Practice ¶ 0.404[10], at 574 (2d ed. 1974). Since *Hazelwood* and *Teamsters* are decisions of the Supreme Court, our prior decisions to the contrary in this case will carry no weight on certiorari, and applying law of the case is an exercise in futility. *White v. Higgins*, 116 F.2d 312, 317 (1st Cir. 1940) (Magruder, J.). The only effect can be further proceedings and waste of time, precisely the evils which law of the case is meant to avoid.

When a change in controlling law intervenes between two proceedings in the same court, the judgment should be modified to conform to current law insofar as it requires a future course of conduct. This is true whether the change is the result of statutory amendment, *System Federation v. Wright*, 364 U.S. 642, 81 S.Ct. 368, 5 L.Ed.2d 349 (1961); *Pennsylvania v. Wheeling & Belmont Bridge Co.*, 59 U.S. (18 How.) 421, 431-32, 15 L.Ed. 435 (1855), or an intervening decision by the same court, *Davis v. United States* 417 U.S. 333, 94 S.Ct. 2298, 41 L.Ed.2d 109 (1974) (intervening decision by same Court of Appeals); *Hampton v. Graff Vending Co.*, 516 F.2d 100, 103 (5th Cir. 1975) (same). Thus, where a party, as here,

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[2] In *Wright*, the conduct involved, organizing a "union shop," had actually been unlawful at the time it was enjoined. Here, by contrast, the injunction was based upon an erroneous construction of Title VII. Also, *Wright* was a stronger case for applying law of the case, since it involved a consent decree rather than, as here, a fully litigated controversy.

Both *Swift* and *Wright* state that an injunction must be modified if transformed by a change of law into an "instrument of wrong." However, *Wright* makes it clear that this means merely that a party is restrained from carrying out what has become a legal course of conduct. The opinion states:

> Had the 1945 decree simply represented relief awarded by the District Court after a trial of the action instituted by petitioners, there could be little doubt but that, faced with the 1951 amendment to the Railway Labor Act, it would have been improvident for the court to continue in effect this provision of the injunction prohibiting a union shop agreement as being unlawful *per se*, or its use as an instrument to effectuate to her statutorily forbidden discriminations. That provision was well enough under the earlier Railway Labor Act, but to continue it after the 1951 amendment would be to render protection in no way authorized by the needs of safeguarding statutory rights at the expense of a privilege denied and deniable to no other union.

364 U.S. at 648, 81 S.Ct. at 371. *See Theriault v. Smith*, 523 F.2d 601 (1st Cir. 1975)(vacation of consent decree to conform with subsequent decison of the Supreme Court); 11 C. Wright & A. Miller, Federal Practice and Procedure §§ 2863, 2961 (1973); Developments in the Law — Injunctions, 78 Harv.L.Rev. 994, 1082 (1965).

is under a continuing injunction barring conduct once considered unlawful, but now permitted, it is an abuse of discretion not to conform the injunction to prevailing law. *System Federation v. Wright, supra,* 364 U.S. at 646-50, 81 S.Ct. 368 (Harlan, J.).[2] *See United States v. Swift & Co.,* 286 U.S. 106, 114-15, 52 S.Ct. 460, 76 L.Ed. 999 (1932) (Cardozo, J.).

Even though the challenged decree commands actions thought beneficent, these principles must be applied. Thus, in *Passadena City Board of Education v. Spengler,* 427 U.S. 424, 96 S.Ct. 2697, 49 L.Ed.2d 599 (1976), the Supreme Court was faced with a decree meant to prevent re-segregation of a school district already integrated by court order. After the decree was entered, the school district did not appeal. Subsequently, the Supreme Court's decision in *Swann v. Charlotte-Mecklenberg Board of Education,* 402 U.S. 1, 91 S.Ct. 1267, 28 L.Ed.2d 554 (1971), made it clear that the district court had exceeded its authority in ordereing such relief. The defendants sought a modification of the injunction under Fed.R.Civ.P. 60(b)(5), which was denied, and the Court of Appeals affirmed this decision. The Supreme Court reversed. It held that law of the case did not insulate the decree from attack and that, insofar as it governed future conduct, the district court should have conformed it to current law. 427 U.S. at 437-38, 96 S.Ct. 2697.

There can be no doubt that *Hazelwood* and *Local 14* significantly changed the law, delimiting for the first time the standard for selecting the labor force used as a benchmark in establishing a prima facie case of discrimination. *Hazelwood, supra,* __ U.S. at __, 97 S.Ct. 2736; *Local 14, supra,* 553 F.2d at 254. The majority opinion as much as concedes their relevance. It states:

> It is true that we have recently held that "where a significant number of union members come from outside the union's geographic jurisdiction, the court must widen its sights; the appropriate reference area then should be that region from which the union draws its members." *EEOC v. Local 14,* 533 F.2d

> 251, 254 (2d Cir. 1977). See also *Hazelwood School District v. United States*, __ U.S. __, n. 17, 97 S.Ct. 2736, 53 L.Ed.2d 768 (June 28, 1977). In *Hazelwood* and in *Local 14*, however, the court was concerned with a statistical basis for a finding of discrimination. Here we have no such problem, discrimination having been established by direct evidence of long-standing practices. *See EEOC v. Local* 638, 532 F.2d 821, 826.

553 F.2d at 2 (footnote omitted). This cirucular argument proves nothing at all. The discrimination that was "established by direct evidence" was premised upon the challenged test, which cannot possibly be its own justification. *Hazelwood* and *Local 14* set out the test to be used in establishing discrimination, and conclusively demonstrate that the finding of liability in the earlier proceedings was based on incorrect standards. I am at a loss to see how a determination of liability under an erroneous test insulates itself from judicial scrutiny once the correct test is laid out by the Supreme Court. The majority should concede that we have no discretion to apply law of the case when the holding of the first appeal has been discredited by the Supreme Court. *Zdanok v. Glidden Co.*, 327 F.2d 944, 951 (2d Cir. (Friendly, *J.*), *cert. denied*, 377 U.S. 934, 84 S.Ct. 1338, 12 L.Ed.2d 298 (1964); *Higgins v. California Prune & Apricot Grower, Inc.*, *supra*, 3 F.2d at 897 (2d Cir. 1924) (L. Hand, *D.J.*). Because neither the district court nor the first panel that heard this case had these decisions before it, the case should be remanded for reconsideration in the light of subsequent developments.

II

In this case, the plaintiffs established their prima facie case of discrimination by proving that the percentage of minority workers in the union was substantially less than the percentage of minority workers in the population. The district court, and now the panel majority, endorse this view. However, under our decision in *Local 14*, this finding resulted from the application of a clearly erroneous legal standard.

Title VII is addressed only to discrimination which has occurred since the effective date of the Act. *Hazelwood, supra*, __ U.S. __ , 97 S.Ct. 2736; *International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 97 S.Ct. 1843, 52 L.Ed.2d 396 (1977). The district court, the original panel decision and the majority here, however, looked to employment figures which included pre-Act membership in the union to establish a prima facie case of discrimination. In *Hazelwood*, the Court of Appeals concluded that a school district which has 1.8 percent minority teachers, in an area whose labor pool was 5.7 percent minority, had unlawfully discriminated. In vacating the decision, the Supreme Court stated:

> The Court of Appeals totally disregarded the possibility that this prima facie statistical proof in the record might at the trial court level be rebutted by statistics dealing with Hazelwood's hiring after it became subject to Title VII. Racial discrimination by public employers was not made illegal under Title VII until March 24, 1972. A public employer who from that date forward made all its employment decisions in a wholly nondiscriminatory way would not violate Title VII even if it had formerly maintained an all-white work force by purposefully excluding Negroes. For this reason, the Court cautioned in the *Teamsters* opinion that once a prima facie case has been estblished by statistical work force disparities, the employer must be given an opportunity to show "that the claimed discriminatory pattern is a product of pre-Act hiring rather that unlawful post-Act discrimination." [— U.S.at —, 97 S.Ct. at 2742].
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> The record in this case showed that for the 1972-1973 school year, Hazelwood hired 282 new teachers, 10 of whom (3.5%) were Negroes; for the following school year it hired 123 new teachers, five of whom (4.1%) were Negroes. Over the two-year period, Negroes constituted a total of 15 of the 405 new teachers hired (3.7%). Although the Court of Appeals briefly mentioned these dates in reciting the

> facts, it wholly ignored them in discussing whether the Government had shown a pattern or practice of discrimination. And it gave no consideration at all to the possibility that post-Act data as to the number of Negroes hired compared to the total number of Negro applicants might tell a totally different story.

— U.S.at —, 97 S.Ct. at 2743 (footnotes omitted). We reached the identical conclusion in *Local 14, supra*, 553 F.2d at 254.

It is by no means a futile gesture to allow this union a chance to produce such evidence. In *Local 14* we overturned a finding of liability against another construction union whose jurisdiction was New York City. That union had a minority membership of 6.5 percent; however, when its post-Act hiring was compared to the appropriate population figures, we found the question of discrimination sufficiently doubtful to remand the case for a proper hearing. This union had a minority membership of 5.77 percent in December, 1976, fairly close to the figure in *Local 14*. As the district court found, less than one-third of the membership has joined this union since the effective date of Title VII. *See Local 638, supra*, 532 F.2d at 824; 401 F.Supp. at 474. Moreover, the record does not reveal how much control the union had over direct transfers and organization of non-union shops.[3] Nor does the majority take account of the extremely depressed conditions in the construction industry in New York during the period in question. Finally, the district court did not have before ti the "applicant-flow data deemed essential by the Supreme Court in *Hazelwood*. *See* — U.S.at —, 97 S.Ct. 2736 (Brennan, J., concurring). Without clear findings on these matters, we are in a position to affirm neither the finding of discrimination nor the broad remedial order. As the *Hazelwood* Court concluded:

> It is thus clear that a determination of the appropriate comparative figures in this case will depend

[3] As is clear from the district court opinion, the discriminatroy organization of non-union shops took place in "the late 1950's and early 1960's," 401 F.Supp. at 485, before the effective date of the Act.

upon further evaluation by the trial court. As this Court admonished in *Teamsters*, "statistics ... come in infinite variety .... [T]heir usefulness depends on all of the surrounding facts and circumstances." [431 U.S. at 340, 97 S.Ct. 1843]. Only the trial court is in a position to make the appropriate determination after further findings. And only after such a determination is made can a foundation be established for deciding whether or not Hazelwood engaged in a pattern or practice of racial determination in its employment practices in violation of the law.

__ U.S. at __, 97 S.Ct. at 2744 (footnote omitted).

I do not mean to suggest that this union's history in racial matters is commendable. The blatant pre-Act discrimination is deplorable, the very most that can be said for it is that it was not unlawful. Furthermore, there have been enough subsequent acts of discrimination to support a conclusion that compliance with Title VII has been, at most, grudging and half-hearted.[4] Nonetheless, Title VII does not empower us to right all the wrongs of society, but only to correct specific illegal conduct. *Equal Employment Opportunity Commission v. Enterprise Ass'n Steamfitters Local 638*, 542 F.2d 579, 592 (2d Cir. 1976), *cert denied*, 430 U.S. 911, 97 S.Ct. 1186, 51 L.Ed.2d 588 (1977). It may well be that the plaintiffs in this action could prevail under a proper test. However, no matter how "just" the result appears, we cannot base a finding of liability on "a wholly inappropriate legal standard of discrimination," *Hazelwood*, *supra*, __ U.S. at __, 97 S.Ct. at 2744 (Brennan, *J.*, concurring), as was done here. Thus, further factfinding is required, which can be accomplished only if the case is remanded to the district court. *Id.* (majority opinion).

III.

There is a second fundamental error in the determination of liability. The district court used the New York City minority population as the standard to determine the existence of

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[4] If is for the district court to determine if these constitute a "pattern and practice" of discrimination or if they call for individual treatment. *Local 14*, *supra*, 553 F.2d at 255-56.

discrimination. Under our recent decision in *Local 14*, this was clearly erroneous. As Judge Van Graafeiland stated for a unanimous panel:

> [W]here a significant number of union members comes from outside the union's geographic jurisdiction, the court must widen its sights; the appropriate reference area then should be that region from which the union draws its members.

533 F.2d at 254. In June, the Supreme Court, in *Hazelwood*, "highlight[ed] the importance of the choice of the relevant labor market area." __ U.S. at __ n. 17, 97 S.Ct. at 2744.¶ The majority ignores the district court's error in this crucial decision.[6]

The district court below determined the minority population of New York City to be 29 percent, which it used as a benchmark. 401 F.Supp. at 488-89. This was clearly incorrect in light of *Hazelwood* and *Local 14*. The error is underscored by the fact that the court below expanded the areas from which minority membership would be drawn on the ground that:

> If it be true many of the present membership reside outside the limits of New York City there is no reason why applicants should be restricted to New York City.

421 F.Supp. 603, 618. It may be true, as the majority states, that this is a careful finding of fact that an "insignificant" part of the membership lives outside of New York. I must note, however, that "insignificant" is generally not synonymous with "many". If so, it belies both our earlier decision that the relevant labor pool was "the Metropolitan area," 532 F.2d at 831, and the position taken on this appeal by the EDOC that "many of the present membership reside outside the limits of New York City." Brief of the EEOC at 19. It is abundantly clear that a

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[5] *Hazelwood* dealt with the exact opposite of this situation. There, a district court failed to include the minority population of a central city in a lawsuit against a largely white suburb. It is inconceivable, however, that a different legal standard determines the existence of discrimination in cities and suburbs.

[6] One commentator has noted that "the geographical delimitation of the relevant population can be the deciding factor in a case." Loptaka, A 1977 Primer on the Federal Regulation of Employment Discrimination, 1977 U. Ill. L.F. 69, 76.

further hearing is necessary, at which proper statistical evidence could be taken.

IV.

The crucial nature of this evidence is illustrated by a comparison with the *Local 14* case. Local 15,[7] the union involved there, was another construction union whose jurisdiction is New York City. Just as here, there was ample evidence of blatant pre-Act discrimination, resistance to change and substantial individual acts of discrimination after the Act. However unpleasant such conduct is, it does not necessarily make out a prima facie "pattern and practice" case under Title VII. In that case, we indicated that the proper hiring goal was approximately 16.2 percent. Here, four out of every five members taken into the union have come from the apprenticeship program. Minority participation in that program rose from .37 percent in 1965 to 21.8 percent in 1967, fell to 9.77 percent in 1973, and rose to 14 percent in 1974. These figures cast substantial doubt on the finding that the apprenticeship program was discriminatory. *Compare Local 14, supra,* 533 F.2d at 254; *Hazelwood, supra,* — U.S. at —, 97 S.Ct. 2736. Moreover, the district court confusingly lumped together pre and post-Act discrimination in such areas as the organization of non-union shops, preventing meaningful analysis of the record. 401 F.Supp. at 485-86. There is thus some possibility that the union is not liable under Title VII. In any event, if liability is found, a proper remedy cannot be formulated until the scope of the violation is known. The majority's holding makes this task impossible.

V.

Even if majority's affirmance of the finding of liability is correct, the case still should be remanded for the formulation of a proper remedy. If the district court fixes the proper figure for determining the existence of discrimination, then it logically follows that the same figure is the appropriate target in any affirmative action plan imposed. The rule in Title VII cases, as in all others, is that the remedy is to be fitted to the wrong. Thus, in *Albermarle Paper Co. v. Moody,* 422 U.S. 405, 95 S.Ct. 2362, 45 L.Ed.2d 280 (1975), the leading case on remedies under

under Title VII, the Court explicitly adopted this familiar principle:

> "The general rule is, that when a wrong has been done, and the law gives a remedy, the compensation shall be equal to the injury. The latter is the standard by which the former is to be measured. The injured party is to be placed, as near as may be, in the situation he would have been committed." *Wicker v. Hoppock* [73 U.S. 94] 6 Wall. 94, 99 [18 L.Ed. 752] (1867).

Id. at 418-419, 95 S.Ct. at 2372. *See Dayton Board of Education v. Brinkman*, – U.S. –, –,97 S.Ct. at 2766, 53 L.Ed.2d 851 (1977), *Milliken v. Bradley*, 418 U.S. 717, 738, 744, 94 S.Ct. 3112, 41 L.Ed.2d 1069 (1974). We expressed the same views in *Local 14*, where we stated:

> When a District Court finds that discriminatory practices on the part of a union or an employer have prejudiced minority workers, it should frame its relief with an eye toward remedying the wrong, *see generally Albermarle Paper Co. v. Moody*, 422 U.S. 405, 421 [95 S.Ct. 2362, 45 L.Ed.2d 280] (1975), and should interfere with the defendant's operations no more than is necessary to accomplish this result.

553 F.2d at 256.

The majority simply ignores this principle. Instead, it holds, in effect, that the district court, once it has made a finding of discrimination, is free to select a hiring goal on an arbitrary basis, or no basis at all. There can be no other explanation for a holding that, even if 16.2 percent is the appropriate figure for determining the existence of discrimination, 29 percent is the hiring goal which must be set to remedy that discrimination. A simple example will demonstrate the absurdity of this position.

Assume that two unions, in related trades, have jurisdiction over a city whose minority population is 30 percent. The metropolitan area of which the city is a part has an overall

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[7] Local 14 was found liable for discrimination. The remand was ordered for Local 15, a companion union in the same case.

minority population of 15 percent. Both unions' membership live throughout the metropolitan area. On the effective date of the Act, neither union has any minority members.

The first union in this example admits 15 percent minority members after the Act becomes effective; the second union only 10 percent. Under *Hazelwood* and *Local 14*, the first union is in full compliance with Title VII. The second union, however, would be in violation of the Act since it falls short of the 15 percent goal. A minority membership goal of 30 percent within five years could be set by the district court, following the majority reasoning of this case.

After five years, if the second union has succeeded in raising its overall minority membership to 20 percent, it would be in violation of the affirmative action plan imposed. At the same time, the first union, with its 15 percent post-Act minority membership, would be in full compliance with the law. I do not believe that the drafters of Title VII envisioned such an incongruous result.

VI

Finally, this decision will, on balance, retard rather than advance the acheivement of non-discrimination in employment. While it may lead to somewhat "more" integration in the central cities, it will halt efforts to integrate suburban employers. Thus, if a union whose jurisdiction is Nassau and Suffolk Counties were found liable under Title VII, I assume that the majority, in order to be consistent, would set the hiring goal by reference to the small minority population of those suburban counties. It would presumably be error to consider New York City's far more substantial minority population. Although this result appears to be compelled by today's decision, it is clear that it will hardly advance the cause of integration. If we are to eliminate the national disgrace of employment discrimination, we must widen, and not restrict, our horizons. I believe that the majority, proceeding from the best of motives, jeopardizes the cause Title VII is designed to serve.[8]

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[8] As we stated in *Local 14:*

We must carefully balance the need for effective enforcement of the Act against overzealous enforcement which can only lead to resentment and a resistance to change. 533 F.2d at 255.

I would vacate the decision of the district court, and remand for a hearing under proper standards.

REVISED AFFIRMATIVE
ACTION PROGRAM AND ORDER
71 CIV. 2877 (HFW)

United States District Court
Southern District of New York

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, and
THE CITY OF NEW YORK,

Plaintiffs,

– against –

LOCAL 638 . . . LOCAL 28 OF THE SHEET METAL WORKERS' INTERNATIONAL ASSOCIATION, LOCAL 28 JOINT APPRENTICESHIP COMMITTEE, . . . SHEET METAL AND AIR-CONDITIONING CONTRACTORS' ASSOCIATION OF NEW YORK CITY, INC., etc.,

Defendants.

LOCAL 28,

Third-Party Plaintiff,

– against –

NEW YORK STATE DIVISION OF HUMAN RIGHTS,

Third-Party Defendant.

LOCAL 28 JOINT APPRENTICESHIP COMMITTEE,

Fourth-Party Plaintiff,

– against –

NEW YORK STATE DIVISION OF HUMAN RIGHTS,

Fourth-Party Defendant.

REVISED AFFIRMATIVE ACTION PROGRAM

Introduction

1. Upon the motion of the plaintiffs and the State Division of Human Rights (the "State Division") this Revised Affirmative Action Program ("Revised Program") is adopted after reconsideration and review of the remedial provisions of the Decision and Order dated July 18, 1975, the Order and Judgment dated August 28, 1975 and entered on September 2, 1975 ("Order and Judgment"), the Affirmative Action Program entered November 25, 1975, and the Court of Appeals decision dated March 6, 1976 in light of the present changed working and employment conditions in the sheet metal industry in New York City, including the present severe and widespread unemployment in the industry. The goal of this Revised Program is to assure that in light of these changed circumstances and conditions the non-white[e] membership in Local Union No. 28 of the Sheet Metal Workers International Association ("Local 28") reaches a minimum level of 29% by July 1, 1982; to assure that substantial and regular progress is made toward this goal in each year prior to 1982; and to assure that all members and

[e] "Non-white" as used in the Revised Program means black and Spanish surnamed individuals.

apprentices of Local 28 share equitably in all available employment opportunities in the industry.

2. For the purpose of reaching the above goal of 29% by July 1, 1982 this Revised Program establishes the following interim percentage goals for the nonwhite membership of Local 28:

July 1, 1977	8%
July 1, 1978	11%
July 1, 1979	15%
July 1, 1980	19%
July 1, 1981	24%

Each of the above percentages shall be measured against the total membership of Local 28 as of each interim goal date, respectively, and the final goal date. For the purpose of measurement, total membership shall include (a) all journeyman members, (b) all pensioners[oo] who, while on pensioner status, have been employed as sheetmetal workers within the three years prior date which measured, (c) all members or participants in the Local 28 Apprentice Program ("Apprentice Program"), and (d) all individuals who (i) have been offered admission to and membership in Local 28 but have exercised their option, pursuant to Section 16 of the Revised Program or pursuant to a parallel policy adopted by Local 28, to defer such admission and membership and (ii) at the time of measurement have continued to exercise the aforesaid deferment option. The parties to this action and the Administrator are to implement this Revised Program so that the final goal shall be attained. At least once every six months, the Administrator shall review the progress toward the attainment of these interim goals and shall take any such action as he is empowered to take under the Order and Judgment and which is necessary to assure their achievement. In addition, upon his own motion or that of any party, the Administrator is authorized and directed to periodically review the working and employment conditions in the sheetmetal industry in New York City to determine whether

[oo] "Pensioner" as used in the Revised Program means any individual who receives benefits from the Local 28 pension program.

it is feasible and practical to increase the interim goals or reduce the time period within which any interim goal or the final goal shall be met by Local 28 and the JAC. It is the express purpose and intent of this Revised Program to attain the goal of 29% non-white membership in Local 28 and the Apprentice Program at the earliest practicable time.

3. Admission to Journeyman membership in Local 28 shall be attained only through the following procedures:

a) Successful completion of 'hands-on' journeyman test administered pursuant to Sections 5 through 11;

b) establishment of proof of the required experience in the sheetmetal trade pursuant to Section 12; or

c) successful completion of the Local 28 Apprentice Program; or

d) transfer in accordance with the Sheet Metal Workers' International Union Constitution and Ritual; or

e) organization of non-union shops.

f) the deposit of a previously obtained withdrawal card with the Executive Board of Local 28 and compliance with the relevant provisions of the Sheet Metal Workers' International Union Constitution and Ritual.

4. Membership in the Apprentice Program shall be obtained only through the following procedures:

a) successful completion of an apprentice aptitude test, as set forth in Sections 18 through 28; or

b) entry with advanced standing as set forth in Sections 29 through 32.

Admission to Journeyman Status

5. Local 28 shall administer a validated, non-discriminatory, 'hands-on' journeyman's test under the overall supervision and approval of the Administrator no later than March 1, 1978 and at least once a year thereafter at a date, time and place to be set by the Administrator. The Administrator, after consultation with the

parties, may apply to the Court (i) to schedule a 'hands-on' journeyman's test for a date certain prior to March 1, 1978 and (ii) to decrease the frequency of the tests to be administered subsequent to March 1, 1978, consistent with the requirements of the interim goals set forth in Section 2.

6. The 'hands-on' journeyman's tests administered pursuant to Section 5 shall be professionally developed and validated in accordance with EEOC Guidelines. With respect to the test to be administered by March 1, 1978 as required in Section 5, Local 28 shall furnish counsel for the parties and the Administrator with (i) a copy of a report demonstrating the validity of the test and (ii) a copy of the test to be administered at a date set by the Administrator, provided that counsel for the parties and the Administrator shall not distribute or disclose the contents of the test to any individual or organization except for the purpose of professional validation thereof. With respect to all subsequent tests administered pursuant to Section 5, Local 28 shall provide the Administrator and counsel for the parties with the information and material described in subdivisions (i) and (ii) herein at least four weeks prior to the schedule date of each test.

7. All qualified applicants shall be eligible to take the 'hands-on' journeyman's test specified in this Revised Program. A qualified applicant is defined as follows: any person who

a) has or will have attained the age of 18 by the date of the test, and

b) is a citizen or lawful permanent resident alien legally entitled to work in the United States, and

c) has resided in New York City or the counties of Westchester (N.Y.), Nassau (N.Y.), Suffolk (N.Y.), Passaic (N.J.), or Essex (N.J.), for six (6) months prior to the filing of an application, and

d) has one year of sheet metal work experience including but not limited to employment as a member in any branch of Local 400 of the Sheet Metal Workers International Association, sheet metal experience in the Armed Forces, or vocational education or taining related to the skills of a journeyman sheet metal worker.

Persons presently registered or recently registered in the Local 28 Apprentice Program or any other recognized apprentice program affiliated with the Sheet Metal Workers International Association are not eligible.

8. Subject to the approval of the Administrator, Local 28 shall develop a standardized application form for the 'hands-on' journeyman's test. Such form shall include only the following:

a) provisions for the name, address, telephone number, social security number, citizenship or lawful resident alien status, residency, record of convictions, age, sex and race or ethnic identification of the applicant (with a notation that information regarding race or ethnic identification is required solely for the purpose of compliance with the court order herein and the regulations of the United States Equal Employment Opportunity Commission), and previous sheet metal experience.

b) information regarding the eligibility requirements, fee, date, time, location, and nature of the 'hands-on' journeyman's test.

9. Local 28 shall make available an application form for the 'hands-on' journeyman's test and a short description of the nature of the test in the following manner:

a) at the offices of Local 28;

b) by mail in response to inquiries and requests made by mail;

c) in bulk to plaintiffs, the City Department of Employment, the New York State Employment Service, Recruitment and Training Program, Inc., Fight Back, and the other governmental or community agencies listed in Appendix A as amended from time to time.

Completed applications for the test shall be accepted by mail or delivery in person at the offices of Local 28. Local 28 may establish, with the approval of the Administrator, a suitable cut-off date for the acceptance of applications. Local 28 may establish a fee for the taking of the 'hands-on' journeyman's test

consistent with the cost of administering such a test. Such fee shall be, provisionally, $25.00. Local 28 may apply to the Administrator for an increase in this fee upon good cause shown. Applicants shall be informed, in writing, as to the place of examination with instructions as to how to reach the place and/or a map indicating its location.

10. The 'hands-on' journeyman's test shall be graded by a Board of Examiners consisting of three members knowledgable in sheet metal. Said Board shall be comprised of a representative chosen by Local 28, a representative chosen by the Administrator, and a representative chosen by the plaintiffs and the State Division. Said Board shall act by majority vote and shall employ the passing grade level developed pursuant to the validation procedures set for in Section 6. All applicants shall be advised of their status by first class mail within 30 days of the test. Applicants who fail the test shall be advised of their possible eligibility for advanced standing in the apprenticeship program pursuant to Sections 29 through 32 of the Revised Program or pursuant to a parallel policy adopted by Local 28 and/or the Local 28 Joint Apprentice Committee ("JAC").

11. (a) All qualified applicants who pass the test and are physically fit to perform sheet metal work shall be admitted to journeyman status in Local 28 within 60 days of the test unless the applicant elects to defer admission pursuant to Section 16, or pursuant to a parallel policy adopted by Local 28.

(b) To the best of their ability the parties and the Administrator shall endeavor to set forth on the application form the most accurate estimate of the employment opportunities available in the industry.

12. Commencing February 1, 1977 there shall be established a program for admission to Local 28 journeyman membership of persons who have had four years experience, obtained in the United States or elsewhere, in sheet metal work or employment reasonably related or similar to sheet metal work, including experience in the Armed Forces, or vocational training related to the skills of a sheet metal worker. Persons eligible for admission under this program must,

a) be a resident of New York City, or the counties of Nassau (N.Y.), Suffolk (N.Y.), Westchester (N.Y.), Bergen (N.J.), Passaic (N.J.), Essex (N.J.), Union (N.J.), or Hudson (N.J.) for six (6) months prior to application; and

b) be age of 18 or over; and

c) be physically fit to perform sheet metal work; and

d) establish to the satisfaction of a majority of a board of three members knowledgable in sheet metal work, comprised of a representative chosen by Local 28, a representative chosen by the Administrator, and a representative chosen by the plaintiffs and the State Division that the applicant has the requisite sheet metal experience; and

e) be a citizen or lawful permanent resident alien legally entitled to work in the United States.

The Administrator, after due consultation with all the parties, shall establish procedures for application to this program, for investigation and verification of the criteria set forth in subsections (a) through (e), and for the timing and conditions of admission. Appropriate publicity for the program shall be undertaken at the direction and with the approval of the Administrator.

13. a) Upon proper application, a non-white eligible for admission to journeyman membership in Local 28 pursuant to Sections 5 through 12 or Section 31(e) of this Revised Program may request of Local 28's Executive Board that the Local 28 initiation fee be reduced pursuant to the provisions of Paragraph 22(d) of the Order and Judgment. Within 5 days of receipt of such application, the Local 28 Executive Board shall render a decision on the application in writing and notify the applicant, the Administrator, and the parties of the disposition of the application (the notification to the Administrator and the parties shall include the name and address of the applicant). If such application is denied in whole or in part, or is not acted upon within five days of its receipt by the Executive Board of Local 28, an application may be made to the Administrator who shall either grant or deny the request in writing after duly

considering all the factors set forth in Paragraph 22(d) of the Order and Judgment. In considering such an application the Administrator may require the submission of such information, documents, or other data from either Local 28 or the applicant as he deems necessary.

b) Upon proper application a non-white eligible for admission to journeyman membership in Local 28 pursuant to Sections 5 through 12 or Section 31(e) may request of the Local 28 Executive Board that payment of the Local 28 initiation fee commence with employment and be payable on a pro rated basis, each payment not exceeding 10% of the net pay check, and payable only during periods of employment until the fee is paid. Within 5 days of the receipt of such application the Local 28 Executive Board shall render a decision on the application in writing and notify the applicant, the Administrator, and all parties of the disposition of the application (the notification to the Administrator and the parties shall include the applicant's name and address). If such application is denied in whole or in part or not acted upon within 5 days of its receipt by the Executive Board of Local 28, an application may be made to the Administrator who shall either grant or deny the application in writing. The decisions of the Executive Board of Local 28 and the Administrator shall be made having duly considered the financial circumstances of the applicant.

14. a) At any time after an application pursuant to Section 13 has been pending with the Administrator for more than 5 days a non-white eligible for admission to journeyman membership in Local 28 pursuant to Sections 5 through 12 or Section 31(e) of this Revised Program shall be admitted conditionally to journeyman membership upon payment of $56 dollars and one month's dues pending the determination of the Administrator which shall be made within 30 days of the date of the application to the Administrator. During such conditional membership an applicant wll be entitled to all the rights and privileges of regular journeyman membership.

b) If a conditional member is terminated without becoming a regular journeyman member of Local 28 he shall be entitled to a return of any dues paid in advance for any month in which he was not employed and, if he was not employed during his conditional membership, he shall also be entitled to a return of any payment mde toward the initiation fee.

15. The granting of any application pursuant to Section 13 shall not diminish any rights or privileges accruing to journeyman membership in Local 28.

16. A person eligible for admission pursuant to Sections 5 through 11 shall be permitted to defer such admission for up to twelve months from the time he is first entitled to be admitted. During such period, a person who has elected to defer may apply to the Administrator for further deferral of admission, and upon a showing of good cause, the Administrator may continue such deferment for such time as the Administrator shall determine. If an applicant invokes his right of deferral he shall be admitted, on the same terms and conditions as he was previously entitled, within 15 days of written notice to Local 28 that he seeks to be admitted, however, upon good cause shown by the applicant, the Administrator may direct Local 28 to admit the applicant in less than 15 days.

17. Local 28 shall issue "permits" or "identification slips" only with the express written consent of the Administrator, and pursuant to Paragraph 22(f) of the Order and Judgment.

Apprentice Program

18. The JAC shall maintain an Apprentice Program of four years duration or less. The terms and conditions of the apprentice program shall be as set forth in the Collective Bargaining Agreement ("Standard Form of Union Agreement . . . between Local 28 . . . and Sheet Metal Contractors"), the Local 28 Joint Apprenticeship Trust and Indenture, and the rules and regulations thereunder except as modified by the Order and Judgment, the provisions of this Revised Program, or order of the Administrator pursuant to his powers under the Order and Judgment and this Revised Program.

19. a) The JAC shall indenture no less than 36 apprentices by February 1977 and another class of apprentices (in a number to be determined as set forth in subsection (b) below) by July 1977. The JAC shall indenture two classes of apprentices each year up to and including July 1982; the classes shall be indentured in February and July of each year.

b) Upon consideration of the goals of this Revised Program, and the availability of employment opportunities in the industry, the JAC shall forward its recommendation of the number of apprentices to be indentured in each class, no later than 90 days before each class is indentured, to counsel for the parties and the Administrator. Such recommendation shall be accompanied by a report setting forth the basis for the recommendation. Any objections to the recommendation shall be filed with the Administrator no later than 15 days after receipt of the JAC's recommendations and report. The Administrator shall review the recomendations and objections, if any, to determine if the action taken by the JAC is in accord with the goals and objectives of the Revised Program. Upon a finding that the JAC's recommendation does not meet the goals and objectives of the Revised Program the Administrator shall render his determination as to the appropriate number of apprentices to be indentured. The Administrator shall render his determination within 20 days after the date for filling objections.

c) The numbers of apprentices to be indentured shall include those apprentices admitted with advanced standing.

20. a) Seniority among apprentices shall not be a criterion for employment, and apprentices may be rotated for employment where necessary and feasible pursuant to subsection (c) of this section.

b) The JAC shall make every effort to provide apprentices with classroom instruction, including evenings and Saturdays where necessary, during periods of unemployment, and shall credit such hours toward fulfillment of apprenticeship requirements. The JAC may authorize the accelerated advacement or graduation of any apprentice as it deems proper.

c) The JAC shall establish an employment referral system which shall incorporate the following elements:

(i) A list of all apprentices shall be established in three groupings. Group one shall contain apprentices in terms 1, 2, 3; Group two shall contain apprentices in terms 4,5,6; Group three shall contain apprentices in terms 7 and 8.

(ii) A record shall be kept for each apprentice of the number of manhours worked within each group and the JAC shall refer out apprentices in inverse order to the numer of manhours worked (so that apprentices with the lowest numer of manhours shall receive referrals first).

(iii)To the extent feasible the JAC shall rotate the groupings to insure that no one grouping, or persons therein, receive a disproportionate amount of work.

(iv)The JAC shall provide counsel for the parties and the Administrator with monthly reports. Such reports shall include but not be limited to: A) all apprentices by name, ethnic status, term, grouping, number of manhours worked, and name of contractor(s) that the apprentice is assigned to; and B) summary of manpower reports showing the number of journeyman and apprentices working for all employees.

The JAC shall provide counsel for all parties and the Administrator with a proposed referral system incorporating the above elements, on or before April 1, 1977.

d) The JAC shall take all reasonable steps, in addition to those set forth in subsections (a) through (c) of this section, to insure that apprentices receive adequate employment and/or training opportunities. Such steps shall include but not be limited to the following:

(i) Advising counsel for all parties and the Administrator whenever an employer receives a contract from the City, State, or Federal Government.

(ii) Advising such employers of their obligations under City Executive Order 71, New York State Labor Law 220e (and any New York State Executive Order 45), and Federal Executive Order 11246.

(iii) Reporting to counsel for all parties and the Administrator the names of any sheet metal employers which, based upon manhour computations, appears to be out of compliance with the appropriate statute, executive order, and/or rule and regulation.

(iv) Taking all necessary steps to seek out and apply for governmental manpower training funds. The JAC shall advise counsel for all parties and the Administrator what actions it is taking in this regard and shall provide a copy of any funding proposal to the Administrator prior to its submission to the funding agency.

21. Upon successful completion of the Apprentice Program, apprentices shall be promptly admitted to full journeyman membership upon payment of the balance due of the initiation fee, if any, which upon application to the Local 28 Executive Board may be paid on an installment basis for good cause shown, and subject to the procedures contained in Section 13.

22. Applications for the Apprentice Program shall be made available to and accepted from any qualified candidate. A qualified candidate is defined as follows: any person who is deemed physically fit for sheet metal work and who has or will have attained the age of 18 years by the date of indenture of the next scheduled apprentice class and who is not older than 25 years of age (for veterans of active military duty the age limit is extended one year for each year of such duty up to the age of 30) and for non-whites not over the age of 35 applying for advanced standing, and who is a citizen or permanent resident alien.

23. With the approval of the Administrator, the JAC shall develop a standardized application form for the Apprentice Program. The application form shall include information about the date of the next class of apprentices to be indentured, and shall require only the following information of the applicant:

a) Name, address and telephone number;

b) Birth date and age;

c) Social Security number;

d) Extent of education;

e) Sex;

f) Race or ethnic classification (with a notation that this informantion is required solely for the purposes of compliance with federal anti-discrimination statutes);

g) Military service;

h) Convictions and pending criminal charges;

i) Citizenship or lawful permanent resident alien status.

24. Application forms for the apprentice Program shall be available at the offices of the JAC during normal business hours and at the offices of the organizations listed in Appendix A at least 60 days before an examination. Application forms shall be made available by mail upon written request. Completed applications shall be accepted in person or by mail at the offices of the JAC. There shall be a filing fee of no more than $15.00. Application forms shall be made freely available to any governmental employment office and minority community organizations not listed in Appendix A upon request. The time for filing applications for a particular apprentice test may be closed by the JAC at a reasonable time (not to exceed three weeks) before the date of the examination.

25. a) An apprentice aptitude test shall be given in December, 1977 and at least once yearly thereafter at a date, time and location approved by the Administrator. The test shall consist of the following. (i) a mechanical comprehension test, which has been validated under EEOC Guidelines, similar in substance and scope to the mechanical comprehension test administrered by JAC in April 1969, and/or (ii) a spatial relations test, which has been validated under EEOC Guidelines, similar in substance and scope to the spatial relations test given in December 1975. The Administrator, after consultation with the parties, may apply to the Court to decrease the frequency of the tests consistent with the requirements of the interim goals set forth in Section 2.

b) The JAC may apply to the Administrator to give a basic "read and follow directions" test which has been validated under EEOC Guidelines and is designed to ascertain an applicant's ability to master and understand those written and verbal instructions, directions, and other communications necessary to participate in the Apprentice Program at the first year level; upon good cause shown, the Administrator shall authorize the administration of such a test as part of the apprentice aptitude test. There shall be professionally developed and validated a qualifiying score on the "read and follow directions" test designed to reflect the minimum ability necessary to participate in the Apprentice Program at the first year level. The JAC may also apply to the Administrator to give a math test as part of the apprentice aptitude test, and such test may be given upon good cause shown. Such math test shall be professionally developed and validated (pursuant to EEOC Guidelines) as to content and qualifying score in such manner as to reflect the minimum ability necessary to participate in the Apprentice Program at the first year level.

(c) With respect to the apprentice aptitude test which is to be administered in December 1977, on or before May 1, 1977, the JAC shall furnish counsel for the parties and the Administrator with (i) a copy of a report demonstrating the validity of the test and (ii) a copy of the test to be administered, provided that counsel for the parties and the Administrator shall not distribute or disclose the contents of the test to any individual or organization except for the purpose of validation thereof. With respect to all subsequent tests administered pursuant to this section, the JAC shall provide the Administrator and counsel for the parties with the information and material requested in subsections (i) and (ii) herein at least four weeks prior to the schedule date of each test.

26. Within three weeks of the administration of an apprentice aptitude test, JAC shall provide the Administrator and all parties with:

a) the names, race and ethnic identification, raw scores and rank of all candidates on all tests; and

b) the mean and median scores on all tests of all identifiable racial and ethnic groups among the candidates.

27. In fulfillment of JAC's and Local 28's obligations under Section 19, apprentices chosen by means of the apprentice aptitude test shall be selected on the basis of the ranking of scores (highest first) received on the mechanical comprehension test and/or the spatial relations test among all eligible candidates.° If a "read and follow directions" test and/or a math test is administered pursuant to Section 25, then ranking and selection based upon scores on the mechanical comprehension test and/or the spatial relations test shall be from among those applicants who meet or exceed the qualifying score on the "read and follow directions" test and/or the math test.

28. Persons selected for the Apprentice Program may be required to appear for orientation and a physical examination prior to being indentured. The cost of physical examinations are to be borne one half by successful applicants and one half by the JAC. Additional persons may be invited to orientation and a physical examination by Local 28 JAC if that appears desirable. Persons selected in accordance with the above procedures shall be indentured as apprentices unless such indenturing is waived by them, or they are certified physically unable to perform sheet metal work by a medical practicioner licensed in New York State.

ADVANCED APPRENTICES

29. There shall be established by the JAC procedures for the admission and advanced placement in the Apprentice Program of non-white apprentices who have experience in sheet metal work or trade education but cannot perform at journeyman level.

° Apprentices chosen for the July 1977 class shall be selected on the basis of ranking of scores received on the spatial relations test MAT 8 and MAT 9 given December 1975.

Applicants for advanced placement shall have at least six months experience in sheet metal work or trade education, be physically fit and shall be not less than 18 years old or more than 35 years old by the date of indenture of the next scheduled apprentice class.

30. The Training Coordinator of JAC (the "Coordinator") shall evaluate the experience of all applicants for advanced standing and shall make placement of appropriate grade level. The grade level assigned shall be conditional for a period to be determined by the Coordinator, not exceeding three months, based upon classroom work and on the job performance. Applicants who challenge the grade level assigned shall be advised of their right to appeal to the Administrator.

31. a) The Administrator shall determine the number of advanced apprentices to be admitted from the list resulting from each test, based upon the needs of the Apprentice Program at any given time and the number of applicants eligible for advanced standing as certified by the Coordinator.

b) Apprentices who meet the requirements of Section 29 shall be selected for advanced standing in the following manner:

(i) Those whose ranking on the apprentice aptitude examination qualifies them for acceptance into the Apprentice Program pursuant to Section 19 shall be selected in accordance with their ranking and admitted with advanced standing subject to the number determined by the Administrator pursuant to subdivision (a) of this Section.

(ii) If there are insufficient apprentices who qualify for advanced standing selected by the procedure contained in subdivision (b)(i) of this section to satisfy the number determined by the Administrator, additional apprentices to reach this number shall be selected in ranked order, from those who are over 25 years of age and whose score on the apprentice aptitude examination places then below the number otherwise selected pursuant to Section 19.

c) The number of apprentices admitted with advanced standing under subdivision (b)(i) of this section shall be included in the number of apprentices selected pursuant to

Section 19. The number of apprentices admitted with advanced standing under subdivision (b)(ii) of this section shall not be included in the number of apprentices selected pursuant to Section 19.

d) An advanced apprentice shall be entitled to all rights, privileges and other benefits including work referral, pay, instruction, and supervision accruing to regular apprentices at the same level of training.

e) Apprentices admitted with advanced standing pursuant to Sections 29 through 31 who successfully complete the Apprentice Program may make the applications provided for in Section 13 of this Revised Program.

f) Advanced apprentices assigned for work may be utilized to satisfy City and City-assisted contract requirements for the employment of minority trainees.

32. The Coordinator shall develop a pre-examination study group program so as to familiarize all applicants for the Apprentice Program with the type of test that they will be given. All applicants shall be notified in writing at least two weeks in advance of the apprentice aptitude test that the study program is available to them. Such notice shall contain the date, time and location of the study group meetings. The meetings shall be held in the evening after 6:30 P.M. At such time as shall be determined by the Administrator but in no event later than 60 days prior to the test date, the Coordinator shall submit a detailed program including but not limited to teaching methodology, program materials, and the organization of the groups.

Records

33. In addition to any other records or lists required to be maintained under the terms of this Revised Program or the Order and Judgment, Local 28 and JAC, as the case may be, shall maintain separately for whites and non-whites, records and lists containing the following information, beginning with the effective date of the Affirmative Action Program entered on November 25, 1975.

a) Persons who request an application for or apply to take the "hands-on" journeyman's test described in Section 5:

b) Persons who take the "hand-on" journeyman's test described in Section 5;

c) Persons who pass the "hands-on" journeyman's test described in Section 5;

d) Persons who apply for journeyman admission on the basis of experience, described in Section 12;

e) Persons who are admitted, and those rejected, for journeyman membership on the basis of experience, described in Sectin 12;

f) Persons who seek or apply to transfer into Local 28 from an affiliated sister local union;

g) Persons who inquire of Local 28 about the possibility of transferring into Local 28 from an affiliated sister local union;

h) Persons who inquire of Local 28 as to the availability of work opportunities with or through Local 28, including but not limited to inquiry about or seeking "permits" or "identification slips;"

i) Persons to whom "permits" or "indentifiction slips" are issued or work opportunities with or through Local 28 are otherwise made available;

j)Persons who contact Local 28 or JAC seeking sheet metal work;

k) Persons who are employed as sheet metal workers or apprentices by Local 28 contractors;

l) Persons working in sheet metal shops at the time they are organized by Local 28;

m) Persons who are reinstated to journeyman membership or membership in the Apprentice Program;

n) Non-whites who apply for advanced standing in the apprenticeship program described in Sections 29-32;

o) Non-whites who are granted advance standing in the apprenticeship program and the standing granted as described in Sections 29-32;

p) Persons who are reinstated to journeyman membership in Local 28 having previously exercised withdrawal privileges.

The records and lists specified in subsection (a) through (o) of this Section shall contain the name, address, race, or national origin, union affiliation, if any, of each individual listed therein, as well as the date of the application, test, inquiry, contact, or employment (and the name of the contractor, where applicable), and the disposition with reasons, of each such application, test, inquiry contact or employment. Copies of these records and lists shall be submitted to counsel for the parties and the Administrator at least once every three months.

Said records and lists may exclude telephonic requests for information. However individuals requesting information by telephone shall be informed that their requests should be made in writing, and a form for this purpose shall be sent to such individual.

34. Local 28 or JAC, as the case may be, shall submit the following data to the Administrator and the parties at the time specified:

a) the name and ethnic identity of persons admitted into (i) journeyman status in Local 28 or (ii) apprentice status in the Apprentice Program within 5 days of such admission;

b) on January 1 and July 1 of each year the total number of (i) journeyman members of Local 28 (as defined in Section 2), and (ii) apprentices. Such reports shall include the percentage of non-whites in each group.

35. The JAC shall maintain complete records of all applications and other material concerned with the selection and work records of apprentices. These records shall include but not be limited to an applicant log for each examination showing the name, ethnicity, date of birth of each applicant, dates of completion of each step in the application procedure, and

disposition of each step in the application procedure, and disposition of each application. All such records shall be made available for inspection and copying by the plaintiffs and the State-Division at reasonable intervals during normal working hours or at other mutually convenient times. In addition, records shall be submitted to the Administrator and plaintiffs as follows:

a) Prior to each apprentice entrance test and within 7 days or the closing of the application procedure the JAC shall submit a report including the following information for each person who filed or requested an application for that apprentice examination: name, address, telephone number and race or national origin, if known, for those who request applications.

b) Within 20 days after indenturing a class of apprentices the JAC shall provide a report of the names and ethnic classification of all persons who were rejected during the application and testing period and the reason therefore and the names of all persons whose application became inactive and the reason therefore.

c) Every six months subsequent to the indenturing of a class of apprentices the JAC shall furnish a report giving the names of all non-white apprentices, the name(s) of contractors to which each was referred and the number of hours worked. Such report shall be a summary of the reports required to be filed monthly pursuant to Section 20(c).

d) The Joint Apprenticeship Committee shall furnish the names of all non-white apprentices who are dropped from the Apprentice Program. Said information shall be furnished within twenty days from the date action is taken by the Joint Apprenticeship Committee. Said report shall contain the reason why the individual was dropped from the Program and the steps taken by the Joint Apprenticeship Committee to retain the individual in the Program. The report shall also include the training and employment history of the individual while he was in the Program. The Joint Apprenticeship Committee shall furnish the names of all non-white apprentices who leave the Program other than by action of the JAC. Such report shall contain the reason the apprentice has

left the Program as ascertained by an exit interview diligently attempted. Said information shall be furnished within twenty days form the time the JAC is notified that the apprentice has left the Program.

36. All records and lists required to be compiled by the Revised Program shall be maintained for ten years and shall be made available for inspection and copying by the parties and the Administrator on reasonable notice during regular business hours or at any other mutually convenient time without further order of the court.

Advertising and Publicity

37. The parties shall use their best efforts to disseminate accurate information to the non-white community of opportunities within Local 28 and the Apprentice Program.

38. Prior to each "hands-on" journeyman's test and apprentice aptitude test, at a time to be selected by the Administrator to insure full coverage and effectiveness, Local 28 (in the case of the "hands-on" journeyman's examination) and JAC (in the case of apprentice aptitude tests) shall undertake a program of advertising and publicity, under the overall supervision of the Administrator, designed to inform the non-white community in New York City of the date, location, and nature of such examinations, the qualifications therefor and the opportunities available upon successful completion of the test. Additionally, the overall apprenticeship recruiting and publicity campaign shall include a component limited toward advanced apprentices. These campaigns may include print and electronic media, dissemination of material to community, government and minority organizations. The City of New York may provide space and opportunities for such publicity.

39. By April 1977, Local 28 and JAC shall provide to the Administrator and the other parties a written plan of an effective general publicity campaign designed to inform the non-white community in New York City of non-discriminatory opportunities in Local 28 and the Apprentice Program as provided in the Order and Judgement and this Revised Program. The other parties shall have 30 days to

comment upon the written plan and Administrator, having considered all submissions, shall revise the plan if he deems necessary and shall order it into effect by may 1, 1977.

Work Referral

40. The Administrator shall conduct a study of the present Local 28 work referral system as described in the written statement submitted pursuant to Paragraph 21(g) of the Order and Judgment. This study shall be completed by April 1, 1977 and the Administrator shall submit to the parties such recommendations he deems necessary to assure that non-whites do not bear a disproportionate share of unemployment.

Resolution of Disputes

41. a) The Administrator shall hear and determine all complaints concerning the operation of the Order and Judgment and this Revised Program and shall decide any questions of interpretation and claims of violations of the Order and Judgment and the Revised Program, acting either on his own initiative or at the request of any party herein or any interested person. All decisions of the Administrator shall be in writing and shall be appealable to the Court.

b) Any party or any individual affected by this Revised Program may make a complaint to the Administrator within thirty days after the situation complained of arises. The Administartor shall give the parties notice of such a complaint within five days and, where a hearing is in his discretion warranted, expediously schedule such hearing.

General Provisions

42. Local 28 and the JAC shall post conspicuous notices, in language and at locations approved by the Administrator, advising individuals of their rights under this Revised Program within 60 days after the Revised Program is approved by the Court.

43. Nothing contained in the Revised Program should be construed as preventing the Executive Board from adopting portions of the Revised Program for the benefit of whites and

other minortities provided that such plans do not interfere with the operation of this Revised Program.

44. Except as modified, changed or amended by the terms of this Revised Program or order of the Administrator, Local 28 and JAC shall not change, modify or amend any aspect of the operation or content of the Apprentice Program, or the conditions or terms upon which an individual shall become a member of the Apprentice Program of Local 28 or entitled to work within the jurisdiction of Local 28.

45. At any time, any of the parties herein may apply to the Administrator and then to the Court for the purpose of seeking additional orders to insure the full and effective implementation of the terms and intent of this Revised Program.

Dated: New York, New York]
December 30, 1976

.....

DAVID RAFF, ESQ.
Administrator

SO ORDERED:

/s/.....

U.S.D.J.

Dated:

APPENDIX A

New York State Division of Employment
(Department of Labor)
Department of Employment of the City of
New York

Bureau of Labor Services of the City of New York
Recruitment and Training Program, Inc.
Fight Back
Asian Americans for Equal Employment
Black Economic Survival
Regional Neighborhood Manpower Services Centers of New York City
New York City Board of Education (Public High School and Evening Trade Division)
Williamsburg Coalition
New York Urban League
National Association for the Advancement of Colored People
Puerto Rican Community Development Project
National Association for Puerto Rican Civil Rights
Citywide Coalition of Black, Hispanic, and Asians in Construction
New York Project Equality
Commonwealth of Puerto Rico
Opportunities Industrialization Center of New York, Inc.
Bedford-Stuyvesant Restoration Corp.
New York City Human Rights Commission*
New York State Division of Human Rights

** Send notices of exams, but no bulk application.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, and the City of New York,

Plaintiffs-Appellees,

v.

LOCAL 638 ... LOCAL 28 of the SHEET METAL WORKERS' INTERNATIONAL ASSOCIATION and Local 28 Joint Apprenticeship Committee,

Defendants-Appellants,

Sheet Metal and Air-Conditioning Contractors' Association of New York City, Inc., etc.,

Defendants.

LOCAL 28,

Third-Party Plaintiff,

v.

NEW YORK STATE DIVISION OF HUMAN RIGHTS,

Third-Party Defendant.

LOCAL 28 JOINT APPRENTICESHIP COMMITTEE,

Fourth-Party Plaintiff,

v.

NEW YORK STATE DIVISION OF HUMAN RIGHTS,

Fourth-Party Defendant.

Nos. 464, 465, Dockets 75-6079, 75-6093.

United States Court of Appeals,
Second Circuit.

Argued Dec. 4, 1975.
Decided March 8, 1976.

The District Court for the Southern District of New York, Henry F. Werker, J., 401 F.Supp. 467, granted affirmative relief against union and apprenticeship committee under Civil Rights Act of 1964 to remedy racially discriminatory employment practices, and union and apprenticeship committee appealed. The Court of Appeals, J. Joseph Smith, Circuit Judge, held that evidence was sufficient to support finding that union and apprenticeship committee had engaged in racially discriminatory employment practices in violation of the Civil Rights Act of 1964, that appointment of administrator with broad powers over union and apprenticeship committee was appropriate, that order requiring replacement of one of three apprenticeship committee representatives was not warranted, that order requiring union and apprenticeship committee to attain by 1981 a combined membership in the union and apprenticeship program composed of 29 percent of persons of minority descent was warranted, and that back pay award would be modified to allow individuals to prove by means of testimonial evidence that they were unlawfully excluded from union and apprenticeship program in order to attain back pay award. A majority of the court was also of the opinion that order would be modified so that acceptance into training program would be based on test results alone and not on white-minority ratio.

Modified and, as modified, affirmed.

Feinberg, Circuit Judge, filed a concurring opinion.

Sol Bogen, New York City, for Sheet Metal Workers Intern. Ass'n, Local 28 and Union Trustees of Local 28, Joint Apprenticeship Committee.

Louis G. Corsi, Asst. U. S. Atty., New York City (Thomas J. Cahill, U. S. Atty., for the Southern District of New York, Taggart D. Adams and Steven J. Glassman, Asst. U. S. Attys., New York City, Abner W. Sibal, Gen. Counsel, EEOC, Joseph T. Eddins, Jr., Associate Gen. Counsel, and Beatrice Rosenberg, Atty., EEOC, Washington, D. C., of counsel), for Equal Employment Opportunity Commission.

Ellen Kramer Sawyer, New York City (W. Bernard Richland, Corp. Counsel of the City of New York, L. Kevin Sheridan, New York City, of counsel), for City of New York.

Before SMITH and FEINBERG, Circuit Judges, and WARD,* District Judge.

J. JOSEPH SMITH, Circuit Judge:

This appeal requires this court to confront, again, one of the most important and difficult questions currently facing the federal judiciary: the nature and scope of permissible remedies under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq.

Local 28 of the Sheet Metal Workers' International Association (hereinafter Local 28) is a union, based in New York City, with about 3,500 members. Of this number, approximately three percent are persons of minority descent.[1] The sheet metal workers who belong to Local 28 fabricate and install ducts and other equipment for ventilating, air-conditioning and heating systems. Local 28 maintains jurisdiction over all five of the City's boroughs and exercises complete control over entry into the sheet metal trade in New York City.

The Sheet Metal and Air-Conditioning Contractors' Association of New York City, Inc. (hereinafter the Contractors' Association) is a trade organization of builders who do sheet metal construction work. The Contractors' Association has a collective bargaining agreement with Local 28 and the firms which compose the Association normally employ 70-80 percent of the members of Local 28.

The Joint Apprenticeship Committee (hereinafter the JAC) is a body of three representatives from Local 28 and the Contractors' Association which oversees a training program for apprentice sheet metal workers. This program involves four years of

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* Robert J. Ward, United States District Judge for the Southern District of New York, sitting by designation.

[1] For the purpose of this opinion, the term "minority" refers primarily to persons who are black or of Spanish-speaking lineage.

classroom and on-the-job training at the end of which time the apprentices normally graduate to journeyman status and full membership in Local 28.

This appeal has its origins in a broad-reaching action initiated by the Justice Department[2] against several New York City construction unions under Title VII of the 1964 Civil Rights Act. That action charged the defendant unions and their respective apprenticeship programs with instituting and maintaining discriminatory membership policies in violation of federal law. However, the various unions were granted separate trials and, thus, the only defendants-appellants in this appeal are Local 28, the JAC, and the sheet metal Contractors' Association.[3]

In the proceeding below in the United States District Court for the Southern District of New York, Local 28 and the JAC were found to have violated Title VII's ban on discriminatory employment and membership practices. The court, Henry F. Werker, *Judge*, thereupon ordered a variety of remedial actions, including, *inter alia*, the institution of a court-appointed administrator to oversee Local 28 and the JAC, the payment of back pay to certain victims of past discrimination, the imposition of a remedial racial membership goal upon Local 28 and the replacement of one of the present JAC representatives with a new representative of minority descent.

Local 28 and the JAC appeal from Judge Werker's factual findings as to past discriminatory practices. They also contest the nature of the remedy ordered below. The EEOC and the City of New York seek to uphold the factual findings and the remedial order of the district court except that they seek

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[2] While the Justice Department initiated this action, the Equal Employment Opportunity Commission (EEOC) has been substituted as the named plaintiff agency for the federal government. The City of New York has been granted status as a plaintiff-intervenor.

[3] There is no claim here that the Contractors' Association has engaged in discriminatory employment policies. The Association is a party only for the purposes of relief and because, under the standards of Rule 19(a), Fed. R. Civ.P., the Contractors' Association is an indispensable party. Fed.R.Civ.P. 19(a).

modification of Judge Werker's back-pay order so as to expand the class of persons eligible for a back-pay award.

For the reasons outlined below, we modify the district court's order and, as modified, affirm.

I. FACTUAL BACKGROUND

[1] Local 28 and the JAC are no strangers to the courts. In 1964, the New York State Commission for Human Rights, after an administrative hearing, found that Local 28 and the JAC had maintained discriminatory hiring practices in violation of New York law. That finding was specifically affirmed, upon review, by the Supreme Court of New York. *State Commission for Human Rights, v. Farrell*, 43 Misc.2d 958, 252 N.Y.S.2d 649, 652 (Sup.Ct., N.Y. County, 1964). As a result of that judgment, Local 28 and the JAC have been subject to a state judicial decree mandating certain procedures to insure non-discriminatory recruitment and membership practices.

In April and July of 1974, Judge Murray I. Gurfein, sitting in the United States District Court for the Southern District of New York, issued interim orders against Local 28 and the JAC, requiring that certain minority applicants be accepted into the sheet metal apprenticeship program. Finally, Judge Henry F. Werker, after a three-week trial beginning in January of 1975, found that Local 28 and the JAC had violated Title VII. It is the findings and remedies of this last proceeding which are presently on appeal.

Local 28 and the JAC argue here that there was insufficient evidence to support Judge Werker's findings. We disagree.

The provisions of Title VII relevant here make it unlawful for a labor union, such as Local 28, "to discriminate against, any individual because of his race ... or national origin," to refuse "applicants for membership ... because of such individual's race ... or national origin," and to "cause an employer," such as the members of the Contractor's Association, "to discriminate against an individual" on account of race or national origin. 42 USC § 2000e-2(c).

In addition, Title VII forbids a labor union or apprenticeship committee, such as the JAC, from discriminating "against any individual because of his race ... or national origin." 42 U.S.C. § 2000e-2(d).

In the record before Judge Werker, there was ample evidence to find that Local 28 and the JAC had violated these statutory provisions.

There are four means by which an individual can be admitted to membership in Local 28. The majority of Local 28 members are admitted upon graduation from the apprenticeship program administered by the JAC. In addition, persons in allied, "sister" unions in the construction industry may be allowed to transfer directly into Local 28, without prior training in the apprenticeship program. There is a third route onto the Local 28 membership rolls by which an individual may take a battery of journeyman-level tests, without formal apprentice training or membership in an allied union, and upon passage of these examinations, the individual is certified as a journeyman and admitted to Local 28. Finally, sheet metal workers in nonunion shops become members of Local 28 if Local 28 subsequently organizes their shop, and if their employer certifies that his workers perform at journeyman standards. Local 28 also issues temporary work permits to individuals who are not permanent members of the union of sheet metal workers.

There is ample evidence that all the routes into Local 28 have been blocked to minority group members as a result of discriminatory practices by Local 28 and the JAC. The trial record in this case is voluminous and the facts before the district court were more than adequate to sustain its findings. We describe some of these facts briefly to indicate the consideration behind our decision that, as Judge Werker found, Local 28 and the JAC have consistently and egregiously violated Title VII.

Entrance into the apprenticeship program is gained by passing certain written and manual tests and by possession of a high school diploma. The evidence is clear that these requirements

disqualify blacks and Spanish-speaking applicants to a far greater extent than they disqualify non-minority applicants to the apprenticeship program.

Under *Griggs v. Duke Power Co.*, 401 U.S. 424, 91 S.Ct. 849, 28 L.Ed.2d 158 (1971), job requirements which disqualify minority group members to a significantly greater extent than they disqualify whites violate Title VII unless it can be demonstrated that the requirements are "job-related,"[4] See also *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 95 S.Ct. 2362, 45 L.Ed.2d 280; *McDonnell Douglas Corp. v. Green*, 411 U.S 792, 802, 93 S.Ct. 1817, 1824, 36 L.Ed.2d 668, 677 (1973); *Vulcane Society of the New York City Fire Department, Inc. v. Civil Service Commission*, 490 F.2d 387 (2d Cir. 1973). This burden of proof Local 28 and the JAC have failed to meet.

To sustain their burden of proving job-relatedness, Local 28 and the JAC relied upon the expert testimony of an industrial psychologist, Dr. Judah Gottesman of the Stevens Institute of Technology. However, Dr. Gottesman's testimony was, at best, equivocal in its implications and was clearly insufficient to sustain the union's claim of job-relatedness.

Dr. Gottesman indicated that, for technical reasons primarily related to sample size, it was impossible to determine whether or not the entrance exams used for admission to the apprenticeship program bear any relation to on-the-job abilities at the end of the training program. Indeed, Dr. Gottesman, responding to the dearth of evidence as to the job-relatedness of these entrance examinations, had suggested that most of the tests in

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[4] There is language in *Griggs* which might be interpreted to indicate that job-relatedness is not required of employment and entrance criteria if there is no intent to discriminate and if there is no history of past discrimination. However, we need not address that issue here since the decision of the New York Supreme Court in *State Commission for Human Rights v. Farrell, supra*, found that Local 28 and the JAC had maintained discriminatory employment and membership practices. Since the issue of past discrimination may be *res judicata* and is certainly established to our satisfaction, we need not decide if *Grigss* would require job-relatedness in the absence of such prior discrimination.

use be abandoned and others added in their place. This the JAC and Local 28 have declined to do.

Moreover, even if the tests used for entrance into the apprenticeship program were found to be job-related, other aspects of Local 28's behavior would sustain a finding of discrimination in the operation of the apprenticeship program. The 1964 New York state court decision, *State Commission for Human Rights, v. Farrell, supra*, dwelt heaviiy upon admissions into the apprenticeship program and required the use of objective admissions tests rather than the nepotistic criteria for admissions to apprenticeship in use until then. Local 28 responded to this order by establishing, with union funds, "cram courses" for the sons and nephews of present union members in order to prepare them for the entrance tests. This was contrary to the spirit and letter of the New York court's order.

Of course, a cram course available to all applicants would be a different matter. But the decision to use union funds to help sons and nephews circumvent the objective tests required by the court evinces bad faith on the part of Local 28.

The evidence with respect to the other means of union admission reveals a pattern of more blatant discrimination.

Despite intense pressure from its International Association, Local 28 has historically refused to organize the blowpipe industry in the New York area. The blowpipe work force which Local 28 has refused to organize is predominantly of minority descent and, according to the testimony of one contractor, it is "common knowledge" in the industry that Local 28's attitude towards the blowpipe workers is a result of their racial makeup. Eventually, the International Association had to organize these workers separately since Local 28 refused to do so.

There is thus a separate union in New York City predominantly composed of minority group blowpipe workers. This group has been kept at arm's length by Local 28 notwithstanding their membership in the same International.

Local 28 has consistently accepted white transferees from allied construction unions while denying transfer to blacks with equivalent qualifications. In particular, black blowpipe workers have been denied transfer into Local 28 while white workers from the same union have been allowed in. This constitutes a particularly blatant form of discrimination since many of these minority blowpipe workers are entitled to transfer into Local 28 as a matter of right under the constitution of the International Association to which Local 28 belongs.

Local 28 has also issued temporary work permits to white members of allied construction unions, some from areas far removed from New York City, while denying such work permits to minority group sheet metal workers who already reside in the New York City area.

Local 28's performance record to date would be even worse had it not been for the rather minor concessions it has grudgingly made under court order. Indeed, compliance with Judge Gurfein's interim order was delayed for a considerable period and eventual compliance occurred only under heavy pressure.

This brief sample of the evidence against Local 28 and the JAC is sufficient to indicate that Judge Werker's findings of Title VII violations were not "clearly erroneous." Rule 52(a), Fed.R.Civ.P. Indeed, the brief submitted to this court by Local 28 and the JAC does not even make a serious effort to contest the finding of Title VII violations. The real issue before this court is the nature of the remedies in a case such as this. It is to the legal background of this issue that we now turn.

II. LEGAL BACKGROUND

A. Reverse Discrimination and Effective Enforcement of Title VII

The underlying considerations behind an order such as that on appeal are easy to state, if difficult to reconcile. When dealing with recalcitrant unions which have defied gentler means of

enforcement, a mathematical membership goal may be viewed as the only effective means to eradicate discriminatory practices and to remedy the effects of past discrimination. On the other hand, the use of such membership goals means, in practice, that certain nonminority persons will be kept out of the defendant union solely on account of their race or ethnic background. Such "reverse discrimination" contradicts our basic assumption that individuals are to be judged as individuals, not as members of particular racial groups.

The tension between these two policy considerations is demonstrated by certain facially-contradictory provisions of the Civil Rights Act of 1964. 42 U.S.C. § 2000e-2(j) specifically prohibits "preferential treatment" in hiring practices to correct racial "imbalance." As Judge Hays demonstrated in his dissent in *Rios v. Enterprise Association Steam Fitters Local 638 of U. A.*, 501 F.2d 622 (2d Cir. 1974), (a dissent Judge Feinberg later characterized as "powerful," *Patterson v. Newspaper & Mail Deliverers' Union of New York and Vicinity*, 514 F.2d 767, 776 (2d Cir. 1975)), there are strong indications that many of the congressmen who supported § 2000e-2(j) thought they were prohibiting the use of numerical goals such as that ordered by Judge Werker in the proceeding below.

On the other hand, 42 U.S.C. § 2000e-5(g) specifically gives authority to the district courts to order any "affirmative action" which "may be appropriate" to remedy past discrimination. Section 2000e-5(g) expressly states that the scope of the district courts' remedies for employment violations is to be "equitable," which is to say, broadly discretionary.

The tension between the needs of effective enforcement and the avoidance of reverse discrimination is further manifested in the opinions of this court. The *Rios* decision, *supra*, affirming union membership goals for minority workers, was made by a sharply divided panel. Those panels which have imposed membership goals have done so with great reluctance, stressing the temporary nature of the goals and the egregiousness of the behavior being corrected. See. *e. g.*, *Bridgeport Guardians*, *infra* at 1340.

Notwithstanding such reservations, minority membership goals have been condoned on specific occasions as "appropriate" exercises of equitable powers.

One of the most recent Second Circuit panels to confront the problem of Title VII remedies involved the case of *Kirkland v. New York State Department of Correctional Services*, 520 F.2d 420, 427 (2d Cir.), *rehearing en banc denied*, 531 F.2d 5 (2d Cir. 1975). The *Kirkland* court promulgated a two-fold test for the imposition of temporary quotas. There must first be a "clear-cut pattern of long-continued and egregious racial discrimination." Second, the effect of reverse discrimination must not be "identifiable," that is to say, concentrated upon a relatively small, ascertainable group of non-minority persons.

Thus, in *Bridgeport Guardians, Inc. v. Members of the Bridgeport Civil Service Commission*, 482 F.2d 1333 (2d Cir. 1973), this court upheld temporary employment goals for use in the selection of new patrolmen for the Bridgeport, Connecticut police force. However, the use of racial goals for promotions above the rank of patrolman was rejected. The court's decision in this instance presaged the logic of the *Kirkland* panel. Minority goals were not appropriate for promotion in the ranks above patrolman (1) because there was inadequate evidence of discrimination in the upper ranks and (2) because

> the imposition of quotas will obviously discriminate against those whites who have embarked upon a police career with the expectation of advancement only to be now thwarted because of their color alone. The impact of the quota upon these men would be harsh and can only exacerbate rather than diminish racial attitudes.

Bridgeport Guardians, *supra* at 1341.

While some whites were to be kept off the Bridgeport police force as a result of the entry level quota for patrolmen, that group of individuals could not be identified with certainty and hence there were no ascertainable victims of reverse discrimination. However, the white officers who were already on the force

were a different matter: they were an easily identifiable group for whom the hardship of reverse discrimination was direct, obvious and personal.

Similarly, the *Rios* panel, which, by a divided vote sanctioned temporary employment goals, analyzed the situation before it in terms essentially the same as those used in *Kirkland*. In particular, the *Rios* situation was distinguished from the facts of *DeFunis v. Odegaard*, 416 U.S. 312, 94 S.Ct., 1704, 40 L.Ed.2d 164 (1974), on two grounds. First, in *Rios* there was substantial evidence of purposive "past discrimination" (as opposed to a mere racial "imbalance" of non-discriminatory origins). Second, the defendant union in *Rios* was capable of expanding its total membership so as to dilute the impact of the remedy upon non-minority persons. In *DeFunis*, in contrast, the fixed number of law school spaces concentrated the impact of reverse discrimination upon a small and narrow group of persons, *i. e.*, the applicants next in line on the University of Washington's "waiting list" for law school admissions. *Rios*, *supra* at 630, n. 6.

[2] Finally, in *Kirkland*, the court explicitly adopted a formula which my brothers find controlling in the instant case: the imposition of racial goals is to be tolerated only when past discrimination has been clear-cut and the effects of "reverse discrimination" will be diffused among an unidentifiable group of unknown, potential applicants rather than upon an ascertainable group of easily identifiable persons. In the court's words:

> The smaller [the] group participating in a civil service examination, the more pointed the problem [of reverse discrimination] becomes. We can no longer speak in general terms of statistics and class groupings. We must address ourselves to individual rights.
>
> A hiring quota deals with the public at large, none of whose members can be identified individually in advance. A quota placed upon a small number of readily identifiable candidates for promotion is an entirely different matter. Both these men and the court

> know in advance that regardless of their qualifications and standing in a competitive examination, some of them may be bypassed for advancement solely because they are white.

Kirkland, supra at 429.

B. Merit System and Job-Relatedness

[3] Just as Title VII evinces a desire to avoid the identifiable forms of reverse discrimination, it also indicates a congressional intent to protect bona fide, nondiscriminatory "professionally developed ability test[s]." 42 U.S.C. § 2000e-2(h). The authoritative construction of this provision in earlier cases makes a more extended discussion unnecessary at this date. *Griggs, supra; Bridgeport Guardians, supra; Chance v. Board of Examiners*, 458 F.2d 1167 (2d Cir. 1972). Suffice it to say that a job requirement which falls with disproportionate effect upon minority-group applicants must be justified by proof of "job-relatedness." While it is not always clear what quantum of evidence is required to establish job-relatedness, see *Albermarle, supra*, 422 U.S. at 423, 449, 95 S.Ct. at 2374, 2387, 45 L.Ed.2d at 299, 316 separate opinion of Chief Justice Burger) (separate opinion of Chief Justice Blackmun), it is clear that, once such job-relatedness is proven, a test or job requirement is immunized from attack under Title VII.

With these legal standards identified, we turn to the task of applying them to the order of the district court.

III. THE DISTRICT COURT'S ORDER

Judge Werker's order may be reviewed as consisting of six major provisions. First, a court-appointed administrator is granted extensive supervisory power over Local 28 and the JAC. The administrator is to develop and enforce more detailed plans for achieving the goals outlined in broad terms by Judge Werker's decree.

Second, Local 28 and the JAC are enjoined from all future violations of Title VII.

Third, one of the present union representatives to the JAC is to be replaced by a representative of minority descent. This is done, apparently, to ensure an internal means of enforcing compliance with Title VII.

Fourth, Local 28 and the JAC are required to attain, by 1981, a combined membership in the union and apprenticeship program which is composed of 29 percent of persons of minority descent. Interim membership goals are to be agreed upon by the parties and enforced by the court-appointed administrator.

Fifth, Local 28 is to offer at least once a year a nondiscriminatory test for journeymen and for entrance into the apprenticeship program and is to allow transfers and issue temporary work permits on a nondiscriminatory basis. Local 28 and the JAC are to engage in extensive recruitment and publicity campaigns in minority neighborhoods in order to ensure a broad applicant pool for these tests and transfers.

Sixth, back pay is to be awarded to persons who applied to and were rejected by Local 28 on account of race or national origin and who can offer documentary evidence of such discriminatory rejection.

[4] The appointment of an administrator with broad powers over Local 28 and the JAC is clearly appropriate under the circumstances here. While union self-government is desirable and is, indeed, an ideal to which the law aspires, 29 U.S.C. § 401, our interest in union self-government cannot immunize Local 28 from the consequences of its actions. The apparent failure of the New York court order to change Local 28's membership practices to an appreciable extent and the rather reluctant response made by Local 28 to Judge Gurfein's orders convince us that it is necessary for a court-appointed administrator to exercise day-to-day oversight of the union's affairs.

The abridgement of self-government implied by this action will, hopefully, prove to be temporary. Moreover, the need for such strict enforcement seems thoroughly justified by the union's past recalcitrance and by the requirements of Title VII.

[5] We similarly believe that it is appropriate to enjoin the defendants in this litigation from repeating their past discriminatory practices. Certainly, the record of Local 28 and the JAC provides a reasonable basis for inferring that future violations of Title VII might occur in the absence of such an injunction.

[6] While we agree that the record here amply demonstrates the need for a court-appointed administrator and for an injunction against the defendants, we do not approve of the district court's decision to require replacement of one of the JAC representatives. Such an action seems superflous in light of the broad supervisory powers granted to the administrator who, for purposes of compliance with Title VII, will serve as the superior of the JAC representatives. Any recalcitrance on the part of the JAC representatives may be overcome by the exercise of the administrator's authority.

Moreover, this part of the district court's order cannot be justified under the "non-identifiability" test adopted by this court in *Kirkland*. The district court's order with respect to the appointment of a minority-group JAC representative is, in effect, a quota mandating that one-third of the JAC's membership be of minority descent. This is, moreover, a quota which must be met by replacing (or, in the parlance of the trade, by "bumping") a white incumbent from the JAC. This is forbidden by Title VII and the law of this circuit.

The *Kirkland* court held that the imposition of a racial goal can be justified only when two conditions are met: there must be a long and egregious pattern of past discrimination and the effects of the goal cannot fall upon a relatively small, identifiable group of reverse discriminatees. While the requirements with respect to past practices are amply met in this situation, the order requiring the replacement of a white JAC representative fails under the second standard of "non-identifability."

In this instance, the impact of the racial goal would be direct, immediate and obvious: one of the two JAC representatives of

the Union must be "bumped." This is the type of narrowly-focused, ascertainable reverse discrimination which *Kirkland* and its predecessors forbid and, accordingly, we reverse that part of the district court's order requiring replacement of an incumbent JAC representative.

[7] While we disapprove of a membership goal for the JAC, we affirm the use of such a goal with respect to overal membership in Local 28 and the apprenticeship program. As this court noted in *Kirkland* and *Bridgeport Guardians, Inc., supra*, an entry-level quota has a more diffuse and amorphous effect upon reverse discriminatees than a quota used to bump incumbents or hinder promotion of present members of the work force. An entry-level goal has less ascertainable effect since we cannot readily determine who it is that is being kept out. Accordingly, entry-level goals have less identifiable impact upon reverse discriminatees and are therefore less objectionable as temporary remedies.

Since the first part of the *Kirkland* test, a long and persistent pattern of discrimination, is amply supported by the record, we approve the 29 percent overall membership goal established by Judge Werker.

[8] The district court's order also requires that a non-discriminatory examination, validated under EEOC guidelines, be given at least annually for entrance into the apprenticeship program and for direct admission at the journeyman level. It is the very specific teaching of *Griggs* and *Albemarle* that examinations, when used by employers and unions, must be job-related. Thus, to the extent that the order requires future tests administered by Local 28 and the JAC to be validly job-related, the order is clearly mandated by the decisions of the Supreme Court.

However, Judge Werker's order goes beyond the mere requirement that tests, when given, be job-related. The order on appeal also mandates that apprenticeship and journeyman tests must be administered at least once a year and that extensive recruitment of minority candidates must precede these tests.

We approve this part of the order as an appropriate exercise of the district court's equitable discretion. It would obviously be possible to circumvent the requirement of job-related tests by administering no tests at all. Moreover, a decision to refrain from giving journeyman and apprenticeship tests or to restrict candidate recruitment could effectively freeze the union's membership in its present racial composition. This is the difficulty which Judge Werker has sought to avoid by requiring annual testing and publicity, and we affirm for the reasons which gave rise to his order in the first instance.

[9] However, we modify the district court's order in one respect. At oral argument, it was established that, pursuant to the order now on appeal, the parties to this litigation and the court-appointed administrator have chosen to implement the decision of the district court by establishing a ratio of white to minority acceptances into the apprenticeship program. This ratio is to be maintained even if it requires accepting a minority applicant with a lower score than a white applicant.[5]

My colleagues feel that this is unacceptable under *Griggs*, *Kirkland* and Title VII as we interpret them above. They consider that the import of those authorities is that the results of job-related tests are to be honored since they are genuinely neutral in intent and effect, *i. e.*, they make ability to perform

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[5] Subsequent to the oral argument in this appeal, EEOC and the City of New York advised this court that the apprenticeship ratios under discussion are embodied in an agreement negotiated by the parties which the district court approved on November 13, 1975. Appeal is now pending from an order setting a temporary 3 minority: 2 white apprentice admission rate. Meanwhile, the parties have agreed to the admission to the class entering in February, 1976, of 66 individuals, 33 minority and 33 white, each of whom would have been admitted whether the ratio was applied or not. (Additional minority members would have been admitted if the ratio were applied.) Nevertheless, we find it incumbent to address this issue now since the ratios in question are adopted pursuant to the order now under appeal, and we feel it is appropriate and indeed necessary for us to clarify what this order does (and does not) permit.

the sole criterion for selection. They hold that it is inconsistent with this policy to administer admittedly neutral, non-discriminatory tests (approved by the EEOC) and then set those results aside because of the racial make-up of the applicants who pass.

They hold that *Griggs* and 42 U.S.C. § 2000e-2(h) require that test results be respected whenever those tests are validily job-related.

The writer disagrees with the majority of the panel on this point, essentially for the reasons set forth by Judge Mansfield dissenting from the denial of *en banc* in *Kirkland v. New York State Department of Correctional Services*, 531 F.2d 5 (2d Cir. 1975), and would approve the application of the temporary quota to the entrants to the apprenticeship program, presently set at 3 to 2, minority to majority applicants, as affirmative action under 42 U.S.C. § 2000e-5(g) appropriate to remedy past discrimination.

This apprenticeship program presents an entry-level situation parallel to that of *Bridgeport Guardians*. It is true that the relatively small number of openings makes those subject to reverse discrimination fairly easily identifiable. This was, however, true in *Bridgeport Guardians* and is necessary to correct the illegally established racial makeup of the present membership. *United States v. Wood, Wire & Metal Lathers*, 471 F.2d 408, 413 (2d Cir. 1973); *Rios v. Enterprise Association Steamfitters Local 638 of U.A.*, 501 F.2d 622, 629 (2d Cir. 1974). *Cf. Kirkland v. New York State Department of Correctional Services*, 520 F.2d 420 2d Cir. 1975). The plan adopted here does not entail the discharge or demotion of majority members already in place, as did the plan disapproved in *Chance v. Board of Education*, 534 F.2d 993 (2d Cir. 1976). It does reduce the appointment opportunities of new majority applicants temporarily until the past illegal discrimination has been remedied.

The membership of the local constitutes the pool of qualified persons who are able to compete for available jobs in the

Metropolitan area. Minorities hve effectively and illegally been excluded from that pool. The apprenticeship program is one of the best available means of correcting within a reasonable time the situation in the industry by erasing the effects of the illegal practices. It involves in a sense reverse discrimination. However, it is positive remedial action not solely to achieve racial balance, but to remove the illegally created imbalance in the industry labor pool. I would approve the court's determination on the apprenticeship program, including the present temporary 3 to 2 ratio. My colleagues, however, consider that the court has exercised its full remedial authority in a case such as this when an acceptable examination is used, even at an entry level and that the application of racial quotas to the lists of those successful in such an exam is forbidden reverse discrimination.

We accordingly modify the order insofar as it might be interpreted to permit white-minority ratios for the apprenticeship program after the adoption of valid, job-related entrance tests. Acceptance into the training program must be based on tests results alone.

Our decision, of course, makes it particularly important that the recruitment of qualified minority test candidates be thorough and vigorous. We believe that the court-appointed administrator has ample authority to assure that result.

We also recognize that, as a result of this decision, a heavy burden may be placed upon direct qualification and admission and transfer from allied unions as the means of reaching the 29 percent membership goal. This, however, seems most appropriate under the circumstances. The persons who are presently eligible for transfer into Local 28 are the persons who have felt the brunt of the union's past discriminatory practices. They are largely older individuals who have been denied entry into Local 28 in the past or who have been forced into essentially segregated unions as a result of Local 28's practices.

[10] Finally, we modify Judge Werker's back-pay order so as to allow individuals to prove by means of testimonial evidence

that they were unlawfully excluded from Local 28 and the apprenticeship program. Judge Werker has limited back-pay awards to those who could provide documentary proof of application and rejection. He justified this limitation on the ground that applicants with only testimonial evidence had too "speculative" a claim for the court to entertain.

[11] We think that *Albemarle, supra,* compels a different result. The Supreme Court has made clear that back pay is to be the rule rather than exception under Title VII and that back pay is to be awarded whenever possible so as to deter Title VII violations and so as to "make whole" the victims of past discrimination. In the Court's words:

> [G]iven a finding of unlawful discrimination, back pay should be denied only for reasons which, if applied generally, would not frustrate the central statutory purposes of eradicating discrimination throughout the economy and making persons whole for injuries suffered through past discrimination.

Albemarle, supra 422 U.S. at 421, 95 S.Ct. at 2373, 45 L.Ed.2d at 298.

In the instant setting, a denial of back pay to those persons who possess only testimonial evidence of their application and rejection would serve to "frustrate the central statutory purposes" of Title VII. One of the reasons that applicants may have no documentary proof of discrimination against them is that Local 28 and the JAC have kept incomplete records of their admission practices. To deny back pay to persons who, as a result of the *union's* actions, have no written proof is to reward the union and the JAC for their record-keeping failures.

Beyond that consideration, back pay should be given as broadly as possible in order to effectuate the dual policies of remediation and deterrence. There is a class of individuals whose claims are too speculative for adjudication: those with neither written nor testimonial evidence of application and rejection. Thus, those who never applied to Local 28 or the JAC because of their

well-deserved reputation for discrimination are, regrettably, ineligible for back pay. But those who did apply and who can prove discrimination by written or testimonial evidence are entitled to back pay.[6]

In summary, we modify the district court's order to eliminate the requirement that a white JAC representative be replaced by a representative of minority descent, to forbid minority-white admission ratios to the apprenticeship program once valid job-related tests have been adopted, and to extend back pay to persons who can prove by testimonial evidence that they applied to and were rejected by Local 28 and the JAC for unlawful reasons.

So modified, the order is affirmed.

FEINBERG, Circuit Judge (concurring):

Because Judge Smith's opinion accurately tracks the law of this circuit as it now stands, I concur in the result we are required to reach. However, I believe it appropriate to set forth the following views.

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[6] We are aware that in our recent decision in *Acha v. Beame*, 531 F.2d 648 (2d Cir. 1976), we indicated that retroactive or constructive seniority could be granted to female police officers who could prove that they had been deterred from applying for jobs in the police department because of its discriminatory practices, relief arguably broader than that granted here. However, the remedy in *Acha* was retroactive seniority, far less drastic for a defendant to be required to bear than back pay. Moreover, the retroactive seniority in *Acha* was, by the nature of plaintiffs' class, limited to those who were subsequently hired after the defendants had ceased discriminating. The relief of back pay granted here is not so limited so that the number of potential claimants, and the potential burden on defendants, is much greater. The fact that the *Acha* plaintiffs all eventually did seek employment as police officers when that job was finally opened to women also makes it more likely that they may indeed have been deterred from applying only by the defendants' discrimination. Finally, the discrimination in *Acha* was an official limitation of certain job categories to males, while in this case the discriminatory practices complained of were covert. Limitation of relief in *Acha* to those who actually did apply in those circumstances would have been far harsher than such a limitation here, where the alleged deterence stemmed not from an officially announced discriminatory policy but from rumors of unfairness.

Judge Smith correctly describes the holding of *Kirkland v. New York State Dep't of Correction Servs.*, 520 F.2d 420 (2d Cir. 1975), as allowing temporary quotas as a remedial measure only when there has been a "clear-cut pattern of long-continued and egregious racial discrimination," 520 F.2d at 427, and the reverse discrimination is not concentrated on a relatively small, identifiable group. Appellees in *Kirkland* sought rehearing en banc, which was denied with three active judges dissenting and expressing the view that *Kirkland* conflicted with prior decisions of this court. At 5, 10 (2d Cir. 1975). Nevertheless in *Chance v. Board of Examiners*, 534 F.2d 993 (2d Cir. 1976), the majority, Judge Oakes dissenting, relied upon *Kirkland* in setting aside a quota.

Since the issue of the legality of quotas is bound to recur and the court seems badly divided, and since Judge Smith has set forth his views on that issue, it may be useful for me to discuss it briefly. In *Patterson v. Newspaper & Mail Deliverers Union of N.Y. & Vicinity*, 514 F.2d 767, 775 (2d Cir. 1975) (concurring opinion), I expressed doubts regarding the legality of racial quotas. Although the opinion in *Kirkland* cities that concurrence with approval, 520 F.2d at 427, n. 22, it nevertheless seems to me—even at the risk of appearing ungracious—that the test laid down in *Kirkland* is itself open to question. The dissenting opinion of Judge Hays in *Rios v. Steamfitters Local* 638, 501 F.2d 622, 634 (2d Cir. 1974), strongly disapproved of racial quotas, relying on the legislative intention expressed in section 703(j) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(j). The opinion in *Kirkland* also cites Judge Hays's dissent with approval, 520 F.2d at 427, n.22, but allows the continued use of racial quotas, albeit under sharply limited circumstances; the opinion does not discuss the effect of section 703(j), probably because the parties ignored it. I respectfully suggest that the effect of that section, which is reproduced in the margin, cannot be ignored.[1]

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[1] Section 703(j) provides:

Nothing contained in this subchapter shall be interpreted to require any employer, employment agency, labor organization, or joint labor-management

Since we disapprove the racial quota here, it is not now necessary for me to explore the issue at greater length. I emphasize, however, that the disapproval of racial quotas expressed in section 703(j) does not prevent the granting of broad relief to effectuate Title VII's purpose of correcting racial injustice. Focusing on individuals rather than on groups in granting relief, as by providing an immediate remedy to identifiable plaintiffs who were themselves discriminatorily denied jobs, can accomplish much without resort to quotas. *Cf. Acha v. Beame*, 531 F.2d 648 (2d Cir. 1976). The remedy would go to all who fell into this category and would be based, not upon a percentage or quota perhaps forbidden by section 703(j), but upon proof of individual discrimination. Indeed, Judge Smith's opinion in this case utilizes this concept in approving a back-pay award to those who had applied to Local 28 and JAC and had been rejected for racial reasons. See also *Acha v. Beame*, supra. However, since *Kirkland* presently controls and since I agree with the result reached here, further discussion of the problem is not now necessary.

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committee subject to this subchapter to grant preferential treatment to any individual or to any group because of the race, color, religion, sex, or national origin 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, religion, sex, or national origin employed by any employer, referred or classified for employment by any employment agency or labor organization, admitted to membership or classified by any labor organization, or admitted to, or employed in, any apprenticeship or other training program, in comparison with the total number or percentage of persons of such race, color, religion, sex, or national origin in any community, State, section, or other area, or in the available work force in any community, State, section, or other area.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, and the City of New York,

Plaintiffs,

v.

LOCAL 638 et al.,

Defendants,

LOCAL 28,

Third-Party Plaintiff,

v.

NEW YORK STATE DIVISION OF HUMAN RIGHTS,

Third-Party Defendant.

LOCAL 28 JOINT APPRENTICESHIP COMMITTEE,

Fourth-Party Plaintiff,

v.

NEW YORK STATE DIVISION OF HUMAN RIGHTS,

Fourth-Party Defendant.

No. 71 Civ. 2877 (HFW).

United States District Court,
S.D. New York

Nov. 25, 1975.

Civil Rights Act suit was brought against labor union and its apprenticeship committee charging them with discrimination in admission and employment of nonwhites. The District Court, 401 F.Supp. 467, ordered union to adopt a program to achieve a nonwhite membership percentage of 29% by July 1,

1981. An affirmative action program was submitted and objections were voiced thereto. The District Court, Werker, J., held that adoption of interim goals was appropriate, that inclusion of pensioners in measuring total membership was proper, that those claiming one year or more experience were not exempt from aptitude test, that maximum examination fee of $25 would be adopted provisionally, that installment payment of initiation fee was to be related to income rather than time, that successful applicants for apprenticeship programs were to bear one-half the cost of required physical examination and that a preexamination study group program was to be conducted to familiarize applicants with the type of test to which they would be exposed.

Order accordingly.

Judgment modified, 2 Cir., 532 F.2d 821.

Paul J. Curran, U.S. Atty., S.D.N.Y. by Taggart D. Adams, Louis G. Corsi, New York City, for plaintiff U.S. equal Opportunity Commission.

W. Bernard Richland, New York City Corp. Counsel by Beverly Gross and Thomas A. Trimboli, New York City, for plaintiff City of New York.

Sol Bogen, New York City, for defendant Local 28.

Rosenthal & Goldhaber by William Rothberg, Brooklyn, N.Y., for defendant Joint Apprenticeship Committee and Trust.

Louis J. Lefkowitz, Atty. Gen. of N.Y. by Dominic Tuminaro, New York City, for third and fourty-party defendant New York State Div. of Human Rights.

AFFIRMATIVE ACTION PROGRAM

Introduction

1. This Affirmative Action Program ("Program") is adopted pursuant to the Decision and Order dated July 18, 1975 and

the Order and Judgment dated August 28, 1975 and entered in this action on September 2, 1975 ("Order and Judgment"). The goal of this Program is to assure that the nonwhite[1] membership in Local Union No. 28 of the Sheet Metal Workers' International Association ("Local 28") reaches a minimum level of 29% by July 1, 1981; to assure that substantial and regular progress is made toward this goal in each year prior to 1981; and to assure that non-white members of Local 28 and nonwhite apprentices of Local 28 share equitably in all employment opportunities afforded to members of Local 28.

2. For the purpose of reaching the above goal of 29% by July 1, 1981 this Program establishes as interim percentage goals for the non-white membership of Local 28 the following:

July 1, 1976	10%
July 1, 1977	13%
July 1, 1978	16%
July 1, 1979	20%
July 1, 1980	24%

Each of the above percentages shall be measured against the total membership of Local 28 as of each interim goal date respectively and the final goal date. For the purpose of measurement, total membership shall include all journeyman members, all pensioners[2] who have been employed as sheetmetal workers within the last three years, and all members or participants in the Local 28 Apprentice Program ("Apprentice Program"). The parties to this action and the Administrator are to implement this Program so that these interim goals may be attained. The administrator shall periodically review the progress toward the attainment of these goals and take such action as he is empowered to take under the Order and Judgment to assure their achievement.

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[1] "Non-white" as used in the Program means black and Spanish surnamed individuals.

[2] "Pensioner" as used in the Program means any individual who receives benefits from the Local 28 pension program.

3. Admission to Journeyman membership in Local 28 shall be attained only through the following procedures:

a) Successful completion of a 'hands-on' journeyman test administered pursuant to Paragraphs 5-14; or

b) establishment of proof of the required experience in the sheetmetal trade pursuant to Paragraph 15; or

c) successful completion of the Local 28 Apprentice Program; or

d) transfer in accordance with the Sheet Metal Workers' International Union Constitution and Ritual; or

e) organization of non-union shops.

4. Membership in the Apprentice Program shall be obtained only through the following procedures:

a) successful completion of an apprentice aptitude test as set forth in Paragraphs 21-32; or

b) entry with advanced standing as set forth in Paragraphs 33 through 36.

Admission to Journeyman Status

5. Under the supervision and with the approval of the Administrator, Local 28 shall administer a 'hands-on' journeyman's test on October 11, 1975 designed to test fairly and in a non-discriminatory manner the skills needed for a journeyman sheet metal worker. This test and its grading shall be in substance the equivalent of the 'hands-on' portion of journeyman's test given by Local 28 in November, 1969 as revised by a sheetmetal expert provided by the plaintiffs or the New York State Division of Human Rights. Disputes as to any proposed revisions shall be resolved by the Administrator. There shall be a filing fee of $25 for this test.

6. Local 28 shall undertake a program of publicity and advertising and prepare, make available, and process applications relating to the October 11, 1975 "hands-on" journeyman's test in accordance with the standards and conditions set forth heretofore by the parties and the Administrator. The administration and grading of the test shall be under the overall supervision of the Administrator and shall be accomplished and recorded in such a manner as to facilitate the professional development and validation of future "hands-on" journeyman's tests.

7. Under the following conditions all persons who receive a passing grade in the test described in Paragraphs 5 and 6, and who are physically fit for sheetmetal work shall be eligible for admission to full journeyman membership in Local 28 as follows:

a) all non-white applicants who receive a passing grade, up to a total of 200 such applicants, shall be admitted to journeyman membership by December 1, 1975 in accordance with and subject to the provisions of Paragraphs 16-18 of the Program. In the event that more than 200 non-white applicants receive a passing grade and elect to exercise their rights to admission to journeyman membership under this Program, the 200 non-whites with the highest grades shall be admitted by December 1, 1975; the remaining non white applicants shall be admitted in accordance with the provisions of sub-paragraph (b) of this paragraph;

b) white applicants who receive a passing grade shall be placed on a list and ranked in descending order on the basis of their grades on the examination.

i) white applicants shall be selected for admission in the order of their ranking on the above described list on the basis of a ration to the non-whites admitted pursuant to section (a) of this Paragraph. Said ration shall be agreed upon by the parties, but in no event shall the ratio be less than one non-white for every white. Such ratio shall be designed with the purpose of implementing the interim goals set forth in Paragraph 2. If the parties cannot agree

on a ratio by November 10, 1975 the Administrator shall establish such ratio by November 15, 1975.

ii) all applicants who receive a passing grade but who are not admitted pursuant to subparagraph (a) or section (i) of subparagraph (b) may be ordered admitted to journeyman membership by the Administrator at a time deemed suitable by him. White applicants who have received a passing grade and who are not admitted by March 1, 1976 shall be eligible for a selection priority over other white applicants qualified by the journeyman's test to be held in the Spring of 1976, or subsequent tests. Non-white applicants who have received a passing grade and who are not admitted pursuant to subparagraph (a) shall be admitted by July 1, 1976, if they so elect.

8. Local 28 shall administer a non-discriminatory, "hands-on" journeyman's test under the overall supervision and approval of the administrator in the Spring of 1976 and at least once a year thereafter. The Administrator after consultation with the parties, may apply to the Court to decrease the frequency of the tests consistent with the requirements of the interim goals set forth in Paragraph 2.

9. The journeyman's "hands-on" tests administered pursuant to Paragraph 8 shall be professionally developed and validated in accordance with EEOC Guidelines. Within a reasonable time before the administration of each test (which shall not be less than four weeks unless good cause is shown), Local 28 shall furnish counsel for the parties and the Administrator with (i) a copy of a report demonstrating the validity of the test and (ii) a copy of the test to be administered, provided that counsel for the parties and the Administrator shall not distribute or disclose the contents of the test to any individual or organization except for the purpose of professional validation thereof.

10. All qualified applicants shall be eligible to take the "hands-on" journeyman test specified in this Program. A qualified applicant is defined as follows: any person who

a) has or will have attained the age of 18 by the date of the test, and

b) is a citizen or a lawful permanent resident alien legally entitled to work in the United States, and

c) has resided in New York City or the counties of Westchester (N.Y.) Nassau (N.Y.) Suffolk (N.Y.), Passaic (N.J.) Bergen (N.J.) Hudson (N.J.) Union (N.J.) or Essex (N.J.) for six (6) months prior to the filing of an application, and

d) has one year of sheet metal work experience including but not limited to employment as a member in any branch of Local 400 of the Sheet Metal Workers International Association, sheet metal experience in the Armed Forces or vocational education or training related to the skills of a journeyman sheet metal worker.

Persons presently registered or recently registered in the Local 28 Apprentice Program or any other recognized apprentice program affiliated with the Sheet Metal Workers' International Association are not eligible.

11. Subject to the approval of the Administrator, Local 28 shall develop a standardized application form for the "hands-on" journeyman's test. Such forms shall include only the following:

a) provisions for the name, address, telephone number, social security number, citizenship or lawful resident alien status, residency, record of convictions, age, sex and race or ethnic identification of the applicant (with a notation that information regarding race or ethnic identification is required solely for the purpose of compliance with the court order herein and the regulations of the United States Equal Employment Opportunity Commission), and previous sheet metal experience.

b) information regarding the eligibility requirements, fee, date, time, location, and nature of the "hands-on" journey-man's test.

12. Local 28 shall make available an application form for the "hands-on" journeyman's test and a short description of the nature of the test in the following manner:

a) at the offices of Local 28;

b) by mail in response to inquiries and requests made by mail;

c) in bulk to plaintiffs, City Department of Employment, the New York State Employment Service, Recruitment and Training Program, Inc., Fight Back, and the other governmental or community agencies listed in Appendix A as amended from time to time.

Completed applications for the test shall be accepted by mail or delivery in person at the offices of Local 28. Local 28 may establish, with the approval of the Administrator, a suitable cut-off date for the acceptance of applications. Local 28 may establish a fee for the taking of the "hands-on" journeyman test consistent with the cost of administering such a test. Such fee shall be provisionally, $25.00. Local 28 may apply to the Administrator for an increase upon good cause shown. Applicants shall be informed, in writing, as to the place of examination with instructions as to how to reach the place and/or a map indicating its location.

13. The "hands-on" journeyman test shall be graded by a Board of Examiners consisting of three members knowledgeable in Sheet Metal. Said Board shall be comprised of a representative chosen by Local 28, a representative chosen by the Administrator, and a representative chosen by the Plaintiffs and the State Division of Human Rights. Such Board shall act by majority vote. Said Board of Examiners shall employ the passing grade level developed pursuant to the validation procedures

set forth in Paragraph 9. All applicants shall be advised of their status by first class mail within 30 days of the test. Non-whites who fail the test shall be advised of their possible eligibility for advanced standing in the apprenticeship program.

14. (a) A qualified non-white applicant who passes the test and is physically fit to perform sheet metal work shall be admitted to journeyman status in Local 28 within 60 days of the test unless the applicant elects to defer admission pursuant to Paragraph 19.

(b) A qualified white applicant who passes the test and is physically fit to perform sheet metal work shall be admitted to journeyman status in Local 28 in accordance with the following procedures:

(i) no later than 30 days prior to the test the parties shall attempt to agree on an appropriate ratio of non-whites to whites to be admitted to journeyman status. This ratio will be established with the purpose of fairly implementing the interim and final goals set forth in Paragraphs 1 and 2 but in no event shall said ratio be less than one non-white for every white. If no agreement is reached by the time specified, the Administrator shall establish the ratio within 15 days thereafter.

(ii) in accordance with the above ratio white applicants shall be admitted on the basis of the highest scores achieved on the "hands-on" journeyman test;

(c) To the best of their ability the parties and the Administrator shall endeavor to set forth on the application form the most accurate estimate of the opportunities available to whites based on the number of preferred candidates pursuant to Paragraph 7(b), the number of expected non-white candidates, and past experience.

15. Commencing January 1, 1976 there shall be established a program for admission to Local 28 journeyman membership of non-whites who have had four years experience obtained in

the United States or elsewhere, in sheet metal work or employment reasonably related or similar to sheet metal work, including experience in the Armed Forces, or vocational training related to the skills of a sheet metal worker. Persons eligible for admission under this program must,

a) be a resident of New York City, or the counties of Nassau (N.Y.) Suffolk (N.Y.) Westchester (N.Y.), Bergen (N.J.) Passaic (N.J.) Essex (N.J.) Union (N.J.) or Hudson (N.J.) for six (6) months prior to application; and

b) be age 18 or over; and

c) be physically fit to perform sheet metal work; and

d) establish to the satisfaction of a majority of a board of three members knowledgeable in sheet metal work, comprised of a representative chosen by Local 28, a representative chosen by the Administrator, and a representative chosen by the plaintiffs and the State Division of Human Rights that the applicant has the requisite sheet metal experience; and

e) be a citizen or lawful permanent resident alien legally entitled to work in the United States.

The Administrator, after due consultation with all the parties, shall establish procedures for application to this program, for investigation and verification of the criteria set forth in subparagraphs (a) through (e), and for the timing and conditions of admission. Appropriate publicity for the program shall be undertaken at the direction and with the approval of the Administrator.

16. (a) Upon proper application, a non-white eligible for admission to journeyman membership in Local 28 pursuant to Paragraphs 5 through 15 or Paragraph 35(e) of this Program may request of Local 28's Executive Board that the Local 28 initiation fee be reduced pursuant to the provisions of Paragraph 22(d) of the Order and Judgment. Within 5 days of receipt of such

application, the Local 28 Executive Board shall render a decision on the application in writing and notify the applicant, the Administrator and the parties of the disposition of the application (the notification to the Administrator and the parties shall include the name and address of the applicant). If such application is denied in whole or in part, or is not acted upon within five days of its receipt by the Executive Board of Local 28, an application may be made to the Administrator who shall either grant or deny the request in writing after duly considering all the factors set forth in Paragraph 22(d) of the Order and Judgment. In considering such an application the Administrator may require the submission of such information, documents, or other data from either Local 28 or the applicant as he deems necessary.

(b) Upon proper application a non-white eligible for admission to journeyman membership in Local 28 pursuant to Paragraphs 5 through 15 or Paragraph 35(e) may request of the Local 28 Executive Board that payment of the Local 28 initiation fee commerce with employment and be payable on a pro rated basis, each payment not exceeding 10% of the net check, and payable only during periods of employment until the fee is paid. Within 5 days of the receipt of such application the Local 28 Executive Board shall render a decision on the application in writing and notify the applicant, the Administrator and all parties of the disposition of the application (the notification to the Administrator and the parties shall include the applicant's name and address). If such application is denied in whole or in part or not acted upon within 5 days of its receipt by the Executive Board of Local 28, an application may be made to the Administrator who shall either grant or deny the application in writing. The decisions of the Executive Board of Local 28 and the Administrator shall be made having duly considered the financial circumstances of the applicant.

17. (a) At any time after an application pursuant to Paragraph 16 has been pending with the Administrator for more than 5 days a non-white eligible for admission to journeyman membership in Local 28 pursuant to Paragraph 5 through 15 or Paragraph 35(e) of this Program shall be admitted conditionally

to journeyman membership upon payment of $56 dollars and one month's dues pending the determination of the Administrator which shall be made within 30 days of the date of the application to the Administrator. During such conditional membership an applicant will be entitled to all the rights and privileges of regular journeyman membership.

(b) If a conditional member is terminated without becoming a regular journeyman member of Local 28 he shall be entitled to a return of any dues paid in advance for any month in which he was not employed and, if he was not employed during his conditional membership, he shall also be entitled to a return of any payment made toward the initiation fee.

18. The granting of any application pursuant to Paragraph 16 shall not diminish any rights or privileges accruing to journeyman membership in Local 28.

19. A person eligible for admission pursuant to Paragraphs 5 through 14 shall be permitted to defer such admission for up to six months from the time he is first entitled to be admitted. During such period, a person who has elected to defer may apply to the Administrator for further deferral of admission for up to another 12 months. If an applicant invokes his right of deferral he shall be admitted, on the same terms and conditions as he was previously entitled, within 30 days of written notice to Local 28 that he seeks to be admitted.

20. Local 28 shall issue "permits" or "identification slips" only with the express written consent of the Administrator, and pursuant to Paragraph 23(f) of the Order and Judgment.

Apprentice Program

21. The Local 28 Joint Apprenticeship Committee ("JAC") shall maintain an apprentice program of four years duration or less. The terms and conditions of the apprentice program shall be as set forth in the Collective Bargaining Agreement ("Standard Form of Union Agreement between Local ... and Sheet Metal Contractors."), the Local 28 Joint Apprenticeship Trust

and Indenture, and the rules and regulations thereunder except where modified by the Order and Judgment, the provisions of this Program, or order of the Administrator pursuant to his powers under the Order and Judgment.

22. The apprentice program shall indenture no less than 300 apprentices by July 1, 1976 of which no less than 100 apprentices shall be indentured by February 2, 1976. No less than 200 apprentices shall be indentured in each year thereafter up to and including 1981. Said numbers shall include those apprentices admitted with advanced standing. The JAC may indenture apprentices in two separate classes during a year.

23. Apprentices shall be assigned for employment in a ratio of not less than one apprentice for every four journeymen working of the aggregate journeymen employed. Seniority shall not be a criterion for employment, and apprentices shall be rotated for employment where necessary and feasibile. The JAC shall make every effort to provide apprentices with classroom instruction, including evenings and Saturdays where necessary, during periods of unemployment, and shall credit such hours toward fulfillment of apprenticeship requirements. The JAC may authorize the accelerated advancement or graduation of any apprentice as it deems proper.

24. Upon successful completion of the Apprenticeship Program, apprentices shall be promptly admitted to full journeyman membership upon payment of the balance due of the initiation fee, if any, which upon application to the Local 28. Executive Board, may be paid on an installment basis for good cause shown, and subject to the procedures contained in Paragraph 16.

25. Applications shall be made available to and accepted from any qualified candidate. A qualified candidate is defined as follows: any person who is deemed physically fit for sheet metal work and who has or will have attained the age of 18 years by the date of indenture of the next scheduled apprentice class and who is not older than 25 years of age (for veterans of active

military duty the age limit is extended one year for each year of such duty up to the age of 30) and for non-whites not over the age of 35 applying for advanced standing, and who is a citizen or permanent resident alien. For the apprentice aptitude test to be administered in November, 1975 only, JAC may require proof of completion of a tenth grade course of education. The JAC shall validate the tenth grade requirement before said requirement may be imposed for subsequent examinations.

26. With the approval of the Administrator, JAC shall develop a standardized application form for the Apprentice Program. The application form shall include information about the date of the next class of apprentices to be indentured, and shall require only the following information of the applicant:

a) Name, address and telephone number:

b) Birth date and age:

c) Social Security number;

d) Extent of education;

e) Sex;

f) Race or ethnic classification; (with a notation that this information is required solely for the purposes of compliance with federal anti-discriminations statutes);

g) military service;

h) convictions and pending criminal charges.

i) Citizenship or lawful permanent resident alien status.

27. Application forms for the Local 28 JAC Apprentice Program shall be available at the offices of the JAC during normal business hours and at the offices of the organizations listed in Appendix A at least 60 days before an examination. Application forms shall be made available by mail upon written request. Completed applications shall be accepted in person or

by mail at the offices of the JAC. There shall be a filing fee of no more than $15.00. Application forms shall be made freely available to any governmental employment office and minority community organizations not listed in Appendix A upon request. The time for filing applications for a particular apprentice test may be closed by the JAC at a reasonable time (not to exceed three weeks) before the date of the examination.

28. An apprentice aptitude test shall be given on December 13, 1975 and at least once yearly thereafter at a date, time and location approved by the Administrator. The test shall consist of the following professionally developed and validated components: (1) a basic "read and follow directions" test designed to ascertain an applicant's ability to master and understand those written and verbal instructions, directions, and other communications necessary to participate in the Apprentice Program at the first year level; and (2) a mechanical comprehension test similar in substance and scope to that mechanical comprehension test administered by JAC in April 1969. There shall be professionally developed and validated a qualifying score on the "read and follow directions" test designed to reflect the minimum ability necessary to participate in the Apprentice Program at the first year level. The JAC may apply to the Administrator to give a math test as part of the apprentice aptitude test, and such test may be given upon good cause shown. Such math test shall be professionally developed and validated as to content and qualifying score in such manner as to reflect the minimum ability necessary to participate in the Apprentice Program at the first year level.

29. Within three weeks of the administration of an apprentice entrance test, JAC shall provide the Administrator and all parties with:

(a) the names, race identification, raw scores and rank of all candidates on all tests; and

(b) the mean and median scores on all tests of all identifiable racial and ethnic groups among the candidates.

30. Persons selected to be indentured as apprentices pursuant to Paragraph 22 shall be selected in accordance with a ratio of non-whites-to-whites which shall be established by agreement of the parties within 30 days prior to the tests, or by the Administrator within 15 days thereafter if the parties fail to agree.[3] This ratio will be established with the purpose of fairly implementing the interim and final goals set forth in Paragraphs 1 and 2 but in no event shall said ratio be less than one to one. For the purpose of assuring that white applicants are accorded an opportunity to be accepted in the Apprentice Program in reasonable numbers, the parties and the Administrator shall use their best efforts to assure that the total population of the program shall not exceed 60 non-white individuals, and that an individual term or class shall not exceed 70% non-white individuals.

31. In fulfillment of JAC's and Local 28's obligations under Paragraphs 22 and 30, apprentices chosen means of the apprenticeship entrance test shall be selected from those who meet or exceed the qualifying score on the "read and follow directions" test in the following manner:

(a) the white apprentices shall be selected on the basis of the highest scores received on the mechanical comprehension test among the white eligible qualified candidates;

(b) the non-white apprentices shall be selected on the basis of the highest scores received on the mechanical comprehension test among non-white eligible qualified candidates subject to the provisions of paragraph 35.

32. Persons selected for the Apprentice Program may be required to appear for orientation and a physical examination prior to being indentured. The cost of physical examinations are to be borne one half by successful applicants and one half

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[3] The parties shall agree by November 14, 1975, what the ratio shall be for the classes to be indentured in February and June 1976. If no agreement is reached, the Administrator shall establish the ratio by November 21, 1975.

by the JAC. Additional persons may be invited to orientation and a physical examination by Local 28 JAC if that appears desirable. Persons selected in accordance with the above procedures shall be indentured as apprentices unless such indenturing is waived by them, or they are certified physically unable to perform sheet metal work by medical practitioner licensed in New York State.

Advanced Apprentices

33. There shall be established by the JAC procedures for the admission and advanced placement in the Apprentice Program of non-white apprentices who have experience in sheet metal work or trade education but cannot perform at journeyman level. Applicants for advanced placement shall have at least six months experience in sheet metal work or trade education, be physically fit and shall be not less than 18 years old or more than 35 years old by the date of indenture of the next scheduled apprentice class. For such person applying to be indentured in February and July, 1976 only, the JAC may require proof of completion of a tenth grade course of education by that date. Such requirement must be validated for subsequent utilization.

34. The Training Coordinator of JAC shall evaluate the experience of all applicants for advanced standing and shall make placement to the appropriate grade level. The grade level assigned shall be conditional for a period to be determined by the coordinator, not exceeding three months, based upon classroom work and on the job performance. Applicants who challenge the grade level assigned shall be advised of their right to appeal to the Administrator.

35. a) The Administrator shall determine the number of advanced apprentices to be admitted from the lists resulting from each test, based upon the needs of the apprenticeship program at any given time and the number of applicants eligible for advanced standing as certified by the coordinator.

b) Apprentices who meet the requirements of Paragraph 33 shall be selected for advanced standing in the following manner:

(i) those whose ranking on the apprenticeship aptitude examination qualifies them for acceptance into the apprenticeship program pursuant to Paragraphs 22 and 30 shall be selected in accordance with their ranking and admitted with advanced standing, subject to the number determined by the Administrator pursuant to subdivision (a) of this paragraph.

(ii) if there are insufficient apprentices who qualify for advanced standing selected by the procedure contained in subdivision (b)(i) of this paragraph to satisfy the number determined by the Administrator, additional apprentices to reach this number shall be selected in ranked order, from those who are over 25 years of age and whose score on the apprenticeship aptitude examination places them below the number otherwise selected pursuant to Paragraph 22.

c) The number of apprentices admitted with advanced standing under subdivision (b)(i) of this paragraph shall be included in the number of apprentices selected pursuant to Paragraph 22 and computed in the total of non-white apprentices selected on the basis of the ratio established pursuant to Paragraph 30. The numbers of apprentices admitted with advanced standing under subdivision (b)(ii) of this paragraph shall not be included in the number of apprentices selected pursuant to Paragraph 22 or computed in the total of non-white apprentices selected on the basis of the ratio established pursuant to Paragraph 30.

d) An advanced apprentice shall be entitled to all rights, privileges and other benefits including work referral, pay, instruction, and supervision accruing to regular apprentices at the same level of training.

e) Apprentices admitted with advanced standing pursuant to Paragraphs 33 through 35 who successfully complete the apprenticeship program may make the applications provided for in Paragraph 16 of this Program.

f) Advanced apprentices assigned for work may be utilized to satisfy City and City-assisted contract requirements for the employment of minority trainees.

36. The coordinator shall develop a pre-examination study group program so as to familiarize all applicants for the Apprenticeship Program with the type of test that they will be given. All applicants shall be notified in writing at least two weeks in advance of the apprentice test that the study program is available to them. Such notice shall contain the date, time, and location of the study group meetings. The meetings shall be held in the evening after 6:30 P.M. Within two weeks of the effective date of this Affirmative Action Program, the Coordinator shall submit a detailed program including but not limited to teaching methodology, program materials, and organization of the groups.

37. In addition to any other records or lists required to be maintained under the terms of this Program or the Order and Judgment, Local 28 and JAC, as the case may be, shall maintain separately for whites and non-whites, records and lists containing the following information, beginning with the effective date of this Program.

a) Persons who request an application for or apply to take the "hands-on" journeyman's test described in Paragraphs 5 and 8;

b) Persons who take the "hands-on" journeyman's test described in Paragraphs 5 and 8;

c) Persons who pass the "hands-on" journeyman's test described in Paragraphs 5 and 8;

d) Persons who applied for journeyman admission on the basis of experience, described in Paragraph 15;

e) Persons who are admitted, and those rejected, for journeyman membership on the basis of experience, described in Paragraph 15;

f) Persons who seek or apply to transfer into Local 28 from an affiliated sister local union;

g) Persons who inquire of Local 28 about the possibility of transferring into Local 28 from an affiliated sister local union;

h) Persons who inquire of Local 28 as to the availability of work opportunities with or through Local 28, including but limited to inquiry about or seeking "permits" or "identification slips";

i) Persons to whom "permits" or identification slips" are issued or work opportunities with or through Local 28 are otherwise made available.

j) Persons who contact Local 28 or JAC seeking sheet metal work;

k) Persons who are employed as sheet metal workers or apprentices by Local 28 contractors.

l) Persons working in sheet metal shops at the time they are organized by Local 28;

m) Persons who are reinstated to journeyman membership or to the Apprentice Program;

n) Non-whites who apply for advanced standing in the apprenticeship program described in Paragraphs 33-35;

o) Non-whites who are granted advance standing in the apprenticeship program and the standing granted as described in Paragraphs 33-35;

The records and lists specified in subsection (a) through (o) of this Paragraph shall contain the name, address, race, or national origin, union affiliation, if any, of each individual listed therein, as well as the date of the application, test, inquiry, contact, or employment (and the name of the contractor, where applicable), and the disposition with reasons, of each such application, test, inquiry, contact or employment. Copies of these records and lists shall be submitted to counsel for the parties and the Administrator at least once every three months.

Said records and lists may exclude telephonic requests for information. However, telephoners should be informed that their requests should be made in writing, and a form of this purpose shall be sent to the telephoner.

38. Local 28 or JAC, as the case may be shall submit the following data to the Administrator and parties at the time specified.

a) the name and race identify of persons admitted into (i) journeyman status in Local 28 or (ii) apprentice status in the Apprentice Program, within 5 days of such admission;

b) on January 1 and July 1 of each year the total number of (i) journeyman members of Local 28, (ii) pensioner members of Local 28 (as defined in Paragraph 2), and (iii) apprentices. Such reports shall include the percentage of non-whites in each group.

39. The JAC shall maintain complete records of all applications and other material concerned with the selection and work records of apprentices. These records shall include but not be limited to an applicant log for each examination showing the name, race, date of birth of each applicant, dates of completion of each step in the application procedure, disposition of each step in the application procedure, and disposition of each application. All such records shall be made available for inspection and copying by the plaintiffs at reasonable intervals during normal working hours or at other mutually convenient times. In addition, records shall be submitted to the Administrator and plaintiffs as follows:

a) Prior to each apprentice entrance test and within 7 days of the closing of the application procedure the JAC shall submit a report including the following information for each person who filed or requested an application for that apprentice examination: name, address, telephone number and race or national origin, if known for those who request applications.

b) Within 20 days after indenturing a class of apprentices the JAC shall provide a report of the names and ethnic classification of all persons who were rejected during the application and testing period and the reason therefore and the names of all persons whose application became inactive and the reason therefore.

c) Every six months subsequent to the indenturing of a class of apprentices the JAC shall furnish a report giving the names of all non-white apprentices, the name(s) of contractors to which each was referred and the number of hours worked.

d) The Joint Apprenticeship Committee shall furnish the names of any non-white apprentices who are dropped from the Apprentice Program. Said information shall be furnished within twenty days from the date action is taken by the Joint Apprenticeship Committee. Said report shall contain the reason why the individual was dropped from the program and the steps taken by the Joint Apprenticeship Committee to retain the individual in the program. The report shall also include the training and employment history of the individual while he was in the program. The Joint Apprenticeship Committee shall furnish the names of all non-white apprentices who leave the program other than by action of the JAC. Such report shall contain the reason the apprentice has left the program as ascertained by an exit interview diligently attempted. Said information shall be furnished within twenty days from the time the JAC is notified that the apprentice has left the program.

40. All records and lists required to be compiled by this Program shall be maintained for ten years and shall be made available for inspection and copying by the parties and the Administrator on reasonable notice during regular business hours or at other mutually convenient time without further order of the court.

Advertising and Publicity

41. The parties shall use their best efforts to disseminate accurate information to the non-white community of opportunities within Local 28 and the Local 28 apprentice program.

42. Prior to each "hands-on" journeyman's test and apprentice entrance test, at a time to be selected by the Administrator to insure full coverage and effectiveness Local 28 (in the case of the "hands-on" journeyman's examination) and JAC (in the case of apprentice entrance tests) shall undertake a program of advertising and publicity, under the overall supervision of the Administrator, designed to inform the non-white community in New York City of the date, location, and nature of such examinations, the qualifications therefore and the opportunities available upon successful completion of the test. Additionally, the overall apprenticeship recruiting and publicity campaign shall include a component limited toward advanced apprentices. These campaigns may include print and electronic media, dissemination of material to community, government and minority organizations. The City of New York may provide space and opportunities for such publicity.

43. By March 1, 1976 Local 28 and JAC shall provide to the Administrator and the other parties a written plan of an effective general publicity campaign designed to inform the non-white community in New York City of non-discriminatory opportunities in Local 28 and the Local 28 apprentice program as provided in the Order and Judgment and this Program. The other parties shall have 30 days to comment upon the written plan and the Administrator, having considered all submissions, shall revise the plan if he deems necessary and shall order it into effect by May 1, 1976.

Work Referral

44. The Administrator shall conduct a study of the present Local 28 work referral system as described in the written statement submitted pursuant to Paragraph 21(g) of the Order and Judgment. This study shall be completed by June 15, 1976 and the Administrator shall submit to the parties such recommendations he deems necessary to assure that non-whites do not bear a disproportionate share of unemployment.

Resolution of Disputes

45. a) The Administrator shall hear and determine all complaints concerning the operation of the Order and Judgment and this Program and shall decide any questions of interpretation and claims of violations of the Order and Judgment and the Program, acting either on his own initiative or at the request of any party herein or any interested person. All decisions of the Administrator shall be in writing and shall be appealable to the Court.

b) Any party or any individual affected by this Program may make a complaint to the Administrator within thirty days after the situation complained of arises. The Administrator shall give the parties notice of such a complaint within five days and, where a hearing is in his discretion warranted, expeditiously schedule such hearing.

General Provisions

46. The union and the JAC shall post conspicuous notices, in language and at locations approved by the Administrator, advising individuals of their rights under this Program within 60 days after the Program is approved by the Court.

47. Nothing contained in the Program should be construed as preventing the Executive Board from adopting portions of the Program for the benefit of whites and other minorities provided that such plans do not interfere with the operation of this Program.

48. Except as modified, changed or amended by the terms of this Program or order of the Administrator, Local 28 and JAC shall not change, modify or amend any aspect of the operation or content of the Apprentice Program, or the conditions or terms upon which an individual shall become a member of the Apprentice Program of Local 28 or entitled to work within the jurisdiction of Local 28.

49. At any time, any of the parties herein may apply to the Administrator and then to the Court for the purpose of seeking additional orders to insure the full and effective implementation of the terms and intent of this Program.

Dated: New York, New York
November 12, 1975

s/David Raff
DAVID RAFF, ESQ.
Administrator

SO ORDERED.

s/HENRY F. WERKER
U. S. D. J.

Dated: November 13, 1975

[Filed November 25, 1975]

APPENDIX A

New York State Division of Employment (Department of Labor)

Department of Employment of the City of New York

Bureau of Labor Services of the City of New York

Recruitment and Training Program, Inc.

Fight Back

Asian Americans for Equal Employment

Black Economic Survival

Regional Neighborhood Manpower Service Centers of New York City

New York City Board of Education (Public High School and Evening Trade Division)

Williamsburg Coalition

New York Urban League

National Association for the Advancement of Colored People

Puerto Rican Community Development Project

National Association for Puerto Rican Civil Rights

Citywide Coalition of Black, Hispanic, and Asians in Construction

New York Project Equality

Commonwealth of Puerto Rico

Opportunities Industrialization Center of New York, Inc.

Bedford-Stuyvesant Restoration Corp.

New York City Human Rights Commission*

New York State Division of Human Rights*

MEMORANDUM AND ORDER

WERKER, District Judge.

The court has read and considered the Affirmative Action Program submitted by the Administrator, the objections submitted by Local 28, the JAC, the City, and the E.E.O.C. together with all appendices and replies to each other's objections which were filed in court before 3 p. m. on October 17, 1975.

The following are the observations and rulings of the court which the Administrator is directed to implement by amendment and modification of the Program as submitted. References

are to sections of the Program unless otherwise noted. Sections which are not otherwise mentioned are approved by implication.

1. Section 1 is approved.

[1] 2. Section 2. While the court's order and judgment did not set interim goals it was hoped that the parties could agree upon such goals as would realistically result in the ultimate percentage at the deadline. The court finds that the proposed goals are not excessive and are consequently approved. The suggestions of counsel for Local 28 are rejected as being the same type of approach to this problem as has been taken by the Union over the last ten years and which has resulted in a mere 4% non-white membership.

[2] To the extent that pensioners are defined in the Program that definition is adopted by the court. Without discounting the political effect which the non-working pensioners' votes may have, it is the court's rationale that the Programs's goals should be primarily addressed to the work force rather than the internal operations of the Union. To do otherwise might create constitutional issues which have no place in this Program or litigation. It is the court's belief that ultimately the Union membership, including pensioners, will recognize the rights of non-whites and the fact that those rights must be enforced regardless of the cost to the courts or the governments involved in order to secure to all working people those rights which the Constitution has guaranteed.

[3-6] 3. Sections 3(b) and 15. There is an implied assumption on the part of Local 28 that the Program may be dragged out until the penultimate date and that it need not diligently and forcefully attempt to achieve the ultimate goal at an earlier date. Nothing is further from the contemplation of the court. If that goal can be reached in 1, 2 or 3 years then it should be so reached. This is why the court adopts the proposals contained in the above-numbered paragraphs. Defendant Local 28's claim that no necessity or desirability has been shown and that

the proposal is premature is, for the reason above stated, as well as the whole purpose of the litigation, misguided. All avenues are opened by the opinion and should remain open until the goal is reached. To the extent that this was labeled an option in the opinion, it was an option open to non-whites. If a sufficient number can be found who are qualified they should be admitted. Since the program is prospective, no one can now know how many non-whites there are who are qualified under these paragraphs.

There would appear to be no reason for an age limit qualification other than the age of 18.

The court adopts the proposal for a tripartite examining board.

If it be true that many of the present membership reside outside the limits of New York City there is no reason why applicants should be restricted to New York City. The residency requirement should be increased to six (6) months to assure bona fide residency. Throughout the Program the qualifications should include a requirement of citienship or an alien status which legally permits work in the United States.

[7-9] 4. Sections 4(b) and 33-36. These sections are approved except as noted below. What was said about goals in paragraphs 1 and 2 hereof is also applicable here.

Paragraph 33(b) should be deleted to the extent that it does not require examination. It appears to the court that all applicants should be required to take the aptitude test. It should not be left to conjecture as to whether the applicant has the aptitude to become a journeyman. If he does not pass the aptitude test there would appear to be no reason why he should be placed in an advanced position in the apprenticeship program. Furthermore all those placed in an advanced position should be so placed conditionally based upon classroom work and on job performance for a period to be determined by the coordinator not exceeding three months.

Section 36 should not be deleted. It should be broadened to provide that nothing contained in the Pr gram should be construed as preventing the Executive Board from adopting portions of the Program for the benefit of whites and other minorities provided that such plans do not interfere with the operation of this Program.

5. Sections 5, 6, 7, 8 and 9 are approved.

6. Section 10 is approved except with respect to age which shall be fixed at 18 (10(b)), and residency (10(c)).

[10-12] 7. Section 11 is supplemented to the extent requested in defendant Local 28's objection 8.

An examination of the application form annexed to Local 28's objections does not indicate that it is unduly complicated. An update of the informational items will, however, be required. The applicants should be informed in writing as to the place of examination with instructions as to how to reach the place and or a map indicating its location.

The maximum examination fee of $25 is adopted provisionally. The defendants may apply to the Administrator for an increase upon a showing that such an increase is needed. Verified costs. *i. e.*, vouchers *verified* by vendors, should be presented to show these costs. The evidence submitted by the City indicates that even this fee is prohibitive to application by a number of non-whites. An initial screening of applicants for the journeyman test ought to be held by the organizations through which they are produced and/or the Union. Results of the journeyman test of October 11, 1975 may indicate that some applicants who took the test were not qualified to do so. This results in wasted effort on everyone's part. Without suggesting that it has been done, we are not interested in testing a number of bodies but persons who are actually qualified but have been discriminated against in the past.

[13, 14] 8. Paragraphs 15, 16 and 17 are approved. In 16(b) the proration of the initiation fee over a period of two years

is unnecessarily restrictive. This should be amended to relate to *income* not *time* and should possibly be included in check off provisions. Thus perhaps 10% of the net check should be paid for the initiation fee until the fee is paid.

The objection contained in defendant Local 28's objection 12B has no place in this Program. It is the assumption of the court that any affirmative action provisions contained in the Program for non-whites with respect to 16(a) and (b) will equally be applicable to whites and other minorities.

9. Paragraph 17 of the plan is approved. With the additional language to be added as set forth in the City's letter of October 15, 1975, page 1.

10. Paragraphs 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28 and 29 are approved. The date for the December test is the 13th not the 11th as shown in the Program in paragraph 28.

11. The suggestion of the United States Attorney, amending the first sentence of paragraph 30 as contained in his letter of October 10, 1975 at page 2 is approved. The deletion of the second sentence is approved and the insertion in its place of the City's paragraph in p. 3 of its letter of October 10, 1975 is approved.

12. Paragraph 31 is approved.

[15-17] 13. Paragraph 32 is amended so as to provide that the successful applicant will bear one-half the cost and JAC the other half. The importance of sound physical condition is such that the safety of all are involved in it. The cost as thus reduced to the applicant assuming a $34 maximum should be easily payable. The utilization of facilities other than those used by JAC is not acceptable since the nature of the examination is subject to too many variations and possible unethical practices.

As indicated earlier, paragraph 33(b) is in part deleted. The court believes that it is unfair to other applicants to exempt those

claiming one year or more experience from the aptitude test. Furthermore if the test is as job-related as it should be those with the experience should have no difficulty with it. The preference to be granted should be based upon scores and work experience as determined by the coordinator. The number to be admitted should be determined by the Administrator based upon the certification by the coordinator and the needs of the apprentice program at any given time. This will require rewriting paragraphs 33 and 35 and possibly paragraph 31(b).

[18] 14. With respect to the Union's objections to the adoption of a rotation system of employment for apprentices, it is suggested that the adoption of such a system will motivate more apprentices to continue in the trade and will eliminate the probability that the upper classmen apprentices, who may be mostly white, will be preferred over lower classmen who will, it is hoped, be significantly non-white. The court finds these two reasons sufficiently persuasive to adopt the program during the period of transition to the 29% goal.

[19, 20] 15. With respect to paragraph 37 the court agrees that telephonic requests for information should be excluded from the record keeping. Telephoners should, however, be informed that their requests should be made in writing and a form for this purpose should be sent to them with regard to each of the categories mentioned in this paragraph.

The submission of these records once every three months during the first year of the Program and thereafter every six months is approved.

16. Sections 39, 40, 41, 42, 43, 44 and 45, 46, 47, 48 are approved as they are set up in the plan.

[21] 17. It should be noted by the parties that in the court's concept of the role of the Administrator, he is not a neutral person. He is the executor of the order and judgment of the court and its alter ego and, to that extent, he is partisan to the letter and spirit of the court's judgment. It has been brought to the

attention of the court that numerous small harassing tactics have been utilized during the period from the date of the judgment to this date. A continuation of such practices is proscribed.

[22] 18. It appears that the major source of journeymen will ultimately be the apprenticeship program. The court has found that the test as administered was a major obstacle to non-white participation in this program. It would appear to the court that this may be so with respect to even validated tests. As a consequence, the Administrator is directed to incorporate in the program a pre-examination study group program to be conducted by the coordinator so as to familiarize *all* applicants with the *type* of test to which they will be exposed.

19. In the contemplation of the court the 29% figure reached in the judgment may result by the time the deadline is reached, in a lesser number of non-whites, than estimated at the time of the judgment, assuming an increase in attrition of Union membership due to the economy or other factors not now foreseeable. Thus accurate reporting of membership is an essential part of the Program.

The corrections and clarifications contained in the United States Attorney's letter of October 10, 1975 as applicable are adopted and approved.

The Administrator is directed to redraft the Program in accordance with this memorandum and order. Oral argument is denied as being unproductive.

So ordered

ANNEX

PROPOSED AFFIRMATIVE ACTION PROGRAM

Introduction

1. This Affirmative Action Program ("Program") is adopted pursuant to the Decision and Order dated July 18, 1975 and the Order and Judgment

dated August 28, 1975 and entered in this action on September 2, 1975 ("Order and Judgment"). The goal of this Program is to assure that the non-white* membership in Local Union No. 28 of the Sheet Metal Workers' International Association "Local 28") reaches a minimum level of 29% by July 1, 1981; to assure that substantial and regular progress is made toward this goal in each year prior to 1981; and to assure that non-white members of Local 28 and non-white apprentices of Local 28 share equitably in all employment opportunities afforded to members of Local 28.

2. For the purpose of reaching the above goal of 29% by July 1, 1981 this Program established as interim percentage goals for the non-white membership of Local 28 the following:

July 1, 1976	10%
July 1, 1977	13%
July 1, 1978	16%
July 1, 1979	20%
July 1, 1980	24%

Each of the above percentages shall be measured against the total membership of Local 28 as of each interim goal date respectively and the final goal date. For the purpose of measurement, total membership shall include all journeyman members, all pensioners** who have been employed as sheetmetal workers within the last three years, and all members or participants in the Local 28 Apprentice Program ("apprentice Program"). The parties to this action and the Administrator are to implement this Program so that these interim goals may be attained. The Administrator shall periodically review the progress toward the attainment of these goals and take such action as he is empowered to take under the Order and Judgment to assure their achievement.

3. Admission to Journeyman membership in Local 28 shall be attained only through the following procedures:

a) Successful completion of a "hands-on" journeyman test administered pursuant to Paragraphs 5-14; or

b) establishment of proof of the required experience in the sheetmetal trade pursuant to Paragraph 15; or

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* "Non-white" as used in the Program means black and Spanish surnamed individuals.

** "Pensioner" as used in the Program means any individual who receives benefits from the Local 28 pension program.

c) successful completion of the Local 28 Apprentice Program; or

d) transfer in accordance with the Sheet Metal Workers' International Union Constitution and Ritual; or

e) organization of non-union shops.

4. Membership in the Apprentice Program shall be obtained only through the following procedures:

a) successful completion of an apprentice aptitude test as set forth in Paragraphs 21-32; or

b) entry with advanced standing as set forth in Paragraphs 33 through 36.

Admission to Journeymen Status

5. Under the supervision and with approval of the Administrator, Local 28 shall administer a "hands-on" journeyman's test on October 11, 1975 designed to test fairly and in a non-discriminatory manner the skills needed for a journeyman sheet metal worker. This test and its grading shall be in substance the equivalent of the "hands-on" portion of journeyman's test given by Local 28 in November, 1969 as revised by a sheetmetal expert provided by the plaintiffs or the New York State Division of Human Rights. Disputes as to any proposed revisions shall be resolved by the Administrator. There shall be a filing fee of $25 for this test.

6. Local 28 shall undertake a program of publicity and advertising and prepare, make available, and process applications relating to the October 11, 1975 "hands-on" journeyman's test in accordance with the standards and conditions set forth heretofore by the parties and the Administrator. The administration and grading of the test shall be under the overall supervision of the Administrator and shall be accomplished and recorded in such a manner as to facilitate the professional development and validation of future "hands-on" journeyman's tests.

7. Under the following conditions all persons who receive a passing grade in the test described in Paragraph 5 and 6, and who are physically fit for sheetmetal work shall be eligible for admission to full journeyman membership in Local 28 as follows:

a) all non-white applicants who receive a passing grade, up to a total of 200 such applicants, shall be admitted to journeyman membership by December 1, 1975 in accordance with and subject to the provisions of Paragraphs 16-18 of the Program. In the event that more than

200 non-white applicants receive a passing grade and elect to exercise their rights to admission to journeymen membership under this Program, the 200 non-whites with the highest grades shall be admitted by December 1, 1975; the remaining non-white applicants shall be admitted in accordance with the provisions of sub-paragraph (b) of this paragraph;

b) white applicants who receive a passing grade shall be placed on a list and ranked in descending order on the basis of their grades on the examination.

i) white applicants shall be selected for admission in the order of their ranking on the above described list on the basis of a ratio to the non-whites admitted pursuant to section (a) of this Paragraph. Said ratio shall be agreed upon by the parties, but in no event shall the ratio of non-whites to whites be less than 1 to 1. Such ratio shall be designed with the purpose of implementing the interim goals set forth in Paragraph 2. If the parties cannot agree on a ratio by November 10, 1975 the Administrator shall establish such ratio by November 15, 1975.

ii) all applicants who receive a passing grade but who are not admitted pursuant to sub-paragraph (a) or section (i) of subparagraph (b) may be ordered admitted to journeyman membership by the Administrator at a time deemed suitable by him. White applicants who have received a passing grade and who are not admitted by March 1, 1976 shall be eligible for a selection priority over other white applicants qualified by the journeyman's tested held in the Spring of 1976, or subsequent tests. Non-white applicants who have received a passing grade and who are not admitted pursuant to subparagraph (a) shall be admitted by July 1, 1976, if they so elect.

8. Local 28 shall administer a non-discriminatory, "hands-on" journeyman's test under the overall supervision and approval of the Administrator in the Spring of 1976 and at least once a year thereafter. The Administrator, after consultation with the parties, may apply to the Court to decrease the frequency of the tests consistent with the requirements of the interim goals set sorth in Paragraph 2.

9. The journeyman's "hands-on" tests administered pursuant to Paragraph 8 shall be professionally developed and validated in accordance with EEOC Guidelines. Within a reasonable time before the administration of each test (which shall not be less than four weeks unless good cause is shown), Local 28 shall furnish counsel for the parties and the Administrator with (i) a copy of a report demonstrating the validity of the test and (ii) a copy of the test to be administered, provided that counsel for the parties and the Administrator

shall not distribute or disclose the contents of the test to any individual or organization except for the purpose of professional validation thereof.

10. All qualified applicants shall be eligible to take the "hands-on" journeyman test specified in this Program. A qualified applicant is defined as follows: any person who

a) has or will have attained the age of 22 by the date of the test, and

b) is a citizen or a lawful permanent resident alien legally entitled to work in the United States, and

c) has resided in New York City or the counties of Westchester (N.Y.) Nassau (N.Y.) Suffolk (N.Y.), Passaic (N.J.) Bergen (N.J.) Hudson (N.J.) Union (N.J.) or Essex (N.J.) for 60 consecutive days prior to the filing of an application, and

d) has one year of sheet metal work experience including but not limited to employment as a member in any branch of Local 400 of the Sheet Metal Workers International Association, sheet metal experience in the Armed Forces or vocational education or training related to the skills of a journeyman sheet metal worker.

Persons presently registered or recently registered in the Local 28 Apprentice Program or any other recognized apprentice program affiliated with the Sheet Metal Workers' International Association are not eligible.

11. Subject to the approval of the Administrator, Local 28 shall develop a standardized application form for the "hands-on journeyman's test. Such forms shall include only the following:

a) provisions for the name, address, telephone number, social security number, age, sex and race or ethnic identification of the applicant (with a notation that information regarding race or ethnic identification is required solely for the purpose of compliance with the court order herein and the regulations of the United States Equal Employment Opportunity Commission), and previous sheet metal experience.

b) information regarding the eligibility requirements, fee, date, time, location, and nature of the "hands-on" journeyman's test.

12 Local 28 shall make available an application form for the "hands-on" journeyman's test and a short description of the nature of the test in the following manner:

a) at the offices of Local 28;

b) by mail in response to inquiries and requests made by mail;

c) in bulk to plaintiffs, City Department of Employment, the New York State Employment Service, Recruitment and Training Program, Inc., Fight Back, and the other governmental or community agencies listed in Appendix A as amended from time to time.

Completed applications for the test shall be accepted by mail or delivery in person at the offices of Local 28. Local 28 may establish, with the approval of the Administrator, a suitable cut-off date for the acceptance of applications. Local 28 may establish a fee for the taking of the "hands-on" journeyman test consistent with the cost of administering such a test, but in no event shall such fee exceed $25.00.

13. The "hands-on" journeyman test shall be graded by a Board of Examiners consisting of three members knowledgeable in Sheet Metal: a representative chosen by Local 28, a representative chosen by the Administrator, and a representative chosen by the Plaintiffs and the State Division of Human Rights. Such Board shall act by majority vote. Said Board of Examiners shall employ the passing grade level developed pursuant to the validation procedures set forth in Paragraph 9. All applicants shall be advised of their status by first class mail within 30 days of the test. Non-whites who fail the test shall be advised of their possible eligibility for advanced standing in the apprenticeship program.

14. (a) A qualified non-white applicant who passes the test and is physically fit to perform sheet metal work shall be admitted to journeyman status in Local 28 within 60 days of the test unless the applicant elects to defer admission pursuant to Paragraph 19.

(b) A qualified white applicant who passes the test and is physically fit to perform sheet metal work shall be admitted to journeyman status in Local 28 in accordance with the following procedures:

(i) within 20 days of the test the parties shall attempt to agree on an appropriate ratio of non-whites to whites to be admitted to journeyman status. This ratio will be established with the purpose of fairly implementing the interim and final goals set forth in Paragraphs 1 and 2 but in no event shall said ratio be less than one-to-one. If no agreement is reached within 20 days, the Administrator shall establish the ratio within 5 days thereafter.

(ii) in accordance with the above ratio white applicants shall be admitted on the basis of the highest scores achieved on the "hands-on" journeyman test;

c) To the best of their ability the parties and the Administrator shall endeavor to set forth on the application form the most accurate estimate of

the opportunities available to whites based on the number of preferred candidates pursuant to Paragraph 7(b), the number of expected non-white candidates, and past experience.

15. Commencing January 1, 1976 there shall be established a program for admission to Local 28 journeyman membership of non-whites who have had four years experience obtained in the United or elsewhere, in sheet metal work or employment reasonably related or similar to sheet metal work, including experience in the Armed Forces, or vocational training related to the skills of a sheet metal worker. Persons eligible for admission under this program must,

a) be a resident of New York City, or the counties of Nassau (N.Y.) Suffolk (N.Y.) Westchester (N.Y.), Bergen (N.J.) Passaic (N.J.) Essex (N.J.) Union (N.J.) or Hudson (N.J.) for 60 consecutive days prior to application; and

b) be age 22 or over; and

c) be physically fit to perform sheet metal work; and

d) establish to the satisfaction of a majority of a board of three members knowledgeable in sheet metal work, comprised of a representative chosen by Local 28, a representative chosen by the Administrator, and a representative chosen by the plaintiffs and the State Division of Human Rights that the applicant has the requisite sheet metal experience.

The Administrator, after due consultation with all the parties, shall establish procedures for application to this program, for investigation and verification of the criteria set forth in subparagrphs (a) through (d), and for the timing and conditions of admission. Appropriate publicity for the program shall be undertaken at the direction and with the approval of the Administrator.

16. (a) Upon proper application, a non-white eligible for admission to journeyman membership in Local 28 pursuant to Paragraphs 5 through 15 or Paragraph 35(d) of this Program may request of Local 28's Executive Board that the Local 28 initiation fee be reduced pursuant to the provisions of Paragraph 22(d) of the Order and Judgment. Within 5 days of receipt of such application, the Local 28 Executive Board shall render a decision on the application in writing and notify the applicant, the Administrator and the parties of the disposition of the application (the notification to the Administrator and the parties shall include the name and address of the applicant). If such application is denied in whole or in part, or is not acted upon within five days of its receipt by the Executive Board of Local 28, an application may be made to the Administrator who shall either grant or deny the request in

writing after duly considering all the factors set forth in Paragraph 22(d) of the Order and Judgment. In considering such an application the Administrator may require the submission of such information, documents, or other data from either Local 28 or the applicant as he deems necessary.

(b) Upon proper application a non-white eligible for admission to journeyman membership in Local 28 pursuant to Paragraphs 5 through 15 or Paragraph 35(d) may request of the Local 28 Executive Board that payment of the Local 28 initiation fee be pro-rated over a period of time not to exceed two years. Within 5 days of the receipt of such application the Local 28 Executive Board shall render a decision on the application in writing and notify the applicant, the Administrator and all parties of the disposition of the application (the notification to the Administrator and the parties shall include the applicant's name and address). If such application is denied in whole or in part or not acted upon within 5 days of its receipt by the Executive Board of Local 28, an application may be made to the Administrator who shall either grant or deny the application in writing and set such schedules and payments as he shall determine. The decisions of the Executive Board of Local 28 and the Administrator shall be made having duly considered all pertinent facts, including, but not limited to, the following circumstances:

i) the financial circumstances of the applicant and Local 28;

ii) the present and future employment situation in the sheet metal industry in New York City in general;

iii) the likelihood and nature of future employment for the individual applicant

17. At any time after an application pursuant to Paragraph 16 has been pending with the Administrator for more than 5 days a non-white eligible for admission to journeyman membership in Local 28 pursuant to Paragraph 5 through 15 or Paragraph 35(d) of this Program shall be admitted conditionally to journeyman membership upon payment of $100 dollars and three months dues pending the determination of the Administrator which shall be made within 30 days of the date of the application to the Administrator. During such conditional membership an applicant will be entitled to all the rights and privileges of regular journeyman membership.

18. The granting of any application pursuant to Paragraph 16 shall not diminish any rights or privileges accruing to journeyman membership in Local 28.

19. A person eligible for admission pursuant to Paragraphs 5 through 14 shall be permitted to defer such admission for up to six months from the time he is first entitled to be admitted. During such period, a person who has elected

to defer may apply to the administrator for further deferral of admission for up to another 12 months. If an applicant invokes his right of deferral he shall be admitted, on the same terms and conditions as he was previously entitled, within 30 days of written notice to Local 28 that he seeks to be admitted.

20. Local 28 shall issue "permits" or "identification slips" only with the express written consent of the Administrator, and pursuant to Paragraph 22(f) of the Order and Judgment.

Apprentice Program

21. The Local 28 Joint Apprenticeship Committee ("JAC") shall maintain an apprentice program of four years duration or less. The terms and conditions of the apprentice program shall be as set forth in the Collective Bargaining Agreement ("Standard Form of Union Agreement . . . between Local . . . and Sheet Metal Contractors."), the Local 28 Joint Apprenticeship Trust and Indenture, and the rules and regulations thereunder except where modified by the Order and Judgment, the provisions of this Program, or order of the Administrator pursuant to his powers under the Order and Judgment.

22. The apprentice program shall indenture no less than 300 apprentices by July 1, 1976 of which no less than 100 apprentices shall be indentured by February 2, 1976. No less than 200 apprentices shall be indentured in each year thereafter up to and including 1981. Said number shall include those apprentices admitted with advanced standing. The JAC may indenture apprentices in two separate classes during a year.

23. Apprentices shall be assigned for employment in a ratio of not less than one apprentice for every four journeymen working of the aggregate journeymen employed. Seniority shall not be a criterion for employment, and apprentices shall be rotated for employment where necessary and feasible. The JAC shall make every effort to provide apprentices with classroom instructions including evenings and Saturdays where necessary, during periods of unemployment, and shall credit such hours toward fulfillment of apprenticeship requirements. The JAC may authorize the accelerated advancement or graduation of any apprentice as it deems proper.

24. Upon successful completion of the Apprenticeship Program, apprentices shall be promptly admitted to full journeyman membership upon payment of the balance due of the initiation fee, if any, which upon application to the Local 28 Executive Board, may be paid on an installment basis for good casue shown, and subject to the procedures contained in Paragraph 16.

25. Applications shall be made available to and accepted from any qualified candidate. A qualified candidate is defined as follows: any person who is deemed physically fit for sheet metal work and who has or will have attained the

age of 18 years by the date of indenture of the next scheduled apprentice class and who is not older than 25 years of age (for veterans of active military duty the age limit is extended one year for each year of such duty up to the age of 30 and up to the age of 35 for non-whites applying for advanced standing). For the apprentice aptitude test to be administered in November, 1975 only, JAC may require proof of completion of a tenth grade course of education. The JAC shall validate the tenth grade requirement before said requirement may be imposed for subsequent examinations.

26. With the approval of the Administrator JAC shall develop a standardized application form for the Apprentice Program. The application form shall include information about the date of the next class of apprentices to be indentured, and shall require only the following information of the applicant:

a) Name, address and telephone number:

b) Birth date and age:

c) Social Security number;

d) Extent of education;

e) Sex;

f) Race or ethnic classification; (with a notation that this information is required solely for the purposes of compliance with federal anti-discriminations statutes);

g) military service;

h) convictions and pending criminal charges.

i) Citizenship or lawful permanent resident alien status

27. Application forms for the Local 28 JAC Apprentice Program shall be available at the offices of the JAC during normal business hours and at the offices of the organizations listed in Appendix A at least 60 days before an examination. Application forms shall be made available by mail upon written request. Completed applications shall be accepted in person or by mail at the offices of the JAC. There shall be a filing fee of no more than $15.00. Application forms shall be made freely available to any governmental employment office and minority community organizations not listed in Appendix A upon request. The time for filing applications for a particular apprentice test may be closed by the JAC at a reasonable time (not to exceed three weeks) before the date of the examination.

28. An apprentice aptitude test shall be given on December 11, 1975 and at least once yearly thereafter at a date, time and location approved by the

Administrator. The test shall consist of the following professionally developed and validated components: (1) a basic "read and follow directions" test designed to ascertain an applicant's ability to master and understand those written and verbal instructions, directions, and other communications necessary to participate in the Apprentice Program at the first year level; and (2) a mechanical comprehension test similar in substance and scope to that mechanical comprehension test administered by JAC in April 1969. There shall be professionally developed and validated a qualifying score on the "read and follow directions" test designed to reflect the minimum ability necessary to participate in the Apprentice Program at the first year level. [Consideration of the inclusion of a math test in the December examination has been postponed. See attached letter.]

29. Within three weeks of the administration of an apprentice entrance test, JAC shall provide the Administrator and all parties with:

(a) the names, race identification, raw scores and rank of all candidates on all tests; and

(b) the mean and median scores on all tests of all identifiable racial and ethnic groups among the candidates.

30. Persons selected to be indentured as apprentices pursuant to Paragraph 22 shall be selected in accordance with a ratio of non-whites-to-whites which shall be established by agreement of the parties within 30 days after the tests results are known, or by the Administrator within 15 days thereafter if the parties fail to agree. The parties shall agree by November 10, 1975, what the ratio shall be for the classes to be indentured in February and June, 1976. If no agreement is reached the Administrator shall establish the ratio by November 15, 1975. In arriving at an appropriate ratio for the entry of non-whites and whites into the Apprentice Program, the parties and the Administrator shall use their best efforts to assure that the total population of the program shall not exceed 60% non-white individuals, and that an individual term or class shall not exceed 70% non-white individuals.

31. In fulfillment of JAC's and Local 28's obligations under Paragraphs 22 and 30 apprentices chosen by means of the apprenticeship entrance test shall be selected from those who meet or exceed the qualifying score on the "read and follow directions" test in the following manner:

(a) the white apprentices shall be selected on the basis of the highest scores received on the mechanical comprehension test among the white eligible qualified candidates;

(b) the non-white apprentices shall be selected on the basis of the highest scores received on the mechanical commprehension test among non-white eligible qualified candidates subject to the provisions of paragraph 35.

32. Persons selected for the Apprentice Program may be required to appear for orientation and a physical examination prior to being indentured. The cost of physical examinations are to be borne by successful applicants. Additional persons may be invited to orientation and a physical examination by Local 28 JAC if that appears desirable. Persons selected in accordance with the above procedures shall be indentured as apprentices unless such indenturing is waived by them, or they are certified physically unable to perform sheet metal work by a medical practitioner licensed in New York State.

Advanced Apprentices

33. There shall be established by the JAC procedures for the admission and advanced placement in the Apprentice Program of non-white apprentices who have experience in sheet metal work or trade education but cannot perform at journeyman level. Applicants for advanced placement shall be physically fit and shall be not less than 18 years old or more than 35 years old by the date of indenture of the next scheduled apprentice class. For such person applying to be indentured in February and July, 1976 only, the JAC may require proof of completion of a tenth grade course of education by that date. Such requirement must be validated for subsequent utilization.

a) Applicants with at least six months but less than one year experience in sheet metal work or trade education shall be eligible to take the apprenticeship aptitude examination as set forth in Paragraph 28.

b) Applicants with more than one year experience in sheet metal work or trade education shall be eligible for indenture without taking the examination.

c) The overall apprenticeship recruiting and publicity campaign shall include a component directed toward advanced apprentices.

34. The Training Coordinator of JC shall evaluate the experience of all applicants for advanced standing and shall make placement to the appropriate grade level. Applicants who challenge the grade level assigned shall be advised of their right to appeal to the Administrator.

35. a) Apprentices shall be selected for advanced standing in the following manner: those who meet the requirements of Paragraph 33(a) whose ranking on the apprenticeship aptitude examination qualifies them for acceptance into the apprenticeship program shall be admitted with advanced standing along with such numbers of those who meet the requirements of Paragraph 33(b) so that the combined total of advanced apprentices shall equal the number of non-white first term apprentices admitted, unless the group of advanced apprentices is sooner exhausted.

b) The number of apprentices admitted with advanced standing shall be included in the total of non-white apprentices selected on the basis of the ratios established pursuant to Paragraph 30.

c) An advanced apprentice shall be entitled to all rights, privileges and other benefits including work referral, pay, instruction, and supervision accruing to regular apprentices at the same level of training.

d) Apprentices admitted with advanced standing pursuant to Paragraphs 33 through 35 who successfully complete the apprenticeship program may make the applications provided for in Paragraph 16 of this Program.

e) Advanced apprentices assigned for work may be utilized to satisfy City and City-assisted contract requirements for the employment of minority trainees.

36. Nothing in Paragraphs 33-35 is intended to preclude the JAC from establishing a similar program for whites.

Records

37. In addition to any other records or lists required to be maintained under the terms of this Program or the Order and Judgment, Local 28 and JAC, as the case may be, shall maintain separately for whites and non-whites, records and lists containing the following information, beginning with the effective date of this Program.

a) Persons who request an application for or apply to take the "hands-on" journeyman's test described in Paragraphs 5 and 8;

b) Persons who take the "hands-on" journeyman's test described in Paragraphs 5 and 8;

c) Persons who pass the "hands-on" journeyman's test described in Paragraphs 5 and 8;

d) Persons who applied for journeyman admission on the basis of experience, described in Paragraph 15;

e) Persons who are admitted, and those rejected, for journeyman membership on the basis of experience, described in Paragraph 15;

f) Persons who seek or apply to transfer into Local 28 from an affiliated sister local union

g) Persons who inquire of Local 28 about the possibility of transferring into Local 28 from an affiliated sister local union;

h) Persons who inquire of Local 28 as to the availability of work opportunities with or through Local 28, including but not limited to inquiry about or seeking "permits" or "identification slips";

i) Persons to whom "permits" or "identification slips" are issued or work opportunities with or through Local 28 are otherwise made available.

j) Persons who contact Local 28 or JAC seeking sheet metal work;

k) Persons who are employed as sheet metal workers or apprentices by Local 28 contractors.

l) Persons working in sheet metal shops at the time they are organized by Local 28;

m) Persons who are reinstated to journeyman membership or to the Apprentice Program;

n) Non-whites who apply for advanced standing in the apprenticeship program described in Paragraphs 33-35;

o) Non-whites who are granted advance standing in the apprenticeship program and the standing granted as described in Paragraphs 33-35;

The records and lists specified in subsection (a) through (*o*) of this Paragraph shall contain the name, address, race, or national origin, union affiliation, if any, of each individual listed therein, as well as the date of the application, test, inquiry, contact, or employment (and the name of the contractor, where applicable), and the disposition with reasons, of each such application, test, inquiry, contact or employment. Copies of these records and lists shall be submitted to counsel for the parties and the Administrator at least once every three months.

38. Local 28 or JAC, as the case may be shall submit the following data to the Administrator and parties at the time specified.

a) the name and race identity of persons admitted into (i) journeyman status in Local 28 or (ii) apprentice status in the Apprentice Program, within 5 days of such admission;

b) on January 1 and July 1 of each year the total number of (i) journeyman members of Local 28, (ii) pensioner members of Local 28 (as defined in Paragraph 2), and (iii) apprentices. Such reports shall include the percentage of non-whites in each group.

39. The JAC shall maintain complete records of all applications and other material concerned with the selection and work records of apprentices. These records shall include but not be limited to an applicant log for each examination showing the name, race, date of birth of each applicant, dates of completion of each step in the application procedure, disposition of each step in the application procedure, and disposition of each application. All such records shall be made available for inspection and copying by the plaintiffs at reasonable intervals during normal working hours or at other mutually convenient times. In addition, records shall be submitted to the Administrator and plaintiffs as follows:

a. Prior to each apprentice entrance test and within 7 days of the closing of the application procedure the JAC shall submit a report including the following information for each person who filed or requested an application for that apprentice examination: name, address, telephone number and race or national origin, if known for those who request applications.

b. Within 20 days after indenturing a class of apprentices the JAC shall provide a report of the names and ethnic classification of all persons who were rejected during the application and testing period and the reason therefore and the names of all persons whose application became inactive and the reason therefore.

c. Every six months subsequent to the indenturing of a class of apprentices the JAC shall furnish a report giving the names of all non-white apprentices, the name(s) of contractors to which each was referred and the number of hours worked.

d. The Joint Apprenticeship Committee shall furnish the names of any non-white apprentices who are dropped from the Apprentice Program. Said information shall be furnished within twenty days from the date action is taken by the Joint Apprenticeship Committee. Said report shall contain the reason why the individual was dropped from the program and the steps taken by the Joint Apprenticeship Committee to retain the individual in the program. The report shall also include the training and employment history of the individual while he was in the program. The Joint Apprenticeship Committee shall furnish the names of all non-white apprentices who leave the program other than by action of the JAC. Such report shall contain the reason the apprentice has left the program if known by the JAC. Said information shall be furnished within twenty-days from the time the JAC is notified that the apprentice has left the program.

40. All records and lists required to be compiled by this Program shall be maintained for ten years and shall be made available for inspection and copying by the parties and the Administrator on reasonable notice during regular business hours or at other mutually convenient time without further order of the court.

Advertising and Publicity

41. The parties shall use their best efforts to disseminate accurate information to the non-white community of opportunities within Local 28 and the Local 28 apprentice program.

42. Prior to each "hands-on" journeyman's test and apprentice entrance test at a time to be selected by the Administrator to insure full coverage and effectiveness, Local 28 (in the case of the "hands-on" journeyman's examination) and JAC (in the case of apprentice entrance tests) shall undertake a program of advertising and publicity, under the overall supervision of the Administrator, designed to inform the non-white community in New York City of the date, location, and nature of such examinations, the qualifications therefor and the opportunities available upon successful completion of the test. These campaigns may include print and electronic media, dissemination of material to community, government and minority organizations. The City of New York may provide space and opportunities for such publicity.

43. By March 1, 1976 Local 28 and JAC shall provide to the Administrator and the other parties a written plan of an effective general publicity campaign designed to inform the non-white community in New York City of nondiscriminatory opportunities in Local 28 and the Local 28 apprentice program as provided in the Order and Judgment and this Program. The other parties shall have 30 days to comment upon the written plan and the Administrator, having considered all submissions, shall revise the plan if he deems necessary and shall order it into effect by May 1, 1976.

Work Referral

44. The Administrator shall conduct a study of the present Local 28 work referral system as described in the written statement submitted pursuant to Paragraph 21(g) of the Order and Judgment. This study shall be completed by June 15, 1976 and the Administrator shall submit to the parties such recommendations he deems necessary to assure that non-whites do not bear a disproportionate share of unemployment.

Resolution of Disputes

45. (a) The Administrator shall hear and determine all complaints concerning the operation of the Order and Judgment and this Program and shall decide any questions of interpretation and claims of violations of the Order and Judgment and the Program, acting either on his own initiative or at the request of any party herein or any interested person. All decisions of the Administrator shall be in writing and shall be appealable to the Court.

(b) Any party or any individual affected by this Program may make a complaint to the Administrator within thirty days after the situation complained of arises. The Administrator shall give the parties notice of such a complaint within five days and, where a hearing is in his discretion warranted, expeditiously schedule such hearing.

General Provisions

46. The union and the JAC shall post conspicuous notices, in language and at locations approved by the Administrator, advising individuals of their rights under this Program within 60 days after the Program is approved by the Court.

47. Except as modified, changed or amended by the terms of this Program or order of the Administrator, Local 28 and JAC shall not change, modify or amend any aspect of the operation or content of the Apprentice Program, or the conditions or terms upon which an individual shall become a member of the Apprentice Program of Local 28 or entitled to work within the jurisdiction of Local 28.

48. At any time, any of the parties herein may apply to the Administrator and then to the Court for the purpose of seeking additional orders to insure the full and effective implementation of the terms and intent of this Program.

Dated: New York, New York
October 7, 1975
(s) David Raff

DAVID RAFF, ESQ.
Administrator

SO ORDERED

U. S. D. J.

Date:

APPENDIX A

New York State Division of Employment (Department of Labor)

Department of Employment of the City of New York

Bureau of Labor Services of the City of New York

Recruitment and Training Program, Inc.,

Fight Back

Asian Americans for Equal Employment

Black Economic Survival

Regional Neighborhood Manpower Service Centers of New York City

New York City Board of Education (Public High School and Evening Trade Division)

Williamsburg Coalition

New York Urban League

National Association for the Advancement of Colored People

Puerto Rican Community Development Project

National Association for Puerto Rican Civil Rights

Citywide Coalition of Black, Hispanic, and Asians in Construction

New York Project Equality

Commonwealth of Puerto Rico

Opportunities Industrialization Center of New York, Inc.

Bedford-Stuyvesant Restoration Corp.

New York City Human Rights Commission*

New York State Division of Human Rights*

OBJECTIONS OF NEW YORK CITY

October 10, 1975
BY HAND

Hon. Henry F. Werker
United States District Judge
United States Court House
Foley Square
New York, New York 10007

RE: *E.E.O.C and City of New York*
v.
Local 28 Et al, 71 Civ. 2877 (HFW)

Dear Judge Werker:

In accordance with the schedule established by Mr. Raff in the referenced case, the City hereby sets forth its objections to the proposed Affirmative Action Program as submitted by the Administrator.

1. Paragraph 2:

The City proposes that all pensioners be considered as union members for purposes of measuring compliance with the Program's goals for non-whites and not merely those pensioners who worked in the previous three year period. The union estimates there are currently 753 pensioners, one of whom is believed to be non-white.

Pensioners have the right to vote at union meetings, including election meetings. They thereby have an impact upon the selection of union leadership and the determination of union policy. While they are not fined for failure to vote in a union election, as are non-pensioner members, their vote carries as much weight as that of other members. Moreover, union policy is not made only at election meetings. Mr. Bogen indicted, for example, that he was required to obtain membership approval for commencing the advertising campaign ordered by the Court. Further, it is common knowledge that "voluntary" assessments for legal fees, political endorsements and contributions, and similar matters, are voted on at union meetings. In addition, testimony at the trial reflected that a myriad of Executive Board proposals require ratification by a vote of the membership. This right of participation laudable as it is, necessarily dilutes the impact of the non-whites upon union policy. These considerations, as well as the right of pensioners to rejoin the active work force, requires that this group as a whole be considered "members" against which the achievement of goals is to be measured.

Therefore, the City proposes that the words "who have been employed as sheet metal workers within the last three years" be deleted.

2. Paragraph 10:

The City proposes that an additional sentence be added after the unnumbered paragraph at the top of page 8, as follows:

"Recently registered" means that the apprentice class in which the person was registered at the time he left the program, has not yet been graduated.

3. Paragraph 17:

The payment of $100 toward the initiation fee plus three months dues (currently $20 per month) places an untold burden upon non-whites who, as the Court found, have long been denied union admission and, therefore, work opportunity. This is a particular hardship since the $160 is required to be paid before the individual has earned any wages. The City was intimately involved in the recruitment of applicants for the October 11 test through the Recruitment and Training Program, Inc., a nationally recognized minority organization pre-eminent in the field of construction trades recruitment and funded by the United States Department of Labor for this purpose. Seventeen non-white individuals required R.T.P. grants to cover the $25 (non-fundable) filing fee. However, such grants are problematical when the amount is of the magnitude of $160, and many applicants who were discouraged from even applying because of the $25 fee will be lost to the Program by the prospect of having to lay out such a large amount of money (See attached Roffle affidavit).

Since the proposed program delays for only 30 days a final determination by the Administrator, the City believes that 1/24 of the current initiation fee, or $56 plus one month's dues in advance is all that should be required. We therefore propose changing "$100 and three months dues" to "$56 and one month's dues" which represents a major commitment for a non-white who has spent enough time in the trade to qualify as a journeyman but for the first time is being given the opportunity to join the union.

4. Paragraph 30:

The City strongly objects to the omission in this paragraph of a floor on the non-white to white ratio which the parties (or the Administor) will establish. There must be a minimum ration below which there is no discretion, else the subject will be a matter of debate each year, leading to objections, motions and appeals and consequent delays in the implementation of the Program. A floor is established for the ratio of admission of journeymen (paragraphs 7 and 14) and should similarly be established for apprentices.

Further, the City objects to the language limiting the percentage of non-white apprentices to 60% of the total apprentice program and 70% of any class or term. The apprentice program will be a major source of entry to the union for non-whites. There are eight apprentice classes and it is anticipated that in the early stages of the Program the non-whites will be more heavily represented in the early grades than the later grades. It is conceivable that any given class might have to be non-white in greater percentages than those proposed, particularly if there is a deficit in the goals of the previous period. Moreover, the apprenticeship program was 100% white for over 50 years; it is difficult to justify an objection to an occasional predominantly non-white class following this history of total exclusion. In addition, the City believes

it inappropriate for an affirmative action program which is premised on findings of discrimination against non-whites to contain quantitative maximums on the relief afforded them.

The City therefore proposes that paragraph 30 be amended to delete the last sentence and to insert a new sentence after the first sentence, as follows:

"This ratio will be established with the purpose of fairly implementing the interim and final goals set forth in Paragraphs 1 and 2 but in no event shall said ratio be less than one-to-one."

5. Paragraph 32:

The City rejects the proposal that the cost of physical examination must be borne by successful applicants. This is a dramatic departure from previous practice of the JAC, which heretofore paid the costs of the physical exam. It would be most ironic if, as a result of civil rights litigation, apprentices were for the first time required to pay for their own physical examination, and this on top of a 50% increase in the filing fee over previous years. While the physical examination certainly produces a social benefit, in this case it is primarily for the benefit of the JAC which should, as in the past, bear the cost.

Moreover, JAC will require the examination to be taken at a designated private examining service which will charge $34 per applicant. JAC utilizes this service because it tests for drug presence as well as offering what JAC believes to be a quality physical. There has been no showing by JAC that a similar examination is not available at a lesser cost. In fact, recent inquiry made by the City through R.T.P has ascertained the availability of quality physicals with a drug-presence component at a substantially lower cost. (See attached Ross affidavit). Moreover, the applicant should be free to be examined by any licensed physician so long as the examination establishes his physical fitness for sheet metal work and to obtain that service at a cost that is not pre-established by the JAC's arrangement with a private concern.

The City proposes, therefore, that the second sentence of paragraph 32 be amended so that "JAC" is substituted for "successful applicants." In the alternative, the City proposes a new second sentence, as follows:

"Successful applicants must produce proof satisfactory to the JAC of a recent medical examination establishing their physical fitness for sheet metal work and containing a statement as to the presence or absence of drugs. A successful applicant electing to utilize a JAC-recommended medical facility may do so at no charge to the applicant."

6. Paragraph 36:

The City believes that this provision is inappropriate for inclusion in an affirmative action program. The JAC is free to take any actions it is empowered to take and this Program does not preclude such actions. We note that a similar provision included in the last previous draft, relating to procedures established by paragraph 16, has been omitted by the Administrator in this proposal. We believe that paragraph 36 was included by inadvertence and, in any event, has no place in this Program.

7. Paragraph 39(d):

The City feels that it is necessary that JAC make diligent efforts to locate non-white apprentices who leave the program by other than action of JAC. Our experience in other construction trades indicates the existence of harassment of non-whites by fellow employees, which has led qualified men to leave the trade. Further, misunderstandings and failure of communication is a common problem. The City Commission on Human Rights has found that exit interviews where possible, are a valuable technique for avoiding such difficulties. In any event, the information derived from this type of follow up can be of great value to JAC in minimizing turnover and in assuring the most effective administration of the apprentice program. Moreover, Mr. Rothberg has indicated that efforts are, in fact, made to contact these individuals. It should be no burden to record these efforts and their results. We propose replacement of the words "if known by JAC" with "as acertained by an exit interview diligently attempted."

8. Paragraph 45 (a):

The City proposes the deletion of paragraph 45(a) and the substitution of the following:

> "The Administrator shall make final determinations in the event of a dispute relating to the operation of the Order and Judgment and of this Program, arising between the parties, between an individual and the union, between an individual and the JAC, and between an individual and a contractor. His authority shall include, but not be limited to the resolution of disputes regarding:
>
> (i) maintenance, availability and production of documents;
>
> (ii) frequency of the apprentice or journeyman's tests required under this Program;
>
> (iii) the ratio of non-whites to whites for entry into the union and apprenticeship program;

(iv) amendment of the Program;

(v) work referrals, including but not limited to the failure of the union to refer a non-white, the failure of a contractor to accept a non-white referral or direct application for employment when there are job openings, and the layoff of any non-white workers out of job seniority for any reason save good cause shown;

(vi) the validity and/or administration of a journeyman or apprentice test;

(vii) eligibility to take a journeyman or apprentice test, and/or refusal of appropriate appointment as a journeyman or apprentice;

(viii) amount and terms of payment of an initiation fee;

(viii) amount and terms of payment of an initiation fee;

(ix) back pay claims."

While the above, at first blush, appears redundant of the Order, it should be noted that the injunctive provisions of the order are phrased as negative prohibitions. We believe it important to establish affirmatively what is only implied in the Order concerning the Administrator's authority to monitor all practices affecting the treatment of non-whites and the equitable distribution of work opportunities. For example, paragraph 44 of the Program, absent the language proposed above, could be read to preclude the Administrator from hearing complaints of unfair treatment of non-whites in work referral for the first year of the Program.

9. Appendix A:

The New York City Board of Education should be asterisked as "information only", since it is not a manpower source. Also, both the New York State and the United States Department of Labor, Bureau of Apprenticeship Training, should be added to the list, each with an asterisk, as appropriate agencies to receive notices of examinations. The New York State Division of Employment (Department of Labor) is incorrectly titled. It should be changed to read "New York State Department of Labor, Division of Employment".

Respectfully submitted,
W. BERNARD RICHLAND
CORPORATION COUNSEL
by (s) Beverly Gross

Beverly Gross
Assistant Corporation Counsel

CC: BY HAND
David Raff, Esq
Taggart D. Adams, Esq.
Dominick Tuminaro, Esq.
William Rothberg, Esq
Sol Bogen, Esq

REPLY OF E. E. O. C

October 15, 1975

The Honorable Henry F. Werker
United States District Judge
Southern District of New York
United States Courthouse
Foley Square
New York, New York 10007

Re: EEOC v. Local 28
71 Civ. 2877 (HFW)

Dear Judge Werker:

This letter will respond to the objections submitted by Local Union 28 and the City of New York to the proposed Affirmative Action Program ("AAP"). This office has not received any objections from Mr. Rothberg, co-counsel to JAC and counsel for the Contractors Association.

Local 28 Objections

Objection No. 1. The language objected to in Paragraph 1 is directed toward assuring that non-whites share equitably in opportunities for employment. That was, and is, the purpose of this lawsuit. The language is prospective and neither it nor the AAP as a whole should be limited to the specifics which may or may not be in the "record". The proposed language does not guarantee that all non-whites will be employed for an equal number of hours as whites, but it seeks a goal that opportunities for such employment will be equitably shared. Local 28's proposed language which is applicable only to undefined "current depressed conditions" is too narrow.

Objection No. 2. The establishment of interim goals is authorized by ¶¶ 11 and 14 (e) of the Order and Judgment entered in this action on September 2, 1975 ("Order and Judgment"). The interim percentages are well-considered and moderate. Including apprentices, the union now has a non-white percentage of approximately 5%. In the first three years of the Program this percentage is to be increased by 11% and in the last three years by 13%. The largest increases are called for in the first year (from 5% to 10%) and in the sixth and last year (24% to 29%). The larger increase in the first year is based upon the fact that the present manpower level in the apprentice program is extraordinarily low and a larger number of non-whites should be entering the union through the journeyman's test and the four years experience requirement (see discussion *infra*).

The definition of pensioners was left for formulation in the Program (¶11, Order & Judgement). We believe the formulation contained in the proposal before Your Honor is a fair compromise reasonably calculated to attain the purpose sought. Initially, it should be noted that this definition affects only the calculation of the interim and final goals. We believe it would be unfair to include all pensioners in the calculation since many might not have been part of an active work force for many years and may no longer even reside in the area. However, as pointed out by the City of New York, these pensioners are voting members of the union and have the power to affect union policies and programs. Furthermore, pensioners can become part of the active work force at will. Therefore, we believe the three year definition which reduces the number of pensioners calculated in the percentage by 70% is fair.

Objection No. 3. The provision making membership in the union available to individuals with experience in the industry is a necessary and viable admission procedure which is authorized by Paragraph 22 of the Order and Judgment. The criteria set out in Paragraph 22 for implementing the provisions contained therein include:

a) furthering the goal of achieving non-white membership of 29% in Local 28;

b) restoring non-whites to positions which would have been available absent discrimination;

c) other relevant circumstances.

We believe that the parties and the Administrator have fully considered the criteria at the numerous and lengthy conferences held during the development of the AAP. We see the rationale for the inclusion of an experience avenue as being an additional means of entry into the union of *qualified* non-whites in order to reach the 29% goal. We do not believe that the only way to test qualifications is through a "hands-on" test. In our view, four years of sheetmetal experience, as reviewed by a qualified board of examiners, is a reasonable means of qualification. Furthermore, such experience indicates an exposure to and genuine interest in the trade. It may also mean that such persons have indeed been subject to past discriminatory practices on the part of Local 28 or the JAC.

The proposed three member examining board is a compromise. Originally it was proposed that the board consist of representatives of Local 28, the Contractors, and the Administrator. When the Contractors objected to participating in such a program, a representative of the plaintiffs was substituted. In this regard, we do not think that the subjective evaluation of a sheetmetal project should be left entirely to the discretion of the defendant union. See opinion, p. 480 and n. 16.

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In Objection 3C Local 28 again raises the difference between construction sheetmetal and other sheetmetal. This was effectively disposed of by the Court in its Opinion at pp. 482-484

In Objection 3D Local 28 confuses the means of developing a "relevant labor force" for the purposes of establishing a goal percentage with an implied residence requirement. Such a requirement limited to New York City would be illogical in the face of the fact that many present Local 28 officers and members live outside the city. We believe the 60-day requirement is ample protection against the feared "influx".

Local 28's Objection 3E seeme misdirected. The parties and the Administrator have been careful to assure that avenues of entry to immediate union membership be opened only to qualified persons. The age 26 itself does not seem to be a prerequisite for a qualified sheetmetal worker. Under Local 28's suggestion a person with *four year's* experience would still have to join the apprentice program.

We accept the proposal contained in Objection 3F.

Objection No. 4 In our letter of October 10, we outlined the objections of the EEOC to Paragraphs 33-36 of the AAP; however, we noted our support for the general concept. The parties and the Administrator gave careful consideration to this concept before its adoption. Essentially, we believe that prior experience in sheetmetal work (though not enough to immediately qualify an individual for journeyman status) is indicative of interest and possible past discrimination and should be accorded apropriate weight. The advanced apprentice concept is founded on a strong belief that the apprentice program is a valuable and legitimate means of assuring entry into the union. We do not propose to bypass it. Rather we seek to measure an applicant's relevant experience and place those who do not require the first term apprentice training in an upper term.

We agree with the Objection 4D.

Objection No. 5. On the whole we think this objection is mooted by the fact that only 36 persons (17 non-white) passed the journeyman's test on October 11, 1975.

Objection No. 6. We do not accept Local 28's unsupported "estimate" of $40-50,000 as the cost of conducting the recent journeyman's test. Whatever the actual cost of that test, we also expect that the arrangements and advertising for a second journeyman's test will be far less involved and expensive. A regular schedule of journeyman's tests has merit and should be authorized. The proposed AAP provides adequate flexibility for timing the journeyman's tests according to needs.

Objection No. 7. Previously discussed. See Local 28 Objection No. 3, *supra.*

Objection No. 8. We agree that proposed Paragraph 11 omits certain necessary provisions. The last two lines of ¶11(a) should read:

> "Opportunity Commission) record of convictions, citizenship or alien status, length of residence, and previous sheet metal experience"

Objection No. 9. There is no persuasive reason behind the argument that the applicants should fully subsidize the cost of the journeyman's test. An application fee in excess of $25.00 would seriously reduce the number of non-whites applications. *See* City of New York letter of October 10 and enclosure.

Objection No. 10. See comments on Local 28's Objection No. 3, *supra.*

Objection No. 11. The paragraph objected to is, very simply, an essential part of an AAP. To say that we do not know the numbers is to state the obvious. To employ that fact as a reason for not developing a Program is to ignore the reason for such a Program. Local 28 would prefer day-to-day negotiations. The EEOC, realizing that amendments are always possible, and often the wisest way to deal with problems in the future, prefers not to negotiate daily but to set some concrete guidelines which can be amended if and when a need to do so has been demonstrated.

Objection No. 12. Objection 12A is based on previous objections already discussed. Objection 12B is accepted.

Objection No. 13. We believe that the optional deferral program is an essential element of the Program because it provides persons eligible for union membership with a reasonable degree of flexibility in timing their entry into the union. Journeyman's tests occur when the parties and the Adminstrator decide they should occur; that time may not coincide with a person's individual circumstances. Since union membership is not a guarantee of employment, we believe that an eligible applicant should be entitled to arrange his entry into the union with a minimum disruption to his own life. In this regard, it should be noted that Local 28 has not shown that this option will be in any way prejudice the union or its members.

The deferral option is not available to those who seek admission on the basis of experience since they may seek admission at any time.

Objection No. 14. Paragraphs 22 and 30 of the AAP establish two essential foundations of the AAP. First, the apprentice program will be the main source for non-white entry into the union. Second, the apprentice program should not be an all-minority program. Assuming a 3-2 non-white to white ratio (we

prefer a 1-1 ratio) 780 non-whites will have entered apprenticeship status by July 1, 1981. This number by itself will be insufficient to reach a 29% non-white goal by 1981 even assuming a union attrition rate to 100 per year. Thus we are relying on journeyman's tests and the experienced avenue of entry to reach the required goal. A further reduction in the minimum number of apprentices would increase the necessary reliance on these other avenues of entry. Given the limited number of experienced non-white sheetmetal workers in New York City this reliance would be unwise.

The EEOC submits that the apprentice program which has historically suffered an attrition rate of approximately 25% can handle the number of apprentices required by the AAP. The fact has been confirmed by the employer members of the JAC.

Objection No. 15. The provisions contained in Paragraph 23 are designed to provide adequate flexibility so that apprentices can enjoy the fullest possible employment. If, as we believe, the apprentice program is to be the most important avenue of entry to union membership it should provide the greatest possible opportunities for employment to its members.

Objection No. 16. The substance of Objection 16(a) has been previously discussed. We accept Objection 16(b).

Objection No. 17. See our comments to the City's Objection No. 5

Objection No. 18. We agree.

Objection No. 19. The position of the EEOC is that the establishment of an appropriate ratio should be done *before* the scores on the tests are known. This would eliminate any appearance of impropriety in establishing the ratio.

Objection No. 20. The establishment of two lists is essential to identifying and granting an admission preference to non-whites. Such lists, of course, do not alter the scores of the applicants.

Objection No. 21. Local 28's suggested limitation of the recordkeeping requirements to requests or inquiries made in person or in writing is unnecessarily restrictive. To the extent that other types of contacts are made with Local 28 they should be recorded. Obviously Local 28 can only record the information it receives. With regard to Objections 21D and E these requirements cover requests for permits or other general requests and they should be retained.

The three month requirement is generally part of Paragraph 21 of the Order and Judgment.

Objection No. 22 We agree with this objection.

City of New York's Objections

Objection No. 1. See our comments to Local 28's Objection No. 2.

Objection No. 2. We do not oppose this suggestion although we think this definition might be left flexible.

Objection No. 3. The AAP provision was the product of compromise among the parties. While granting the force of the City's argument, we feel that the AAP provision is equitable.

Objection No. 4. We believe that the circumstances should dictate the ratio and there is no need for a floor.

Objection No. 5. The AAP provision in question was the product of compromise. The EEOC suggested that in order to reduce the fee charged to all applicants the physical examination fee should be paid by those who have scored high enough to be admitted into the program. JAC originally proposed a fee of $27.00 per applicant. Through suggestions like the above we have reduced it to $15.00. We believe the provision is reasonable.

Objection No. 6. Paragraph 36, while unnecessary, is acceptable to the EEOC.

Objection No. 7. We believe the AAP provision is acceptable.

Objection No. 8. In light of the provisions of the Order and Judgment we think the City's objection is unnecessary.

Objection No. 9. This objection and proposal is acceptable.

Very truly yours,

PAUL J. CURRAN
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REPLY OF JAC

October 14, 1975

The Honorable Henry F. Werker
United States District Judge
Southern District of New York
United States Courthouse
Foley Square
New York, New York 10007

Re: EEOC vs. Local 28
71 Civ. 2877

Dear Judge Werker:
I write to set forth comments on behalf of my client to the objections interposed by the City of New York to the Affirmative Action Plan submitted by the Administrator.

Paragraph 30—There is no need to establish a minimum ratio. This paragraph clearly sets forth the procedure wherein it allows the Administrator to establish the ratio if the parties cannot agree. There need not be a particular ratio established as a minimum in advance. There are many factors which must be considered, such as the attrition rate of Local 28, the number of

minorities who enter journeyman status through the examination, etc. Before a ratio can be determined which would best implement the goals of the Affirmtive Action Program, it is best to evaluate these factors on a regular and continuing basis rather than set a minimum ratio.

I would support the comments of the United States Attorney in connection with the second aspect of this paragraph, werein he proposes additional language clarifying the purpose of the paragraph.

Paragraph 32 — A physical examination is an important requirement for entering the sheet metal trade. Apprentices work at great heights in high rise constructions, with power tools and machinery, and with fellow workers. Any disabilities which are not detected could seriously endanger the apprentice as well as his fellow worker. It is for this reason that the JAC requires a thorough physical examination by a competent health organization. We have worked with Executive Health, Inc. who have met the needs and requirements of our industry in this regard.

We do not look to have the cost become a barrier for admission to the JAC and this was so indicated by the JAC in discussions with the parties and the Administrator in connection with the development of the program. We stated that any applicant who was not able to pay the physical examination fee at the time the examination is given, could have said payment deferred. In practice, in this situation, the JAC would pay the fee for such applicant and would have the applicant reimburse the JAC over a period of time after the applicant has commenced employment. We do not see this as any hardship or burden.

We are all well aware of the deficiency in medical care available to the poor and would strongly question the thoroughness of a physical examination for which there is only a $3.00 fee. Accordingly, it is important that the JAC have control over the extent of the physical examination and would be opposed to having applicants provide various and sundry certificates.

Paragraph 36 — We would object to the deletion of this paragraph from the Program. Its inclusion clarifies an area and avoids potential conflict in the future.

Paragraph 39 (d) — We feel that the language of the Plan as proposed by the Administrator is more than adequate to meet the needs of the Plaintiff. Practice has shown that most apprentices leave the program without giving any notice, either to the JAC or their employer. The JAC becomes aware of such action only when notified that the apprentice has not reported to work for some period of time. Attempts then made by the JAC to locate the apprentice have generally been futile. To impose an affirmative burden on the JAC to conduct exit interviews where practices indicated, this would not be possible, and would serve no useful purpose.

Paragraph 45 (a) – I would strongly oppose the language proposed by the City in this regard. The Administrator's language is broad and all encompassing and gives him the authority to decide any questions of interpretation and claims of violations of the order, judgment and program. It further sets forth that he can act on his own initiative or at the request of any party or interested person. It would seem that this language would more than meet the needs of the City.

More specifically, the City includes in subparagraph V, an item which is not part of many of the aforementioned documents, namely the establishment of job seniority. This goes well beyond the scope of the aforementioned documents. The employers, as party defendants, have an obligation to see that the minorities do not bear a disproportionate burden of the unemployment. This need not be done through a system of job seniority which has never been the practice in the industry.

It would also seem that enumeration of specific items could be construed to limit the authority of the Administrator wherein the general language as submitted by the Administrator would be all encompassing.

I have no objection to comment # 3 as submitted by the United States Attorney which concerns itself with the program for advanced apprentices.

Very truly yours,

(s) William Rothberg
William Rothberg

ph

c.c. David Raff, Esq.
Taggart D. Adams, Esq.
Dominick Tuminaro, Esq.
Soi Bogen, Esq.
Beverly Gross, Esq.

REPLY OF NEW YORK CITY

October 15, 1975

Hon. Henry F. Werker
United States District Judge
United States Court House
Foley Square
New York, New York 10007

Re: *E.E.O.C. and City of New York*

v.

Local 28 71 Civ. 2877 (HFW)

Dear Judge Werker:

In accordance with the schedule established by Mr. Raff, this letter constitutes the City's reply to the objections raised by the United States and Local 28 to the Administrator's proposed Affirmative Action Program:

1. E.E.O.C.'s objections:

a) We agree with the proposal that there be a refund of dues to conditional members who do not become regular members. However, dues refunds should only be required for months in which the conditional member did not work. Moreover, any portion of the initiation fee paid during conditional membership by an individual who is unable to become a regular member should also be refunded, if the individual did not commence work.

Therefore we propose the following language to be added at the end of Paragraph 17:

"If a conditional member is terminated without becoming a regular journeyman member of Local 28 he shall be entitled to a return of any dues paid in advance for any month in which he was not employed and, if he was not employed during his conditional membership, he shall also be entitled to a return of any payment made toward the initiation fee."

b) Paragraphs 33 through 36 as submitted by the Administrator reflects a program worked out between the City and counsel for the employers. The purpose is to avoid the necessity for testing applicants for advanced standing who have more than one year experience as determined by JAC's Training Coordinator. It was agreed between the employers and the City, and E.E.O.C's proposal also recognizes, that testing of these individuals is unnecessary. The purpose of sharing non-white apprentice appointments between advanced and entry-level applicants is to avoid the devisiveness and conflict that might arise if there were no fixed system for admitting apprentice applicants who have more thn one year experience and who therefore can become journeymen in less than four years. The City is award of large numbers who may be qualified by experience to be immediately placed with advanced

standing, as was done under the 1974 interim orders of Judge Gurfein, including individuals who fail to qualify as full journeymen on the October 11 examination. The placement of such individuals should be specificlly provided for in the Program.

It should be noted that Paragraph 35(a) does not contemplate or permit the admission of a lower-ranking non-white over a higher ranked non-white. Indeed, the opposite is provided but possibly requires clarification, which could be accomplished by inserting the words "in accordance with Paragraph 31(b)" after the words "acceptance into the apprenticeship program" on line 5 of paragraph 35(a).

2. Local 28's objections:

Objection # 1: Title VII is an equal employment opportunity statute and the effectiveness of the program herein will ultimately be measured by reference to the equitable sharing by non-whites of employment opportunities available to Local 28 members. The union proposal does not express the purposes either of this suit or of the Program ordered by the Court to be established.

b) Objection # 2:

A. Paragraphs 11 and 14(e) of the Court's Order and Judgment specifically provide for the establishment of interim goals to assure "regular and substantial" annual progress toward the final goals of 29%.

B. Local 28, which has virtually excluded non-whites, should be required to make a dramatic showing of the reversal of historic patterns in the beginning years of this Program. Non-whites should be in a position to compete for available employment by being admitted to membership in annual percentages that reflect an equitable opportunity to an equitable share of the work that exists. Lesser percentages than those proposed will unreasonably reduce the potential for minority employment, unfairly continue the preference given white members, and make unlikely the attainment of the long range-goal of this Program.

C. The City's proposal is stated in our proposal of October 10.

c) Objection # 3:

A. The provision for admission on the basis of four years' experience is necessary to be included in the Program from the outset to obviate continual amendment. It should be noted that the timing and conditions of admission are left to the Administrator. Since less than 100

minority individuals took the October 11th test, this vehicle for admission must appear in the Program so that it can be readily utilized.

B. The precedent for a tri-partite Examining Board is firmly established (e. g., *Rios v. Local 638*) and, we believe, is absolutely necessary, based upon the miniscule number of minority individuals in the union. An impartial Board will insure an objective evaluation of an individual's qualifications, and the existence of such a Board will aid to preserve the integrity of the Court's Order and Judgment.

D. It is inconsistent to impose a New York City residency requirement on incoming members where none exists for present members, many of whom, in fact, do not reside in the City.

E. A survey made and reported on by the City in the course of the meetings of the parties reveals that minimum age requirements do not exist in the vast majority of building trades. The ability to perform journeyman's work is the essential criterion. The age "22" takes into account that apprentices may commence the apprenticeship program at age 18 and become journeyman four years later.

d) Objection # 4:

A. We note here that Local 28 advocates the deferral of each proposed system of admission until the results are known of the others, thus assuring the non-implementation of any. It is not premature to establish a program of admission to apprenticeship with advanced standing for non-whites, because the pool of qualified minority journeymen is limited. Therefore, the apprenticeship program will provide the major route for participation by non-white individuals, and there is a need to immediately accommodate those who should not be required to spend four more years achieving journeyman status when they already have previous trade experience. Further, since Mayoral Executive Orders require the employment of minority individuals as "trainees", the implementation of a Program for advanced apprentices may avoid the kind of situation which led to the contempt proceedings in this case in 1974.

B. It is unnecessary to subject to an aptitude test individuals who have established to the satisfaction of the Training Coordinator that they possess more than one year's experience in the trade.

C. Since the total number of apprentices is not "entirely unknown at this time" (see Paragraph 22 of Administrator's proposal), it is possible for the inclusion of specific proportions of advanced apprentices within the total of non-white apprentices to be admitted.

e) *Objection # 5:* Without getting on the Local 28 merry-go-round as to whether the journeymen's admissions should be deferred until the apprentice results are known, and vice versa, Local 28's comments are no longer valid since it is now known that less than 100 non-white individuals took the October 11th test and those successful is expected to be less.

f) *Objection #6:* According to preliminary reports, only about sixteen minority individuals who took the October 11th test received a passing grade. This small number of new minority journeymen will have no impact on the membership or employment profile of Local 28 members, particularly since more white individuals passed the test than did minority individuals. There is a clear need for journeyman's tests to be conducted at least once a year in order to maximize the flow of qualified minority journeymen into the union. With adequate lead time, which we did not have for the October 11th test, publicity and other costs could be sharply reduced. Figures estimated by Local 28 are questionable.

g) *Objection #8:* The application form submitted by Local 28 was adopted for the October 11th test only and should not now be adopted as a standarized form for future tests. It is unduly long and burdensome (i.e., medical information unnecessary because medical certificate is required) and the general information more properly belongs in a separate fact sheet reflecting current circumstances (as is being done by JAC for the December test). Local 28's standard application form was never this detailed in prior years, and new application forms should include only that information determined by the parties or the Administrator to be relevant at the time used.

h) *Objection #10:* See comment (c) above.
It is important that the minority community perceive the entire testing process as impartial. A union-only Examining Board creates a contrary appearance and, thus, a negative testing environment for non-whites.

i) *Objection # 11:* As stated in the City's letter of October 10th, a minimum ratio must be established in the Program else the subject will be a matter of debate each year, leading to objections, motions and appeals and consequent delay. Given the results of the October 11th test, in which more whites than minorities were passed, such minimums are clearly essential to assure the admission of a maximum of qualified minorities.

j) *Objection #12:*

A. The application of paragraphs 16 and 17 of the Administrator's proposal will, in fact, only to journeyman admitted with four year's experience and to advanced apprentices after these methods of entry are approved by the Court. Paragraph 22(d) of the Order and Judgment specifically applies paragraphs 16 and 17 of the Program to these

two groups of incoming journeymen.

B. We believe such provision is inappropriate for inclusion in an affirmative action program and, in any event, the Executive Board may take this action with or without such provision.

k) *Objection #13:* It should be made clear at the outset that the Program contemplates the utilization of every available method permitted under the Order and Judgment by which the entry of non-whites to the union can be expedited. It is far better to include all these provisions at the outset than to constantly attempt to amend the Program.

l) *Objection #14:* After the June, 1976 class graduates, there will be less than 100 apprentices of all races in the apprenticeship program. The number of apprentices to be admited, i.e., 300 by June, 1976 and 200 per annum thereafter, will restore the apprenticeship program to approximately its traditional size. Local 28's objection erroneously states that deferring the decision as to numbers, until after the results are known, will permit such decision to be knowledgably made. However, the apprentice exam produces a ranked list only and so does not bear on the question of how many should be admitted to the apprentice program.

The thrust of Local 28's argument is that the number of apprentices should be decided by collective bargaining, which is subject to arbitration. Clearly, such a procedure is unacceptable as a Title VII remedy after an adjudication of discrimination. It also creates a monstrosity of overlapping jurisdiction of the arbitrator, the Administrator and the Court. Overwhelming Title VII precedent rejects such a mechanism.

m) Objection #15:

A. The union's objection ignores the plain language of the Administrator's paragraph 23, which measures the ratio of employed apprentices to the *aggregate* of employed journeymen and not to site-by-site numbers.

B. Counsel for the employers confirmed at one of the drafting meetings that JAC's policy to place upper termers first and to lay them off last results in the placement of fewer apprentices than is possible if seniority amongst apprentices were not relied on. Since the lower grades are expected to reflect a larger number of minority apprentices than the upper grades, at least for the first years of this Program, it is obligatory to expand opportunities for them to receive the on-the-job training that constitutes the bulk of apprentice training. Rotation of apprentices is another device for expanding work opportunities, in which the employers also concur.

n) *Objection #19:* The union correctly points out the inconsistency of procedures relating to the establishment of ratios, but proposes an inappropriate adjustment since the examination itself produces only a ranked list with no pass-fail cutoff. The decision as to ratios should, in all cases, be made prior to the giving of the examination in order to insure that it is made dispassionately to effectuate the Order and Judgment and to facilitate an intelligent recruitment campaign.

o) *Objection #20:* It is important to grant the Court-ordered preference in favor of non-whites for admission into the apprenticeship program unless a method of racial identification and selection is established. Since the examination will produce a list of ranked candidates, from which a predetermined number and ratio will be appointed, there is no reason to delay a determination of the selection method to be utilized.

p) Objection # 21:

F. and H. Objection 21 F is derived from the Order and Judgment paragraph 21(e)(xii), and its deletion would require modification of the Order. Moreover, the information is presently readily available, as each employer is required to furnish the various welfare funds with current data as to individual members employed and the number of hours worked. The union trustees have access to these records and it is not a substantial burden to copy and forward them. Sharing of this existing information is essential to a proper implementation of the Program. Quarterly reports, (Objection 21 H), as required by the Order, are necessary for most effective monitoring: semi-annual information will not be sufficiently timely.

Respectfully submitted,
W. Bernard Richland
Corporation Counsel

by (s) Beverly Gross
Assistant Corporation Counsel

CC: BY HAND

Taggart B. Adams, Esq.
Dominick Tuminaro, Esq.
William Rothberg, Esq.
Sol Bogen, Esq.
David Raff, Esq.

ORDER AND JUDGMENT
71 CIV. 2877 (HFW)

United States District Court
Southern District of New York

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, and
THE CITY OF NEW YORK,

Plaintiffs,

– against –

LOCAL 638 . . . LOCAL 28 OF THE SHEET METAL WORKERS' INTERNATIONAL ASSOCIATION, LOCAL 28 JOINT APPRENTICESHIP COMMITTEE, . . . SHEET METAL AND AIR-CONDITIONING CONTRACTORS' ASSOCIATION OF NEW YORK CITY, INC., etc.,

Defendants.

LOCAL 28,

Third-Party Plaintiff,

– against –

NEW YORK STATE DIVISION OF HUMAN RIGHTS,

Third-Party Defendant.

LOCAL 28 JOINT APPRENTICESHIP COMMITTEE,

Fourth-Party Plaintiff,

– against –

NEW YORK STATE DIVISION OF HUMAN RIGHTS,

Fourth-Party Defendant.

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that plaintiffs shall have judgment against defendants as follows:

A. GENERAL EQUITABLE RELIEF

1. Defendant Local 28 of the Sheet Metal Workers International Association, its officers, agents, employees and successors and all persons in active concert or participation with them in the administration of the affairs of Local 28 ("Local 28") are permanently enjoined from engaging in any act or practice which has the purpose or the effect of discriminating in recruitment, selection, training, admission to membership in Local 28, admission to membership in the Local 28 Apprentice Program (the "Apprentice Program") indenturing apprentices, referral, advancement, compensation terms, conditions, or privileges of employment against any individual or class of individuals on the basis of race, color or national origin. Local 28 shall not exclude or expel any individual from membership in Local 28 or the Apprentice Program, or limit, segregate or classify members in Local 28 or the Apprentice Program, or fail or refuse to refer any individual for employment with sheet metal contractors, their agents, subsidiaries or successors with whom Local 28 presently has, or shall have in the future, a collective bargaining agreement ("Local 28 contractors") on the basis of race, color or national origin, nor shall they take any other action which would deprive or tend to deprive any

individual of employment opportunities with Local 28 contractors or membership in Local 28 or the Apprentice Program, or otherwise adversely affect his or her status as an employee of Local 28 contractors or member of Local 28 of the Apprentice Program, or as an applicant for employment with Local 28 contractors or membership in Local 28 or the Apprentice Program because of such individual's race, color or national origin. They shall receive and process applications for membership in Local 28 and the Apprentice Program, admit members to Local 28 and the Apprentice Program, indenture appentices, train, test, offer journey status to graduate apprentices, refer for employment, handle grievances, and otherwise administer all of the affairs of Local 28 and the Apprentice Program so as to ensure that no individual is excluded from equal work opportunities, including but not limited to overtime and advancement, on the basis of race, color or national origin.

2. Defendant Local 28 is permanently enjoined from preventing, impairing, obstructing, delaying or otherwise interfering with Defendant Sheet Metal and Air-conditioning Contractors National Association, New York City Chapter, Inc. (the "Contractors Association") and/or all Local 28 contractors from fulfilling the affirmative action obligations imposed on them or any of them by Presidential Executive Order 11246, 3 C.F.R. Chapter IV §202, and Mayor Executive Order 71, dated April 2, 1968, 96 The City Record 2842 (April 10, 1968) and rules and regulations thereunder.

3. Except as otherwise provided in this Order and Judgment ("Order"), defendant Local 28, is permanently enjoined from denying, withholding, discouraging, obstructing or otherwise interfering with direct access by non-whites * to membership in Local 28 by failing to administer at least once a year a journeyman's test and by using as journeyman tests examinations not professionally developed and valid under the Equal Employment Opportunity Commission Guidelines on Employee

* Hereinafter, the term "non-white" shall mean black and Spanish surnamed individuals.

Selection Procedures, 29 C.F.R. Part 1607 ("EEOC Guidelines").

4. Defendant Local 28 is permanently enjoined from denying, withholding, discouraging, obstructing or otherwise interfering with direct access by non-whites to membership in Local 28 or the Apprentice Program by selective organizing non-union sheet metal shops with few, if any, non-white sheet metal employees, and/or by admitting into Local 28 or the Apprentice Program from such non-union shops only white sheet metal employees.

5. Defendant Local 28 is permanently enjoined from denying, withholding, discouraging, obstructing or otherwise interfering with direct access by non-whites to membership in Local 28 by accepting transfers of white members or apprentices of affiliated sister local unions while refusing transfers of non-white members or apprentices of affiliated sister local unions, and/or by only accepting transfers of those individuals who formerly were members and/or apprentices of Local 28.

6. Defendant Local 28 is permanently enjoined from denying, withholding, discouraging, obstructing or otherwise interfering with direct access by non-whites to membership in Local 28 by relying on, using a system of, or issuing "identification slips" or "permits" to white members and/or apprentices of affiliated sister local unions or allied construction unions.

7. Defendant Contractors Association, its officers, agents, employees, members and successors, and all persons in active concert or participation with them, are permanently enjoined from engaging in any act or practice which has the purpose or the effect of discriminating in recruitment, selection, training, admission to membership in Local 28, admission to membership in the Apprentice Program, indenturing apprentices, referral, advancement, compensation, terms, conditions or privileges of employment against any individual or class of individuals on the basis of race, color or national origin. They shall not fail or refuse to hire for employment, nor shall they fail or refuse to refer for membership, or advise of membership opportunities, in Local 28

or the Apprentice Program any individual on the basis of race, color or national origin, nor shall they take any other action which would deprive or tend to deprive any individual of equal employment opportunities with a Local 28 contractor or otherwise adversely affect such individuals status as an employee of a Local 28 contractor or as a member of Local 28 or the Apprentice Program because of such individual's race, color or national origin.

8. Defendant Local 28 Joint Apprenticeship Committee, its trustees, officers, agents, employees, and successors, and all persons in active concert and participation with them in administering the affairs of the Apprentice Program ("JAC") are permanently enjoined from engaging in any act or practice which has the purpose or the effect of discriminating in recruitment, selection, training, admission to membership in the Apprentice Program, indenturing apprentices, admission to membership in Local 28, referral, advancement, graduation, compensation, terms, conditions or privileges of employment against any individual or class of individuals on the basis of race, color or national origin. JAC shall receive and process applications for the Apprenticeship Program, admit, indenture, train, test, refer for employment with a Local 28 contractor, advance and graduate apprentices, and otherwise administer the Apprentice Program so as to ensure that no individual or class of individuals is excluded from equal work opportunities with a Local 28 contractor on the basis of race, color or national origin.

9. Except as specifically set forth in paragraph 21(c) *infra*, defendant JAC, is permanently enjoined from administering all unvalidated tests, including but not limited to the battery of tests, and all unvalidated variations thereof, set forth in the Corrected Fifth Draft of Standards For Admission of Apprentices for the Sheetmetal Industry of New York City, New York ("Corrected Fifth Draft") which is appended to the opinion and order of the Supreme Court of the State of New York, County of New York, in the case *State Commission on Human Rights v. Mell Farrell*, 43 Misc. 2d 958, 252 N.Y.S. 2d 649 (Sup. Ct. N.Y. City 1964).

10. Defendant JAC is permanently enjoined from requiring a high school diploma or equivalency certificate or other indicia of

completion of twelfth grade as a prerequisite to taking the apprentice entrance test, or admission to the Apprentice Program.

B. REMEDIAL RACIAL GOAL

11. By July 1, 1981, Local 28 and JAC are hereby directed and ordered to achieve a non-white percentage of 29% in the combined membership of Local 28, including pensioners, and the Apprentice Program. (The pensioners to be included in this computation shall be defined in the Program.) Nonwhites shall be admitted to Local 28 and the Apprentice Program in such a manner as to insure that there is regular and substantial progress made every year in achieving this goal.

12. In order to achieve this non-white percentage of 29%, Local 28 and JAC are hereby directed and ordered to forthwith grant a preference in favor of non-whites for admission into Local 28 and the Apprentice Program. The terms and conditions of this admission preference shall include, but not be limited to, the provisions set forth in paragraphs 13 through 23 *infra* and in a program of recruitment, selection, testing, record-keeping, admission, referral and employment (the "Program") which is to be developed by the parties herein and the Administrator who is appointed in paragraph 13 of this Order.

C. THE ADMINISTRATOR

13. David A. Raff, Esq. is hereby appointed Administrator to implement the provisions of this Order and the Program and to supervise the performance and implementation thereof. He shall immediately commence his duties. If the position of Administrator becomes vacant by virtue of the death or incapacity of the individual hereby appointed, the Court shall appoint a successor.

14. In addition to the powers and duties specified in this Order and the Program, the Administrator shall be empowered to take all actions, including but not limited to the following, as he deems necessary and proper to implement and insure the performance of the provisions of this Order and the Program:

(a) establish additional record-keeping requirements;

(b) increase the frequency with which the apprentice entrance test and/or the hands-on journeyman's test described more fully *infra* are administered;

(c) devise and implement additional methods and procedures for entry by non-whites into Local 28 or the Apprentice Program;

(d) establish ratios of non-whites to whites by which individuals will be admitted to Local 28 or the Apprentice Program;

(e) establish through the Program or otherwise such interim percentage goals of non-white membership in Local 28 and/or the Apprentice Program in order to insure that the 29% goal set forth in paragraph 11 *supra* is achieved by July 1, 1981.

(f) establish procedures and practices for work referral and employment, including but not limited to work referral and employment procedures and practices based on ratios of non-whites to whites, furloughs and/or rotation;

(g) conduct an investigation into, and/or require Local 28, and/or JAC to submit reports, concerning any aspect of the operation of Local 28 and the Apprentice Program.

(h) review and approve or object to the disposition of all applications for entry into Local 28 or the Apprentice Program. At such time, if ever, that the Administrator shall adopt and implement any of the procedures and requirements authorized in this paragraph, he shall do so in writing and such procedures and requirements shall thereafter be deemed included in and part of the Program described *infra* and subject to review by the Court.

15. The Administrator shall hear and determine all complaints concerning the operation of this Order and the Program and shall decide any questions of interpretation and claims of violations of this Order and the Program, acting either on his own initiative or at the request of any party herein or any interested person. All decisions of the Administrator shall be in writing and shall be appealable to the Court.

16. Within the guidelines set forth in paragraph 23 through 25 *infra,* the Administrator shall award back pay to non-whites who file a written claim with him before January 15, 1976. The Administrator is empowered to hold hearings and make such factual determinations as he deems appropriate on all such claims for back pay.

17. At the end of three months from the date of entry of this Order, and at three month intervals thereafter up to the first anniversary, the Administrator shall submit a detailed report to the Court and the parties describing the work he has performed and the progress that has been made in working toward the percentage goal of 29% non-white membership in Local 28 and the Apprentice Program by July 1, 1981. In this report, the Administrator shall recommend such modifications, amendments or changes to this Order or the Program that he deems necessary and proper in order to meet the aforesaid percentage goal. From the first anniversary of the date of entry of this Order and thereafter until July 1, 1981, the Administrator shall submit the above described report every six months.

18. Nothing contained herein shall give the Administrator the right to amend, modify or change the substantive terms of this Order and the Program, nor shall he have any power or authority other than that granted to him in this Order and the Program.

19. The Compensation for the Administrator which shall be at a rate of $60.–per hour and such out-of-pocket expenses as approved by the Court shall be charged upon and apportioned among the defendants as the Court may direct. The Administrator shall submit at the beginning of every calender quarter to the defendants, with a copy to the Court and counsel for the plaintiffs and the State Division of Human Rights (the "State), a bill itemizing his compensation and the expenses that he incurred during the immediately preceeding quarter.

20. The Administrator shall remain in office for such time as the Court shall determine.

D. THE PROGRAM

21. On or before September 30, 1975, the parties herein and the Administrator shall agree on a Program designed to implement and facilitate a preference in favor of non-whites in recruitment, admission, entry, and training in Local 28 and the Apprentice Program, and to achieve by July 1, 1981, a 29% goal of non-whites in Local 28 and the Apprentice Program. The Program shall include, but not be limited to, the following provisions:

(a) Local 28 shall administer at least once a year, or more often if the Administrator shall order, a non-discriminatory hands-on journeyman's test, professionally developed and designed to test the ability of the applicant to perform duties normally required of an average sheet journeyman on a daily basis. Except as provided for in paragraph 21(b) *infra*, such tests shall be professionally developed and validated in accordance with EEOC Guidelines. Within a reasonable time before the administration of each test (which shall not be less than four weeks unless good cause is shown), Local 28 shall furnish counsel for the parties and the Administrator with (i) a copy of a report demonstrating the validity of the test and (ii) a copy of the test to be administered, provided that counsel for the parties and the Administrator shall not distribute or disclose the contents of the test to any individual or organization except for the purpose of professional validation thereof. No such test shall be administered without the prior written approval of the Administrator, and the Administrator shall supervise all phases of the administration of all such tests, including the grading and notification to applicants of the results thereof. In addition, the Program shall include provisions describing the application forms and procedures to be used, and within the guidelines set forth in paragraph 21(f) *infra*, establish eligibility requirements, and such other provsions as are necessary and proper to insure that the hands-on journeyman's tests are administered in a non-discriminatory manner and in furtherance of the 29% goal of non-whites in Local 28 and the Apprentice Program.

(b) The first such test described in paragraph 21(a) *supra* shall be administered in or before September 1975 and Local 28 shall immediately initiate and implement, under the supervision and direction of the Administrator, an advertising and publicity campaign designed to inform the non-white community within the City of New York that the test is to be administered and that it will be conducted and graded in a non-discriminatory manner. Local 28 shall not be required to engage media whose principal place of business is located outside the five boroughs of New York. The test to be administered pursuant to this provision shall consist of a practical examination substantially similar to the practical examination which was part of the journeyman's test administered by Local 28 on November 8, 1969, as reviewed and modified by a sheet metal expert chosen by counsel for the plaintiffs and the State and the Administrator.

(c) JAC shall administer at least once a year, or more often if the administrator shall order, a non-discriminatory apprentice entrance test consisting solely of (i) the mechanical comprehension aptitude test previously given by JAC in April, 1969, or such variations thereof which have been professionally developed and validated in accordance with EEOC Guidelines and (ii) a "read and follow directions" test to be developed professionally and validate in accordance with the EEOC Guidelines. In addition, the Program as devised by the parties and the Administrator may include upon good cause shown, a professionally developed, valid and non-discriminatory basic arithmetic test which shall become part of the apprentice entrance test. Within a reasonable time before the administration of each such test (which shall not be less than four weeks unless good cause is shown), JAC shall furnish counsel for the parties and the Administrator with (i) a copy of a report demonstrating the validity of each component of the apprentice entrance test to be administered and (ii) a copy of the test to be administered, provided that counsel for the parties and the Administrator shall not distribute or disclose the content of the test to any individual or oganization except for th purpose of professional validation thereof. No such test shall be administered without the prior written approval o the

Administrator, and the Administrator shall supervise a phases of the administration, including the grading and notification to applicants of the results, of all such tests. In addition, the Program shall include provisions describing the application forms and procedures to be used and within the guidelines set forth in paragraph 21(f) *infra*, establishing eligibility requirements, and such other provisions as are necessary and proper to insure that the apprentice entrance tests are administered in a non-discriminatory manner and in furtherance of the 29% goal of non-whites in Local 28 and the Apprentice Program.

The first such test shall be administered in or before December 1975 and JAC shall immediately initiate and implement commencing on or before October 1, 1975 an advertising and publicity campaign designed to inform the non-white community within the City of New York that the test is to be administered and that it will be conducted and graded in a non-discriminatory manner. JAC shall not be required to engage media whose principal place of business is located outside the five boroughs of New York.

(d) Within a reasonable time, but not later than November 1, 1975, Local 28 shall replace one of the white JAC Trustees designated by it with a non-white. A non-white shall hold that position and continue to serve as a union-designated Trustee of JAC until at least July 1, 1981.

(e) In addition to any other lists or records required to be maintained by Local 28 or JAC by the terms of this Order or the Program or by order of the Administrator, either Local 28 and JAC, as the case may be shall maintain separate records and lists for whites and non-whites concerning the following matters:

(i) Whites and non-whites who request an application for or apply to take the apprentice entrance test described in paragraph 21(c) *supra;*

(ii) Whites and non-whites who request an application for or apply to take the hands-on journeyman's test described in paragraph 21(a) and 21(b) *supra;*

(iii) Whites and non-whites who take the apprentice entrance test described in paragraph 21(c) *supra;*

(iv) Whites and non-whites who take the hands-on jouneyman's test described in paragraphs 21(a) and 21(b) *supra;*

(v) Whites and non-whites who pass the apprentice entrance test described in paragraph 21(c) *supra;*

(vi) Whites and non-whites who pass the hands-on jouneyman's test described in paragraphs 21(a) and 21(b) *supra;*

(vii) Whites and non-whites who seek or apply to transfer into Local 28 from an affiliated sister local union;

(viii) Whites and non-whites who inquire about the possiblity of transferring into Local 28 from an affiliated sister local union;

(ix) Whites and non-whites who inquire as to the availability of work opportunities with or through Local 28, including but not limited to inquiring about or seeking "permits" or "identification slips";

(x) Whites and non-whites to whom "permits or "identification slips" are issued or work opportunities with or through Local 28 are otherwise made available.

(xi) Whites and non-whites who contact Local 28 or JAC seeking sheet metal work;

(xii) Whites and non-whites who are employed as sheet metal workers by Local 28 contractors.

The records and lists specified in subsections (i) through (xii) of this paragraph shall contain the name, address, race, color or national origin, union affiliation, if any, of each individual listed therein, as well as the date of the application, test, inquiry, contact, or employment (and the name of the contractor, where applicable), and the disposition, with reasons, of each such application, test, inquiry, contact or employment. Copies of these records and lists shall be submitted to counsel for the parties herein and the

Administrator at least once every three months. (f) An individual who is a lawful permanent resident alien shall not be denied access to Local 28 or the Apprentice Program, or work opportunities within the jurisdiction of Local 28 because of such individual's alien status.

(g) Local 28 and JAC shall provide non-white jouneymen and apprentices of Local 28 with the same assistance including the assistance of Local 28's officers and business agents, in obtaining employment as that provided to white members and apprentices of Local 28. Within thirty days after adoption of a Program, Local 28 and JAC shall file with the Administrator and submit to the parties a written statement describing the operation of their work referral and employment activities on behalf of the members and apprentices of Local 28. Nothing contained herein shall in any way limit the power of the Administrator to require Local 28 and/or JAC to modify, amend or change their work referral and employment activities, or institute or undertake additional procedures or activities regarding work referral or employment in order to (i) assist non-white journeymen and apprentices of Local 28 in obtaining employment or (ii) protect non-white journeymen and apprentices of Local 28 from bearing a disproportionate burden of unemployment.

(h) In order to dispel Local 28's and JAC's reputations for discrimination in non-white communities, Local 28 and JAC shall implement, under the supervision of the Administrator, a program of advertising and publicity, through the use, *inter alia,* of non-white media including newspapers and radio stations directed primarily toward non-white communities, designed to inform the non-white communities in New York City of the non-discriminatory opportunities to join Local 28 and the Apprentice Program. Such a program shall include, but not be limited to, provisions to inform the non-white communities of the specific dates and qualifications for the hands-on journeyman's test and the apprentice entrance tests, and generally of opportunities available on a non-discriminatory basis in Local 28 and the Apprentice Program. Local 28 and JAC shall not be required to engage

media whose principal place of business is located outside the five boroughs of New York.

(i) At least once a year until July 1, 1981 on a date to be set forth in the Program, Local 28 and JAC shall submit to the Administrator and the parties herein, a list of all members and apprentices of Local 28, with race identification, broken down into the following categories:

(i) Active members;

(ii) Pensioners; (as defined in Program)

(iii) Apprentices.

(j) Except as modified, changed or amended by the terms of this Order, the Program or order of the Administrator, Local 28 and JAC shall not change, modify or amend any aspect of the operation or content of the Apprentice Program, or the conditions or terms upon which an individual shall become a member of the Apprentice Program or Local 28 or entitled to work within the jurisdiction of Local 28.

22. In order to further the goal of achieving non-white membership of 29% in Local 28 and the Apprentice Program by July 1, 1981 and to restore non-whites to the positions that would have been available to them absent the pattern and practice of discrimination by Local 28 and the JAC, and further, considering all relevant circumstances, the Program may include, or the Administrator may, upon notice to the parties and the Court, adopt and implement as part of the Program, the following provisions requiring Local 28 and/or JAC to take the following actions:

(a) Require Local 28 to send written notice to the members and apprentices of the Blowpipe Division, Local 400 stating that pursuant to Section 9(k) of Article 16 of the Sheet Metal Workers International Association Constitution and Ritual, such members and apprentices are entitled to transfer into Local 28 after five years in good standing with the Blowpipe Division of Local 400.

(b) Under terms and conditions to be established in the Program or by the Administrator, require Local 28 to admit as full journeyman members all non-whites who apply in writing and have four years experience as a sheet metal worker in the United States, or elsewhere, in construction or industrial sheet metal work as an employee of a union or non-union employer, or have been employed in other sheet metal work, including but not limited to: employment as a member in any branch of Local 400 of the Sheet Metal Workers International Association; sheet metal experience in the Armed Forces; or, vocational training related to the skills of a journeyman sheet metal worker.

(c) Under terms and conditions to be established in the Program or by the Administrator, require Local 28 and JAC to establish a program for the admission of non-whites with sheet metal experience into the Apprentice Program with advanced standing. A non-white admitted to the Apprentice Program with advanced standing shall be entitled to the same pay, instruction, supervision, training, employment and all other rights and priviliges of any other individual in the Apprentice Program at the same level of training, and upon graduation from the Apprentice Program shall become a journeyman member of Local 28 with the same rights and privileges thereunder as any other journeyman member of Local 28.

(d) Under terms and conditions to be established in the Program or by the Administrator, requre and direct that non-whites admitted to journeyman status in Local 28 through the procedures set forth in paragraphs 21(a) 21(b), 22(b) and 22(c) supra, shall pay an initiation in an amount not to exceed the amount of the lowest initiation fee charged to any white individual who was admitted membership at the time the non-white would have been eligible for membership in Local 28 absent Local 28's and/or JAC's discrimination, including discriminatory admission requirements, against non-whites. In addition, the Administrator may direct that payment by non-whites of the aforesaid initiation fees shall commence with their employment with a Local 28 contractor and shall be paid in such monthly installments as determined by the

Administrator. Neither the amount of the initiation fee to be paid by non-whites under this paragraph, nor the installment payment authorized hereunder, shall in any way affect the journeyman status, including but not limited to the right to secure employment with a Local 28 contractor, of the non-whites to whom this provision applies.

(e) Require and direct that persons who become qualified for journeyman membership pursuant to paragraphs 21(a) and 21(b) *supra* may, at their discretion, defer their admission into Local 28 for a reasonable period of time.

(f) Local 28 shall issue "permits" or "identification slips" only with the express written consent of the Administrator, and only on such terms and conditions as the Administrator, in his discretion, shall require, including but not limited to requiring Local 28 to first solicit the members and/or apprentices of the Blowpipe Division, Local 400 to work within the jurisdiction of Local 28 on "identification slips" or "permits" before contacting any other individual including members and/or apprentices of other affiliated sister local unions or allied building trades local unions in order to solicit such individual work on "permits" or "identification slips".

BACK PAY

23. Non-whites who file a written claim with Administrator on or before January 15, 1976, and who count with the following conditions shall be entitled to award back pay from Local 28:

(a) There is a record, of application fo direct entry into Local 28, either through a journeyman's test previously administered by Local 28 or through transfer

(b) Each such non-white for whom there is record as described in paragraph 23(a) *supra* demonstrates before the Administrator, in light of this Court's conclusions in its Opinion dated July 18, 1975. that he or she was discriminatorily excluded from membership in Local 28; and

(c) Each such non-white demonstrates monetary damages suffered as a result thereof.

24. All non-whites who qualify for awards of back-pay as described in paragraph 23, shall be entitled to recover proven damages from the date the discrimination occurred through (a) July 18, 1975, the date of filing of this Court's Opinion in this action, or (b) the date of the individual's admission to Local 28, whichever is earlier.

25. Back-pay damages shall be computed on the basis of the average monthly wage earned by members of Local 28 in each of the affected calendar years and shall be adjusted to reflect orther employment income or public assistance received by claimants. Payment of damages, as computed above, shall be made after determination by the Administrator of all claims and their discretionary review if necessary, by this Court.

GENERAL PROVISIONS

26. All records and lists required by this Order and the Program shall be maintained for ten years, and shall be made available for inspection and copying by the parties and the Administrator on reasonable notice during regular business hours or at other mutually convenient time without further Order of this Court.

27. At any time, any of the parties herein may apply to the Administrator and then to the Court for the purpose of seeking additional orders to insure the full and effective implementation of the terms and intent of this Order and the Program.

28. This Court shall retain jurisdiction over this action to ensure compliance with the terms of this Order and the program and to enter such additional orders may be necessary to effectuate equal employment opportunty for non-whites and other appropriate relief.

Dated: New York, New York
August 28 1975.

HENRY F. WERKER

U.S.D.J.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, and the City of New York, Plaintiffs

v.

LOCAL 638 et al., Defendants.

LOCAL 28, Third-Party Plaintiff,

v.

NEW YORK STATE DIVISION OF HUMAN RIGHTS, Third-Party Defendant.

LOCAL 28 JOINT APPRENTICESHIP COMMITTEE, Fourth-Party Plaintiff,

v.

NEW YORK STATE DIVISION OF HUMAN RIGHTS, Fourth-Party Defendant.

No. 71 Civ. 2877 (HFW)

United States District Court
S.D. New York.
July 18, 1975

United States and City of New York brought action against local union and its apprenticeship committee based on allegations of racial discrimination. The District Court, Werker, J., held that statistical evidence presented prima facie case of discrimination; that use by union and apprenticeship committee of tests which were not validated according to EEOC guidelines and which were shown to have discriminatory impact on nonwhites were violative of Civil Rights Act; that union would be required to achieve nonwhite membership comparable to percentage of nonwhites in the relevant labor market within six years; and that back pay would be awarded in cases where the persons entitled to such back pay could be identified.

Order accordingly.

Paul J. Curran, U. S. Atty., S. D. N. Y., New York City, for plaintiff United States Equal Employment Opportunity Commission; by Taggart D. Adams, Louis G. Corsi, New York City.

W. Bernard Richland, New York City Corp. Counsel, New York City, for plaintiff City of New York; by Beverly Gross, Thomas A. Trimboli, New York City.

Sol Bogen, New York City, for defendant Local 28.

Rosenthal & Goldhaber, Brooklyn, N. Y., for defendant Joint Apprenticeship Committee and Trust; by William Rothberg, Brooklyn, N. Y.

Louis J. Lefkowitz, Atty. Gen., New York City, for third and fourth-party defendant New York State Division of Human Rights; by Dominic J. Tuminaro, New York City.

OPINION

WERKER, District Judge.

This is an action filed in 1971 by the United States pursuant to § 707(a) of Title VII of the 1964 Civil Rights Act, 42 U.S.C. § 2000e-6(a). It was originally part of a larger action against four unions in the building trades industry and their joint apprenticeship committee for engaging in a past and continuing pattern and practice of discrimination in admission and employment of non-whites.[1] Soon after issue was joined in that case separate trials were ordered for each union and its related co-defendants.[2] After severance of the four groups for purposes of

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[1] For purposes of this case the parties have agreed that the term "non-whites" includes black and Spanish surnamed individuals. Pre-trial Order, p. 3.

[2] The reported decisions of those actions which have proceeded to trial can be found at 347 F.Supp. 169 (S.D.N.Y.1972) (Local 40 of the structural iron workers), and 360 F.Supp. 979 (S.D.N.Y.1973) (Local 638 of the steamfitters). *modified* 501 F.2d 622 (2d Cir. 1974); on remand, unreported decision of Judge Bonsal dated May 5, 1975.

trial, the City of New York (the City) was granted leave to intervene in that portion of the action relating to Local Union No. 28 of the Sheet Metal Workers' International Association (Local 28). *United States v. Local 638, Enterprise Ass'n, etc.*, 237 F.Supp. 164 (S.D.N.Y.1972).[3]

The defendants who were on trial before this court from January 13 to February 3, 1975 are Local 28, Local 28's Joint Apprenticeship Committee and Trust (JAC), and, for purposes of relief only, the New York City Chapter of the Sheet Metal and Air Conditioning Contractors' National Association (Contractors' Association). By virtue of third and fourth party complaints filed by Local 28 and JAC, the New York State Division of Human Rights (the Division) is a defendant in this action for purposes of relief. The third and fourth-party pleadings were predicated upon administrative and judicial proceedings instituted by the State Attorney General against Local 28 and JAC in which the defendants were directed to end racially discriminatory selection and admission practices under the supervision and direction of the Division.[4] *See State Commission on Human Rights v. Farrell*, 43 Misc.2d 958, 252 N.Y.S.2d 649 (Sup.Ct.N.Y.Cnty. 1964). Although a nominal defendant in this case, the Division has in its papers and at trial consistently aligned itself with the plaintiffs' cause.

[1] The complaint filed by the United States (the government) alleges that Local 28 is engaged in a pattern and practice of resistance to the full enjoyment by non-whites of rights secured

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[3] Intervention was sought during the pendency of an administrative proceeding for racial discrimination initiated by the City Commission on Human Rights against Local 28 for violation of Title B, Chapter I, of the New York City Administrative Code (City Human Rights Law). *See* 347 F. Supp. at 166.

[4] The Commission on Human Rights had found, after conducting administrative hearings, the the defendants discriminated against Negroes in the designation and approval of applicants for the Local 28 apprentice program. The Honorable Jacob Markowitz of the New York Supreme Court adopted all of the Commission's findings as to JAC and ordered implemented new standards for the admission of apprentices.

to them by Title VII of the 1964 Civil Rights Act, 42 U.S.C. §§ 2000e-2(c) and 2000e-2(d). The pattern and practice alleged includes, but is not limited to, the following:

> (a) Failing and refusing to admit nonwhite workmen . . . as journeymen members on the same basis as whites are admitted;
>
> (b) Failing and refusing to refer non-white workmen for employment . . . (within its jurisdiction) . . . on the same basis as whites are referred by applying standards for referral which have the purpose and effect of ensuring referral priority to . . . (its) . . . members . . .;
>
> (c) Failing and refusing to recruit blacks for membership in and employment through . . . (Local 28) . . . on the same basis as whites are recruited;
>
> (d) Failing and refusing to permit contractors with whom . . . (Local 28) . . . has collective bargaining agreements to fulfill the affirmative action obligations imposed upon those contractors by Executive Order 11246 by refusing to refer out blacks whom such contractors wish to employ;
>
> (e) Failing and refusing to take reasonable steps to make known to non-white workmen the opportunities for employment in the . . . (sheet-metal trade) . . ., or otherwise to take affirmative action to overcome the effects of past racially discriminatory policies and practices.

The government's complaint does not allege specific acts of discrimination by defendant JAC. To the extent, however, that plaintiffs have succeeded in establishing such violations at trial, the government's complaint is deemed amended to conform to the proof. *See* Rule 15(b), Fed.R.Civ.P.

The City's complaint (¶ 10) alleges that Local 28 is engaged in a pattern and practice of resistance to the full enjoyment by non-whites of rights which are secured to them by § B1-7.0 of

the New York City Administrative Code as well as by Title VII of the 1964 Civil Rights Act. It sets forth the same allegations as to Local 28 quoted above, and adds as an additional example of discriminatory practice:

> (f) Adopting standards for admission to union membership which are not job related and which operate to disqualify a disproportionate number of non-whites for membership.

The City's complaint, furthermore, alleges that defendant JAC is also engaged in a pattern and practice of discrimination, which includes, but is not limited to:

> (a) Failing and refusing to make information concerning apprenticeship opportunities available to non-whites on the same basis as it is made available to whites;
>
> (b) Failing and refusing to make apprenticeship opportunities available to non-whites on the same basis as they are made available to whites;
>
> (c) Adopting standards for the selection of apprentices which are not job related and which operate to disqualify a disproportionate number of non-white applicants for apprenticeship.

The allegations of both complaints have been largely substantiated by the evidence produced at trial.

BACKGROUND FACTS

A. Local 28

1. Local 28 is an unincorporated labor union. It is the recognized bargaining agent for journeymen and apprentice sheet metal workers [5] hired by sheet metal contractors within its geographical jurisdiction.

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[5] Sheet metal workers fabricate and install ducts for ventilating, air-conditioning and heating systems.

2. The geographical jurisdiction of Local 28 includes the five boroughs of the City of New York.

3. A non-white has never been an officer of Local 28, or a member of the Executive Board of Local 28.

4. Since its inception in 1913 Local 28 has been governed by its own Constitution and By-Laws, and by the Constitution and Ritual of the Sheet Metal Workers' International Association. Prior to November 1946, the Constitution of the International Association contained a provision for the establishment of an "auxiliary" local union when there was a "sufficient number of eligible Negro applicants." As stated in this provision, the auxiliary was:

> subordinate to the established and affiliated white local union and shall be represented by said white local union at all conferences and conventions, including International Conventions . . . . The same initiation, reinitiation and reinstatement fees shall apply to auxiliary members and the privilege of transfer shall be limited to transferring from one auxiliary to another auxiliary.

5. As of October 1, 1974 Local 28 has collective bargaining agreements with approximately 133 sheet metal contractors in New York City. Those contractors do not employ an individual to perform sheet metal work within the trade jurisdiction of Local 28[6] unless the individual is a member or apprentice of

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"In heating and air-conditioning duct work, sheet metal workers plan the job to determine the size and type of metal needed before cutting it with hand snips, power-driven shears, and other tools. They shape the metal with machines, hammers, and anvils, then weld, bolt, rivet, solder, or cement the seams and joints . . . . To install ducts, components are fitted together, hangers and braces installed for support, and joints connected and soldered or welded. Some sheet metal workers specialize in shopwork or on-site installation, others do both." Occupational Outlook Handbook, 1974-75 Edition, published by the United States Department of Labor, at 279. This description appears accurate in light of testimony at trial as to the nature of work performed by members of Local 28.

[6] "The manufacture, fabrication, assembly, erection, installation, dismantling, reconditioning, adjustment, alteration, repairing and servicing of all sheet

Local 28, or has been given an "identification slip" (ID Slip) by Local 28 permitting him to temporarily work in the sheet

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metal work (including ferrous or non-ferrous sheet metal) of No. 10 U.S. gauge or its equivalent or lighter gauge, or any and all substitute materials used in lieu thereof (any question of jurisdiction of substitute materials used in lieu thereof in accordance with the Joint Arbitration Plan between the Building Trades Employers' Associations and the Unions of the Building Trades of the City of New York), including all shop and field sketches used in fabrication and erection (including those taken from original architectural and engineering drawings or sketches and all other work included in the jurisdictional claims of Sheet Metal Workers International Association.

"Testing and balancing of all air-handling equipment and duct work contracted for after June 30, 1969. All internal linings for casing, plenum and ducts must be lined prior to erection. Supply casings, Supply air-shafts must be Sheet Metal.

"The manufacturing and erection of all sheet metal work in connection with buildings and structures as follows: hollow metal sash, frames, partitions, skylights, cornices, crestings, awnings, circular mouldings, spandrels (except stamping of same), sheet iron sheeting or roofing, package chutes, linen chutes, rubbish chutes, hoods, sheet metal fire proofing, ventilators, heating and ventilating pipes, air washers, conveyors, breeching and smoke pipes for hot water heaters, furnaces and boilers, laundry dryers and all connections to and from same, metal connections to machines in planning mills, saw mills and other factories (whether it be used for ventilating, heating or other purposes), sheet metal connections to and from fans, seperators, sheet metal cyclones for shavings or other refuse in connection with various factories, sheet metal work in connection with or fastened to store fronts or windows, sheet metal work in connection with concrete construction and sheet metal columns and casings, covering all drain boards, lining of coil boxes, ice boxes and other sheet metal work in connection with bar furniture and soda fountains.

"Spot welding, electric arc welding, oxyacetylene cutting and welding in connection with sheet metal work of No. 10 gauge or lighter covered by the collective bargaining agreement also: sheet metal work in connection with plain and corrugated fire doors of No. 10 gauge or lighter: also the erection of floor domes, the setting of registers and register faces in connection with sheet metal work, the cutting and bending of metal necessary for application and erection of metal ceilings and side walls (except stamping), the applying of metal to ceiling and side walls and the furring and sheathing of same. The assembling and erection of fans and blowers: also the erection of metal furniture, factor bins, shelving and lockers, corrugated iron on roofs and sidings,

metal industry within the geographic jurisdiction of Local 28. The reason for this is that members of Local 28 will not work with sheet metal workers who do not fit within either of the two categories above. Thus, despite a contract provision which grants Local 28 contractors autonomy in hiring, Local 28 has substantial, if not complete, control of job opportunities which arise with them.

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all metal shingles and metal slate, and tile, plain or covered with a foreign substance, the manufacture and erection of corrugated wire glass and accessories: the glazing of metal skylights. The installation of unit vents where there is sheet metal work in connection with the supply and discharge of air: the setting of radiator enclosures of sheet metal where it does not support the radiator.

"In the manufacturing of drawn metal work: the work of journeyman sheet metal workers shall be the cutting and forming of the metal before the same is applied to the wood, and all clipping and soldering that may be necessary in the finishing of the assembled parts and the covering of wood and composition door frames and sash with sheet metal. Also such other sheet metal work of No. 10 gauge or lighter, not herein specified that has been decided by the Executive Committee of the Building Trade Employers' Association to be, or is now, in the possession of the Sheet Metal Workers' Union shall be regarded as sheet metal worker's work.

"In the Kitchen Equipment Industry it shall be understood that the term "Sheet Metal Work" shall mean all work made of sheet metal No. 10 gauge or lighter including the making, mounting, erecting, cleaning and repairing of all steel and gas ranges, grid irons and oven racks, hoods, tables and stands, warming closets, plate warmers and plate shelves, bands, doors and slides for some, drip pans, urns, and percolators, kettles, revolving covers, meat dishes and covers, steam and carving tables and drainers for same, bain marie boxes and potato mashers and any other items or types of work that may be included in Article I, Section 5 of the Constitution and Ritual of the International Association.

"In the temporary operation of fans or blowers in a new building, or in addition to an existing building, for heating and/or ventilation, and/or air conditioning, the temporary operation and/or maintenance of such fans or blowers."

Description of Local 28's work jurisdiction. Stipulation of Facts, ¶ A(5).

6. In preventing its contractors from hiring non-union non-white sheet metal workers Local 28 has precluded them from fulfilling the affirmative action obligations imposed on them by Presidential Executive Order 11246, 3 C.F.R. Chapter IV § 202, and Mayoral Executive Order 71, April 2, 1968, 96 The City Record 2842 (April 10, 1968). Those orders require recipients of federal construction funds and city construction contracts to take affirmative action to ensure that all applicants for employment enjoy equal access to work opportunities without regard to race, color or national origin.

7. Since 1960 there have been four methods by which individuals have been admitted to membership in Local 28:

a) successful completion of a four-year apprentice program administered by JAC;

b) successful performance on a writen and practical examination administered by the Examining Board of Local 28 (journeyman's test);

c) transfer from a sister local union, affiliated with the Sheet Metal Workers' International Association;

d) employment with a newly organized sheet metal contractor who will certify as to its need for the applicant and the applicant's ability to work in accordance with journeyman standards of performance.

The availability of the first method is determined by the collective bargaining agreement between Local 28 and the employers. The availability of the other three methods is determined by the Executive Board of Local 28, with the approval of the Union membership.

8. As of July 1, 1974, 3.19% of the union's total membership (including pensioners) was non-white.

9. Between January 1965 and July 1974 Local 28 admitted 1103 new members, 79.78% from the apprentice program, 9.07% through the use of written and practical examinations,

5.98% via transfer from sister unions, and 2.81% from newly organized sheet metal shops. Of the 1103 new members, 111 or 10.06% were non-white.

10. Local 28 does not maintain a hiring hall. Referral and hiring are done informally, through word of mouth and contacts with other members, apprentices and contractors. Sometimes business agents call Local 28 members and advise them of job opportunities; sometimes members call the agents seeking information on work openings. In good times, each business agent makes a job referral approximately five to ten times a week.

11. Local 28 refused to participate in the New York Plan when it was in effect in New York City. The Plan was a joint industry, City and State effort to increase participation of minority employees in the construction trades.[7]

B. The Contractors' Association

12. The Contractors' Association is an association of building contractors in New York City who are engaged in sheet metal construction work. It has a collective bargaining agreement with Local 28, and its members employ approximately 70-80% of the union's members and apprentices.

13. The manpower requirements of the Contractors' Association is a mandatory subject of collective bargaining by and between the Association and Local 28.

C. JAC and the Apprentice Program

14. JAC is a joint labor-management committee composed of representatives of Local 28 and of the Contractors' Association. It administers the Local 28 apprentice program.

15. A non-white individual has never been a member of JAC.

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[7] It also refused to work with the City and Federal government in negotiating an alternative tailor-made affirmative action plan.

16. Since 1964 the operation and organization of the apprentice program has been governed by the Standard Form Union Agreement (the Collective Bargaining Agreement), the order and opinion in *State Commission on Human Rights v. Farrell, supra*, which includes the Corrected Fifth Draft of Standards for the Admission of Apprentices for the Sheetmetal Industry of New York City, New York (Corrected Fifth Draft), JAC's Agreement and Declaration of Trust, and JAC's Rules and Regulations.

17. In 1965 non-white enrollment in the apprentice program was .37%. It increased to a high of 21.80% in July 1967, fell to 9.77% in July 1973 and returned to 13.99% in July 1974.

18. The Local 28 apprentice program presently consists of eight terms of six months each. Apprentices attend ten all-day class sessions per term, receiving eight hours of pay for each such session.[8] The other days they work for employers who have collective bargaining agreements with Local 28.

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[8] The current Collective Bargaining Agreement provides in Rule XVII that if 300 Local 28 journeymen are unemployed, the industry shifts to a six hour day. When the six hour day is in effect, apprentices receive seven hours of pay for each class session. They are paid according to the following scale:

1st term—40% of the journeyman wage rate

2nd term—45% of the journeyman wage rate

3rd term—50% of the journeyman wage rate

4th term—55% of the journeyman wage rate

5th term—60% of the journeyman wage rate

6th term—65% of the journeyman wage rate

7th term—70% of the journeyman wage rate

8th term—80% of the journeyman wage rate

19. Under the most recent (1972) Collective Bargaining Agreement apprentice classes are to be appointed every six months, and the size of the entire program is to be stabilized at 568 apprentices. Between January 1, 1972 and July 1, 1974 the total number of apprentices enrolled in the program has decreased:

January 1, 1972	— 568
July 1, 1972	— 482
November 11, 1972	— 517
January 1, 1973	— 498
July 1, 1973	— 399
January 1, 1974	— 323
July 1, 1974	— 286

20. An apprentice must pass a physical exam and be between the ages 18 and 25 at the time of admission, although exceptions up to age 30 are made for time spent in military service.

21. Since 1969, as a result of the Corrected Fifth Draft contained in the New York Supreme Court decision in *State Commission on Human Rights v. Farrell, supra*, apprentices are required to have high school diplomas or equivalency certificates at the time of admission. For the years 1967-1968 only three years of high school education were required. For the years 1965-1966, only two years of high school education were required. Prior to 1965 apprentices were appointed from an applicants list, with high school diplomas, veteran's status and recommendations of relatives by members of Local 28 receiving some weight in the appointment process.

22. Application forms utilized for the apprentice program require the applicant to list his police record, if any, and his citizenship.

23. Applicants satisfying the age, education and physical requirements are admitted to the apprentice program in accordance with the ranking obtained on an apprentice entrance exam. There is no cut-off pass/fail score for the entrance exam, which is an aptitude exam consisting of tests in five areas (the JAC battery):

a) mental alertness

b) mechanical reasoning

c) space relations

d) mathematical computations and concepts

e) mathematical analysis and problem solving

24. Since 1966 the choice of tests in the aforementioned areas, their administration, and the ranking of those tested has been performed by Stevens Institute of Technology (Stevens Institute). In 1965 and 1966 this work was done by the New York Testing and Advisement Center.

25. None of the defendants have kept records of the race or the ethnic identification of persons who have applied or sought to apply to the apprentice program, of persons whose applications have been rejected prior to the aptitude examination, or of persons who have taken the aptitude examination and have been rejected or have themselves rejected admission to the apprentice program.

26. None of the defendants prior to 1973 kept records of the race or ethnic identification of persons taking the apprentice aptitude examination.

27. No one fails out of the apprentice program because of school performance, although he may be left back.

28. JAC assigns apprentices for employment. However, no apprentice can begin working for a Local 28 employer without first receiving a union "apprentice work card."

29. The current Collective Bargaining Agreement between Local 28 and the Contractors' Association provides:

ARTICLE IX

§ 3(c). There shall be a moratorium on apprentices during the period of the six (6) hour day. Apprentices

> shall be appointed, but work assignments deferred until return to the seven (7) hour day and shall then be made by the Joint Apprenticeship Committee in accordance with the required needs of the program.

Since October 31, 1973, the industry has been on a six hour day.

DISCRIMINATION IN THE APPRENTICE PROGRAM

Prior to the institution of a new selection procedure in accordance with the Corrected Fifth Draft, Local 28 alone controlled admission to the apprentice program. Union officers testified that the basic selection criterion applied by Local 28 was the applicant's relationship to, or friendship with, union members. Thus the union's selection procedure was largely nepotistic, with the result that a majority of the individuals enrolled in the apprentice program were related in some manner to members of Local 28.[9] This is further borne out by evidence that no Black was over enrolled in the apprentice program, and at least during the period from January 1, 1960 through March 15, 1965, only one other non-white individual was a Local 28 apprentice.

[2] Congress's objective in enacting Title VII of the 1964 Civil Rights Act was to achieve equality of employment opportunity by removing those selection barriers which have historically operated to favor white employees; therefore under the Act,

> practices, procedures, or tests neutral on their face, and even neutral in terms of intent, cannot be maintained if they operate to 'freeze' the status quo of prior discriminatory employment practices.

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[9] Local 28's reputation for nepotism also prevented many non-whites who might have otherwise applied from even contacting JAC. One Black mechanic who had sought sheet metal work in New York City in the early 1960's testified that although aware of Local 28, he had not applied because be had "heard that it was a father and son thing, you had to be a relative to become a member ... That threw me out, I didn't have any relatives." (Tr. 1592).

Griggs v. Duke Power Co., 401 U.S. 424, 429-30, 91 S.Ct. 849, 853, 28 L.Ed.2d 158 (1970).

Whether the new selection procedure provided for in the Corrected Fifth Draft discriminates against non-whites and/or operates to "freeze the status quo" of the defendants' prior discrimination would best be determined by a thorough statistical analysis of the entire procedure as a whole. However, the fact that no records were kept of applicants' race and national origin has precluded this approach.[10] Plaintiffs at trial therefore sought to establish that each individual component of the selection procedure operates separately to discriminate against non-whites. For the reasons discussed below the court finds that the selection procedure does not fully comport with the mandate of Title VII.

A. The Apprentice Entrance Exam

Plaintiffs' argument as to the JAC battery of tests was based almost exclusively upon the testimony and statistical analysis of Dr. Raymond Katzell, Professor of Psychology at New York University, and an expert in industrial psychology and psychological testing. Dr. Katzell analyzed the percentage of identified non-whites tested, as opposed to that of whites tested, who appeared in the top 50, top 100, and top half of the aggregate rankings for all eight exams administered between April

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[10] Neither Local 28 nor JAC maintained such records despite the Equal Employment Opportunity Commission Guidelines on Testing and Selecting Employees (EEOC Guidelines), which require:

> Every employer, labor organization, and joint labor-management committee subject to Title VII which controls an apprenticeship program (regardless of any joint or individual obligation to file a report) shall, beginning August 1, 1967, maintain a list is chronological order containing the names and addresses of all persons who have applied to participate in the apprenticeship program, including the dates on which such applications were received. (See section 709(c). Title VII, Civil Rights Act of 1964). Such list shall contain a notation of the sex of the applicant and of the applicant's identification as "Negro," "Spanish Surnamed American,"

1968 and March 1973.[11] He found that the percentage of non-whites at each level was smaller than that of whites to a statistically significant degree. This means, in the language of the industrial psychology profession, that the apprentice entrance examination as administered in those eight testing sessions had an "adverse impact" on non-whites, and that the impact was not likely to have happened by mere chance (i. e.: was likely to have occurred by chance on the basis of a random sampling no more than one time in twenty).

Dr. Katzell also separately analyzed each of the eight test batteries in the same manner. He found that on at least one level in each of seven batteries there was a statistically significant difference in percentage. There was no statistically significant difference on the eighth battery. The more conclusive result achieved in the aggregate analysis stems from the larger size of the applicant sample involved.

Dr. Katzell further testified that the presence of statistically significant adverse impact on the JAC battery is not surprising, as Blacks and other economically disadvantaged subgroups perform competitively less well than whites on verbally-based tests. This conclusion is generally shared by the psychology profession. *See* Cooper and Sobol, Seniority and Testing Under Fair

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"Oriental," "American Indian," or "Other."

29 C.F.R. § 1602.20(b) (1975). However, despite the lack of records, plaintiffs managed to research at least in part the race and nationality of applicants for apprenticeship. Out of 3,490 applicants between 1969 and 1972 they were able to identify 489 as non-whites. Of 446 persons who became apprentices, 43 were non-white. Thus, to the extent that plaintiffs' attempts at identification were successful, it appears that 13.43% of whites who applied became apprentices while only 8.79% of non-whites did so, resulting in a success rate for whites of 1½ times that for non-whites. In *Chance v. Board of Examiners*, 458 F.2d 1167, 1171 (2d Cir. 1972) the court found that disparity enough to establish a prima facie case of discrimination.

[11] He confined his analysis to the top half and above because with the exception of applicants tested in April 1969 (see p. 479 *infra*) those ranking below have never been selected by JAC for admission to the apprentice program.

Employment Laws: A General Approach to Objective Criteria of Hiring and Promotion, 82 Harv.L.Rev. 1598 at 1639 (1969); indeed, JAC's expert witness, Dr. Judah Gottesman, senior consulting industrial psychologist at the Stevens Institute of Technology, testified in substantial agreement. *See also Boston Chapter NAACP inc. v. Beecher*, 504 F.2d 1017, 1021 (5th Cir. 1974); *Bridgeport Guardians, Inc. v. Members of Bridgeport Civil Service Comm'n*, 482 F.2d 1333, 1337 (2d Cir. 1973).

[3-5] Title VII proscribes standardized testing devices which, however neutral on their face, operate to exclude non-whites capable of performing effectively in the desired positions. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 806, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973). As the Second Circuit noted in *United States v. Wood, Wire & Metal Lathers International Union*, 471 F.2d 408, 414, n.11 (2d Cir.), *cert. denied*, 412 U.S. 939, 93 S.Ct. 2773, 37 L.Ed.2d 398 (1973), "statistics may establish a prima facie case of discrimination" in violation of Title VII.[12] The court finds that plaintiffs' statistical analysis described above establishes such a case, and thereby shifts to defendants the burden of justifying their use of the discriminatory testing device. *See Chance v. Board of Examiners*, 458 F.2d 1167, 1175 (2d Cir. 1972). Since the touchstone in justifying a discriminatory practice is business

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[12] Indeed, plaintiffs argue that the statistical disparity between the percent of union and apprentice members who are non-white (3.97%), and the percent of what they define as the "relevant labor force in New York City" that is non-white (36%), is by itself enough to establish a prima facie case of across-the-board discrimination. Defendants, of course, contest plaintiffs' definition of relevant labor force and thereby dispute plaintiffs' statistics. However, even accounting for errors and overinclusion on the part of plaintiff (see discussion *infra* at 488-490), the disparity between the number of non-whites available to Local 28 and JAC as a membership pool and those chosen may well be enough to establish a general prima facie case of discrimination. *Cf. Vulcan Society v. Civil Service Comm'n*, 360 F.Supp. 1265, 1269 (S.D.N.Y. 1973); *aff'd* 490 F.2d 387 (2d Cir. 1973). Rather than rely on this possibility, however, the court has made findings as to each allegation of discriminatory practice. *See United States v. Ironworkers Local 86*, 443 F.2d 544, 551 (9th Cir.) *cert. denied*, 404 U.S. 984, 92 S.Ct. 447, 30 L.Ed.2d 367 (1971).

necessity,[13] defendants' burden is to prove by professionally acceptable methods that the Local 28 apprentice entrance exam is significantly related to job performance. *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 95 S.Ct. 2362, 45 L.Ed.2d 280, 43 U.S.L.W. 4880 (1975); *Griggs v. Duke Power Co.*, 401 U.S. at 431, 91 S.Ct. 849.

To sustain that burden JAC called Dr. Gottesman who testified as to three validation studies which he had performed on the JAC battery. A validation study is one made to determine if a test can with significant accuracy predict an individual's performance on the job. According to Dr. Gottesman, validity studies are of three kinds: A "construct validity" study establishes whether or not the exam determines the degree to which applicants possess characteristics important to job performance. A "content validity" study establishes whether or not the exam contents closely duplicate the actual duties to be performed on the job. Lastly, a "predictive validity" study establishes whether or not exam scores correlate with external variables considered to provide a direct measure of job performance. *See* American Psychological Association, Standards for Educational and Psychological Tests at 25-31 (1974). Of the three methods, the predictive validity study is considered best. *Bridgeport Guardians*, 482 F.2d at 1337; *United States v. Local 638, Enterprise Ass'n*, 360 F.Supp. 979, 992 (S.D.N.Y. 1973), *modified* 501 F.2d 622 (2d Cir. 1974).

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[13] In *United States v. Bethlehem Steel Corp.*, 446 F.2d 652, 662 (2d Cir. 1971) the Second Circuit adopted the following definition of the business necessity doctrine:

> When an employer or union has discriminated in the past and when its present policies renew or exaggerate discriminatory effects, those policies must yield, unless there is an overriding legitimate, non-racial business purpose.

The court then went on to state: "Necessity connotes an irresistible demand ... if the legitimate ends ... can be served by a reasonably available alternative system with less discriminatory effects, then the present policies may not be continued."

The first study performed by Dr. Gottesman fits within none of the three categories described above. At best it may be described as an "indirect validity study." It consists of no more than a comparison of the JAC battery to prevalidated aptitude tests of the same name and supposed subject matter in the United States Employment Service's General Aptitude Test Battery. Such a comparison shows nothing with respect to the JAC battery as a whole. Furthermore, it is predicated on the precarious assumption that aptitude tests with the same name are equivalent.[14] Dr. Gottesman's conclusion that the two sets of tests are "essentially identical" and therefore equally valid accordingly carries little, if any, probative force.

Dr. Gottesman's second study examined predictive validity. Although it also shows nothing with respect to the JAC battery as a whole, it indicates the separate predicative validity of each of the five tests. This study was made possible by the fact that JAC admitted to the apprentice program all of the applicants who took the April 1969 entrance examination (the April 1969 group) regardless of rank. As part of the validation study, when those in the April 1969 group were completing their four year apprenticeships they were examined as to job performance on a practical test ("hands-on") and a written test ("trade-information"). All parties agree that of the two tests, the hands-on sample, created by the apprentice program's coordinator of training, Robert Schluter, is the more direct measure of job performance. Plaintiffs, however, question the adequacy of that test as a scientific criterion of sheet metal success. *See* note 16 *infra*.

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[14] Standard F 4 of the American Psychological Association's Standards for Educational and Psychological Tests warns against making such an assumption without evidence to back it up, and rates the advice given as "essential." The EEOC Guidelines specifically rule out "assumptions of validity based on test names or descriptive labels." 29 C.F.R. § 1607.8 (1975). While the EEOC Guidelines are not binding on the courts, the Second Circuit has endorsed reliance on them "as a helpful summary of professional testing standards." *Vulcan Society v. Civil Service Comm'n*, 490 F.2d 387, 394 (2d Cir. 1973).

In comparing the apprentices' performance on the hands-on sample to their performance on each component of the JAC battery, Dr. Gottesman was able to determine the correlation between job performance and each aptitude test. He concluded that:

> unfortunately, by reason of acceleration, natural attrition and other factors, the graduating apprentice class in June, 1973, did not contain a sufficient number of either Blacks (N=8) or Spanish-surnamed Americans (N=5) to represent statistically meaningful subgroups. *Hence, no case can be made either for or against the existence of any differential validity*. That is, the data does not support or negate any contention that the test predictors operate differently for minorities than for whites.

Ex. W. at 1-2 (emphasis added). His findings, however, show little evidence of validity for *either* whites *or* minorities, and largely support the expert opinion of Dr. Katzell that the apprentice entrance exam adversely affects non-white applicants. Dr. Gottesman's findings, in brief, are that for the April 1969 group as a whole, only one of the five tests in the JAC battery, the mechanical comprehension test, was highly and significantly correlated to the "hands-on" sample. That test, moreover, was the only one in which non-whites scored as well as or better than whites. The math computations and concepts test correlated to a lesser degree, but the other three tests had no significant correlation at all. More importantly, for the non-white applicant group viewed alone, none of the five tests were significantly correlated to the hands-on sample.

Because this study produced only meagre evidence of validity, Dr. Gottesman recommended that JAC alter the apprentice entrance exam. He suggested the elimination of four out of five of the battery tests, leaving only the test on mechanical comprehension, and the addition of a basic arithmetic and a "read and follow directions" test. No action has been taken by JAC on his recommendations.

Dr. Gottesman's third validity study attempted to determine the predictive validity of the JAC battery as a whole. He compared the total weighted raw scores of applicants tested in April

1969 with their May, 1973 combined trade-information, and hands-on scores in order to determine whether a significant predictive correlation existed between the JAC battery and the criteria used to determine performance level. The correlation coefficient he found was one of .25, which Dr. Katzell later demonstrated to be marginal, i.e.: "a weak depiction of relationship between the test on the one hand [and] what you are trying to predict by means of the test on the other." (Tr. 585).

The court has been unable to follow Dr. Gottesman's calculations in arriving at the .25 figure because the data on which it is based have not been made part of the record.[15] From the data available to the court, however, it appears that this study, like the previous predictive one, is seriously incomplete in that it fails to take into consideration forty-two apprentices in the April 1969 group. Those apprentices were not tested as to job performance because they graduated early from the apprentice program. The significance of this ommission to the two validity studies premised on relative exam performance becomes apparent when one considers that approximately half of those who graduated early ranked in the *bottom* half of entrance exam scores. Thus they are evidence that persons who score poorly on the test battery can perform successfully as apprentices and journeymen. All of these apprentices readily could have been made available by the defendants for testing; as they had all been inducted, upon graduation, into membership in Local 28.[16]

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[15] As plaintiffs note in their Post-Trial Memorandum:

> Appendix A of Exhibit W contains raw scores of ... apprentices identified only by number. Plaintiffs were unable to do the same calculations as are contained in Dr. Gottesman's testimony because they had no way of correlating the raw scores of people identified only by numbers with the *percentile scores of named individuals (with different identification numbers) which had previously been produced (P. Exh. 59, Appendices 208).*

[16] These last two validity studies are also suspect in that they rely upon a hands-on test as a measure of job performance, yet that test itself was prepared, contrary to the EEOC Guidelines, without benefit of a professional job analysis.

[6] In summary, then, the testimony produced by defendants as to the job-relatedness of the apprentice entrance exam is spotty and largely equivocal. Their validation studies have failed to demonstrate that the JAC battery as a whole is significantly job-related, or indeed, that any of its component parts other than the section on mechanical comprehension is capable of identifying and testing for characteristics necessary to adequate sheet metal performance. Defendants, therefore, have failed to sustain their burden of proving "that the disproportionate impact was simply the result of a proper test demonstrating less ability of blacks and Hispanics to perform the job satisfactorily." *Vulcan Society v. Civil Service Comm'n*, 490 F.2d 387, 392 (2d Cir.1973). Further use of the JAC battery will therefore be enjoined.

B. The Requirement of a High School or Equivalency Diploma

Until institution of the Corrected Fifth Draft, applicants were not excluded from the apprentice program for failure to attain a minimum educational level. Indeed, it is unclear to the court even after three weeks of trial testimony and the filing of post-trial memoranda, why the new requirement of a high school diploma was added other than to upgrade in general the median educational achievement level of Local 28. Neither JAC nor Local 28 produced evidence of a relationship between success as a sheet metal apprentice and *completion* of high school.

[7] Plaintiffs' witness, Mrs. Roxee Joly, a high school superintendent and a former mathematics teacher in the New York City school system, reviewed on the witness stand most of the math examinations used in the apprentice program. She described the areas of skill tested in those exams as: decimals, fractions, trigonometry, basic arithmetic, basic arithmetic as

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29 C.F.R. § 1607.5(b)(3) (1975). *See Vulcan Society v. Civil Service Comm'n*, 490 F.2d 387, at 394 n. 8. As the district court in *Chance v. Board of Examiners* noted, the evaluation of a test's validity "depends upon the reliability and fairness of the field appraisal of performance on the job." 330 F.Supp. 203, 216 (S.D.N.Y. 1971), *aff'd*, 458 F.2d 1167 (2d Cir. 1972).

to linear measurements, solid geometry and elementry algebra. She noted that students of average academic achievement in the New York City school system are taught those skills in grades four through nine, and defendants in no way rebutted her testimony. They merely emphasized on cross-examination what is a matter of common knowledge—that some students have difficulty learning those skills and must continue to study them in later grades, and that some students never learn them at all. Apprentice program coordinator Robert Schluter furthermore testified that at least in so far as trigometry is concerned, apprentices are not expected to enter the program with training in it; they are taught all the trigonometry needed to perform as sheet metal workers during their course of study. Thus, although the evidence indicates that knowledge of certain mathematical concepts is essential to adequate performance as an apprentice on written and practical examinations, defendants failed to demonstrate any nexus between that knowledge and a high school diploma.

[8] It is a fact of which the court takes judicial notice that non-white persons obtain high school diplomas at a lower rate than do whites. Publications of the Bureau of the Census, for example, show that the median schooling possessed by all males, age 25 or older, in the New York City Standard Metropolitan Statistical Area is 12.1 years, while that possessed by Black males of the same age group and residence is 10.9 years, and that of Puerto Rican males of the same age group and residence, 8.3 years. 1970 Census of Population General Social and Economic Characteristics, New York, Tables 83, 91, 97. According to the EEOC Guidelines, a specific educational requirement such as a high school diploma is a "test" which must be validated like any other if it adversely affects persons protected by Title VII of the 1964 Civil Rights Act. 29 C.F.R. §§ 1607.2, 1607.3. While the Guidelines are not binding on the courts, they are entitled to great deference. *Griggs v. Duke Power Co.*, 401 U.S. at 434, 91 S.Ct. 849.

In view of the fact that high school diplomas have never been required as a condition of attaining journeyman status in the

union and that they have only recently been required for entry to the apprentice program, defendants' failure to produce any evidence tending to validate that requirement becomes all the more significant.

> History is filled with with examples of men and women who rendered highly effective performance without the conventional badges of accomplishment in terms of certificates, diplomas, or degrees. Diplomas and tests are useful servants, but Congress has mandated the common sense proposition that they are not to become masters of reality.

Griggs v. Duke Power Co., 401 U.S. at 433, 91 S.Ct. at 854. This is not to say that no minimum level of education could or should be required as job-related in the sheet metal industry.[17] Defendants, however, have simply not produced convincing evidence that for Local 28's apprentice program the line should be drawn at twelve years. *Cf. United States v. Sheet Metal Workers, Local No. 10*, 6 E.P.D. ¶ 8715 (D.N.J.1973). Further requirement of a high school or equivalency diploma for entrance to the Local 28 apprentice program will therefore be enjoined.

C. The Application Form — Inquiry as to Arrest Record

Two types of application forms have been used by JAC for the apprentice program since 1965. Both contain a section which reads as follows:

> POLICE RECORD: List below, giving all detailed information, any police record that you have. List each arrest.

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[17] If the need for mathematical skills to adequately perform as an apprentice, however, is the only concern, it would seem that such skills could be better evaluated through a contemporary test of mathematical ability than by inference of that ability drawn from completion of a given educational level. *Cf. Dobbins v. Local 212, Electrical Workers*, 292 F.Supp. 413, 453 (S.D. Ohio 1968).

It is not necessary to list minor traffic violations. This information must be accurate and complete. Any information which is withheld will be cause for immediate dismissal from the Apprentice Program. If none, say "none."

Name and Address of Police Station or Court	Date	Offense	Outcome

It is evident that this section is intended to encompass both convictions and arrests. Plaintiffs object, however, only to the inquiry about arrests. Although they introduced evidence of five instances since 1965 in which JAC rejected applicants because of information contained in the Police Record section of their applications, the evidence is more remarkable for its paucity than for its probative weight; it is apparently unknown whether those five applicants were rejected because of conviction records or because of arrest records.

[9] Plaintiffs also introduced into evidence two tables from *Crime in the United States, Uniform Crime Report 1973* issued by Clarence M. Kelly as Director of the FBI, which indicate that non-whites are arrested both nation-wide and city-wide proportionately more often than whites. From this they argue that the presence of the Police Record section on the application form adversely affects non-whites, and therefore imposes a burden on the defendants to validate the arrest inquiry as job-related. The burden, however, cannot be shifted quite so easily; plaintiffs have not established a *prima facie* case that JAC has a policy of rejecting applicants who have suffered arrest without conviction, or even that JAC has rejected such applicants in the past. *Cf. Gregory v. Litton Systems, Inc.*, 316 F.Supp. 401, 402 (C.D.Cal. 1970); *aff'd* in relevant part, 472 F.2d 631 (9th Cir. 1972). On the evidence presented, therefore, this court cannot determine that the apprentice program application form discriminates in practice against non-whites. *Accord. Green v. Missouri Pacific R. R. Co.*, 381 F. Supp. 992, 996 (E.D.Mo.1974).

DISCRIMINATION IN DIRECT ADMISSION TO LOCAL 28

Non-whites presently are, as they have been in the past, conspicuously absent from Local 28. Although qualified non-white sheet metal workers exist in large percentages in other construction locals within the New York metropolitan area, in particular Local Union 400 (Blowpipe Division) of the Sheetmetal Workers International Association, their rate of pay is substantially lower than that received by the Local 28 membership.[18] Defendants would explain this grouping of non-whites in the lower-paying union by arguing that the work performed by Local 28 is more complex and therefore requires a more skilled and adroit membership.

Plaintiffs, however, presented convincing evidence at trial, from members and contractors of both locals, that the skills and tools required to perform Local 400 work are largely the same as those required of Local 28 jobs. Although the trade jurisdication of the two unions are separate and discreet,[19] they overlap

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[18] Louis Commarato, president of Local 400, testified that in 1965-1966, members of his union earned approximately $2.25 an hour compared with Local 28's $5 an hour. As of July 1974, Local 400 men earn $7.10 per hour while members of Local 28 receive $12.05 per hour. Similarly, members of Local 295 of the Operating Engineers, who also perform sheet metal work, receive $4.60 per hour.

[19] The trade jurisdiction of Local 400 encompasses:

"Spray booth systems, including blowers, tanks (duct work incidental to the system if 75 ft. or under), if over 75 ft., all duct work incidental to the system will be subcontracted to a sheet metal shop in agreement with Sheet Metal Workers' International Association local having jurisdiction in the area in which the work is being done.

"Ovens and drying systems, including the manufacture of ovens, heaters, panels, etc., (and the duct work incidental to the system if 75 ft. or under), will be subcontracted to a sheet metal shop in agreement with the Sheet Metal Workers' International Association local having jurisdiction in the area in

to a significant degree. It is not unusual, for example, for members of Local 28 to perform blowpipe work.[20] Likewise, members of Local 400 are authorized by their collective bargaining agreement to perform up to 75 feet of the square duct work usually considered within Local 28's jurisdiction.

The Local 400 apprentice program, furthermore, is modeled after that of Local 28. Testimony of Thomas Carlough, a member of Local 28 who instituted and now coordinates Local 400's course of apprentice training, indicates that students in both programs are taught the same sheet metal skills. Thus, although a Local 28 member might be more adept at square

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which the work is being done. "Dust collecting systems, including the exhausts, blowers, fans, round pipe and cyclones.

"Conveyor systems; except no slide chutes or hoppers to be installed except at Building Trades rates by a sheet metal shop in agreement with a Building Trades local of the Sheet Metal Workers' International Association.

"Smoke houses.

"Plating and degreasing tanks, including the exhaust systems and round pipe work.

"Smoke stacks; breechings only when done as an accommodation while doing an installation covered in this Schedule in an existing plant.

"Retail bakery work where the duct work does not exceed 75 ft. on the exterior of the building—if over 75 ft. all duct work incidental to the system will be sub-contracted out to a sheet metal shop in agreement with the Sheet Metal Workers' International Association local having jurisdiction in the area in which the work is being done.

"Furnish and install makeup air systems in industrial plants."

[20] Blowpipe work entails the creation of ducts to be used for removal of fumes, dust or indeed particles of any substance that be conveyed by air. It usually involves fabrication and/or installation of round duct work. Local 28's sheet metal work, on the other hand, usually involves fabrication and installation of rectangular or square ducts. Blowpipe work tends to involve prefabricated or standard elbows, joints and forms whereas rectangular ducts for heating and air conditioning units must more frequently be custom made.

duct work, or faster because of his daily familiarity with it, members of Local 400 are certainly equipped to, and can, perform the same work.[21] The fact that Local 28 has initiated numerous complaints against Local 400 for infringement of its trade jurisdiction only corroborates this conclusion.

[10] Why, then, is it that non-white sheet metal workers are not evenly distributed throughout the industry? Plaintiffs have argued, and the court finds that Local 28 has denied qualified non-whites direct access to membership in the union while granting such access to white persons by: (a) failing to administer yearly journeyman tests, and using as journeyman tests examinations not validated by EEOC Guidelines; (b) selectively organizing non-union sheet metal shops with few, if any, non-white employees, and/or admitting from those shops only white employees; and (c) accepting as transfer members whites from affiliated sister locals while refusing transfers of non-whites.

A. The Journeyman Tests

It is a matter of common knowledge that at least between 1967 and 1972 the urban areas of the United States experienced a construction boom. Yet since 1959, Local 28 has administered only two journeyman examinations. Both of these exams came about as a result of arbitration proceedings brought by the Contractors' Association to force the union to increase its manpower. In 1968 when ordered by Arbitrator Theodore Kheel to admit 100 new journeymen, Local 28 designed and administered a journeyman test which, admittedly, has never been validated in accordance with EEOC Guidelines. Of 330 individuals tested on the first, written portion of the exam, only thirty-four passed, and were allowed to proceed to the practical portion. Ten failed the practical portion, with the result

[21] The only skill found within Local 28 which is not shared by Local 400 is that of drafting. Not all members of Local 28 are drafters, however; drafting is considered the highest specialty in the union, and requires extra training over and above that acquired in the apprentice program.

that twenty-four journeymen, all white, were admitted to the union. The above statistics would seem to indicate that the test served more as an obstacle to, than a vehicle for, the admission of new journeymen. Indeed, one of the candidates for admission, then a fourth-year apprentice in Local 400, testified that "the test was pretty far out. In other words, you had to have more or less a college degree to really do anything on that test." (Tr. 1543).

[11] Although Local 28 may have only intended to limit the number of new journeymen (white *or* non-white) admitted by way of the 1968 exam, the effect of that exam was to exclude non-whites. Robert Schluter, chairman of the local's examining board, testified that by visual observation 15% of those taking the exam were Black; he could not estimate the number of Hispanics. Even assuming that no Hispanics were tested, the exam clearly had an adverse impact on non-whites, and as such, without validation, was violative of Title VII. *See Griggs v. Duke Power Co.*, 401 U.S. at 430, 91 S.Ct. 849.

In 1969, following another arbitration order, Local 28 administered a second journeyman test. According to Chairman Schluter the exam had been restructured since 1968 so as to eliminate questions involving mathematical concepts unrelated to sheet metal work, and replace them with questions of "shop math." As a result, 14 non-whites and 61 whites successfully passed the journeyman test and were admitted to the union. Because of Local 28's failure to keep records as to the numbers of whites and non-whites tested it is not possible to determine whether this exam also had an adverse impact on non-whites. In 1969 as in 1968 the exam had been advertised by sending a letter of notice to the New York State Employment Service, the Veterans Administration, the New York State and New York City Human Rights Offices, the Workers Defense League, members of Local 28, and Local 28 contractors. Application forms were not sent, however, as Local 28 required that these be obtained and filled out in person at union headquarters.

In 1970 Local 28 refused to administer another journeyman test. Instead, in response to pleas by the Contractors Association

for more manpower, Local 28 recalled pensioners who on doctors' certificates were able to work, and issued hundreds of ID slips to members of affiliated locals and allied construction trades. Between July 1, 1969 and July 1, 1972, Local 28 issued the following numbers of ID slips:

7/1/69	150-200
1/1/70	200-250
7/1/70	200-250
1/1/71	250-300
7/1/71	400-450
1/1/72	400-450

Only one of those receiving ID slips has been identified as nonwhite. In addition, despite the fact that Local 28 saw fit to request ID men from sister locals all across the country, as well as from allied New York construction unions such as plumbers, carpenters and iron-workers, it never once sought them from Sheet Metal Local 400.[22] Furthermore, in 1969 when a group of apprentices and journeymen from Local 400 went to Local 28's offices to request ID cards, they were informed by Union President Mell Farrell that the union was not giving out ID slips.

[12] By using the ID slip system of temporary manpower rather than continuing to administer journeyman tests, Local 28 restricted the size of its membership and thereby enabled its membership to earn substantial payment for overtime work. This had the illegal effect, if not the intention, of denying nonwhites access to employment opportunities in the industry. *Cf. United States v. Local 638, Enterprise Ass'n*, 347 F.Supp. at 181; *accord United States v. Local No. 357, et al.*, 356 F. Supp. 104, 116 (D.Neb.1973). Union President Farrell in 1971 at a

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[22] Local 28's asserted reason for not contacting Local 400 was its "knowledge" that members of the 400 Blowpipe Division were enjoying full employment. Yet Thomas Carlough, coordinator of the Local 400 apprentice program and himself a member of Local 28, testified that in 1970 the bankruptcy of a major blowpipe shop left many 400 sheet metal workers without jobs.

Joint Adjustment Board grievance proceeding initiated by the Contractors Association justified the refusal to enlarge union membership by remarking that "overtime is expected in the Construction Industry" (Ex. 111 at 2). Self-serving expectations, however, do not constitute business necessity within the meaning of Title VII. *Cf. United States v. Local 638, Enterprises Ass'n*, 501 U.S. at 633.

B. Organization of Non-Union Shops

Prior to 1973 no non-white ever became a member of Local 28 through the organization of a non-union shop. The explanation for this proffered by the union is that they have never been aware of any non-union sheet metal shops owned by or employing non-whites. Such an assertion, aside from testing the credulity of the court, is clearly contradicted by the testimony of record. For example, Edward Carlough, former president of Local 28, testified by deposition that he had been aware of non-union shops employing non-white sheet metal workers as early as the 1940s. In addition, Rupert Jonas, a Black sheet metal worker in Local 295 of the Operating Engineers, testified that in 1971 Local 28 organized the Integrity Air Conditioning shop in which he worked with ten other non-whites.

Since 1973 non-whites have only gained membership in Local 28 through organization of shops because the parties to this litigation during settlement negotiations entered into an agreement whereby the union was to embark on an organizing campaign. Pursuant to that agreement Local 28 organized six shops in 1973 and 1974, and thereby admitted three non-whites to membership.

A large percentage of the shops with non-white workers which Local 28 had the opportunity but chose not to organize were blowpipe companies. In the late 1950's and early 1960's the Sheet Metal Workers' International Association urged Local 28 to organize the blowpipe industry in the metropolitan region. The industry at that time consisted of approximately 265-365

workers, 60 to 75% of whom were non-whites. Local 28 refused to organize them despite insistent pressure from the International Association as well as from the Contractor's Association.[23] Its official reason was that the blowpipe contractors could not meet Local 28's pay scale, and the union could not under its collective bargaining agreement accept a wage differential for its members.[24] The unofficial reason, however, appears to be that Local 28 did not wish to admit as members the non-white blowpipe workers.

[3] Seymour Zwerling, the principal of several contracting companies in signed agreement with Local 28, testified that it was a matter of "common knowledge in the industry" that the union did not want to organize the blowpipe workers because many of them were minorities. (Tr. 1145). Indeed, there appears to be no other reason for the union's refusal. In organizing an entire industry it would not have been able, as with individual shops, to admit only white workers and exclude non-white employees. In any case, whatever the reason, the effect of Local 28's refusal was the denial to non-whites of employment opportunities granted whites. "Congress directed the thrust of the [Civil Rights] Act to the consequences of employment practices, not simply the motivation." *Griggs v. Duke Power Co.*, 401 U.S. at 432, 91 S.Ct at 854. As a result of the union's refusal the International Association organized blowpipe workers on its own, forming them into a special building trades division of Local 400.

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[23] The Contractors' Association wanted the blowpipe workers organized so as to have access to greater manpower, and so as to eliminate competition from the blowpipe contractors. (Tr. 1127).

[24] A dual wage scale, however, had for many years already existed within the union. Edward O'Reilly, Recording Secretary of Local 28, admitted that the Kalamein Workers (those union members specializing is applying sheet metal linings to doors) receive a lower rate of pay than other members of the local union. (Tr. 225).

C. Transfers

Section 9(k) of Article 16 of the Sheet Metal Workers' International Association Constitution and Ritual provides:

> Any member who has established a record of continuous good standing of five (5) years or more to and including date of issuance of transfer card *shall be admitted* by transfer card into any local union of this Association in accordance with the requirements of this Constitution, and without payment of any difference in initiation fee.

(emphasis added). Such a provision has existed in the Constitution since at least 1946. During the period from 1967 through 1972, Local 28 accepted fifty-seven transfers from sister locals. All of those accepted were white. Indeed, between May 1940 and February 1973, Local 28 accepted 153 transfers, all of whom were white. Only after commencement of this litigation did the union, in 1973, accept its first non-white transfers, two journeymen from Local 400.

The homogeneity of the transfer group, however, is not the only evidence of Local 28's purposeful discrimination against non-whites. Henry Woods, a Black member of Local 28 who gained admission to the union through the 1969 journeyman test, stated at trial that he and several other blowpipe workers from Local 400 inquired about transfer of Local 28 President Farrell. Farrell told them that transfer was impossible since they were not members of a building trades union like 28. (Tr. 1641.) Given his familiarity with the organization of the blowpipe industry, Farrell indubitably knew that his statement was false. Furthermore, only nine months previously, four white blowpipe workers from Local 400 had been allowed to transfer into Local 28.

At trial present union officials testified that they had no records of, and could recall no non-whites ever requesting transfer into Local 28. However, traditionally all requests for transfer are formally made in person before the union's Executive Board. Non-whites who were discouraged when they

inquired informally as to transfer, were simply never given the opportunity to appear before the Board. Even had they been permitted to do so, however, Local 28 policy would have prevented their transfer. Union Recording Secretary Edward O'Reilly testified that for at least the past ten years, Local 28 has refused to accept transfers of all but former members, a policy in direct contravention of the International Association Constitution and Ritual.

[14] This "members only" policy went into effect in the early 1960's when Local 28 was almost exclusively all white. It therefore effectively foreclosed transfer into Local 28 by non-whites. Although the International Association has on an occasional appeal overruled Local 28 and ordered it to accept a qualified transfer worker, this has never resulted in the admission of a non-white journeyman. The existence of an appeal procedure clearly cannot be viewed as justifying or in any way ameliorating the union's practice of denying to qualified non-whites the equal access to employment opportunities guaranteed them by the Civil Rights Act.

CONCLUSIONS

1. Local 28 is a union and labor organization within the meaning of § 701(d). Title VII of the 1964 Civil Rights Act and § B1-2.0, subd. 3, Title B of the New York City Administrative Code, and is engaged in an industry affecting commerce.

2. JAC is a joint labor-management apprenticeship committee within the meaning of § 701(d), Title VII of the 1964 Civil Rights Act and § B1-7.-0(1)(a), Title B of the New York City Administrative Code, and is engaged in an industry affecting commerce.

3. Prior to the effective dates of Title VII and Title B, and continuing to the present, Local 28 has maintained clearly discernable discriminatory practices in recruitment, selection, training and admission to membership of non-white workers. As a result of this history of discrimination Local 28 has had a well-deserved reputation in non-white communities of

discriminating in recruitment, selection training and admission. This reputation operated and still operates to discourage non-whites from seeking membership in the local union or its apprentice program, in violation of Title VII and Title B.

4. Prior to the effective dates of Title VII and Title B, JAC and Local 28 maintained standards and practices in selection of apprentices for admission to the Local 28 apprentice program which discriminated against non-whites. JAC and Local 28 have a clearly deserved reputation in non-white communities of discriminating in the administration of the Local 28 apprentice program. This reputation operated and still operates to discourage non-whites from seeking to enter the apprentice program in violation of Title VII and Title B.

5. Subsequent to the effective dates of Title VII and Title B, JAC and Local 28 adopted selection procedures and standards for admission to the Local 28 apprentice program, some of which are not demonstrably job-related. They operate individually and in combination to prevent non-whites from ejoying equal access to the program in violation of Title VII and Title B.

6. Local 28 and JAC, by virtue of the above-described discriminatory practices, have illegally denied non-whites access to lucrative employment opportunities in the sheet metal industry equal to that enjoyed by whites, and have thereby maintained Local 28 as a white "A" local to the Blowpipe Division's racially mixed "B" local.

7. In order to remedy the effects of the above-described discrimination, Local 28 and JAC have been, and are under an obligation to take affirmative action to recruit, select, train, admit to the apprentice program and admit to membership in the local union substantial numbers of non-whites.

RELIEF

[15] In determining what relief could most appropriately remedy the ongoing effects of defendants' discrimination, it is

a relevant inquiry whether each defendant has "voluntarily 'cleaned house' or taken any meaningful steps to eradicate the effects of its past discrimination." *Rios v. Enterprise Ass'n*, 501 F.2d 622, 631-632 (2d Cir. 1974). The record in both state and federal court against these defendants is replete with instances of their bad faith attempts to prevent or delay affirmative action. After Justice Markowitz ordered implementation of the Corrected Fifth Draft, with the intent and hope that it would create "a truly nondiscriminatory union."[25] Local 28 flouted the court's mandate by expending union funds to subsidize special training sessions designed to give union members' friends and relatives a competitive edge in taking the JAC battery. JAC obtained an exemption from state affirmative action regulations directed towards the administration of apprenticeship programs on the ground that its program was operating pursuant to court order; yet Justice Markowitz had specifically provided that all such subsequent regulations, to the extent not inconsistent with his order, were to be incorporated therein and applied to JAC's program. More recently, the defendants unilaterally suspended court-ordered time tables for admission of forty non-whites to the apprentice program pending trial of this action, only completing the admission process under threat of contempt citations.

[16] "Once a violation of Title VII is established the district court possesses broad power as a court of equity to remedy the vestiges of past discriminatory practices." *Rios v. Enterprise Ass'n*, 501 F.2d at 629. In light of Local 28's and JAC's failure to "clean house" this court concludes that the imposition of a remedial racial goal in conjunction with an admission preference in favor of non-whites is essential to place the defendants in a position of compliance with the 1964 Civil Rights Act. The use of such measures to compel compliance with the letter and spirit of civil rights legislation is well-recognized. *See Patterson v. Newspaper and Mail Deliverers' Union*, 514 F.2d 767, 2d Cir. 1975; *Rios v. Enterprise Ass'n, supra* and cases cited at 629; *United States v. Wood Wire & Metal Lathers International, supra.*

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[25] *State Commission on Human Rights v. Farrell*, 43 Misc.2d at 969, 252 N.Y.S.2d 649.

The purpose of setting a remedial goal is to place eligible non-whites in the position they would have enjoyed had there been no discrimination. To do so here the court must determine what percentage of union and apprentice program members would today be non-white had the defendants not engaged in discriminatory practices. The best available measure of that percentage is the percentage of non-whites in the relevant labor force existing today within New York City. Although there is some danger inherent in assuming the equivalence of these percentages, the court does so in an effort to "do the best it can" with the information available to it. *Rios v. Enterprise Ass'n*, 501 F.2d at 632.

The relevant labor force in this case consists of an aggregate of three groups: males, eighteen years of age and older[26] with zero to eight years of education, males eighteen years of age and older with nine to twelve years of education, and males eighteen years of age and older with more than twelve years of education.[27] Since the only available labor force statistics come from the 1970 Census conducted by the Department of Commerce the court, to be as accurate as possible, should look to males who at the time of the census were thirteen years or older (*i. e.:* now eighteen years of age or older). Unfortunately, census figures speak of males sixteen years and older rather than males eighteen years and older. Thus to the extent that thirteen, fourteen and fifteen-year old males are excluded from our calculations, the total labor force figure arrived at is low.

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[26] The age requirements for admission to the Local 28 apprentice program were not challenged by plaintiffs.

[27] The three educational divisions were made in an attempt to replicate the educational mix which census figures show to exist among sheet metal workers nationwide. Those figures show that 23.98% of sheet metal workers nationwide have completed zero to eight years of education, 67.79% have completed nine to twelve years of education, and 8.22% have completed more than twelve years of education. *See* 1970 Census of Population, Subject Reports, Occupational Characteristics, PC(2)-7A. Table 5.

The census figures, furthermore, while they reflect relevant data on total population, Black population, Spanish language population and Puerto Rican population, fail to isolate a Spanish *surnamed* group. The court therefore has used census statistics on Spanish language persons.[28] For these reasons, and others of similar nature, absolute precision in the calculation of a percentage goal is impossible. However, using figures provided by the Bureau of the Census to the best advantage, and adjusting for the fact that a percentage of Spanish language males are Black,[29] the court has determined that approximately 29% of the relevant labor force in New York City is non-white. *See* Appendix for an explanation of the court's method of determining percentage goal.

[17, 18] The court accordingly orders that by July 1, 1981, the combined union and apprentice program membership achieve a non-white percentage of 29%.[30] The recruitment, testing and admission procedure for arriving at that goal is to be agreed upon and developed by the parties, under the

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[28] *Spanish language persons* are defined by the Bureau of the Census as those individuals "of Spanish mother tongue and all other persons in families in which the head or wife reported Spanish as his or her mother tongue." *Mother tongue* is defined as the language spoken in the person's home when he or she was a child, *1970 Census of Population, General Social and Economic Characteristics*, PC(1)-C34 (hereinafter "General Social and Economic Characteristics") Appendix B. at 7.

[29] Approximately 11.6% of males of Spanish origin are Black. *Rios v. Enterprise Ass'n.* 400 F.Supp. 983 S.D.N.Y.1975. Persons of Spanish origin are those who indicated to the census takers that they were of Mexican, Puerto Rican, Cuban, Central or South American, or "Other Spanish" descent. General Social and Economic Characteristics. Appendix B. at 7. 34. The parties have provided the court with the separate figures as to the percentage of Spanish language males who are Black. The Court has consequently assumed the percentage to be the same as that for males of Spanish origin.

[30] The court has chosen a six year period for implementation of the 29% goal after full consideration of the depressed economic condition of the construction industry, and in the firm belief that a gradual but steady influx of non-whites will produce the most stable membership.

guidance of a court-appointed administrator, within the next two months. The court specifically requires, however, that the following be included as part of such procedure:

> —The union is to administer a non-discriminatory hands-on journeyman's test, professionally developed and validated in accordance with EEOC Guidelines, at least once a year; the first such test is to be given in or before September 1975.
>
> —JAC is to administer a yearly apprentice entrance exam consisting solely of the mechanical comprehension aptitude test validated by Dr. Gottesman and a "read and follow directions" test to be developed professionally and validated in accordance with EEOC Guidelines; the first such test is to be given in or before December 1975.
>
> —The union is to replace one of its present JAC trustees with a non-white.
>
> —Both Local 28 and JAC, in conjunction with the Administrator, are to develop recruitment practices specifically designed to dispel their reputation for discrimination in non-white communities and to guard against the recurrence of such reputation.[31]
>
> —Both Local 28 and JAC are to maintain separate lists of whites and non-whites who (a) apply to take the apprentice entrance exam and/or the journeyman's test; (b) take the apprentice entrance exam and/or journeyman's test: (c) pass the apprentice entrance exam and/or

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[31] In *Gresham v. Chambers*, 501 F.2d 687, 691 (2d Cir. 1974) the Court of Appeals noted:

> Where a pattern of past discrimination appears, recruitment procedures that might otherwise be classified as neutral will no longer be accepted as non-discrimination. Additional methods must then be devised to compensate for the effects of past discriminatory practices and to guard against their perpetuation or recurrence.

> journeyman's test; (d) seek to transfer into Local 28 from a sister local; and (e) inquire about the possibility of transferring into Local 28.

The administrator named by the court is also requested to develop with the parties a plan aimed at protecting non-whites admitted into union and apprentice membership from bearing a disporportionate burden of the unemployment caused by current depressed conditions in the construction industry.

In light of the recent Supreme Court decision in *Albemarle Paper Co. v. Moody, supra,* this court is constrained to determine whether an award of back pay here pursuant to 42 U.S.C. § 2000e-5(g) is necessary and appropriate. In *Albemarle* the Court held that "given a finding of unlawful discrimination, backpay should be denied only for reasons which, if applied generally, would not frustrate the central statutory purposes of . . . [Title VII] . . . ." Those purposes are "to achieve equality of employment opportunities and remove barriers that have operated in the past to favor an identifiable group of . . . [whites] . . ." over others, *Griggs v. Duke Power Co.*, 401 U.S. at 429-30, 91 *S.Ct.* at 853, and to make whole those persons who suffered injury on account of such unlawful discrimination. As the Court noted in *Albemarle Paper Co., supra* 422 U.S. at 417, 95 S.Ct. at 2371, backpay has an obvious connection with these purposes:

> It is the reasonably certain prospect of a backpay award that "provide[s] the spur or catalyst which causes employers and unions to self-examine and to self-evaluate their employment practices . . .".

[19, 20] Plaintiffs in this case did not specifically request backpay in their complaints, and did not during trial attempt to define proposed classes of persons entitled thereto. However, they did include in their proposed post-trial findings the following paragraph:

> As a result of the above-described discrimination, non-whites have suffered financial loss and are, therefore entitled to receive backpay in amounts to be determined subsequent to the trial of this action.

The tardiness with which plaintiffs assert their demand for backpay does not preclude the court from awarding it where entitled, Rule 54(c) Fed.R.Civ.P. and in this case, does not prejudice the defendants, who have long been on notice of the discriminatory practices which are alleged as the basis for backpay relief. The difficulty with plaintiffs' proposal, however, is that no complete records exist of persons who would be entitled under it to an award of backpay. Although the court hesitates to limit relief on this ground, thus in effect rewarding defendants for their failure to keep adequate records as required by the EEOC Guidelines, the alternative is clearly unacceptable. Any award of damages to those for whom records do not exist would at best be hypothetical. The court therefore concludes that backpay should be awarded by Local 28[32] only to non-white persons

> a) for whom there exist records of application for direct entry into the union, either through the journeyman's exam or through transfer procedures;
>
> b)who demonstrate before the administrator, in light of this court's conclusions of law on the merits, that they were discriminatorily excluded from union membership;[33] and
>
> c) who show monetary damages suffered as a result thereof.

This class of persons is undoubtedly small. There is no risk, therefore, that it will inequitably drain the financial resources of the non-profit defendant association.

[21] Damages suffered by persons denied entrance to the apprentice program and by blowpipe workers organized as part of Local 400 rather than as part of Local 28, are too highly

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[32] As JAC has no role in granting or denying *direct* admission to Local 28 it will not be held liable for backpay.

[33] This of course includes a showing that claimant is qualified for admission in accordance with Local 28's entrance requirements as modified by this *decision*.

speculative to merit backpay awards in this case. Likewise the award of damages to that class of non-whites who would have applied for direct admission to membership had Local 28's reputation for discrimination been less pervasive will also be denied as unascertainable.

[22, 23] Those non-whites who are entitled to backpay awards must file a claim with the administrator on or before January 15, 1976. They may recover proven damages from the date the discrimination occurred[34] to the date of filing of this decision on the merits, or to the date of union admission, whichever is earlier. Damages shall be computed on the basis of the average monthly wage earned in each calendar year by members of Local 28, and shall of course be adjusted to reflect other employment income or public assistance received by claimants. *See* 42 U.S.C. § 2000e-5(g); Memorandum Decision of Judge Bonsal, *Rios v. Enterprise Ass'n*, 400 F.Supp. 988, S.D.N.Y., June 27, 1975. Payment is to be made after determination by the administrator of all claims, and their discretionary review, if necessary, by this court.

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[34] Discrimination for purposes of backpay computations will be deemed to have occurred on the date on which the next applicant for admission who does not qualify as a non-white, as defined for purposes of this case, is admitted to the union. *See Rios v. Enterprise Ass'n*, 400 F.Supp. 988 S.D.N.Y. 1975 memorandum decision of Judge Bonsal.

Title VII specifically provides that "back pay liability shall not accrue from a date more than two years prior to the filing of a charge with Commission." 42 U.S.C. § 2000e-5(g). No such time limitation is imposed here, however, because unlike the *Rios* class action case, this action was not initiated by the filing of a charge with the EEOC. Rather, it was begun by the Attorney General in accordance with the procedures outlined in 42 U.S.C. §2000e-6(a).

Ruling that accrual not extend more than two years prior to the filing of the Attorney General's complaint would appear a logical analogy under the circumstances. However, in formulating the accrual limitation quoted above, the United States Senate specifically rejected a provision that would have limited backpay liability to a date two years before institution of judicial proceedings. *Albemarle Paper Co., supra* 422 U.S. at 420, n. 13, 95 S.Ct. 2362. In light of this legislative history, and the small number of persons entitled to backpay in this case, the court choses not to limit accrual of Local 28's liability.

The foregoing constitute the court's findings of fact and conclusions of law. The parties and the administrator are ordered to submit an agreed upon recruitment, testing and admission procedure within 60 days of the filing of this decision. The court will maintain continuing jurisdiction over the parties to this action for purposes of ensuring implementation of appropriate relief.

So ordered.

APPENDIX

The Court's Method of Calculating Percentage Goal[a]

1. Total number of Spanish language males 18 and over:

To find this total the court determined the ratio of the number of Spanish language males in the population to the number of Puerto Rican males in the population, and then multiplied the number of Puerto Rican males 18 and over by that ratio.

$$\text{Number of P.R.}^{b}\ \text{Males 18 and over} \times \frac{\text{Number of Spanish language}^{c}\ \text{Males in the Population}}{\text{Number of P.R. Males in the}^{d}\ \text{Population}} = \text{Total Number of Spanish Language Males 18 and Over}$$

[a] The formula used in this appendix is substantially the same as that employed by Honorable Dudly B. Bonsal in *Rios v. Enterprise Ass'n, supra*, 400 F.Supp. 988. "Important national goals would be frustrated by a regime of discretion that 'produce[d] different results for breaches of duty in situations that cannot be differentiated in policy.' " *Albemarle Paper Co. v. Moody*, 422 U.S. at 417, 95 S.Ct. at 2371.

[b] Taken from Table 131, *General Social and Economic Characteristics* at 663.

[c] Census data speaks only of Spanish language *population*. *See* Table 119, General Social and Economic Characteristics at 607. The court assumes, however, that the percentage of males among that population is equivalent to the percentage of males among the Puerto Rican population, i.e.: 47.5%. *See* Table 129, *General Social and Economic Characteristics* at 659.

[d] Taken from Table 129, *supra*.

2. Adjusted number of Spanish language males 18 and over:

The court then multiplied this figure by (1 minus .116)[e] or .884 in order to avoid counting Blacks as Spanish language males.

$$\left[\text{Number of P.R. Males 18 and over} \times \frac{\text{Number of Spanish language Males in the Population}}{\text{Number of P.R. Males in the Population}}\right] \times .884 = \text{Adjusted Number of Spanish Language Males 18 and over}$$

3. Total number of non-white males 18 and over:

Lastly, the court added the number of Black males 18 and over to arrive at the total for non-white males 18 and over. (T)

$$\text{Number of Black Males 18 and over} + \left[\text{Number of P.R. Males 18 and over} \times \frac{\text{Number of Spanish Language Males in the Population}}{\text{Number of P.R. Males in the Population}} \times .884\right] = T$$

[e] *See* note 29 *supra*.

4. Total number of non-white males 18 and over in each educational category:

For reasons explained in the opinion, *supra* at note 27, the court sought to identify:

(a) the total number of non-whites 18 and over who have completed zero to eight years of education,

(b) the total number of non-whites 18 and over who have completed nine to twelve years of education; and

(c) the total number of non-whites 18 and over who have completed more than twelve years of education.

The court therefore conducted three series of calculations using the formula for T as adjusted to reflect education (T(a), T(b) and T(c)).

$$\text{Number of Black}^{f} \text{ Males 18 and over with ( ) education} + \left[\text{Number of P.R.}^{g} \text{ Males 18 and over with ( ) education} \times \frac{\text{Number of Spanish Language Males in the Population} \times .884}{\text{Number of P.R. Males in the Population}} \right] = T\,(\ )$$

[f] Census figures reflect educational levels for males 25 and over. *See* Table 125, *General Social and Economic Characteristics* at 643. The court assumes that educational levels of males 18 and over would be equivalent.

[g] Taken from Table 130, *General Social and Economic Characteristics* at 661.

5. Non-white percent and percentage goal of the relevant labor force in each educational caterogy:

To learn what percent of the relevant labor force in each category is non-white, and therefore what the non-white percentage goal for that category should be (PG), the court simply compared T( ) to the total number of *all* males 18 and over with ( ) education (RLF).[h]

$$\frac{T(\ )}{RLF(\ )} = PG$$

6. Total non-white percent and percentage goal of the relevant labor force:

The court multiplied PG(a) by 23.98%, PG(b) by 67.79% and PG(c) by 8.22%[i] and then added the three results to achieve the total non-white percentage goal in this case of 29%[j]

[h] RLF stands for relevant labor force. This data is readily available from the census reports. *See* Table 120, *General Social and Economic Characteristics* at 613.

[i] *See* note 27 *supra*.

[j] The court finds it unnecessary to inflate the percentage goal because of the existence of a greater census undercount for Blacks than for whites. Any advantage the defendants thereby derive is counterbalanced by the advantage plaintiffs gain through the use of the more inclusive Spanish language data as a substitute for unavailable Spanish surname data.

UNITED STATES of America

v.

LOCAL 638, ENTERPRISE ASSOCIATION OF STEAM, HOT WATER, HYDRAULIC SPRINKLER, PNEUMATIC TUBE, COMPRESSED AIR, ICE MACHINE, AIR CONDITIONING AND GENERAL PIPEFITTERS, et al., Defendants.

No. 71 Civ. 2877

United States District Court,
S.D. New York.
July 7, 1972.

Action brought under Civil Rights Act of 1964. The District Court, Gurfein, J., held that though admissions procedures to apprenticeship training programs run by defendant committee did not discriminate against black and Spanish-surnamed applicants, past and present pattern of membership of defendant local, the practice as to work referral employed in hiring hall run by defendant local and practice by which defendant local admitted persons to membership in effect discriminated with regard to employment opportunity against black and Puerto Rican individuals by reason of their race, color and national origin, entitling the government to relief.

Judgment accordingly.
See also D.C., 347 F.Supp. 164.

Whitney North Seymour, Jr., U.S. Atty., S.D.N.Y., for United States of America by Daniel H. Murphy II, Joel B. Harris, New York City, of counsel.

Doran, Colleran, O'Hara & Dunne, New York City, for Local 40 and others by Robert A. Kennedy, Richard O'Hara and Ronald E. Guttman, New York City, of counsel.

Proskauer, Rose, Goetz & Mendelsohn, New York City, for defendant Allied Building Metals Industries by Michael A. Cardozo, New York City, of counsel.

GURFEIN, District Judge.

This is an action brought by the Attorney General of the United States in a complaint signed on July 29. 1971 under the Civil Rights Act of 1964 pursuant to authority granted to the Attorney General in that Act (Act of 1964, 42 U.S.C. § 20000e-6(a)). The defendants were four local unions in the building trades servicing metropolitan New York and their counterpart Joint Apprenticeship Committees and employee associations. By order of this Court, separate trials were ordered for each local union and its counterparts.

A separate trial has now been had to the Court in the case against Local 40. International Association of Bridge, Structural and Ornamental Iron Workers ("Local 40"), the Joint Apprenticeship Committee, Iron Workers Local 40 and 361 ("JAC") and an employer's association, the Allied Building Metal Industries ("Allied Metal").[1] Decision was reserved.

THE COMPLAINT

The complaint alleges that Local 40 is engaged in a pattern and practice of discrimination in violation of Title VII of the Civil Rights Act of 1964. It charges that Local 40 which has approximately 878 members[2] has only fifty non-white members (¶12). All individuals employed by members of Allied Metal as structural iron workers must be members of Local 40 or hold valid work permits issued by Local 40. The JAC trustees are representatives of employers and union and they control the apprenticeship program for Locals 40 and 361 and determine which persons shall be admitted to the apprenticeship program (¶14).

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[1] Allied Metal is joined as a defendant for purposes of relief only pursuant to Fed.R.Civ.P. 19(a) (1).

[2] The Government now shows that there are 1229 members, but the union shows 244 of these are honorary or pensioners.

The pattern and practice of resistance to the full enjoyment by non-whites of rights secured to them by 42 U.S.C. § 2000e-2(c) and § 2000e-2(d)[3] are alleged to consist, *inter alia*, of the following: (a) failing to admit non-white workmen into the union as journeymen members on the same basis as white; (b) failing to refer non-white workmen for employment on the same basis as white by applying standards of referral which have the purpose and effect of insuring referral priority to their members; (c) failing to recruit "blacks" for membership in and employment through the union on the same basis as whites are recruited; (d) failing to permit contractors to fulfill the affirmative action obligations imposed by Executive Order 11246 by refusing to refer blacks whom such contractors wish to employ; and (e) failing to take reasonable steps to make known to non-white workmen the opportunities for employment, or

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[3] § 2000e-2(c):

"Labor organization practices.

It shall be an unlawful employment practice for a labor organization —

(1) to exclude or to expel from its membership, or otherwise to discriminate against, any individual because of his race, color, religion, sex, or national origin:

(2) to limit, segregate, or classify its membership, or to classify or fail or refuse to refer for employment any individual, in any way which would deprive or tend to deprive any individual of employment opportunities, or would limit such 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; or

(3) to cause or attempt to cause an employer to discriminate against an individual in violation of this section."

§ 2000e-2(d):

"Training programs.

It shall be an unlawful employment practice for any employer, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs to discriminate against any individual because of his race, color, religion, sex, or national origin in admission to, or employment in, any program established to provide apprenticeship or other training."

otherwise to take affirmative action to overcome the effects of past racially discriminatory policies and practices.

THE HISTORY

Local 40 is a hard-hat union of structural steel workers whose members were braving the heights of rising skyscrapers long before the hard-hat was used. Created in 1904, its members shared the prejudices of their time, stuck largely to their ethnic stock and surely discriminated against black persons, among others. Like most prejudice, it was probably made to appear justified on economic grounds of self-survival by otherwise decent hard-working folk. The union fostered nepotism and was, on the whole, a family oriented group. In this respect, Local 40 was probably not different from the other construction unions across the land.

It is unprofitable to assay in retrospect the relative strength of each of the coalescing factors that spelled discrimination. The net effect, suffice it to say, was smugly discrimination against black workmen. It is this effect that the Congress sought to eliminate, or at least ameliorate, through the Civil Rights Act. The evils were well known and labor unions were singled out as special targets in the legislative desire to end discrimination in employment.

When the Civil Rights Act became effective in 1965, Local 40 had one black member, and he had been admitted toward the end of 1963, and one person of Spanish ancestry, admitted in 1948. That this was tokenism is apparent. But the union cannot legally be charged with discrimination practiced before the Civil Rights Law was enacted. It can only be charged with what it has done or failed to do since then. One must bear in mind, however, that we do not start with a clean slate, but with a chronic condition which it will obviously take some strong affirmative action to improve.

The union, in simple terms, contends that it has set itself to the task with a will and that it deserves no censure for its efforts. The Government, to some extent at least, must grudgingly concede that there has indeed been some progress, but

it maintains that the pace is too slow, that foot-dragging continues, and that the proof of the pudding is in the statistics. The union appears reluctantly to accept the use of statistical measurements, although it rightly argues that statistics alone should, in no event, be wholly determinative of its conduct. The Government stresses the results viewed objectively, while the union stoutly maintains that the asserted purity of its motives and its recent conduct must weigh heavily in the scale in favor of exculpation. With this background, let us try to see what has happened since 1965 when the Civil Rights Act came into being.

FINDINGS OF FACT

1. Local 40 is a labor organization within the meaning of 42 U.S.C. §2000e(d). It has more than 100 members and maintains a hiring hall, and is in an industry affecting commerce. (Stipulated)

2. JAC is a joint labor management committee within the meaning of 42 U.S.C. §2000e-2(d). (Stipulated)

3. Local 361 is a sister union of the same International whose jurisdiction covers Kings, Queens, Nassau and Suffolk Counties, while Local 40's jurisidction covers Bronx, New York, Westchester and Richmond Counties. The craft jurisdiction is the same for both locals. (Stipulated)

4. In 1965, Local 40 had one black member, admitted in 1963 and one Puerto Rican member, admitted in 1948. (Stipulated)

Union Membership — "Bookman v. Permitmen."

5. There are two classes of workmen who may be employed under the industry-wide collective agreement. These are full fledged members of Local 40 in good standing — the "bookmen": and journeymen from other locals as well as workmen some of whom are equivalent in capacity to "bookmen" or possess skills necessary for a particular job assignment, but who have no union affiliation — the "permitmen." (Tr. 297-298: Ct. Ex. 1)

6. These men, if they get a job in the industry on their own or through the hiring hall, are permitted to work, after they get the job, under a permit granted by the union upon payment of a fee of $2.50 per week to the union. (Tr. 27).

7. They receive the same pay scale as the bookmen, and receive certain fringe benefits like vacation pay. Ther permitmen generally get their jobs through the union hiring hall. (Tr. 221-22)

8. Under the charter of the International Union permitmen must be qualified journeymen (Ex. FF50).

9. A welder certified by the City of New York may get a permit to work even though he is not qualified as a journeyman (Tr. 320-21), and there is a separate column on the daily hiring hall sheet where a workman can signify that he is a welder (Id.)

10. To be admitted to membership in any local union of the International, one must be a practical workman versed in the duties of some branch of the trade, of good moral character and competent to demand standard wages (Ex. 3, Constitution, Art. II, 2).

11. There is no record kept of the number of permitmen nor of the ratio of permitmen to bookmen.

12. By extrapolating the weekly cash receipts from the $2.50 permit fee, one may, however, reasonably deduce the number of permitmen in a given period. The Government has attempted to do this and has arrived at an average of 580 permitmen, a figure I can accept as a fair approximation (Ex. 48A, Tr. 361, 298-301).

13. There were 1229 members of Local 40 at the end of April 1972, of whom 86 are apprentices. The active bookmen number about 903, the rest being hononary and pensioners (224 men) (Ex. 60). This means that the actual working population in this craft within the four counties included in the Local 40 jurisdiction is about 1480 persons, all of whom have the apparent capacity to do the work required, plus apprentices.

14. Not all of the 580 permitmen are seeking membership in Local 40, for many of them are members of other locals in the International. Of the non-members of Local 40 who applied for referral in the months of May and December 1971, out of a total of 1114 persons listed, 708 or 63% were not members of other locals (Ex. 34). The figure may be of little significance because the same name is repeated many times on the successive daily sheets when the person continues to be out of work. It tends to show, however, that, in aggregate, there are a considerable number of permitmen, apparently qualified to work, who are not members of the International union.

15. At the end of April 1972, the total non-white membership of Local 40 consisted of 40 "black" persons, 16 "with Spanish surnames," 6 "Orientals" and 66 "American Indians." There were 86 apprentices of whom about 14 (estimated) are black and Puerto Rican (Ex. 9, EEO-2 form for 1971, Part E; Ex. 11, Local 40 Membership Certificate for September 1971; Tr. 297 and Ct. Ex. 1).

16. That adds up to 128 non-whites out of 989 (including apprentices), or about 12.9%. Excluding the 66 Indians, however, the black and Puerto Rican group constituted 6.3% against the total population figure derived below of 23.9%.

17. The related population figures for the eight counties which are included within the jurisdiction of Local 40 and its sister union Local 361 (which have a joint apprenticeship and joint job rights program) are the following:

Total male population	5,368,436
Negro male population	854,933
Puerto Rican males (½ of total Puerto Rican population)	429,978
Combined Negro and Puerto Rican male population	1,284,911

(U.S. Bureau of the Census, Census of Population 1970, General Population Characteristics Final Report PC(1)-B34, Table 35, New York; Puerto Rican male population estimated from Pltf. Ex. 58A).

This indicates that Negro and Puerto Rican males are 23.9% of the total male population of the eight counties.[4]

18. On the other hand, there has been a positive increase in "membership" in Local 40 (excluding Indians) for blacks and Spanish speaking persons from 2 to 56, or 2800% in seven years.

19. We do not know the racial composition of the permitmen for they are a shifting group and records are not kept by race.

20. The method for electing journeymen to union membership as bookmen is, on its face, suspect. The applicant fills out a form which is readily given to all. He then is interviewed by the Executive Board of the union, all white, which determines whether his experience qualifes him to take the examination for membership. Only if he passes muster, can he take an examination given by an examination committee of the union, all white. The emphasis is on a practical test with no set form. There is also a written examination. No independent agency reviews the results (Corbett Dep. Ex. 47, pp. 104-09). Nor is there any written rule for processing the applications (Place Dep. Ex. 44, p. 70).

21. The written test is prepared by the coordinator of the JAC from books prescribed for apprentice training. The practical test consists of rigging up a block and tackle, pointing out the parts of a guy derrick from a blueprint; and tieing up a number of knots and hitches using a piece of line and a two-by-four piece of wood (Place Dep. Ex. 44, p. 74).

22. The examinations are job-related.

23. In July 1966 there were 1048 members plus 62 apprentices for a total of 1110. Of these, 833 were journeymen and 215 "retired." In July 1971 there were 1137 members and 87 apprentices, a total of 1224, of which there were 903 journeymen

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[4] The Court has taken only male population figures because there is no evidence that the Women's Liberation Movement has yet reached the level of the skyscraper.

and 234 "honorary and pensionsers." In 5 years, then, the membership rose from 1110 to 1224, an increase of 114, and 155 vacancies were filled, making a total of new members of 269, except that there were 25 more apprentices at the end of the period, making the true figure 244. By extrapolation I find that 42 of the new members were black or Puerto Rican, or about 17.2% of the members admitted (see Ex. 60).

24. There were 100 black iron workers on the World Trade Center (Tr. 370) and 17 of them, who were City certified welders, were given welder's books in Local 40 (Tr. 369). There is no evidence whether any of the other black men on that job were already members of Local 40 though there may have been some. The union claims credit for this showing. Mr. Corbett testified that he felt that black welders who had not had enough experience to pass the journeyman's examination ought, nonetheless, to be allowed into Local 40. Under the union Constitution, if a man failed the journeyman's examination he was no longer permitted to work. To forestall such a peril, Mr. Corbett arranged for such men after two years of work as welders to be given welder's book membership in Local 40 without examination (Corbett Dep. pp. 319, 321-22).

It would not be fair, in any event, to resolve the issue of "bookmen" membership without considering the steps the union has taken to fulfill the mandate to act affirmatively. This requires us to explore another ground for the Government's complaint—recruitment practices.

Recruitment Practices

25. Contemporaneously with the effectiveness of the 1964 Civil Rights Act, the industry and the unions bestirred themselves to form a Joint Apprenticeship Committee (JAC), the avowed purpose of which was to recruit and train apprentices for this skilled and hazardous trade. The Ironworkers' JAC is a common apprentice program shared by both Local 40 and Local 361 (Tr. 222).

26. Apprentices are indentured to the JAC for a period of years.

27. The creation of the JAC was a part of the collective bargaining machinery and the trustee representation was joint. A trust fund was created on July 1, 1966 whose purpose was "to provide training for apprentices pursuant to the Standards of Apprenticeship and Training adopted by the trustees and to provide training and skill advancement for journeymen" (Ex. 2 § 2). The trustees are empowered "to determine the number of apprentices to be initiated into the apprenticeship program, taking into consideration the need for apprentices in the locality, the available job facilities for acquiring the necessary experience, and other relevant factors" (Id. Art. V, 1(b)). But the upper limit is fixed by the ratio of apprentices to journeymen as provided in the regulations of the International Constitution.[5] It is incumbent on the trustees to establish minimum standards of education and experience required of apprentices and to pass on their qualifications, to arrange tests for determing the apprentice's progress in manipulative skills and technical knowledge and to arrange classes (Id.).

Decisions of the trustees are by majority vote requiring at least two concurring votes by union and employer trustees respectively. This has been amended to provide for unit voting.

To break a deadlock, a mutual perosn is to be selected by the trustees, or if they cannot agree, by the United States District Court for the Southern District of New York[6] (Ex. 2, Art. VII § 5).

28. Standards of Apprenticeship have been promulgated. They provide that "selection of apprentices shall be made from qualified applicants on the basis of qualifications alone and without regard to race, creed, color, national origin, sex or occupationally irrelevant physical requirements in accordance with objective standards which permit review, after full and fair opportunity for application; and this program shall be

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[5] We have been unable to find such a ratio in the collective bargaining agreement. Mr. Corbett testified that the ratio is one apprentice to seven journeymen (Tr. 243, but see Tr. 346).

[6] Art. VII, § 5 was later amended but not substantially for present purposes.

operated on a non-discriminatory basis" (Ex. 8 §7). An apprentice is required to work not less than 6000 hours of reasonably continuous employment in an approved schedule of work experience over a period of not less than three years, together with the required related instruction hours, consisting of an additional 144 hours each year. Upon successful completion, the apprentice is given a certificate as a journeyman.

29. Under this apprenticeship program the entering apprentice classes from 1968 through 1971 totalled 268, of whom 48 were black or Puerto Rican, or approximately 18% (Ex. 9).

30. A substantial percentage of the whites admitted to the apprenticeship classes are related by blood to journeymen members of Local 40 (about 30%) and presumably also to members of Local 361 (Place Dep. 206-09; 547-48).

31. While the figure of 18% shows a distinct improvement, it raises two questions: (a) whether the percentage is high enough to eliminate the earlier condition of discrimination, and (b) whether the high incidence of nepotism does not reflect a bias in the selection process.

32. The extent of nepotism cannot be determined unless one knows what percentage of the whites who *tried* to get into the program were blood relatives compared with the total number of white strangers. Second, there may be some hereditary factors, as there are certainly environmental factors, including motivation, which make the blood relative more likely to do well on the tests. But nepotism as a trade union policy is unhealthy, for while the rich may leave an inheritance for their children, the worker may not bequeath job seniority, for that will take a job from another who has no union "father." Nepotism tends to freeze out blacks because blacks do not have white relatives in the union.

33. The test for admission to the program comprise four elements, scored as follows: Aptitude, 30; Physical, 40; High School Diploma or equivalent, 5; and Interview, 25 (Steinberg Dep. Ex. 46, p. 75).

34. While any test which includes an oral interview is presumptively suspect, the Government did not produce any evidence reflecting on the quality of the examinations, though some of the "personality characteristics important in apprenticeship" are susceptible to conscious or even unconscious discrimination (Ex. 46A; Subex-7).

35. There is evidence that white persons, even relatives, have failed the test (Ex. H).

36. The tests have been administered by Stevens Institute of Technology for the mechanical aptitude test and by Professor Balquist of Columbia University for the physical test (Tr. 382). The tests are marked by the independent persons mentioned (Tr. 379-83; Ex. 46, pp. 24, 30-6). There has been no showing that the tests are not job related.

37. In the 1970 apprentice class examinations, 164 whites (out of 238 who had filled in application blanks) appeared for interview after passing the physical and aptitude tests. Of these 147 or 89% were accepted. 55 Black and Puerto Rican men (out of 106 who filled in the application blanks) appeared for interview after passing the physical and aptitude tests. Of these 40 or 72% were accepted. In so small a group (assuming individual differences not adjusted by random sampling) one can hardly find purposeful discrimination in these percentages without further evidence.

38. The Government has not adduced proof that blacks and whites bunched closely together in grades on the basis of aptitude and physical examinations have been graded in a discriminatory fashion on the oral interview.

39. Absent such proof, it would be unwarranted to assume discrimination based solely on *composite* results which include the scoring on the interview test.

40. The Government has not asked for a finding that the examinations were an "unnecessary barrier," to apprenticeship, for it is difficult to find evidence in this record to support that

conclusion. (See Ex. 46A, 7: Steinberg Dep. pp. 51-7; Govt. Br. p. 6),

41. The only examination that is suspect from its very lack of objective standard, the oral interview, is to be eliminated in the future, according to Raymond Corbett, Business Agent of the union (Corbett Dep. 371).

42. Without any evidence, the Court cannot assume that the independent testing agencies conducted examinations that were not job related.

43. Non-white apprentices are affirmatively recruited by JAC. The program is made known to minority and community action groups who disseminate it to the black and Puerto Rican community (Steinberg Dep. 383-85). The Workers Defense League, one of the minority community action groups, in turn, has disseminated the information by radio, television and through local newspapers (Johnson Tr. 437-38).

44. The Government bases its essential claim of discrimination in the selection of apprentices on the "weeding out" process.

45. There is no doubt that 45% of the applications for the 1970 examination were issued to non-whites (Tr. 401-2), which tends to show a fair coverage of the minority community. The JAC claims credit for this result.

46. The Government notes that while only 54% of the persons who *received* applications were white, 85% of the first apprentice class out of the 1970 list was white, and 80% of the second class was white. I find the relevant figures to be not those who *received* application blanks but those who *returned* them filled in. That is, 238 whites against 115 all others. The whites returned 67% of the blanks, the true starting point.

47. Why people have a change of heart on enlisting in the program is not susceptible of direct proof. We assume that it is not an average person who is willling to climb a ten foot steel column fifty stories high. It may be that when the dimensions of the job are sketched ardor cools, and dropping out seems to

some persons, white or black, more sensible than continuing. The Project Director for the New York Plan, himself a black, approved the requirement of a showing of motivation to avoid later disappointment (Johnson Tr. 439-41). A drop-out under these circumstances bears no stigma. Nor does the JAC for making the offer. In short, I find a lack of evidence to support a contention that the JAC, subtly or otherwise, encourages non-whites to drop out of the program.

48. The second part of the process – the tests themselves, obviously cannot guarantee a passing mark for all, nor for any ethnic or racial group, unless they are "fixed" or so devised as to overemphasize information or skills that minority members are likely to possess.

49. Here there appears to have been a rejection of the use of verbal criteria that are unfair to those with a weaker education.

50. The union also suggests as another indication that its heart is in the right place: its voluntary participation in the New York Plan for the training of minority individuals who are ineligible for the apprentice program because they are overage (431-34). Here blacks or Puerto Ricans are taken for training even though they are above the maximum apprentice age of 28; they are assigned to state and city jobs under the Plan, and when these jobs peter out, the union finds them private employment (Corbett Dep. 314-15).

51. There are 33 persons assigned to Local 40 under this program, of whom 15 are currently engaged on projects (Corbett Dep. 314-16).

52. Mr. Corbett testified at some length about these and other steps he had taken to procure more minority employment with the aim of making them union members. I was impressed with his sincerity and I cannot find that there has been purposeful discrimination in the apprentice program.

COMMENT

[1] It is not only active discrimination, however, that gives claim to relief. Unintentional discrimination also runs afoul of the law. In the words of Chief Justice Burger: "...[G]ood intent or absence of discriminatory intent does not redeem employment procedures or tesing mechanisms that operate as 'built-in headwinds' for minority groups and are unrelated to measuring job capability." *Griggs v. Duke Power Co.*, 401 U.S. 424, 432, 91 S.Ct. 849, 854, 28 L.Ed.2d 158 (1971). See *Chance v. Board of Examiners,* 458 F.2d 1167 (2 Cir. 1972).

We now turn to the claim that the referral procedures of the union are discriminatory.

The Referral Practice

53. The union operates a hiring hall. There bookmen, unaffiliated permitmen, and men from other locals shape up every morning to be assigned to such jobs as are available. The Assistant Business Agent in charge of the hiring hall receives calls from employers who tell him the number of men that are needed and whether they require any of the special skills listed in Finding 54.

54. The positions filled for the hiring hall vary in the requirements of experience, skill and agility. Most structural workers can do every phase of the work (Ex. 44, p. 8). In the construction of high rise buildings the jobs may be roughly categorized as follows: (1) a raising gang consists of six or seven men in the setting of structural steel (Place Dep. 32). This gang sets the steel. Its members must know how to work with cranes or derricks. They must be able to bolt up the steel and plumb the building up, read prints to know the steel is being put in the right place, and understand safety requirements (Ex. 44, Place Dep. 7-8). (2) A raising gang normally has two men working as connectors. The steel is sent up to them and they connect the horizontal piece and the vertical piece (Ex. 44, p. 13). There is also a foreman or "pusher" and a bell man who signals the engineer on the derrick, as well as a hooker on and a tag

line man (Ex. 44, p. 26). (3) A demolition gang is similar to a raising gang, but they take a building down (Ex. 44, p. 29). (4) A plank man lays a floor between horizontal beams of steel set up by the raising gang (Ex. 44, pp. 20-21). (5) A decking gang welds a steel deck floor that is put down after the steel is raised and set (Ex. 44, p. 22). (6) A burner tailors the fabricated steel to the particular needs of the job (Ex. 44, p. 24). (7) Welders do the welding procedures. They must be certified by the City of New York (Ex. 44, p. 29). (8) A layout man prepares the insertion of reinforcing steel (Ex. 44, p. 34). (9) A bolter up gang follows the raising gang and puts permanent bolts in the structure in advance of the plank man (Ex. 44, p. 34). (10) A plumber-up plumbs the columns to make sure they are plumb with all the lower columns (Ex. 44, p. 36). (11) A hod hoist tower man constructs the temporary elevator on the side of the building that carries materials. A hod hoist tower gang consists of two ironworkers and two carpenters. (12) An all around bridge man can do all of the above including welding (Ex. 44, p. 38).

55. The men looking for jobs sign their names on either of two sheets. One is marked "Local 40 only;" the other is for non-members of Local 40, and is marked "Permit-and other locals."

56. Anyone who is qualified as a journeyman or as a welder (in which case he signifies his specialty), regardless of race, may sign and wait.

57. He does not wait his turn, however, for the Business Agent makes his own determination of who goes where. Justification is offered for failing to follow the "first in first out" rule. It is said that employers often ask for particular men or at least men fitted to a particular job. And it is quite evident that, even without a formal rule, bookmen are referred to jobs ahead of permitmen or membrs of other locals. Mr. Place, the manager of the hiring hall, conceded that Local 40 men are sent out first (Place Dep. Ex. 44, p. 59).

58. This results in a *de facto* discrimination against blacks and Puerto Ricans because there are not enough of them in the

priority status of bookmen. The power wielded by the director of a hiring hall is, in the absence of an ombudsman on the scene, very great indeed. His conscience, or the collective conscience of the business agents, is the sole censor of preferential treatment for those he favors. A court obviously cannot monitor such a referral system on a daily basis.

59. The evidence fell short of establishing actual discrimination in the referral procedure. Several black men testified that they waited long and wearily for weeks without being sent to jobs, but they could not tell whether the white men sent out were "book" men or "permit" men (Tr. 72, 88, 101, 111, 173-4, 289, 290). And blacks testified that they were sent out while white men were not (Tr. 78, 82, 110, 116; see Tr. 185). One can understand the anguish of the black man where he sees whites being sent out without class identification as part of a process that, at best, he cannot see or touch. Anyone who has waited in a strange physician's office knows the feeling of uncertainty whether some other person in the waiting room has not been called out of turn.

60. The union protests that its criteria are objective and unrelated to race. Since no lists are kept by race, one cannot reconstruct a day in the hiring hall.

61. Though the Government requires local unions which run hiring halls to report, by minority categories, the applicants for referral and the numbers referred, the evidence in this record is sparse. Only one of these EE03 forms in evidence is sufficiently filled in to be of some help. The form filed by Local 40 for the two month period October and November 1971 reveals the following (Ex. 9):

There were 1999 applicants for referral of whom 131 were "Negro and Puerto Rican" and 24 were "American Indians," a total of 155 minority persons who constituted slightly less than 8% of the total number of applicants. A total of 860 persons were "referred," of whom 42 were "Negro and Puerto Rican" and 10 were Indians, a minority total of 52. The white persons referred were, therefore, 808 in number against 1844 white

applicants. The whites thus obtained 43% referrals, while the non-whites were given about 33% referrals. Put another way, although non-whites were 8% of the applicants, they constituted 6% of the referrals.

Even without considering that Local 40 *members* are preferred in referrals, the figures, if true, hardly show an active pattern and practice of discrimination in referral.

62. We do know, moreover, that there are about 580 journeymen and welders who have successfully sat in the hiring hall and obtained jobs by referral. Some of them, though not many according to visual testimony, are black and Puerto Rican. A substantial number have indicated their desire to join the union.

63. In summary, we find a situation in which honest efforts have been made by the union to ameliorate the condition of discrimination, but where the practice of referral still discriminates in favor of *union members* who, as a result of past policy, are predominantly white.

DISCUSSION

In the light of the evidence available, there appears to be no active discrimination against blacks and Puerto Ricans in the apprenticeship program or in referrals from the hiring hall. Yet there is a residuum of discriminatory effect stemming from the earlier practices of discrimination, the failure to accelerate minority journeymen membership, and the continuance of a referral system that has a built-in priority for Local 40 journeymen members against all others in the hiring hall.[7]

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[7] The hiring hall is sanctioned for the building and construction industry, 29 U.S.C. § 158(f). See *Local 357 v. NLRB*, 365 U.S. 667, 81 S.Ct. 835, 6 L.Ed.2d 11 (1961). Preference may not be given to union members to pressure others to join. But that is not in issue here. Here the preference is alleged to be exercised without permitting minority persons to eliminate it by simply joining the local union.

[2,3] The absolute ratio of minority members in the union to the whole membership is, in relation to the matrix of population, of some significance. Statistical evidence can make a prima facie case of discrimination. *Parham v. Southwestern Bell Telephone*, 433 F.2d 421, 426 (8 Cir. 1970). "...[A] small black union membership in a demographic area containing a substantial number of black workers raises an inference that the racial imbalance is the result of discrimination ..." *United States v. Ironworkers Local 86*, 443 F.2d 544, 551 (9 Cir.) *cert denied*, 404 U.S. 984, 92 S.Ct. 447, 30 L.Ed.2d 367 (1971), citing *United States v. IBEW*, Local No. 38, 428 F.2d 144, 151 (6 Cir.) *cert denied*, 400 U.S. 943, 91 S.Ct. 245, 27 L.Ed.2d 248 (1970). The question of what is a "small" membership in relation to black workers in a demographic area is a question of degree. A one-to-one ratio of membership to population is not required.

The *Ironworkers Local 86* case, *supra*, affords an illustration of the difference between the extreme situation there and the situation here. In that case, Judge Lindberg found that in January 1970, Local 86 had about 920 members, only one of whom was black; Local 32 had about 1900 members, only one of whom was black. The sheet metal workers JATC had 100 apprentices indentured in its program and only seven were black. Plumbers JATC had 104 apprentices and none were black. The situation confronting Judge Lindberg was like Local 40's situation in 1965. In his case, however, no progress had been made in more than four years.

In *United States v. Sheet Metal Workers*, 416 F.2d 123 (8 Cir. 1969), Local 36 had at date of trial, June 1967, 1275 white members and *no* Negro members. It accepted its second and third Negro apprentices in 1967. There was no record of any Negro having used its hiring hall prior to the date of trial. 416 F.2d at 128.

In *United States v. IBEW*, Local 38, *supra*, as of the date of the complaint the local union had 1318 members, of whom 2 were Negroes, and 255 apprentices of whom 3 were Negroes. In the preceding year it had referred 3487 persons for work

through the hiring hall, only 2 of whom were Negroes. 428 F.2d. at 151.

[4] Although the statistics in the case of Local 40 do not compel a conclusion that there is present active discrimination, it is now clear that quite neutral practices which have the effect of discriminating because of past history impose a duty on the District Courts to change them. *Swann v. Charlotte-Mecklenburg* Bd. of Ed., 402 U.S. 1, 91 S.Ct. 1267, 28 L.Ed. 2d 554 (1971); *Griggs v. Duke Power Co.*, 401 U.S. 424, 91 S.Ct. 849, 28 L.Ed.2d 158 (1971); *Louisiana v. United States*, 380 U.S. 145, 154, 85 S.Ct. 817, 13 L.Ed.2d 709 (1965); *United States v. Bethlehem Steel Corp.*, 446 F.2d 652 (2 Cir. 1971); *United States v. IBEW, Local No. 38*, 428 F.2d 144 (6 Cir. 1970); *United States v. Sheet Metal Workers*, 416 F.2d 123 (8 Cir. 1969); *Local 53 v. Vogler*, 407 F.2d 1047 (5 Cir. 1969).

[5] Although the Civil Rights Act appears to provide that preferential treatment (by a quota system) is not to be granted on account of existing number or percentage imbalance based on population ratios, 42 U.S.C. § 2000e-2(j), the courts have determined that the statute merely prohibits a requirement of "preferential treatment" *solely* because of an imbalance in racial employment existing at the effective date of the Act. *United States v. IBEW, Local No. 38*, 428 F.2d 144, 149 (6 Cir. 1970); *Sheet Metal Workers, Local 36, supra; Dobbins v. Local 212*, 292 F. Supp. 413 (S.D.Ohio 1968). If it were held otherwise, it would be too easy to draft seemingly innocuous provisions for membership or work referral which would, because of history, freeze blacks and other minority people into a perpetual state of inability to comply with them. See, e.g. *Local 53 v. Vogler*, 407 F.2d 1047, 1054 (5 Cir. 1969). The test is whether the practices in question have any present discriminatory *effect. United States v. Dillon Supply Co.*, 429 F.2d 800 (4 Cir. 1970).

Chief Justice Burger in *Griggs v. Duke Power Co.*, 401 U.S. 424, 430, 91 S.Ct. 849, 853, 28 L.Ed.2d 158 (1971) said: "Under the Act, practices, procedures, or tests neutral on their face, *and even neutral in terms of intent*, cannot be maintained if

they operate to 'freeze' the status quo of prior discriminatory employment practices" (emphasis supplied).

[6] In the present case one cannot escape the conclusion that the industry can employ, in normal times, more than the journeymen membership of Local 40. It appears that probably more than half of the non-members of Local 40 who appear in the hiring hall looking for work are unaffiliated. The artificial limitation of union or apprentice membership far below the number necessary for the particular trade is, itself, a discriminatory pattern or practice in a context involving a predominantly white union with a past history of discrimination. See *Local 53 v. Vogler*, 407 F.2d 1047 (5 Cir. 1969); *United States v. Local 638*, et al., 337 F.Supp. 217 (S.D.N.Y.1972); *United States v. Local No. 86*, 315 F. Supp. 1202 (W.D.Wash. 1970), aff'd, *United States v. Ironworkers Local 86*. 443 F.2d 544 (9 Cir.), *cert. denied*, 404 U.S. 984, 92 S.Ct. 447, 30 L.Ed.2d 367 (1971).

It is true that Local 40 has not specifically said that to obtain priority in referral one must have been employed for a number of years under the collective bargaining agreement as was the requirement in some other cases. Cf. *Equal Employment Opportunity Commission v. United Association of Journeymen*, etc., 311 F.Supp. 468 (S.D.Ohio 1970), vacated, 438 F.2d 408 (6 Cir.), *cert. denied*, 404 U.S. 832, 92 S.Ct. 77, 30 L.Ed.2d 62 (1971); *United States v. Sheet Metal Workers*, 416 F.2d 123 (8 Cir. 1969). In that sense there is not overt discrimination against blacks. But the effect of giving priority to Local 40 members in referral is the same, because of the racial imbalance in membership. Without court intervention, even the voluntary acceleration of minority membership could be matched by equivalent new white membership, thus retaining the relative status quo.

[7] On the other hand, to grant an absolute preference in employment to minority persons, which has the effect of depriving employment of white persons of higher qualifying standing may itself be unconstitutional. The Eighth Circuit was recently confronted with this difficult problem in a civil rights case

under 28 U.S.C. §§ 1331, 1343(3) and (4). *Carter v. Gallagher*, 452 F.2d 315 (8 Cir. 1971), modified after rehearing en banc (1972). The District Court had ordered the Fire Department of Minneapolis to give *absolute preference* in Fire Department employment to twenty minority persons who meet the qualifications for the position. A panel of the Court of Appeals reversed the order upon the ground that it unconstitutionally discriminated against whites under the Fourteenth Amendment and § 1981 of 42 U.S.C.A. The Eighth Circuit, sitting in banc, held that such an absolute preference "does appear to violate the constitutional right of Equal Protection of the Law to white persons who are superiorly qualified." 452 F.2d at 328. It distinguished cases where particular minority persons had been discriminated against and considered that the immediate employment of such persons could be ordered. But "in dealing with the abstraction of employment as a class," *id.*, the constitutional problem does arise. Although theirs was not a Title VII case, the Court accepted as practical guidelines remedies fashioned in Title VII cases. It then noted that the Ninth Circuit had approved a decree ordering building construction unions to offer immediate job referrals to previous "racial discriminatees" and also had approved a protective order requiring the unions to recruit sufficient blacks to comprise a 30% membership in their *apprenticeship* programs. *United States v. Ironworkers Local 86*, 443 F.2d 544 (9 Cir.) *cert. denied*, 404 U.S. 984, 92 S.Ct. 447, 30 L.Ed.2d 367 (1971). It also cited instances under Executive Order No. 11246 where *percentage* goals for the employment of minority workers were sustained. The Court then noted that "the presence of identified persons who have been discriminated against is not a necessary prerequisite to ordering affirmative relief in order to eliminate the present effects of past discrimination." 452 F.2d at 330. To accommodate the "conflicting considerations" the Court said: "[W]e think some reasonable ratio for hiring minority persons who can qualify under the revised qualification standards is in order for a limited period of time, or until there is a fair approximation of minority representation consistent with the population mix in the area." The Court was careful to state that this was not a "quota" system, because as soon as the order is

fully implemented, all hirings would be on a racially non-discriminatory basis. *Id.* The Court of Appeals, therefore, determined that one out of three persons hired by the Fire Department shall be a minority person until at least twenty minority persons are hired.

This extensive discussion of *Carter v. Gallagher* is warranted, perhaps not only because it is so recent, but because it points up the delicate constitutional discrimination that can be involved in the granting of absolute preferences.

The case of admission to membership in a labor union is, however, a step removed from the civil service list in a municipality. Here there is no state law, as there is in civil service, mandating the order of appointment from a list based on relative qualification by examination. Nor is membership in a union equivalent to actual appointment or employment. It is a step to employment and, while in the long run an increase in membership may mean less jobs for whites as a group, it does not penalize a particular white who has a priority status for a particular vacancy. It is, therefore, easier, in a union membership case, to adopt a ratio of minority to non-minority increase in membership until a relative balance is achieved.

RELIEF

There are several possibilities for relief: (a) to require the union to appoint an ombudsman for minority workers; (b) to abolish the priority status of bookmen and put everyone in the hiring hall on a "first in first out" basis; or (c) to increase the union membership enough so that there would no longer be any group discrimination even if the present referral practice is kept.

While the idea of requiring an ombudsman has occurred to the Court, *sua sponte*, it could cause difficulty in the smooth working of the referral system. For there must be an element of judgment in determining which workman fits which job, and one can prophesy endless disputes on a matter so incapable of resolution by objective standards.

The same difficulty attends the strict application of a "first in, first out" rule which would make a single list of bookmen and permitmen and send them out in the order of signing in. A single list could be ordered, it is true, with a direction to the hiring hall manager not to discriminate in favor of members. This method, even if it were enforceable by a court, in a practical sense, would discriminate against bookmen (including the black, Puerto Rican and Indian bookmen) in favor of the permitmen, most of whom are also white.

The practical answer is to increase the non-white membership in Local 40. While there is no mandate to achieve a precise racial proportion to the population, the difficulties inherent in the referral system and the numerical inadequacy of the apprenticeship and training programs, regardless of fault, indicate that at the present rate it will be long before a rough equality is achieved. But more important, there are blacks and Puerto Ricans *now* who are presumably qualified journeymen, as evidence by their acceptance as permitmen, and who want to join Local 40. Objective examinations should be open to them at once.

CONCLUSIONS OF LAW

1. Local 40 is a labor organization within the meaning of 42 U.S.C. § 2000e(d) and is engaged in an industry affecting commerce within the meaning of 42 U.S.C. § 2000e(e).

2. Ironworkers JAC is a joint labor-management committee controlling apprenticeship training within the meaning of 42 U.S.C. § 2000e-2(d).

3. The Court has jurisdiction over this action by virtue of 42 U.S.C. § 2000e et seq. The Attorney General is authorized under the Civil Rights Act of 1964 to institute suit to enjoin a pattern or practice of discrimination and request such relief as may be necessary to insure the full enjoyment of rights described in Title VII. 42 U.S.C. § 2000e-6(a).

[8] 4. The Government has established a *prima facie* case that defendant Local 40 has pursued a pattern and practice of conduct with respect to employment opportunities in the construction industry which has, in effect, denied to black and Spanish-surnamed workers the same opportunities available to whites.

[9] 5. Local 40's policies for admission of members and for referrals for work, which the Government has established as having the effect of perpetuating past discrimination, are unlawful.

[10] 6. Local 40's policy of keeping its membership small in order to guarantee work opportunity for its present members has the effect of perpetuating past discrimination and is, therefore, unlawful.

[11] 7. The admissions procedures to the apprenticeship training programs run by defendant JAC, do not discriminate against black and Spanish-surnamed applicants.

8. The past and present pattern of membership of Local 40, the practice as to work referral employed in the hiring hall run by Local 40, and the practice by which Local 40 admits persons to membership in effect discriminate, with regard to employment opportunity, against black and Puerto Rican individuals by reason of their race, color and national origin.

9. Plaintiff, United States of America, is entitled to judgment ordering the following:

UNION MEMBERSHIP RELIEF

[12] 1. All resident black and Puerto Rican city certified welders shall, upon application, promptly receive a welder's book in the union.

2. They shall also have the right to take the journeyman's examination, independently administered, on payment of equivalent dues and initiation fees, after 2 years of work, consisting of at least 1000 hours.

[13] 3. All other resident blacks and Puerto Ricans with 3 years' experience, consisting of at least 1200 hours, shall be permitted, upon application, to take the impartial journeyman's examination, provided for below, the experience to be verified by the impartial examiners. Experience outside New York City or on non-union jobs shall be accepted as stated by the applicant, subject to post examination check.

4. The term "Puerto Ricans" shall include former residents of the Carribbean area and Central America.

5. There shall be three examiners who shall constitute the examining board: one from the Engineering School Faculty of Columbia University; one from the faculty of Stevens Institute; and one from an accepted aptitude testing service. They shall be nominated to the Court by the Government and Local 40, and if the parties cannot agree, the Court will apoint them.

6. The union shall pay the fees of the impartial examiners.

7. The tests shall be job related and the examiners shall perform what in their discretion may be necessary validating procedures.

8. Only blacks and Puerto Ricans, and those whites whose applications for book membership are pending at the date of this opinion shall be eligible for the first exmination.

9. All who pass the first examination shall be initiated to membership in the Local without a vote by the membership upon their payment of equivalent dues and initiation fees.

10. The date and qualifications for taking the examination shall be publicized in minority media with the statement that it is open at this time only to blacks and Spanish name persons, as well as to those white persons who have applications pending at the date of this opinion.

11. Notice of the holding of the examination shall be sent to all permitmen whose addresses are known, so that minority

persons among them will learn of the examination and the qualifications therefor, including the status of race and national origin mentioned above. The Government may review the lists compiled by the local union and suggest additional names which should properly be on the list.

12. A failure to pass the examination shall not deprive the man of his right to continue to work as a permitman, unless the examining board finds him so unskilled that it is unproductive for an employer to hire him or that he is a hazard to himself or others.

13. Similar examinations for journeymen book membership, based upon the foregoing qualifications, shall be held at least every six months for the next four years (with adequate notice to file applications therefor), under the supervision of the independent examiners or their successors. Each applicant who meets the prerequisites for taking the examination shall be given at least two weeks' notice of the date and place of examination and the nature of the examination.

14. The Court reserves jurisdiction to pass on the valiidity of the examination and the procedures for notice, upon application by either party.

15. Local 40 shall maintain, for two years after any examination, complete records of the examination, including, but not limited to, all applications for membership; copies of all notice sent to applicants; copies of any replies received from applicants; copies of the examination administered and score sheets for the examination; and if the examination is practical, summaries of the applicant's performance detailed enough to allow independent review.

REFERRALS

[14] 1. All applicants for referral to jobs including members of Local 40 shall fill in a master card which permits checking, by job categories, those jobs for which the applicant considers himself qualified. The master card shall include spaces for

address, age, race or nationality, whether applicant owns a car, and any special license he may possess, such as a New York City Certified Welder's Certificate. It shall also provide for a statement of years of experience in the structural steel industry, with the names of former employers.

2. The Business Agent of Local 40 or either of his assistants shall mark the applicant as "qualified" or "not qualified by experience" for each category of the jobs described on the master card. Such evaluation shall appear in writing on the master card of each applicant, with the date of evaluation. If the Business Agent or his assistants cannot make such evaluation as to a particular applicant, they shall note in the job category "unknown" together with date. If the Business Agent or his assistants believe the applicant unfit for a particular job category because of age, lack of experience or for other reasons, the evaluation shall be stated in writing, the reason being particularized.

3. The first time an applicant for referral visits the hiring hall, he shall be required to fill in the master card as a prerequisite to job referral.

4. The master cards shall be retained as a permanent record in the hiring hall, and any applicant for referral shall, upon request, be shown his own master card and the evaluation of the business agents. He shall be given an opportunity, if he so requests, to challenge the evaluation of the business agents and they shall afford him a fair hearing.

5. All requests by contractors for work referrals shall be recorded in a bound book which shall reflect: (a) the date of the request; (b) the person and the firm making the request; (c) the nature of the request; (d) the address of the job; and (e) the names of the persons assigned pursuant to said request, with a notation of color or national origin (which may be visual if applicant refuses to state).

6. The work referrals shall be made without regard to race, color or national origin, and with reference only to job experience and qualification.

7. Until the successful applicants for the first examination described above shall have been initiated, the present practices of referral shall be suspended. That is, no priority shall be given to book members of Local 40 until further order of the Court.

8. All persons referred for employment must appear in person at the hiring hall.

9. After the initiation of new minority members aforesaid, based on the first examination, Local 40 may apply to the Court for a modification of the order respecting referral practices.

The United States and Local 40 shall confer on the drafting of an order in conformity with this opinion. If the parties cannot agree, each party shall submit an order upon notice. If a further discussion with the Court is required, the parties may make such request.

The foregoing numbered paragraphs are the Court's findings of fact and conclusions of law pursuant to Fed.R.Civ.P. 52(a).

Submit order as above provided.

UNITED STATES of America,
Plaintiff,

v.

LOCAL 638, ENTERPRISE ASSOCIATION OF STEAM, HOT WATER, HYDRAULIC SPRINKLER, PNEUMATIC TUBE, COMPRESSED AIR, ICE MACHINE, AIR CONDITIONING AND GENERAL PIPEFITTERS, et al., Defendants.

No. 71 Civ. 2877.

United States District Court,
S.D. New York.
June 14, 1972.

Federal civil rights action against unions wherein city human rights commission sought to intervene. The District Court, Gurfein, J., held that commission could not intervene of right but could intervene by permission, on basis of common questions of law and fact, and that there would be ancillary jurisdiction of commission's claim.

Order Accordingly.

See also D.C. 337 F.Supp. 217 and 347 F.Supp. 169.

J. Lee Rankin, Corp. Counsel for intervenors by Beverly Gross, Steven J. Sacks, New York City, of counsel.

Whitney North Seymour, Jr., U.S. Atty. for plaintiff by Howard S. Sussman, New York City, of counsel.

Cohn, Glickstein, Lurie & Ostrin, New York City, for defendant Local 28 by Sol Bogen, Daniel W. Meyer, New York City, of counsel.

GURFEIN, District Judge.

MEMORANDUM

The New York City Commission on Human Rights (the "City Commission") seeks to intervene as an additional party plaintiff in an action brought by the Attorney General of the United States, pursuant to Section 707(a) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-6(a), against four local unions in the building construction industry in New York City which the Attorney General charges with having engaged in a pattern of discrimination against blacks and Puerto Ricans. One of the defendant unions is Local 28 of the Sheet Metal Workers International Association ("Local 28"). For purposes of trial, the action has been divided into four parts, the case against each local union to be tried separately. The consideration of the proposed intervention by the City Commission will be limited to the part of the action that is against Local 28, which does not oppose permissive intervention. Regardless of this consent, the Court must find jurisdiction to exist in order to permit the intervention.

I

Intervention may be considered either under Rule 24(a) or 24(b), the City Commission having moved in the alternative.

Rule 24(a) deals with intervention of right. That rule provides that "anyone shall be permitted to intervene in an action ... (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties."

[1] I cannot find that the interests of the residents of New York are not adequately represented by the Department of Justice of the United States. Yet this would have to be a necessary finding to permit intervention as of right. There is no evidence to support such a finding. Cf. *Trbovich v. United Mine Workers*,

404 U.S. 528, 538 n. 10. 92 S.Ct. 630, 30 L.Ed.2d 686 (1972). In any event, a broad construction of the word "transaction" in order to allow intervention *of right* seems undesirable. It is better to consider permissive intervention under Rule 24(b), so that the District Court is not bound to accept intervention by cities or their agencies, as a matter of right, in the variety of cases that come before this Court.

[2] I recognize that, from the point of view of federal jurisdiction, the former would be the easier course to take. For in the case of an intervention of right, independent federal jurisdiction is not required whether jurisdiction in the original action is based on diversity of citizenship or on a federal question. See United States to Use and for Benefit of Foster Wheeler Corp. v. American Surety Co. of New York, 142 F.2d 726, 728 (2 Cir. 1944); 3B Moore's Federal Practice ¶ 24.18[1] (2d ed. 1969).

II

[3] The proposed intervention may, however, be considered as a permissive intervention under Fed.R.Div.P. 24(b). There is no "statute of the United States [which] confers a conditional right to intervene" (Rule 24(b) (1)), nor does any party, strictly speaking, rely for ground of claim or defense upon a statute or executive order administered by the intervenor or any regulation (etc.) thereunder (Rule 24(b)). The action is exclusively based on a federal statute, the Civil Rights Act of 1964, which is not administered by any state agency and certainly not by the City Commission. But, in my opinion, the other ground for permissive intervention does exist here: "when an applicant's claim or defense and the main action have a question of law or fact in common" (Rule 24(b) (2)).

[4] We start with the proposition that "[Rule 24(b) (2)] plainly dispenses with any requirement that the intervenor shall have a direct personal or pecuniary interest in the subject of the litigation." SEC v. United States Realty & Improvement Co., 310 U.S. 434, 459, 60 S.Ct. 1044, 1055, 84 L.Ed. 1293 (1940).

[5,6] Second, where the interest of the intervenor "is a public one" the "claim or defense" in Rule 24(b) (2) founded upon this interest has a "question of law in common with the main proceeding." Id. 310 U.S at 460, 60 S.Ct. at 1055.[1] The legal issues in the federal action are substantially the same as those which the City Commission is charged with determining as an administrative matter. " Although the rule speaks in terms of a 'claim or defense' this is not interpreted strictly so as to preclude permissive intervention" where "the legal issues are the same." *Nuesse v. Camp*, 128 U.S.App.D.C. 172, 385 F.2d 694, 704 (1967); see Shapiro, Some Thoughts on Intervention Before Courts, Agencies, and Arbitrators, 81 Harv.L. Rev. 721, 733-34, 759 (1968).

[7] After the Attorney General brought this action, the City Commission started an administrative proceeding against Local 28 by filing a charge of discrimination against it. The charge was that Local 28 had engaged in unlawful discriminatory practices in violation of the Administrative Code of the City of New York, Chapter I, Title B (the City Human Rights Law), specifically with respect to its membership, referral and apprenticeship practices. This federal action would not necessarily stop the City Proceeding. The Congress has specifically disavowed an intent to occupy the field to the Exclusion of state or local laws on the same subject matter. 42 U.S.C. §§ 2000h-4, 2000e-7.

The City Commission, however, seeks to intervene in the federal action on the ground that a decree of this Court ultimately would supersede to some degree its own administrative order, and that the status of the City as a regular contracting party with the construction industry gives it a direct financial interest in any order this Court may make. If intervention is granted, the Commission plans to discontinue its administrative proceeding. The City Commission also notes that the voluntary

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[1] Although there the Commission sought to intervene in a proceeding under Chapter XI of the Bankruptcy Act, the holding affords an analogy to the case at bar.

"New York Plan," designed to increase the representation of minorities within the construction trades and adopted in accordance with Presidential Executive Orders 11246 and 11375, may be affected by the federal case and that this might subject the City to federal sanctions. It alleges that Local 28 is the only construction union in the City which has refused to sign the Plan. Finally, the City Commission seeks to intervene in order to protect the City's citizens from racial and ethnic employment discrimination.

Permissive intervention seems justified in the circumstances. Intervention would permit the City to offer evidence and suggestions to the Court, which might be helpful in this difficult and delicate area. There is no reason to believe that intervention will unduly delay or prejudice the adjudication of the rights of the original parties.

III

Having chosen the harder course of considering permissive jurisdiction, the question of subject matter jurisdiction must be assessed.

The statute which specifically authorizes the Attorney General to bring this action, Title VII, § 707, 42 U.S.C. §2000e-6, is silent on the question of intervention. The companion section relating to actions brought by the "aggrieved person" provides that the Court may stay its own proceedings to permit the state or local authority to remedy the practice alleged; Title VII, § 706(e), 42 U.S.C. § 2000e-5(e).[2] No such stay is provided in actions brought by the Attorney General under Section 707. That federal jurisdiction is mandated in such suit, without regard to state remedies, does not mean, however, that a companion proceeding by the state must be permitted to go on while the federal action proceeds. Two courses of action to avoid such a contretemps are apparent: (1) to enjoin the City Commission

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[2] That subsection also provides for intervention by the Attorney General in certain cases brought by the aggrieved person.

proceeding; or (2) to permit intervention by the City Commission in the federal action.

[8,9] Whether this Court has jurisdiction in the first instance to halt the City Commission proceeding by injunction need not be decided. CF. McNeese v. Board of Education, 373 U.S. 668, 83 S.Ct. 1433, 10 L.Ed.2d 622 (1963); Baker v. Carr, 369 U.S. 186, 82 S.Ct. 691, 7 L.Ed.2d 663 (1962); Carter v. Carlson, 144 U.S.App.D.C. 388, 447 F.2d 358, 368-369 (1971) cert. granted District of Columbia v. Carter, 404 U.S. 1014, 92 S.Ct. 683, 30 L.Ed.2d 661 (1972); Adams v. City of Park Ridge, 293 F.2d 585, 587 (7 Cir. 1961). For I believe that there is subject matter jurisdiction which makes the intervention permissible. That result stems from the doctrine that if the suit proposed to be initiated by the intervenor is "ancillary and dependent, the jurisdiction of the court follows that of the original cause, and may be maintained without regard to the citizenship of the parties or the amount involved." Local Loan Co. v. Hunt, 292 U.S. 234, 239, 54 S.Ct. 695, 697, 78 L.Ed. 1230 (1934).[3] This Circuit has stated that an ancillary suit may be maintained, *inter alia*, "[t]o prevent the relitigation in other courts of the issues heard and adjudged in the original suit." See Pell v. McCabe, 256 F. 512, 515 (2 Cir.), aff'd, 250 U.S. 573, 40 S.Ct. 43, 63 L.Ed. 1147 (1919).[4] If a court has jurisdiction of the principal suit, it also has jurisdiction of any ancillary proceeding in that suit. Neither the citizenship of the parties, nor the amount in controversy, nor any other factor that would ordinarily determine jurisdiction, has any bearing on the right of the court to entertain that proceeding." *Id.* quoting 2 Street's Federal Equity Practice § 1229.[5]

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[3] Or for that matter, without regard to any other jurisdictional prerequisite. See Note, UMW v. Gibbs and Pendent Jurisdiction. 81 Harv.L.Rev. 657, 662-64 (1968).

[4] It is not considered to be of significance that the City litigation is not technically a *court* proceeding.

[5] The same notions of dependence which formerly gave jurisdictional support for an ancillary suit in equity tend to support ancillary jurisdiction for *(footnote continued)*

The same result, I believe, is authorized in this motion for permissive intervention under Rule 24(b) (2), even where no independent basis for federal jurisdiction exists.

The Supreme Court has not determined whether, and in what circumstances, permissive intervention may be allowed in the absence of an independent basis of federal jurisdiction. Professor Moore, however, has stated his view of Rule 24 in categorical fashion:

> "Intervention under an absolute right, or under a discretionary right in an in rem proceeding, need not be supported by grounds of jurisdiction independent of those supporting the original action. Intervention in an in personam action under a discretionary right must be supported by independent grounds of jurisdiction, except when the action is a class action, or when a federal statute gives the conditional right to intervene." 3B Moore, *supra* ¶ 24.18[3] at 24-772 (footnotes omitted).[6]

Research has disclosed neither precedent in the Supreme Court nor in our Court of Appeals for the view that a permissive intervention, in an action which is not in rem, can never be allowed in the absence of an independent federal jurisdictional basis. Given the broad view of the Supreme Court in Local Loan Co. v. Hunt, supra, and in the light of the expanded doctrine

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[5] *(footnote continued)* intervention under the Federal Rules of Civil Procedure. See Walmac Co. v. Isaacs, 220 F.2d 108, 113-114 (1 Cir. 1955); Casters v. Watson, 132 F.2d 614, 615 (7 Cir. 1942), cert. denied, 319 U.S. 757, 63 S.Ct. 1176, 87 L.Ed. 1709 (1943).

[6] Moore says there that "[t]he majority of recent cases continue to follow the principle that where the right to intervene in in personam actions is discretionary, independent jurisdictional grounds must be shown. However, there are several cases which have taken a broader view and have not required independent jurisdiction." 3B Moore, *supra*, at 24-781. A number of the cases cited by Professor Moore as authority for his text, in turn, cite his text as their authority.

of pendent jurisdiction, United Mine Workers v. Gibbs, 383 U.S. 715, 86 S.Ct. 1130, 16 L.Ed.2d 218 (1966), I see no bar to following the old equity practice of supporting federal jurisdiction on the basis of the main action where the intervenor is vitally related to it. Furthermore, although this is not a "class action," the reasons of policy which permit an exception in such cases also apply here. The City Commission seeks to represent an aggregate of persons. So does the Attorney General of the United States. Indeed, they are the same persons, the black and Puerto Rican inhabitants of metropolitan New York. It is hardly a large step, in federal question actions, to extend the doctrine of pendent jurisdiction to pendent parties (who really represent a class), even though the additional "claim" is not independently susceptible to federal adjudication. See Note, UMW v. Gibbs and Pendent Jurisdiction, 81 Harv.L.Rev. 657, 662-64 (1968); cf. Borror v. Sharon Steel Co., 327 F.2d 165, 172-174 (3 Cir. 1964). Such a permissive intervention enhances the efficacy of the federal decree. It does not burden the federal courts unduly, for its operation is permissive and may be easily restricted. It does not lend itself to a possible collusion to confer federal jurisdiction which could exist in diversity cases, because federal question jurisdiction cannot so easily be manufactured.[7]

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[7] Fear of a collusive bestowal of jurisdiction has played a role in a number of prior holdings. Accordingly, some courts have looked at whether the intervenor was a dispensable or an indispensable party. In *diversity* cases, the a nce of independent federal jurisdiction has not defeated permissive intervention where the party was dispensable. E.g., Northeast Clackamas County Electric Co-Operative, Inc. v. Continental Cas. Co., 221 F.2d 329, 331-333 (9 Cir. 1955), relying on Wichita R.R. & Light Co. v. Public Utilities Comm'n. 260 U.S. 48, 54, 43 S.Ct. 51, 53, 67 L.Ed. 124 (1922) ("Jurisdiction once acquired on that [diversity] ground is not divested by a subsequent change in the citizenship of the parties").

Other courts suggest that while permissive intervention in a diversity case does require an independent diversity of citizenship, permissive intervention requires no independent jurisdictional basis where the original jurisdiction is based on a *federal question*. E.g. De Korwin v. First Nat. Bank, 94 F.Supp, 577, 579 (N.D.Ill.1950) (semble); see Olivieri v. Adams, 280 F.Supp. 428, 432 (E.D.Pa. 1968 (three-judge court)

[10] While it is true that the City Commission could simply wait for the decision of this Court and abide by its terms, there is no assurance that it would wait, and the intervenor's complaint comes within the ancillary jurisdiction of this Court. Intervention would insure that there will be no conflicting order by the City outstanding when the federal case is ended. Cf. *Voutsis v. Union Carbide Corp.*, 452 F.2d 889, 893 (2 Cir. 1971). It will make for uniformity in defining the rights of residents of the City, in which the City has a vital interest, both as a concurrent enforcer of those rights and as a contracting party whose financial interests are involved.

Permission for the City of New York to intervene as an additional party plaintiff in that part of the action which relates to Local 28 is granted. See Nuesse v. Camp, *supra*; Mitchell v. Singstad, 23 F.R.D. 62, 64 (D.Md.1959). The caption shall be amended accordingly. Papers may be filed without further order.

It is so ordered.

UNITED STATES of America,
Plaintiff,
v.
LOCAL 638 et al.,
Defendants.

SHEET METAL WORKERS INTERNATIONAL ASSOCIATION, LOCAL UNION NO. 28,
Third-Party Plaintiff,

v.

NEW YORK STATE DIVISION OF HUMAN RIGHTS,
Third-Party Defendant.

SHEET METAL WORKERS (LOCAL UNION NO. 28) JOINT APPRENTICESHIP COMMITTEE AND TRUST,
Fourth-Party Plaintiff,

v.

NEW YORK STATE DIVISION OF HUMAN RIGHTS,
Fourth-Party Defendant.

No. 71 Civ. 2877.

United States District Court,
S.D. New York.
Jan. 3, 1972.

Action by United States under Civil Rights Act against plumbers union local which allegedly discriminated against minority. The District Court, Bonsal, J., held that where Government demonstrated probability of ultimate success on merits, that harm that would occur if preliminary injunction was not issued far outweighed harm to union from injunction and that granting of relief was in public interest, Government was entitled to preliminary injunction requiring certain minority workers to be granted journeyman status in building and construction trades branch of local.

Order accordingly.

Whitney North Seymour, Jr., U.S. Atty., S.D.N.Y., by Joel Harris, and Steven J. Glassman, Asst. U.S. Attys., for the United States.

Peter Kaiser, New York City, for defendant Local 638.

Breed, Abbott & Morgan, New York City, for defendant Mechanical Contractors Association of New York by Edward Shaw, New York City, of counsel.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

BONSAL, District Judge.

FINDINGS OF FACT

I. *Background*

1. Local 638 is a labor union whose territorial jurisdiction consists of the 5 boroughs of the City of New York and Nassau and Suffolk counties (Tr. 16; Gov't Ex. 1-p. 5).

2. Local 638 is a member of the United Association of Journeymen and Apprentices of the Plumbing and Pipe-fitting Industry (Tr. 23).

3. Local 638 has two branches—a construction or A branch whose members do mainly construction work and a metal trades or B branch whose members work in shops and do repair work (Tr. 15-16; Gov't Ex. 1-pp. 4-5).

4. At the present time, there are approximately 3850 journeymen members of the A branch, of whom 31 are non-white (Tr. 16), and 2800-3000 members of the B branch, of whom approximately 500 are non-white (Tr. 16; Gov't Ex. 1-pp. 5, 8).

5. There were no non-white journeymen members of the A branch until 1967 (Gov't Ex. 15-3A(3) and (4)).

6. In the past, Local 638 has discriminated against minority workmen in admitting members to the A branch.

7. Members of the A branch have a higher hourly rate of pay than members of the B branch (Tr. 20).

8. Local 638 has 15 officers and eleven business agents, all of whom are white (Tr. 17; Gov't Ex. 1-p. 8).

9. The Mechanical Contractors Association of New York, Inc. ("MCA") is a trade association of heating, ventilating and air conditioning contractors in the New York area (Tr. 58).

10. MCA has approximately 60 members who employ members of Local 638. (Tr. 59).

II. *Membership Requirements*

11. The only operative requirements for membership in the A branch are that each applicant must have at least 5 years of practical working experience in the plumbing and pipe fitting industry and must be of good moral character. (Gov't Ex. 2-sec. 158, 162).

12. Procedurally, applicants to the A branch send letters to the union stating their qualifications, which letters are reviewed by a committee composed of three of the Union's officers (Gov't Ex. 1-p. 13). These applications are kept on file (Tr. 22) and when additional members are needed in the union—a determination which is based upon the demand for labor (Tr. 21)—applicants are called down, interviewed and, if they have the necessary qualifications, accepted (Tr. 20-1).

13. The union's application process is designed to keep the union membership from being flooded (Tr. 487), by admission of only a small number of new members; this ensures the existence of a shortage of A men and tends to give them job security and high wages.

III. *Advantages of A Branch Membership*

14. Being a member of the A branch is a substantial aid in obtaining a job as a construction steamfitter in the territorial jurisdiction of Local 638 (Tr. 141; 235; 283).

15. Being a member of the A branch is a prerequisite to obtaining job security and preventing early lay-offs. (Tr. 101, 109, 235, 251, 270, 283, 302).

16. Another advantage of A branch membership is the greater opportunity for advancement (Tr. 128–30).

17. A fourth advantage of A branch membership is the greater opportunity to earn overtime pay (Tr. 270; 501–2).

IV. *Shortage of Men in A Branch*

18. In the post-war era, there has been a shortage of construction steamfitters in the New York area (Tr. 152, 171–2, 182, 197–9, 357, 464, 528) as well as a shortage of welders (Tr. 152, 172).

19. As a result of said shortage of manpower, the employers have been required to expend substantial monies for overtime (Tr. 153, 172, 468).

20. In addition, the union has referred B men to work as construction steamfitters in its jurisdiction (Gov't Ex. 1–pp. 27–8, 35).

21. At present there are at least 75 minority members of the B branch and approximately 100 minority non-union men who are working as construction steamfitters in the jurisdiction of Local 638 (Tr. 75–8; Gov't Ex. 7,8).

22. The minority workmen presently employed as construction steamfitters receive A scale wages. (Gov't Ex. 1–p.11).

V. *Minority Workmen and Their Qualifications*

23. The Joint Apprenticeship Program of the Workers Defense League ("WDL") is a non-profit organization funded by the U.S. Department of Labor whose purpose is to recruit and place minority construction workers (Tr. 212).

24. Last summer the WDL, which is the recognized authority for profession recruitment of minorities in the construction business (Tr. 70–1) recruited one hundred minority workmen who were placed in jobs as construction steamfitters by members of the MCA (Tr. 70).

25. Representatives of the employers reviewed the background of these men (Tr. 71–2), all of whom had at least five years experience in the pipefitting industry. (Tr. 83–4)

26. These minority workmen were tested by the recognized testing authorities to determine who could weld (Tr. 72–3) and, although these men were not given the normal cram course (Tr. 75), 25 men were certified and another 25 scored high on the test (Tr. 73).

27. The fifty workmen who scored well on the test were given welding jobs and the other men were employed as steamfitters by members of MCA (Tr. 73–4).

28. The minority workmen (B branch members and non-union) who are presently employed as construction steamfitters are doing the same kind of work as members of the A branch on their respective job sites (Tr. 100, 125, 139, 154, 235, 269, 281, 301).

29 Many of said minority workmen have far more than 5 years experience in the pipefitting industry (Tr. 83, 99, 107, 121, 137, 231, 248, 298, 499).

30. The employers find these 169 minority workmen on the whole to be as competent as A men (Tr. 154, 156–7, 172, 194, 207) and wish to keep them on (Tr. 13).

VI. *Union Membership for Minorities*

31. The 169 minority workmen desire to join the A branch of Local 638 (Tr. 101, 109, 128, 141, 234, 251, 283, 302).

32. A number of the minority workmen have applied for membership in the A branch (Tr. 102, 130–1, 141–2, 270–1, 302–3; Gov't Ex. 10, 12, 13) but none have become members (Tr. 101, 128–132, 140–1, 270–1, 302).

33. Others have not applied for A branch membership because they believed such an application would be useless (Tr. 109, 235).

34. All of the minority workmen meet the requirements to become members of the A branch.

35. The union's denial of membership in the A branch to these 169 minority workmen constitutes a discrimination based upon race and national origin.

CONCLUSION OF LAW

1. Local 638 is a labor organization within the meaning of 42 U.S.C. § 2000e(d) and is engaged in an industry affecting commerce within the meaning of 42 U.S.C. § 2000(e).

2. The Court has jurisdiction over this action by virtue of 42 U.S.C. § 2000e et seq. The Attorney General is authorized under the Civil Rights Act of 1964 to institute suit to enjoin a pattern or practice of discrimination and request such relief as may be necessary to insure the full enjoyment of rights described in Title VII. 42 U.S.C. § 2000e-6(a).

[1] 3. The government has established a *prima facie* case that defendant Local 638 has pursued a pattern and practice of conduct with respect to employment opportunities in the construction industry which has denied minorities the same opportunities available to whites. Parham v. Southwestern Bell Telephone Co., 433 F.2d 421 (8th Cir. 1970); Jones v. Lee Way Motor Freight, Inc., 431 F.2d 245 (10th Cir. 1970); United States v. Dillon Supply Company, 429 F.2d 800 (4th Cir. 1970); Local 189, United Papermakers and Paperworkers v. United States, 416 F.2d 980 (5th Cir. 1969), cert. denied, 397 U.S. 919, 90 S. Ct. 926, 25 L.Ed.2d 108 (1970); United States v. Sheet Metal Workers, Local 36, 416 F.2d 123 (8th Cir. 1969); United States by Mitchell v. Hayes International Corporation, 415 F.2d 1038 (5th Cir. 1969); Rios v. Enterprise Ass'n Steamfitters Local U #638 of U.A. et al., 326 F.Supp. 198 (S.D.N.Y.1971).

[2] 4. The defendant Local 638's membership policies, which the Government has established as having the effect of perpetuating past discrimination, are unlawful. See United States v. Bethlehem Steel Corp., 446 F.2d 652 (2d Cir. 1971); Jones v. Lee Way Motor Freight, Inc., *supra;* United States v. I.B.E.W. Local No. 38, 428 F.2d 144 (6th Cir. 1970) cert. denied, 400 U.S. 943, 91 S.Ct. 245, 27 L.Ed.2d 248 (1970); Local 189, United

Papermakers and Paperworkers v. United States, *supra;* United States v. Sheet Metal Workers, Local 36, *supra;* Local 53, Int'l Ass'n of Heat & Frost Insulators and Asbestos Workers v. Vogler, 407 F.2d 1047 (5th Cir. 1969); Quarles v. Phillip Morris, Inc., 279 F. Supp. 505 (E.D.Va.1968).

[3] 5. The government has shown probability of ultimate success on the merits, that the harm which will occur if the preliminary injunction is not issued far outweighs the harm to the union and the fact that the granting of relief herein is in the public interest. Hence, the government is entitled to preliminary relief in this case. See cases cited in the Government's Memorandum of Law submitted in support of this motion, dated November 9, 1971.

ORDER

Plaintiff, the United States of America, having moved by Order To Show Cause dated November 9, 1971 for the issuance of a preliminary injunction enjoining defendant Local 638, Enterprise Assciation, etc. ("Local 638") from denying to qualified minority workmen union membership on terms and conditions, and with rights, privileges and responsibilities equal to all other workmen enjoying journeyman status in the Building and Construction Trades Branch of Local 638, without regard to race or national origin, and the Court having heard testimony at hearings commencing on November 26, 1971, and having read and filed the affidavits and exhibits submitted in support of said motion and in opposition thereto; and after due deliberation and after rendering and filing Findings of Fact and Conclusions of Law, it is hereby

Ordered, that the 169 minority workers whose names are set forth on Exhibit A, are hereby granted full journeyman status in the Building and Construction Trades Branch, ("A Branch") of Local 638, with rights, privileges and responsibilities equal to those of all other members enjoying full journeyman status, these rights and privileges to include the services provided by Local 638 in assisting members of the A Branch in obtaining and retaining employment with steamfitting industry employers in New York City and Long Island; and it is further

Ordered, that Local 638 shall, within one week of the date of this Order, inform each of the minority workers whose name is set forth on Exhibit A, in writing, of his A Branch status as hereinabove set forth and of the provisions for payment of the initiation or transfer fee and dues, and of the amounts and dates such payments are due, as hereinafter set forth; and it is further

Ordered, that the initiation or transfer fees payable by the said minority workers shall be those charged other members of the A Branch similarly situated and presently in force, and shall be payable at the union office, 841 Broadway, New York City, in equal weekly installments over a period of 10 weeks commencing two weeks from the date of this Order, for which receipts will be given by Local 638; and it is further

Ordered, that, as of the date of this Order, said minority workers shall be liable to pay the union dues charged to other members of the A Branch similarly situated and presently in force, on the same basis as union dues paid by other members of the A Branch, such payment to commence two weeks from the date of this Order, for which receipts will be given by Local 638 until the formal issuance of the appropriate A-Branch Union Book; and it is further

Ordered, that within 45 days of the date of this Order, or immediately upon payment in full of the aforesaid initiation or transfer fee, whichever shall later occur, Local 638 shall issue or cause to be issued formal membership documentation, including the appropriate A-Branch Union Book, to each of the said minority workers as is issued to all other journeymen members of said A Branch; and it is further

Ordered, that within 30 days of the date of this Order, Local 638 shall have the right, if it deems any of said minority workers to be incompetent, to apply to this court for an Order striking the name of such allegedly incompetent minority workers from Exhibit A, such application being independent of but not in lieu of the preceding paragraphs of this Order; and it is further

Ordered, that within 60 days of the date of this Order, Local 638 shall submit to the Court proposed objective qualifications and procedures, including a description of any practical and

written examination(s), for admission of workers, regardless of race or national origin, to full journeyman status in the A Branch which procedures shall take effect upon approval by the Court, and shall be applied to all applicants to the A Branch during the pendency of this action; and is further

Ordered, that the Court retains jurisdiction for the purpose of effectuating this decree.

STATE COMMISSION FOR HUMAN RIGHTS v. FARRELL

Cite as 252 N.Y.S.2d 649

43 Misc.2d 958

Application of STATE COMMISSION FOR HUMAN RIGHTS, Petitioner, v. Mell FARRELL, individually and as president of Local Union No. 28 of Sheet Metal Workers' International Association of Greater New York, an unincorporated association, Joint Apprenticeship Committee, representing the Employers' Association in the Sheet Metal Industry in New York City and said Local Union No. 28, John Mulhearn, Howard Bretz, John Dasch, Michael J. Minieri, Nathaniel Gold, Morris Lipka, Seymour Zwerling, Richard Funk, and Thomas A. Mitchell, Respondents, to obtain a Court Order, pursuant to Section 298 of the Executive Law, for the enforcement of an order dated March 20, 1964, made by petitioner against respondents.

Supreme Court, Special Term, New York County, Part I.

Aug. 24, 1964.

Supplemental Opinions Nov. 6 and 24, 1964.

Proceeding by State Commission on Human Rights for enforcement of order affecting employment practices in sheet metal industry and finding that union, local union, and joint apprenticeship committee denied to or withheld from qualified Negroes and other minority groups right to be admitted to and participate in sheet metal apprentice program solely because of race and color. The Supreme Court, New York County, Special Term, Part I, Jacob Markowitz, J., held that final plan generally providing for selection of apprentices in sheet metal trade without regard to race, creed, color, national origin, or physical or psychological handicaps provided the physical or psychological handicaps would not interfere with ability to perform and for selection of apprentices on basis of qualifications alone, right to appeal and reapply, and appointment solely and exclusively on basis of point score obtained on aptitude test and interview was acceptable as nondiscriminatory, and that

evidence failed to support findings that individuals themselves who acted on joint apprenticeship committee had denied to or withheld from qualified Negroes and other minority groups the right to be admitted to and participate in the program solely because of race and color.

Findings and affirmative provisions of order adopted except as to findings against individuals themselves as to their prior conduct and past acts and as to cease and desist order.

* * *

Henry Spitz, New York City (Sidney Kant, William M. Miles, Solomon J. Heifetz, New York City, of counsel), for NYS Commission for Human Rights.

Cohn & Glickstein, New York City (Sidney E. Cohn and Samuel Harris Cohen, New York City, of counsel), for respondent Local 28, Union Officers and Representatives.

Zelby & Burstein, New York City (Herbert Burstein, New York City, of counsel), for respondent Zwerling.

Breed, Abbott & Morgan, New York City (Thomas A. Shaw, Jr., New York City, of counsel), for respondents Funk & Mitchell.

Stember & Dershowitz, New York City (Jerome M. Stember, New York City, of counsel), for respondent Lipka.

David Harrison Storper, New York City, for respondent Gold.

Louis J. Lefkowitz, Att. Gen., New York City (Shirley A. Siegel and George D. Zuckerman, New York City, of counsel), for the State.

Martin P. Catherwood, Industrial Commissioner (Benjamin Rosenthal, Brooklyn, of counsel), for Joint Apprenticeship Committee, respondent.

JACOB MARKOWITZ, Justice.

Motions numbered 39, 40, 42, 43, and 62 of June 22, 1964, are consolidated with motion Number 41 of the same date.

Pursuant to Section 298 of the Executive Law, the State Commission for Human Rights has brought this proceeding seeking enforcement of its order affecting employment practices[1] in the sheet metal industry. The order of the Commission, in essence, found that the respondent union, Local 28 of the Sheet Metal Workers International Association of Greater New York (hereinafter referred to as "Local 28"), and the Joint Apprenticeship Committee[2] (hereinafter referred to "JAC") denied to or withheld from qualified Negroes and other minority groups the right to be admitted to and participate in the Sheet Metal Apprentice Program under their control solely because of

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[1] Proceedings herein were commenced by complaint of the Attorney General of the State of New York to the Commission, pursuant to Section 297 of the Executive Law of the State of New York. The complaint charged violation of Section 296, subd. 1(b), 296, subd. 1-a and 296, subd. 6, which provide:

"Sec., 296. Unlawful discriminatory practices.

"1. It shall be an unlawful discriminatory practice: ° ° °

"(b) For a labor organization, because of the age, race, creed, color or national origin of any individual, to exclude or to expel from its membership such individual or to discriminate in any way against any of its members or against any employer or any individual employed by an employer.

"1-a. It shall be an unlawful discriminatory practice for an employer, labor organization, employment agency or any joint labor-management committee controlling apprentice training programs: ° ° °

"(b) To deny to or withhold from any person because of his race, creed, color or national origin the right to be admitted to or participate in a guidance program, an apprenticeship training program, on-the-job training program, or other occupational training or retraining program:

"(c) To discriminate against any person in his pursuit of such programs or to discriminate against such a person in the terms, conditions or privileges of such programs because of race, creed, color or national origin. ° ° °

"6. It shall be an unlawful discriminatory practice for any person to aid, abet, incite, compel or coerce the doing of any of the acts forbidden under this article, or to attempt to do so."

The order of the Commission was issued in conformity with Section 297.

[2] The Joint Apprenticeship Committee, containing equal union and employer representation, was created by the parties to supervise and control all duly qualified apprentices. It is required under the Standard Form of Union Agreement, the collective bargaining agreement governing the industry, to formulate and make operative rules to govern the conditions pertaining to duly qualified apprentices and the operation of an adequate apprentice training system.

race and color. The order further found that the individual respondents herein, who are employer members of the JAC, aided and abetted the other respondents in denying qualified Negroes the right to enroll in the apprenticeship program. By separate motions, Local 28 is seeking review of said order, and the individual respondents seek to set aside said order as it affects them individually.

The Commission found that Local 28, consisting of 3300 members and 430 apprentices, has never had nor does it presently have a Negro member, nor has any Negro participated in the JAC training program. The only realistic way of becoming a member of Local 28 is through the JAC program. The Commission further found that, in the most recently completed training program, 80 per cent of the trainees were related in some manner to the members of Local 28. The Commission also found that admission to the apprenticeship training program was not based upon any set of objective standards. No provision existed safeguarding any applicant against discrimination because of race, color, creed, or national origin. Nor was there any provision entitling an applicant to seek review of a rejection of his application for training.

[1] The court concludes that the findings of the Commission, except as hereinafter noted, are supported by substantial evidence on the record considered as a whole. The findings are therefore conclusive (Executive Law, § 298; Holland v. Edwards, 307 N.Y. 38, 44,45, 119 N.E.2d 581, 583, 584,44 A.L.R.2d 1130; Stork Restaurant v. Boland, 282 N.Y. 256, 274, 26 N.E.2d 247, 255). The enforcement procedures set forth in the Commission's order thus are the remaining issue for consideration.

The Court approaches this matter not simply as litigation between private parties, but rather views the instant proceedings as raising vital matters filled with greatest public concern. The issue herein, involving the development of non-discriminatory shop training programs, cannot be approached strictly within the conventional confines of an adversary proceeding. The people of this State, as well as groups throughout the country, are searching for guide lines in the handling of this volatile problem. To that end, the court enlisted the cooperation of the parties.

The Court arranged conferences with all parties and governmental agencies concerned, in the hope that the desirable objectives might be achieved by conciliation and agreement rather than solely by force of law.[2a] Numerous and extended conferences were held throughout the summer in an attempt to achieve the adoption of acceptable standards for an apprentice training program which would carry out the spirit and the intent of the Law Against Discrimination (Article 15 of the Executive Law) and the principles of equality which are fundamental to both our federal and state Constitutions and systems of law. Represented and participating at the conferences were the Commission, the employers, the union officials involved, the Industrial Commissioner, and the Attorney-General. From time to time each of the parties requested a conference with the Court, jointly or severally, while the standards for the joint apprenticeship program consonant with the Court's directions were being formulated.

From the inception of these proceedings and conferences, the Court advised the parties that it could not recognize any plan as acceptable unless it truly afforded every applicant for admission to the apprenticeship program equal opportunity, nor would any plan be approved that did not abolish the existing practice of favoritism because of family affiliation, or did not provide for a complete and fair review procedure, or made it economically difficult for an applicant to qualify, or incorporated unreasonable educational requirements, or which in any other way would prevent equal opportunity under objective standards or selection on any basis other than the basis of qualification alone.

[2a] This is in keeping with the spirit of the law against discrimination, which, rather than providing for the usual procedures for review of administrative agency determinations (See, CPLR Article 78), has incorporated provisions giving the Supreme Court complete jurisdiction of the proceeding and the power to grant such temporary or permanent relief as it deems just and proper (see, Right To Equal Treatment: Administrative Enforcement of Anti-discrimination Legislation, 74 Harvard Law Review, 526 et seq.).

The Court recognized that the issue before it involved the foundations of our democracy. Judicial decisions,[3] legislative enactments,[4] and events in the world outside the courtroom demonstrate that today's crucial testing ground for the American system of democracy is in the area of equal rights for its Negro citizens. Equality for our minority groups—the right to equal job opportunity, the right to equal educational opportunities, the right to equal housing opportunities, and the right to vote—is the essence of democracy today. Without it our democracy falls short of securing fundamental human rights for all citizens. Unless every citizen enjoys all the rights of freedom, our democracy becomes anemic. Anemic democracy is nonexistent democracy. There must be a moral awareness and a greater concern for human rights and dignity and the dignity of man. Industry, labor, government at all levels, and the public-at-large, must embrace this basic concept.

The legal profession has recognized the urgency of achieving racial equality in conformity with law and order.[5] As President

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[3] See, e. g. Brown v. Board of Education, 347 U.S. 483, 74 S.Ct. 686, 98 L.Ed. 873 (state imposed segregated public schools); Shelley v. Kraemer, 334 U.S. 1, 68 S.Ct. 836, 92 L.Ed. 1161 (racial restrictive covenants); Burton v. Wilmington Parking Authority, 365 U.S. 715, 81 S.Ct. 856, 6 L.Ed.2d 45 (restaurant); State Athletic Commission v. Dorsey, 359 U.S. 533, 79 S.Ct. 1137, 3 L.Ed.2d 1028 (athletic contests); Terry v. Adams, 345 U.S. 461, 73 S.Ct. 809, 97 L.Ed. 1152 (political organization primary); Gomillion v. Lightfoot, 364 U.S. 339, 81 S.Ct. 125, 5 L.Ed.2d 110 (geographic redistricting of municipal voting areas); Johnson v. State of Virginia, 373 U.S. 61, 83 S.Ct. 1053, 10 L.Ed.2d 195 (state compelled segregation in courtroom); Conley v. Gibson, 355 U.S. 41, 78 S.Ct. 99, 2 L.Ed.2d 80 (discrimination in violation of Railway Labor Act).

[4] Civil Rights Act of 1964, U.S.P.L. 88-352, 78 U.S.Stat. 241 et seq. N.Y.Laws 1964, Chap. 948, amending the Executive Law and the Labor Law, see infra. U.S. Public Law, 88-452 of the 88th Congress, 78 Stat. 508 ["anti-poverty law"—August 1964].

[5] "The thrust for implementation of Negroes' rights to jobs, education and housing remains the most urgent domestic issue of 1964. It was dramatized in the summer of 1963 by the 'March on Washington', and the summer of 1964 promises to produce a variety of civil rights activity, both in the South and in the North.

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Johnson has recently said, "The denial of rights invites increased

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"The New York State Bar Association considers this a strategic time to express some basic principles for guidance of lawyers and other citizens in meeting the problem. All our human and property rights depend on a system of laws which are to be obeyed. Flaunting any law weakens the grounds of all those rights. New York State has been a pioneer in legal protection of the rights of minorities. There are correlative obligations; on the community, to assure the achievement of racial equality in conformity with law, and on minority groups to conform with law and order in voicing their demands for effective equality.

"The first basic principle is that the achievement of racial equality requires the urgent efforts of the entire community. One hundred years after the Emancipation Proclamation, and ten years after the school segregation decision, there are still many areas of our life where patterns of segregation remain. Anti-bias housing laws still fall short of permitting the dispersal of minority groups from segregated areas in both urban and suburban communities. Steps to provide true equality of educational opportunity are proceeding slowly, and will require vast sums of money, which may necessitate additional taxes on all our citizens. The opening of new employment opportunities for Negroes has proceeded slowly. There is need for much wider channels of communication, so that the community may be fully aware of minorities' problems, and the minorities may be kept informed of the efforts which are being made to implement their rights.

"The second basic principle is that demands for racial equality should be expressed in conformity with law and order. Camping in government or business offices, blocking traffic, or like wilful obstructions, are tactics which we believe both bespeak and beget disrespect for law—a disrespect which is singularly antithetical to the goal of equal rights for all. Such tactics are unnecessary in New York State, where the law imposes virtually no obstacles to peaceful protest against social evils, the courts act impartially, the ballot is open equally to all, and public officials are available to all persons asserting grievances. Moreover, demonstrations which interfere with the civil rights of others are not, we suggest, the best way to achieve equality of treatment. Ideally, the common resolve to promote racial justice should not be prejudiced by any misconduct of civil rights advocates. It is a fact of life that demonstrations which violate the rights of others frequently lose friends and alienate the support of many persons of good will. Frustrations caused by delay in reaching full equality do not justify resort to violence or lawbreaking.

"The third basic principle is that lawyers should lead in assuring the legal rights of all citizens. They are equipped by training, experience and skill to resolve disputes on a basis of reasonable adjustment, rather than emotion and violence, but they must undertake more active roles both individually and in association than heretofore. We commend the efforts of the Lawyers' Committee for Civil

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disorder and violence and those who would hold back progress toward equality and at the same time promise racial peace are deluding themselves and deluding the people. Orderly progress, exact enforcement of the law are the only paths to an end of racial strife." (Address to the American Bar Association, August 12, 1964.)

There is perhaps no right more important for the achievement of equality than the right to learn how to perform a job. The Court of Appeals has recently noted that discrimination in employment, with its consequent economic disparities upon which other kinds of discrimination thrive, is the "main key" to the problem of ending discrimination based on race and creed. Board of Higher Education of the City of New York v. Carter, 14 N.Y.2d 138, 250 N.Y.S.2d 33, 199 N.E.2d 141.[6] Denial of the right to be trained in many industries is tantamount to denial of employment. Discrimination based upon race which effectively excludes a minority from the right to be employed in a particular industry has been condemned by the courts. See e. g. Kelly v. Simons, Sup., 87 N.Y.S.2d 767, 770; James v. Marinship Corp., 25 Cal.2d 721, 155 P.2d 329, 160 A.L.R. 900 (1944); Todd v. Joint

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Rights Under Law, to resolve the nation's racial problems, and we urge all local bar associations to study what needs to be done in their own areas, and to furnish leadership in accomplishing it. The Lawyers' Committee urges local bar aid in two particular fields—establishing bi-racial committees to seek solutions to civil rights problems, and seeing that all persons in civil rights controversies can obtain competent legal counsel. When a citizen takes the law into his own hands by wilfully violating it, the result is nothing less than anarchy and must never be condoned by an emotional misjudgment that the end justifies the means. Resentment of illegal demonstrations should not be an excuse for relaxing the efforts of the white community to promote racial justice. Local bar associations can help clarify fundamental legal issues as a contribution to public discourse."

Statement unanimously adopted by the Executive Committee of the New York State Bar Association, June 15, 1964.

[6] One of the foremost leaders in the Negro movement for equality has stated that the struggle for rights is ultimately the "struggle for opportunities" and that the Negro does not want to be told that there is no place where he can be trained to handle a job. Martin Luther King, Jr., "Why We Can't Wait", (Harper & Row, 1963) p. 149.

Apprenticeship Committee, D.C., 223 F.Supp. 12, rev'd on other grds., 332 F.2d 243 (7th Cir. 1964); compare Gaynor v. Rockefeller, 21 A.D.2d 92 at p. 100, 248 N.Y.S.2d 792 at pp. 802–803.

[2] Independent of judicial precedent, this court enunciates the principle that it will not countenance discrimination in job training programs which exclude the victimized minority from employment in industry. As noted above, consideration of the issue herein must realistically acknowledge the keystone position of equality in job opportunity (and as a prerequisite thereof equality in job training and apprenticeship opportunities)[7] for achievement of full equality required in our democracy. The best schooling in the world can lead only to frustration if it does not lead to a decent job; equal access to the best restaurants or residential areas is meaningless if there is no money to pay the going price; full right to participate in public life is small comfort if one's private life is impoverished.

The court notes that the history of the American labor movement reveals a continuing concern by its major branches and spokesmen for the achieving of equality for all.[8] The concern of American labor for equality has increased with the passing

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[7] In 1959 unemployment averages for whites were at a level of 4.6% while for non-whites the averages were as high as 11.5%. This disparity in unemployment rates has been attributed to the inadequate participation of Negroes in apprenticeship training. The Economic Situation for Negroes in the United States, 1960 Report by U.S. Dept. of Labor.—25% of the male Negro teenagers who are in the labor force are unemployed. [Unpublished Gov't statistics Aug. 22, 1964]

[8] a. As early as 1866, at the convention of the National Labor Congress, it was said that if the union'" * * * be misled by prejudice or passion as to refuse to aid the spread of union principles among our fellow toilers, we would be untrue to them—to ourselves * * * If these general principles be correct, we must seek cooperation of the African race in America." A.C. Cameron, "The Address of The National Labor Congress to the Workingmen of the United States." (Reprinted in Commons, et al., Documentary History of American Society, Vol. 9, pp. 141–168.)

b. One year later, Uriah Stephens, of the Knights of Labor, the forerunner of the American Federation of Labor, declared that he could see ahead of him "an organization * * * that will include men and women of every craft, creed and color." Commons, et al., Vol. 2, p. 167.

years. Particularly relevant to the instant case has been the attention that the labor movement has given to the problem of discrimination in apprenticeship programs. George Meany, President of the AFL–CIO, declared before a Special Sub-Committee of the House Committee on Education and Labor in 1961;[9]

> "What we need in this country is genuine equality of opportunity for all citizens regardless of race, creed, color or national origin. Let's grant that apprenticeships are a problem; fine, let's act on that problem. But apprenticeship is only a part of a much broader problem."[10]

In June of 1963,[11] the General Presidents of the unions affiliated with the Building and Construction Trades Department, AFL–CIO, adopted a program which included the following provision:

> "4. With regard to the application for, or employment of apprentices, local unions shall accept and refer such applicants in accordance with their qualifications and there shall be no discrimination as to race, creed, color or national origin, ° ° °."

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[9] U.S. Congress House Committee on Education and Labor, Equal Opportunity in Apprenticeship Program Hearing, 87th Cong., 1st Sess., (August, 1961) on H.R. 8219.

[10] The model union pledge, signed in 1962 by 116 national unions and 300 directly chartered labor unions, representing about 11 million workers, declares in unambiguous terms:

"We shall seek agreement from management to write into joint apprenticeship training programs in which we participate a non-discrimination clause in regard to admission and conditions of employment of apprentices and shall see that this clause is administered in such a way as to give full and effective application of non-discrimination throughout all such training."

[11] Press Release of the Building and Construction Trades Dept., AFL–CIO, June 21, 1963, p. 2.

Nevertheless, discrimination does exist.[12] It is with the effective and wise eradication of the manifestations of unwarranted prejudice in the apprenticeship program in the Sheet Metal Industry in the City of New York that this Court is concerned in the instant proceeding.

[3] With respect to the plan proposed, Local 28 made a forceful presentation in favor of attaching some preference to those applicants who are sons or sons-in-law of present or deceased members of the Union. The Court recognizes that the practice of giving some preference to applicants with filial ties to Union members is widespread and dates back to the very inception of craft unions when craftsmen first joined together in guilds. The historic, economic and social reasons for the practice of filial preference and its beneficial effects have been urged by the Union and examined by the Court.

Under the realities of today's society, the guarantee of equal protection of the laws and the prohibition against discrimination contained in Section 11 of Article I of the New York Constitution requires that this Court refuse to sanction any plan which could be used, directly or indirectly, to discriminate against any person on the basis of race, color, creed or national origin. The 1964 Amendments to the Executive Law and Labor Law apply this principle directly to the area before the court—apprenticeship training programs. The court concludes that provision in this apprenticeship training program for preference or credit because of filial relation would be illegal and unconstitutional and so advised the parties and the Industrial Commissioner.

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[12] a. Woll, "Labor Looks at Equal Rights in Employment" 24 Fed.Bar Journal, No. 1 page 93 (Winter 1964).

b. Barkin, The Decline of the Labor Movement, 50–51 (1961).

c. President Meany has noted: "It would be futile to pretend that the 13½ million members of the AFL–CIO unions are without exception devoted to the cause of civil rights. They are a cross-section of America, and they reflect the diversity of the nation. But just as truly they reflect the American consensus. That consensus, expressed by AFL–CIO conventions and by conventions of the affiliated national and international unions, is the basis for the AFL–CIO's determination to abolish all forms of discrimination." "Equal Rights for All", p. 4 (AFL–CIO) Publication No. 133.

In addition to the over-riding constitutional and legislative declarations of equality, the court believes that filial preference is contrary to modern day societal objectives concerning job qualifications. No lawyer or doctor today would expect his son to receive preference by reason of family relationship in applying for admission to the Bar or for a medical license. Admission to a profession or industry based exclusively upon the applicant's qualifications to perform in the profession or industry as determined by objective criteria is to be encouraged.

The court was also concerned that the original proposed plan did not provide for adequate review procedures to an applicant, and directed appropriate amendments.

In the fourth completed draft, the parties submitted a new plan whereby an applicant, after he has exhausted his right to review before the JAC, may obtain further review by a member of a panel chosen by the Presiding Justice of the Appellate Division of the First Department. After consultation, the Presiding Justice graciously consented to perform this function.

The court was also concerned with the fact that educational standards higher than were reasonably necessary might be adopted. To this end, the court suggested a graduated system which would be fair to minority groups and at the same time discourage high school drop-outs, while nevertheless meeting the minimum scholastic requirements for an apprenticeship trainee. Under the court's suggestion, an apprenticeship trainee for the 1965–66 programs would be required to have completed two years of high school work or its equivalent; for the 1967–68 programs, a three-year requirement or its equivalent would be necessary, and thereafter a completed high school course or its equivalent would be mandatory. The plan as finally adopted is sufficiently flexible to meet these suggestions, and if need be will be supplemented in the final order of the court.

The question of applicant fees was also considered. In order to avert an economic barrier, it was urged by the court that such fees be kept to a minimum or even eliminated. However, it is recognized that administrative and medical examination costs might make it necessary to require an apprenticeship applicant

to defray some of the expenses. Accordingly, the accepted plan adopted a provision whereby such cost would never exceed the amount of $10.

The problem pertaining to the 430 individuals on the present apprenticeship list was resolved by providing that they and all other applicants shall be accorded equal treatment in determining their eligibility to be appointed to the apprenticeship training program and be judged by the same set of objective standards. Further, it is provided that no preferential treatment shall be given to either those who apply for admission de novo or those who have applied heretofore.

[4] Another question which remained before the court is whether the individual respondents acted as individuals or solely in their representative capacities. This is important in view of the possible sanctions. Were it not for the complete cooperation given by all of the individuals to the establishment of a non-discriminatory joint apprenticeship training program, the Court might well have found that the record was susceptible of sustaining the finding holding the individuals responsible in their individual capacities as well as in their representative capacities. The court, however, is not unaware of the private economic and social forces that operate to compel individuals to follow the course of least resistance, frequently on the theory that it is only committee responsibility and not individual responsibility which they assume. In a situation such as the present one, none of the employer members of the Committee receives compensation for his services, nor do they as individuals benefit from the committee responsibility which they carry out. The court recognizes that industry/union committees are desirable, if not vital, to the harmonious working out of industry-wide labor problems. The court is convinced that the individual respondents are in favor of the underlying theory of equality of opportunity in job training. The court finds that the representatives of industry and labor act both in their individual as well as in their representative capacities. However, under the circumstances of the entire case, the court will not affirm those findings of the Commission against the individuals themselves as to their prior conduct and past acts.

There were other difficulties and problems presented by the original and intermediate plans which need not be gone into in any further detail. The final plan (fourth completed draft) presented by JAC and approved by the Commission is set forth in full in Appendix "A" to this decision.

In addition to the matters heretofore alluded to, the final plan generally provides for the selection of apprentices without regard to race, creed, color, national origin, or physical or psychological handicaps provided the latter two do not interfere with the applicant's ability to perform. Apprentices must be selected on the basis of qualifications alone, and all applicants will be afforded equal opportunity under the adopted standards. A rejected applicant is to be notified and the reasons given therefor with the right to appeal. A rejected applicant may reapply. The age prerequisites are 18 to 23 with some modifications. Medical and physical examinations are required. Aptitude tests are to be given by the New York City Testing Center or equivalent testing center. Two hundred percent of the number of apprentices ultimately to be appointed who have achieved the highest rating in an independently conducted aptitude test will be interviewed. The interviewing board is to consist equally of representatives of labor and industry. The maximum point score one can achieve on the test will be 750, and on the interview 150. Appointments will be made solely and exclusively on the point score. The term of apprenticeship will be four years (approximately 7,000 hours) of reasonably continuous employment, divided into eight periods. On-the-job instruction will be given in specified areas, and trainees will be required to attend formal classes one day every second week with pay. Tuition fees for such instruction are provided for, as well as periodic examinations. The plan annexed hereto also embodies other aspects. Not specifically included in the plan, but agreed to by the parties is a requirement for publicizing the program in the schools and through other channels and media making it clear that it is open to all who are interested and can meet the objective standards. The publicity requirements will be incorporated in the order to be settled hereon. The next apprenticeship class will be in January or February, 1965, and be under the plan adopted herein.

[5] The plan herein adopted was the result of the unusual cooperative spirit on the part of the Commission, industry, union officials, their respective counsel and the Attorney General. The court expresses its appreciation to the aforenamed parties. The court accepts the plan because it is enlightened, progressive and in accordance with the principles of non-discrimination, equality of opportunity and on the basis of qualification alone under objective standards.

It is hopefully expected from the effective implementation of this program a truly non-discriminating union will emerge. A rare opportunity is afforded to this industry to serve as a model for others, and, by rigid adherence to the adopted standards, itself becomes a standard of morality and brotherhood, equal opportunity and democracy.

The objective standards herein adopted for the apprenticeship program in the Sheet Metal Industry of New York City may well be a model for state-wide utilization by the New York State Industrial Commissioner, who is mandated[13] to promulgate rules and regulations in implementing Chapter 948 of the Laws of 1964.[14] In summary, the Commission's findings and affirmative

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[13] The Industrial Commissioner is granted power to promulgate such rules by Section 811 of the Labor Law.

[14] Amendments to the Executive Law and the Labor Law of New York in relation to equality of opportunity in apprenticeship training will become effective on the 1st of September, 1964. (L.1964, Chap. 948). Section 296 of the Executive Law is amended by adding an express provision that it shall be an unlawful discriminatory practice for any joint labor management committee controlling apprentice training programs:

> "(a) To select persons for an apprentice training program registered with the state of New York on any basis other than their qualifications, as determined by objective criteria which permit review."

Subdivision 5 of Section 815 of the Labor Law has been concurrently amended so as to provide that suggested standards for apprenticeship agreements include:

> "5. Provision that apprentices shall be selected on the basis of qualifications alone, as determined by objective criteria which permit review, and without any direct or indirect limitation, specification or discrimination as to race, creed, color or national origin."

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provisions of its order are adopted except as to finding No. 66 as modified and as to the cease and desist order by striking the second decretal paragraph as heretofore indicated in this opinion.

At the request of the parties, the court is retaining jurisdiction. An interim order including findings consistent with this opinion will be settled hereon.

Supplemental Opinion

Since the decision of this Court, the State Industrial Commissioner has issued "Apprentice Training Regulations" (12 N.Y.C.R.R., c. IX, sub.-ch. A, Part 600), effective September 1, 1964, which in many areas embrace the principles set forth in the original decision and Appendix A annexed thereto.

The parties have accordingly amended Appendix A pertaining to the standards established by the Joint Apprenticeship Committee so as to provide that the Apprentice Training Regulations of the State Labor Department and any amendments thereto are to apply insofar as they are not inconsistent with the decision of the Court and the order signed and entered simultaneously herewith.

In addition, Appendix A has been supplemented so as to reflect additional requirements as enunciated in the original decision, clarify and group the provisions pertaining to notification of acceptance, rejection, appeal and review procedures, and incorporate other appropriate changes.

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These two legislative amendments along with the enactment of Title 7 (Equal Employment Opportunity) of the Civil Rights Act of 1964 (78 Stat. 241 et seq., Public Law 88-352) which makes it an unlawful employment practice to discriminate on the basis of race in any apprenticeship program, evince the fact that apprentice systems have not heretofore been dedicated to the principle of equality. Both the state and federal legislation is directed to the same end of abolishing discrimination in the apprentice programs.

The selection of the first apprenticeship class under the newly-adopted standards shall take place within a reasonable period of time.

The standards established by the Joint Apprenticeship Committee, dated October 14, 1964, shall replace and supersede, as Appendix A to the decision-in-chief herein, the standards dated August 12, 1964 and are annexed hereto and made part of this decision.

APPENDIX "A"

CORRECTED
FIFTH DRAFT
-of-
STANDARDS FOR THE ADMISSION OF APPRENTICES
ESTABLISHED BY
THE JOINT APPRENTICESHIP COMMITTEE & TRUST
FOR THE
SHEET METAL INDUSTRY OF NEW YORK CITY, N.Y.
PURSUANT TO
THE "AGREEMENT"
AND
DECLARATION OF TRUST
AND
THE RULES AND REGULATIONS
ADOPTED THEREUNDER BY THE TRUSTEES

PART I

PURPOSES, INTENT AND PROCEDURE

A. NON-DISCRIMINATORY PROGRAM—Selection of apprentices will be made subject to the objective standards herein provided. Apprentices will be selected on the basis of qualifications alone, and all applicants will be afforded equal opportunity under these standards without regard to race, creed, color, national origin or physical or psychological handicaps, *provided however,* that if the physical or psychological handicaps

affect the applicant's ability to perform the manual labors required by the trade, the applicant will not be accepted.

FORMS—Applications shall be submitted on a form designated by the Committee which shall incorporate the standards herein set forth.

B. APPLICATIONS—All applicants who heretofore have applied, and all applicants who may hereafter apply for apprenticeship training shall be accorded equality of treatment in determining their eligibility to be appointed to the apprentice training program and shall be judged by the same set of objective standards. No preference in treatment shall be given between those who apply for admission de novo and those who have applied heretofore.

C. REAPPLICATION OF REJECTEES—Applicants who have been rejected may re-apply at any time, so long as they satisfy the age, educational and physical requirements.

PART II

QUALIFICATIONS

A. NOTIFICATION OF REQUIREMENTS—A written statement of the qualifications for admission will be given to each applicant prior to the time when each applicant is first required to demonstrate his qualifications.

B. AGE PREREQUISITE—Applicants for Apprenticeship Training shall:

(a) be not less than 18 years of age, nor more than 23; but applicants who are 17½ years of age, but less than 18 at date of designation of successful apprenticeship applicants to the program may be considered for apprenticeship from and after the date they reach their 18th birthday. Service in the Armed Forces may extend the age limit to 25 years of age, but in no event shall the age limit be extended for more than the period of time spent in the Armed Forces.

(b) HIGH SCHOOL PREREQUISITE—Applicants who file applications for admission to the Apprenticeship Training Program during the years 1965-1966 shall have completed satisfactorily not less than two years of high school study; and applicants who file applications for admission to the Apprenticeship Training Program during the years 1967-1968 shall have completed satisfactorily not less than three years of high school study; and

Applicants who file applications for admission to the Apprenticeship Training Program during 1969 and thereafter, shall have graduated from high school or have an equivalency certificate showing completion of high school studies.

(c) PHYSICAL EMOTIONAL PREREQUISITE—Be physically fit and emotionally stable for work in the trade. Each applicant who meets the age, educational and physical requirements shall be given an aptitude test and based upon the aptitude scores, personal interviews will be granted to the number determined in accordance with the formula hereinafter set forth.

C. ESTABLISHMENT OF QUALIFICATIONS: Qualifications shall be established by:

1. Certificate of age from Local Board of Education or certified photostat of birth certificate (attach to application).

2. Applicants for admission to apprenticeship training during the years 1965-1966,—a school record attesting to the applicant's satisfactory completion of at least two years of high school study.

3. Applicants for admission to apprenticeship training during the years 1967-1968—a school record attesting to the applicant's satisfactory completion of at least three years of high school study.

4. Applicants for admission to apprenticeship training during 1969 or therafter—a diploma or other proof of graduation

from an accredited high school, or an equivalency certificate establishing equivalent education.

5. PROOF OF PHYSICAL FITNESS—A medical examination pursuant to the form herein set forth, shall be given at a time, place and by a physician designated by the Committee. Physical standards, based upon requirements of the trade, shall be established and revised, from time to time, by a Medical Advisory Panel appointed by the Committee.

D. APTITUDE TESTING. Applicants who satisfy the age, educational and physical requirements will be eligible for Aptitude tests to be given at a time and place designated by the Committee by the New York University Testing and Advisement Center, Washington Square East, New York City or by equivalent University testing center.

Test 1. Mental alertness.
2. Mechanical reasoning.
3. Space relations.
4. Mathematical Computations and Concepts.
5. Mathematical Analysis and problem solving.

Aptitude tests will be graded on a maximum score for all five tests to be 750 points.

E. INTERVIEWS—200% of the number of apprentices to be appointed who achieved the highest aptitude test scores shall be given a personal interview at a time and place and before a person or persons designated by the Committee. The interview procedures as established by the Committee, shall uniformly be applied to each applicant eligible for interview.

F. SELECTION SOLELY BY SCORES ATTAINED—Apprentices shall be appointed in order of rank, without regard to race, creed, color or national origin, after they have displayed qualifications in sufficient measure to meet minimum standards established by the committee.

G. INTERVIEW BOARD—Examining personnel for interview will be 50% representation from each of labor and management. Each interviewer will grade applicant individually

in accordance with specific maximum point allocations for various categories.

H. (1) MAXIMUM TOTAL SCORES—Total maximum score for any applicant shall be:

Tests	750 points
Interviews	150 points
	900 points

(2) FINAL SELECTION—The final selection of applicants shall be based on the determination of the total number of apprentices to be appointed.

I. NOTIFICATION TO APPLICANTS—Each applicant, at least 10 days prior to the commencement of the apprenticeship term for which he has applied, shall be:

1. Given written notification as to whether or not he has qualified for placement on the applicant list and, if he has so qualified, his ranking among the applicants. Further, such notification shall inform each qualified applicant whether or not he has been appointed and if not, the basis of non-appointment. The notification shall be sent by prepaid first class mail and the committee shall obtain from the postmaster, or his representative, a certificate of mailing showing the name and address of the addressee of the letter of notification.

2. Such notification shall set forth the terms of any appellate procedure afforded by the committee. Such appellate procedure shall provide for final determination and written 30 days of the appeal.

3. After the commencement of the term of an apprenticeship program, the committee may appoint available additional or replacement apprentices from the list in the order of their ranking thereon. Notice of such appointment shall be in writing. No applicant on the list may be passed over because of unavailability unless his unavailabiltiy extends seven days after delivery of notice.

4. Complete records of the selection process shall be maintained by the committee for two years, or the life of the

applicant list, whichever is greater, and shall be made available to the Industrial Commissioner upon request. Such records shall include copies of any written examinations taken by or documents submitted by or in connection with each applicant and a brief summary of each interview, if any, including the judgment of the interviewer for each applicant.

J. APPLICATION FEES—Costs of examining procedure—Applicants shall be required uniformly to pay to the Committee, at the time of filing applications, a reasonable fee not to exceed $10.00 to cover the expenses of the examinations and examing procedures.

K. NOTIFICATION OF REJECTION—Applicants who are not accepted because of failure at any stage of qualification to meet the requirements and standards herein provided shall be notified as provided by Paragraph "I" above, but within ten (10) days after the decision is made by the Committee and the reasons for rejection shall be set forth in the notice and each applicant shall have the right of appeal hereafter set forth.

L. (1) REVIEW AND APPEAL RIGHTS OF REJECTEES. Any applicant who has been notified of his rejection shall have the right to request, in writing, sent by mail or presented to the Joint Apprenticeship Committee at 350 Broadway, New York, New York, within ten (10) days after receipt of notice of rejection, a review of his case by the Joint Apprenticeship Committee. If a hearing is requested, it shall be held at the next regularly scheduled meeting of the Joint Apprenticeship Committee, but not later than thirty (30) days, after receipt of such review request.

(2) If the Joint Apprenticeship Committee sustains the rejection it shall notify the applicant therof and shall further advise him of his right to obtain a review of his case by a member of a panel referred to in this sub-paragraph. The applicant may, within ten (10) days after receipt of the written decision of the Joint Apprenticeship Committee request a review by a member of a panel to be appointed

by the Presiding Justice of the Appellate Division of the Supreme Court, First Department.

(3) Any appeal shall be prosecuted, and the appeals officer shall be requested to render his decision, with all due speed, to the end that if the applicant's appeal is sustained and he is ordered installed in apprenticeship training, he may be installed in the class for which he applied.

PART III

APPRENTICESHIP TRAINING PROGRAM

1. Hiring Apprentices.—Employers desiring apprentices shall make written application for said apprentices to the Joint Apprenticeship Committee.

2. Obligation of Apprentice.—The applicant must read and sign the following obligations and file same with the Joint Apprenticeship Committee along with his application:

> "I, the undersigned, having made application to be enrolled as an apprentice with the Joint Apprenticeship Committee, and, having read the standards formulated by said committee providing for training of apprentices, and understanding same, and all the conditions therin contained, do hereby agree to serve such time, and perform such manual training, and study such subjects as the committee may deem necessary to enable me to become a duly qualified journeyman sheet metal worker."

3. Term of Apprenticeship—The term of apprenticeship shall be not less than four years (approximately 7,000 hours) of reasonably continous employment. It shall be divided into eight (8) periods of 875 hours each. The agreement between the Joint Apprenticeship Committee and any apprentice may be cancelled at any time by the Joint Apprenticeship Committee for good cause.

4. Work Experience—During the term of apprenticeship, the sheet metal apprentice may be given such instruction and experience in all branches of his trade as is necessary to develop a practical and skilled journeyman mechanic. He may also be given training in safety and safe working practices for shop and field. He may be given training in the operation of all machinery and be given operating experience thereon. He may be given training, and experience in working with all materials and substitutes which may be used in the shop or on the job during the term of his apprenticeship.

5. Schedule of Work Processes for Sheet Metal apprentice Training:

General Sheet Metal Work.
Ventilating and Air Conditioning.
Specialty Installation and Specialty Work.
Kitchen equipment Work and Installation.
Kalamein Work and Installation
Metal Door, Door Buck, Window Manufacturing and Installation.
School training as outlined under School Curriculum; first term through eighth term inclusive.
Approximately 7,000 hours—total. Eight terms of four years, training.

In the outline above, he may be given such training over the period of his apprenticeship as electric and gas welding, burning and brazing that is necessary for a sheet metal journeyman.

Part IV

RELATED SCHOOL INSTRUCTION

SCHOOL ATTENDANCE AND WAGES

(a) In addition to the training received on the job, an apprentice shall attend school one day each second week with pay. However, if the apprentice does not report for work the last working day before the first working day after his school

day, he shall not receive payment for his day at school. Time spent in school shall be a part of the four-year apprenticesip. Wages for a full day's attendance at school shall be eight hours straight time pay at the appropriate rate for the apprentices term rating.

REQUIREMENTS FOR STUDY

(b) The apprentice shall take such subjects for study as the Joint apprenticeship Committee shall require.

FAILURE TO FULFILL OBLIGATION

(c) In case of failure on the part of any apprentice to fulfill his obligation concerning school attendance, minimum scholastic achievements, the Joint Apprenticeship Committee may suspend or revoke his participation in the training program and the Employer shall carry out the instructions of the Joint Apprenticeship Committee in this respect.

LIMITED ATTENDANCE

(d) The Joint Apprenticeship Committee will limit attendance at courses for sheet metal apprentices to those who are actually apprenticed in the sheet metal trade in accordance with these standards.

(e) The related classroom instruction shall be under the direction of the Joint Apprenticeship committee which shall determine the subjects to be taught and any other problems pertaining to related education of the sheet metal apprentice.

TRAINING IN TRADE SPECIALTIES

(f) The Joint apprenticeship Committee may establish in accordance with the requirements of industry, training and upgrading programs for future draftsmen, foremen, and other specialists as required by the trade.

It is the purpose, intent and responsibility of the Joint Apprenticeship Committee continuously to upgrade this program to increase the curriculum and the school time requirements as facilities and finances permit.

PART V

MISCELLANEOUS PROVISIONS APPLICABLE TO THE TRAINING PROGRAM AS APPLICABLE TO THE APPRENTICES

1. Apprentice Work Card

WORK CARD—The apprentice shall carry an apprenticeship card signed by the Chairman and Secretary of the Joint Apprenticeship Committee. This card shall designate the contractor to whom the apprentice is assigned and the term of service.

The apprentice shall pay the tuition fees as established by the Joint Apprenticeship Committee to the person designated by the said Joint Apprenticeship Committee to collect tuition fees.

EXAMINATIONS

2. Periodic Examinations

At the expiration of each six month period each employer having in his employment one or more apprentices shall report to the Joint Apprenticeship Committee as to each apprentice's progress in his work, on forms to be submitted to the employer by the Joint Apprenticeship Committee; and the teachers shall report on the attendance and progress of each apprentice in his school work.

3. Apprentice Record Card

A master record of the apprentices' work experience and related instruction shall be kept by the Joint Apprenticeship Committee, this information to be furnished by the employer and the school instructors. The record cards and all data pertaining to the Apprenticeship Training Program shall be accessible to the members of the committee at all times.

WORKING HOURS

4. (a) The hours of work for the apprentices should be the same as those of a journeyman for the shop or job on which the apprentice is working.

4. (b) The daytime school session for apprentices shall be eight hours attendance every second week throughout the year as designated by the Joint Apprenticeship Committee. The Joint Apprenticeship Committee reserves the right to have apprentices make up lost school time. Apprentices will not be paid for make up school time.

WAGES

5. (a) A graduated wage scale for apprentices shall be established and maintained on a percentage basis of the established wage rates for journeymen sheet metal workers, as follows:

First year. . . .first half 40% second half 45%
Second year. . . .first half 50% second half 55%
Third year. . . .first half 60% second half 65%
Fourth year. . . .first half 70% second half 80%

PROBATION

6. (a) Every apprentice shall be deemed on probation during the full four year term of his apprenticeship. If during the probationary period, the contractor finds the apprentice is not suitable or unable to learn the trade, he shall notify the Joint Apprenticeship Committee.

DIVERSITY OF TRAINING

(b) Where it is impossible for one contractor to provide the diversity of experience necessary to give an apprentice all-round instruction in the trade, the Joint Apprenticeship Committee may transfer him, temporarily or permanently, to another contractor, in which case the contractor to whom the apprentice is assigned will assume all the obligations of the original contractor. In no case, however, will an apprentice be transferred to a shop where there is a labor dispute.

NON-VESTING

7. Nothing contained in this agreement and nothing deriving from the appointment of any applicant to the status of apprentice shall be deemed or construed to vest in the apprentice any rights

or remedies against his employer or the Joint Apprenticeship Committee or Local 28, or any individual member of the Committee; his rights, and remedies being expressly limited to the right to receive wages for hours actually worked or spent at school.

PART VI

FORMS AND CURRICULUM

All forms and curricula adopted by the Joint Apprenticeship Committee are deemed incorporated herein by reference.

PART VII

MISCELLANEOUS

(a) The Rules and Regulations of the Industrial Commissioner of the State of New York heretofore adopted or which may hereafter be adopted by him, in so far as they are not inconsistent with the within Objective Standards governing the Admission of Apprentices and of the Order of the Court approving same, shall be deemed adopted into, and made part of, the within Objective Standards without specific inclusion.

(b) Any requirement for the advanced publication of notice of the intention of the Committee to accept applicants for new classes to be formed by the Committee, required to be given to any person or persons, or to any public body or bodies, by virtue of the provisions of any Federal or State law, or by virtue of the regulations of any governmental committee or officer having jurisdiction, shall be deemed incorporated into the within Objective Standards, and made a part hereof, without specific inclusion.

The foregoing Objective Standards were duly adopted by the Joint Apprenticeship Committee for the Sheet Metal Industry of New York, New York at a meeting of the aforesaid Joint Apprenticeship Committee held October 14th, 1964 to govern

the admission of applicants to the Apprenticeship Training Program.

Dated: October 14, 1964.

_____	_____
_____	_____
_____	_____
_____	_____

ATTESTATION

WE, the undersigned, the Trustees of the JOINT APPRENTICESHIP COMMITTEE & TRUST for the Sheet Metal Industry of New York City, N.Y. DO HEREBY CERTIFY AND ATTEST that at a meeting of the JOINT APPRENTICESHIP COMMITTEE & TRUST held at the premises of the Building Trades Employers' Association, 711 Third Avenue, New York City, October 14th, 1964, the foregoing Objective Standards to govern the admission of apprentices into apprenticeship training was duly adopted by unanimous vote of the Trustees.

This attestation is expected to be signed in counterparts by the respective Trustees and, when so signed, shall constitite a joint and several attestation of adoption of the Objective Standards by the Trustees.

Dated: October 14th, 1964.

EMPLOYER TRUSTEES	UNION TRUSTEES
_____	_____
_____	_____
_____	_____
_____	_____

Supplemental Opinion

[6] In implementation of the order of this court dated November 6, 1964, the parties have reported that they have agreed upon the institution of an apprenticeship class of 65 to commence not later than March 15, 1965. A stipulation to that effect has been submitted, approved by the court, and marked "So Ordered". The foregoing is reasonably fair and will generally effectuate the purposes of the order herein. It is also expected that henceforth new classes will be instituted on a periodic basis and will generally be selected to effectuate the public policy of this State as reflected in the order herein entered and that the union, employers, joint committee, and governmental agencies herein involved, will do their utmost to achieve and promote the objectives of the order. It is no longer the exclusive function of unions and employers to carry out apprenticeship programs. Governmental agencies charged with responsibility of enforcement of fair employment practices and equal economic opportunities for the general public, cannot be idle bystanders, but must actively participate to effectively regulate apprenticeship programs. Such governmental activities cannot be deemed undue, unreasonable, or unnecessary interference in labor-management matters.

This first apprenticeship class under the court order is the culmination of long conferences and arduous effort. The court expresses its appreciation to the parties and their counsel for the cooperative spirit demonstrated.

NOTICE OF MOTION
71 CIV. 2877
(HFW)

United States District Court
Southern District of New York

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, and
THE CITY OF NEW YORK,

Plaintiffs,

– against –

LOCAL 638 . . . LOCAL 28 OF THE SHEET METAL WORKERS' INTERNATIONAL ASSOCIATION, LOCAL 28 JOINT APPRENTICESHIP . . . SHEET METAL AND AIR-CONDITIONING CONTRACTORS' ASSOCIATION OF NEW YORK CITY, INC., etc.,

Defendants.

LOCAL 28,

Third-Party Plaintiff,

– against –

NEW YORK STATE DIVISION OF HUMAN RIGHTS,

Third-Party Defendant.

LOCAL 28 JOINT APPRENTICESHIP COMMITTEE,

Fourth-Party Plaintiff,

– against –

NEW YORK STATE DIVISION OF HUMAN RIGHTS,

Fourth-Party Defendant.

THE CITY OF NEW YORK, and NEW YORK STATE DIVISION OF HUMAN RIGHTS,

Plaintiffs,

– against –

ABBOTT-SOMMER, INC., A.A.B. CO. SHEET METAL CO., ACOUSTECHS SHEET METAL CORP., AIR DAMPER MFG. CORP., AIRITE VENTILATING CO. INC., ALLEN SHEET METAL WORKS, INC., ALLIED SHEET METAL WORKS INC., ALPINE SHEET METAL & VENTILATING, CO., INC., ARCHER SHEET METAL INC., ARROW LOUVER & DAMPER CORP., BAYCHESTER ROOFING & SHEET METAL, INC., BRUMAR INC., BUNKER INDUSTRIES, INC., CENTER SHEET METAL, COASTAL SHEET METAL CORP., COLONIAL ROOFING CO., INC., COLUMBIA VENTILATING COMPANY, INC., CONTRACTORS SHEET METAL, INC., CRAFT SHEET METAL WORKS, INC., DELTA SHEET METAL CORP., DORITE SHEET METAL, ESSEX METAL WORKS, INC., FASANO SHEET METAL CO., INC., J.J. FLANNERY, INC., GENERAL FIREPROOF DOOR CORP., GENERAL SHEET METAL WORKS, INC., GENTLEMAN SHEET METAL LIMITED, GLOBAL SERVICES & INSTALLATION, INC., HARRINGTON ASSOCIATES, INC., HOWARD MARTIN CO., INC., IMPERIAL DAMPER & LOUVER CO., INDUSTRIAL METAL FABRICATORS, DARO SHEET METAL CORP., KAY ROOFING COMPANY, INC., KENMAR SHEET

METAL CORP., K.G. SHEET METAL, INC., L.P. KENT CORP., MODERN KITCHEN EQUIPMENT CORP., A. MUNDER & SON, INC., NATIONAL ROOFING CORP., NATIONWIDE ACOUSTIC FOIL NOISE CONTROL PRODUCTS, NEW YORK SHEET METAL WORKS, INC., W.H. PEEPELS COMPANY, INC., PENTA SHEET METAL CORP., PERFECT CORNICE & ROOFING CO., INC., PHOENIX SHEET METAL CORP., DANIEL J. RICE, INC., HUGH RICHARDS ASSOCIATES, INC., ROMAR SHEET METAL, INC., JOHN SCHNEIDER ROOFING CONTRACTORS, INC., SHAPIRO EQUIPMENT CO., INC., SIMPSON METAL INDUSTRIES, INC., SOBEL & KRAUS, INC., SPRINGFIELD SHEET METAL WORKS, INC., STEELTOWN SHEET METAL & IRON WORKS, INC., SUMAR SHEET METAL, INC., A. SUNA & COMPANY, INC., LOUVER LITE CORP., ASCO ROOFING CORP., SUPREME FIREPROOF DOOR CO., INC., SWIFT SHEET METAL CO., INC., SWIFT SHEET METAL CORP., TEMPCO COMPANY INC., HERMAN T[illegible]MAN CO., TRIANGLE SHEET METAL INC., TROPICAL VENTILATING CO., INC., TUTTLE ROOFING COMPANY, INC., UNIVERSAL SHEET METAL CORP., UNIVERSAL ENCLOSURES, WOLKOW-BRAKER ROOFING CORP., AIR-BALANCING & TESTING CO., AIR CONDITIONING & BALANCING CO., INC., ALL TYPES STACKS & CHUTES, AMSCO SYSTEMS (AMERICAN STERILIZER), ARCHITECTURAL ACOUSTICS, ASSOCIATED TESTING & BALANCING INC., BAL TEST CORP., CHIMNEY & CHUTES CO., CIRCLE ACOUSTICS CORP., COLLYER ASOCIATES, INC., EASTERN ACOUSTIC CORP., EFFICIENT TOWERS INC., ENSLEIN BLDG. SPECIALTIES, INC., ESS & VEE ACOUSTICAL CONTRACTORS, INC., FISHER SKYLIGHTS INC., INTERNATIONAL TESTING & BALANCING CORP., JACOBSON & COMPANY, INC., JERMIAH BURNS INTERIOR SYSTEMS, INC., JOHNSON CONTROLS, MECHANICAL BALANCING CORP. JOHN MELEN, INC., MORSE BOULGER, INC., R.H. MCDERMOTT CORP., NAB TERN CONSTRUCTION, NATIONAL ACOUSTICS, QUALITY ERECTORS, WILLIAM J. SCULLY ACOUSTIC CORP., SUPERIOR ACOUSTICS, SYSTEMS TESTING & BALANCING, INC., U.S. CHUTES, WETZEL CONTRACTING CORP., WILLOPEE ENTEPRISES, WOLFF & MUNIER INC., APEX CHUTES & MANUFACTURING, INC., MODERN SHEET METAL WORKS INC., CALMAC-MANUFACTURING CO., COOLENHEAT, DE SAUSSURE EQUIPMENT CO., INDUSTRIAL ACOUSTICS CO., INC., INDUSTRIAL IRON & STEEL, INSUL-COUSTIC/BERMA CORP., JERSEY STEEL DRUM MFG. CORP.,

KENCO PRODUCTS CORP. MARATHON INDUSTRIES INC., PHOENIX STEEL CONTAINER CORP., RICH MANUFACTURING CORP., STERNVENT.CO.,

Respondents.

PLEASE TAKE NOTICE, that upon the annexed affidavits of Charles R. Foy and Sheila Abdus-Salaam, sworn to the 16 day of April, 1982 respectively, the City of New York and the New York State Division of Human Rights will move this Court at the Courthouse at Foley Square, New York, New York on June 10, 1982 at 10:00 a.m. or as soon thereafter as counsel may be heard for an order citing defendants and respondents for civil contempt and granting the following relief:

1) require defendants to pay compensatory fines in the amount of $182,500 ($100 dollars a day from July 1, 1977 through June 30, 1982);

2) require defendants to pay coercive fines in such amounts as this Court deems appropriate to ensure prompt compliance with this Court's orders.

3) establish a central job reporting system which would require, *inter alia*, the respondent contractors to notify Local 28 of each Local 28 member hired, and to state for each such hire: name, address, phone number, race, contractor's name, and length of job for which hired; and which would require the union to report quarterly to plaintiffs and the Court on all such new hires;

4) require the defendants to conduct an effective publicity and outreach campaign;

5) enjoin enforcement of the age requirement in the present collective bargaining agreement because of its discriminatory impact on non-whites;*

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* For purposes of this case the term "non-whites" is used to refer to Black and Spanish surnamed individuals. 401 F. Supp. at 470, n.1.

6) increase the non-white union membership goal to reflect the increased non-white minority labor pool;

7) award the City and State their attorneys fees and costs; and

8) award such other and further relief as will ensure prompt compliance with this Court's orders and equal employment opportunities for non-whites in the sheet metal trade and industry.

Dated: New York, New York
April 16, 1982

Respectfully submitted,

/s/ SHEILA ABDUS-SALAAM

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/s/ CHARLES R. FOY
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JUDITH A. LEVITT
CHARLES R. FOY
MERYL R. KAYNARD
Assistant Corporation Counsels of Counsel

AFFIDAVIT IN SUPPORT OF MOTION FOR
ORDER OF CONTEMPT
71 CIV. 2877

(HFW)

United States District Court
Southern District of New York

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, and
THE CITY OF NEW YORK,

Plaintiffs,

– against –

LOCAL 638 . . . LOCAL 28 OF THE SHEET METAL WORKERS' INTERNATIONAL ASSOCIATION, LOCAL 28 JOINT APPRENTICESHIP COMMITTEE . . . SHEET METAL AND AIR-CONDITIONING CONTRACTORS' ASSOCIATION OF NEW YORK CITY, INC., etc.,

Defendants.

LOCAL 28,

Third-Party Plaintiff,

– against –

NEW YORK STATE DIVISION OF HUMAN RIGHTS,

Third-Party Defendant.

LOCAL 28 JOINT APPRENTICESHIP COMMITTEE,

Fourth-Party Plaintiff,

– against –

NEW YORK STATE DIVISION OF HUMAN RIGHTS,

Fourth-Party Defendant.

THE CITY OF NEW YORK, and
THE STATE DIVISION OF HUMAN RIGHTS,

Plaintiffs,

– against –

ABBOTT-SOMMER, INC., A.A.B. CO. SHEET METAL CO., ACOUSTECHS SHEET METAL CORP., AIR DAMPER MFG. CORP., AIRITE VENTILATING CO. INC., ALLEN SHEET METAL WORKS, INC., ALLIED SHEET METAL WORKS INC., ALPINE SHEET METAL & VENTILATING, CO., INC., ARCHER SHEET METAL INC., ARROW LOUVER & DAMPER CORP., BAYCHESTER ROOFING & SHEET METAL, INC., BAYSIDE ROOFING CO., INC., BROOK SHEET METAL, INC., BRUMAR SHEET METAL CORP., BUILDERS SHEET METAL WORKS, INC., BUNKER INDUSTRIES, INC., CENTER SHEET METAL, COASTAL SHEET METAL CORP., COLONIAL ROOFING CO., INC., COLUMBIA VENTILATING COMPANY, INC., CONTRACTORS SHEET METAL, INC., CRAFT SHEET METAL WORKS, INC., DELTA SHEET METAL CORP., DORITE SHEET METAL, ESSEX METAL WORKS, INC., FASANO SHEET METAL CO., INC., J.J. FLANNERY, INC., GENERAL FIREPROOF DOOR CORP., GENERAL SHEET METAL WORKS, INC., GENTLEMAN SHEET METAL LIMITED, GLOBAL SERVICES & INSTALLATION, INC., HARRINGTON ASSOCIATES, INC., HOWARD MARTIN CO., INC., IMPERIAL DAMPER & LOUVER CO., INDUSTRIAL METAL FABRICATORS, KARO SHEET METAL CORP., KAY ROOFING COMPANY, INC., KENMAR SHEET METAL CORP., K.G. SHEET METAL, INC., L.P. KENT CORP., MODERN KITCHEN EQUIPMENT CORP., A. MUNDER & SON, INC., NATIONAL ROOFING CORP., NATIONWIDE ACOUSTIC FOIL NOISE CONTROL PRODUCTS, NEW YORK SHEET METAL WORKS, INC., W.H. PEEPELS

COMPANY, INC., PENTA SHEET METAL CORP., PERFECT CORNICE & ROOFING CO., INC., PHOENIX SHEET METAL CORP., DANIEL J. RICE, INC., HUGH RICHARDS ASSOCIATES, INC., ROMAR SHEET METAL, INC., JOHN SCHNEIDER ROOFING CONTRACTORS, INC., SHAPIRO EQUIPMENT CO., INC., SIMPSON METAL INDUSTRIES, INC., SOBEL & KRAUS, INC., SPRINGFIELD SHEET METAL WORKS, INC., STEELTOWN SHEET METAL & IRON WORKS, INC., SUMAR SHEET METAL, INC., A. SUNA & COMPANY, INC., LOUVER LITE CORP., ASCO ROOFING CORP., SUPREME FIREPROOF DOOR CO., INC., SWIFT SHEET METAL CO., INC., SWIFT SHEET METAL CORP., TEMPCO COMPANY INC., HERMAN THALMAN CO., TRIANGLE SHEET METAL INC., TROPICAL VENTILATING CO., INC., TUTTLE ROOFING COMPANY, INC., UNIVERSAL SHEET METAL CORP., UNIVERSAL ENCLOSURES, WOLKOW-BRAKER ROOFING CORP., AIR-BALANCING & TESTING CO., AIR CONDITIONING & BALANCING CO., INC., ALL TYPES STACKS & CHUTES, AMSCO SYSTEMS (AMERICAN STERILIZER), ARCHITECTURAL ACOUSTICS, ASSOCIATED TESTING & BALANCING INC., BAL TEST CORP., CHIMNEY & CHUTES CO., CIRCLE ACOUSTICS CORP., COLLYER ASOCIATES, INC., EASTERN ACOUSTIC CORP., EFFICIENT TOWERS INC., ENSLEIN BLDG. SPECIALTIES, INC., ESS & VEE ACOUSTICAL CONTRACTORS, INC., FISHER SKYLIGHTS INC., INTERNATIONAL TESTING & BALANCING CORP., JACOBSON & COMPANY, INC., JERMIAH BURNS INTERIOR SYSTEMS, INC., JOHNSON CONTROLS, MECHANICAL BALANCING CORP. JOHN MELEN, INC., MORSE BOULGER, INC., R.H. MCDERMOTT CORP., NAB TERN CONSTRUCTION, NATIONAL ACOUSTICS, QUALITY ERECTORS, WILLIAM J. SCULLY ACOUSTIC CORP., SUPERIOR ACOUSTICS, SYSTEMS TESTING & BALANCING, INC., U.S. CHUTES, WETZEL CONTRACTING CORP., WILLOPEE ENTRISES. WOLFF & MUNIER INC., APEX CHUTES & MANUFACTURING, INC., MODERN SHEET METAL WORKS INC., CALMAC-MANUFACTURING CO., COOLENHEAT, DE SAUSSURE EQUIPMENT CO., INDUSTRIAL ACOUSTICS CO., INC., INDUSTRIAL IRON & STEEL, INSUL-COUSTIC/BERMA CORP., JERSEY STEEL DRUM MFG. CORP., KENCO PRODUCTS CORP., MARATHON INDUSTRIES ICN., PHOENIX STEEL CONTAINER CORP., RICH MANUFACTURING CORP., STERNVENT CO.,

Respondents.

STATE OF NEW YORK }
COUNTY OF NEW YORK } SS.:

CHARLES R. FOY, being duly sworn, deposes and says:

1. I am an Assistant Corporation Counsel in the office of FREDERICK A. O. SCHWARZ, JR., Corporation Counsel of the City of New York, attorney for plaintiff City of New York ("City").

2. I am fully familiar with the facts and circumstances herein. I submit this affidavit in support of the joint motion by the City and the State Division of Human Rights ("State") for an order citing defendants Local 28 of the Sheet Metal Workers' International Association ("Local 28"), Local 28 Joint Apprenticeship Committee ("JAC"), the Sheet Metal and Air Conditioning Contractors' Association of New York City, Inc. ("Contractors' Association") and one hundred and twenty-one individually named Local 28 contractors ("respondents") for civil contempt of court.

I. *Prior Proceedings*

3. This action was originally commenced by the Equal Employment Opportunity Commission ("EEOC") in 1971 under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000 *et seq.*, charging *inter alia*, that Local 28, the JAC and the Contractors' Association had engaged in a pattern and practice of discrimination against Black and Spanish-surnamed individuals with respect to recruitment, selection, training and admission into Local 28, admission into membership in the Local 28 Apprenticeship Program, and employment opportunities as sheet metal workers in New York City.

4. On June 6, 1972 the City moved pursuant to Rule 24(a) of the F.R. Civ. Pro. to intervene in this proceeding because the City Commission on Human Rights had pending before it an administrative proceeding against Local 28 which would be affected by a decree in this action. The motion to intervene was granted on June 14, 1972. The State was named as a defendant by Local 28 and the JAC in third and fourth-party complaints because of administrative and judicial proceedings instituted by

the Attorney General against them in which they were ordered to end racially discriminatory selection and admission practices under the supervision and direction of the State Division of Human Rights. *State Commission for Human Rights v. Farrell*, 43 Misc. 2d 958 (Sup. Ct., N.Y. Cty. 1964).

5. The action was tried from January 13, 1975 to February 3, 1975. In a decision dated July 18, 1975 Judge Henry F. Werker held that Local 28 and the JAC had illegally denied non-whites access to employment opportunities in the sheet metal trade. (401 F. Supp. 467.) Judge Werker held that Local 28 and the JAC denied non-whites such employment opportunities by, *inter alia*, (a) failing to administer yearly validated journeymen tests; (b) selectively organizing non-union sheet metal shops with few non-white employees, and/or admitting from such shops only white employees; (c) accepting as transfer members whites from affiliated sister locals while refusing transfers of non-whites; and (d) utilizing an apprenticeship examination which had an adverse impact upon non-whites and which was not job-related.

6. On August 28, 1975 an Order and Judgment was entered in this action. (A copy of the Order and Judgment is designated Exhibit "1".)° The Order and Judgment provided, in part, that Local 28 and the JAC achieve a non-white percentage of 29% in the combined membership of Local 28 and the JAC apprenticeship program (¶11), undertake a program of advertising and publicity to inform the non-white community of non-discriminatory opportunities in Local 28 and the Apprenticeship Program (¶21(h)), keep specified records and lists (¶21(e)), and not issue permits without the Administrator's approval (¶s 6 and 22(f)). In addition, the Order and Judgment enjoined the defendants from any act or practice which would have the purpose or effect of discriminating in recruitment, selection, training, admission to membership in Local 28, admission to membership in the Apprenticeship Program, referral or any terms and conditions of employment on the basis of race, color or national origin. (¶s 1, 7 and 8.)

° The Exhibits to this affidavit are numbered consecutively and are submitted in separate binder.

7. Pursuant to the Order and Judgment, an Affirmative Action Program and Order ("Program") had been entered on November 25, 1975. This Program was required to be modified by the Court of Appeals' decision dated March 6, 1976 (532 F.2d 821). That decision did not affect the provisions of the Order and Judgment relied upon herein, which were affirmed. *Id.* A Revised Affirmative Action Program and Order ("RAAP & O") was entered on January 19, 1977. (A copy of the RAAP & O is designated Exhibit "2"). The RAAP & O specified the methods by which defendants were to comply with the Order and Judgment's provisions. These methods included defendants seeking governmental training funds (¶20(d)) and following specified procedures for determining the number of apprentices to be indentured each term (¶19). Defendants challenged six of the RAAP & O's provisions on appeal. The challenge was found to be without merit and the RAAP & O was affirmed. (565 F.2d 31 (2d Cir. 1977)).

II. *Parties*

8. While individual sheet metal contractors are not named parties to this action, they have been enjoined from discriminatory employment practices. (See ¶7 above.) By a Memorandum and Order of the Administrator dated July 30, 1979 and an Amended Memorandum and Order ("AMO") dated March 12, 1980* (copies of these orders are designated as Exhibit "3"), the Administrator directed the City and the E.E.O.C. to serve by certified mail members of defendant Contractors' Association, employers who have a contractual relationship with Local 28 and employers who utilize JAC apprentices with a certified copy of the Order and Judgment and the RAAP & O. By so serving these employers plaintiffs put them on notice of their obligations under the Order and Judgment and the RAAP & O. Each of these contractors are named as respondents to this motion. Other sheet metal contractors who

* During the course of this litigation, the Administrator has issued several orders. However, for the purposes of this motion two are particularly relevant - - - the AMO and the September 10, 1980 Memorandum and Order. (A copy of the September 10, 1980 Memorandum is designated Exhibit "5").

were not served with a copy of the Order and Judgment and the RAAP & O are joined as respondents based upon information and belief that they have a contractual relationship with Local 28 pursuant to a collective bargaining contract and, therefore, have actual knowledge of the Order and Judgment and the RAAP & O. (See, Listing of Firms Employing Local 28 members annexed hereto as Exhibit "4").

III. *Events Leading to this Motion*

9. In a Memorandum Opinion and Order dated September 10, 1980 the Administrator stated that "during my review of the record it became apparent that the reasons for not reaching the interim goals are sketchy, at best". To ensure that there was a single comprehensive record of the prior five years the Administrator directed Local 28 and the JAC to prepare reports setting forth, *inter alia*, the efforts they have made since 1975 to meet the RAAP & O's interim goals, why such goals were not met, what action was taken to counter the problems of the previous year and how economic conditions affected meeting the goals. In addition, Local 28 and the JAC were directed to prepare a detailed proposed plan of action for the following two years. On December 15, 1980, Local 28 and the JAC filed their respective reports with the Administrator. (Copies of the JAC and Local 28's Reports are designated Exhibits "11" and "12".) Neither the JAC nor Local 28's reports contained detailed proposed plans of action for the following two years.

10. Prior to filing its comments on defendants' reports the City undertook discovery which included taking depositions of various contractors and serving interrogatories upon Local 28 and the JAC. On August 3, 1981 the City filed its Report and Comments with the Administrator and this Court. The EEOC also filed a Report with the Administrator on August 3, 1981.

11. The City's Report outlined a complete failure by defendants not only to reach the RAAP & O's interim goals, but also to comply with several other substantive provisions of the Order and Judgment and the RAAP & O. The instant motion for contempt is an outgrowth of the defendants' contemptuous acts

as detailed in the City's Report of the defendants' violations of the Order and Judgment and the RAAP & O.

IV. Violations of The Order and Judgment, the RAAP & O, the Administrator's March 12, 1980 Amended Memorandum and Order ("AMO") and the Administrator's September 10, 1980 Order.

12. The Order and Judgment as well as the RAAP & O require defendants to take affirmative steps to overcome their history of discriminatory acts. A review of the defendants' actions during the past six years, documents they have submitted to the parties and Administrator and depositions of various contractors reveals that not only have defendants failed to take such affirmative steps, but that they have engaged in the following apparently widespread and continuing violations which directly evidence discrimination:

(a) the failure to undertake a program of advertising and publicity designed to inform the non-white community of non-discriminatory opportunities in Local 28 and the Apprenticeship Program. See, ¶21(h) Order and Judgment and ¶38 RAAP & O;

(b) the failure to meet even one of the RAAP & O's interim goals and not being within reach of 29% non-white membership by July 1, 1982. See, ¶11 Order and Judgement and ¶2 RAAP & O;

(c) the denial to non-whites of employment rights whites enjoy during periods of unemployment in the sheet metal industry. See, ¶s 1, 2 and 7 Order and Judgment;

(d) the failure to keep required records. See, ¶21(e) Order and Judgment; §20(d), 33(a–p) 34(a), 34(b), 35(a), (b), (d); AMO ¶s (a), (b), (c);

(e) utilizing permit men without the express written approval of the Court-appointed Administrator. See, ¶s 6 and 22(f) of the Order and Judgment and ¶17 of the RAAP & O;

(f) the failure to take necessary steps to seek out and apply for governmental training funds. See, ¶20(d) RAAP & O;

(g) the failure to follow the required procedures in determining the number of apprentices to be indentured each term. See, ¶19 RAAP & O;

(h) the failure to fully comply with the Administrator's September 10, 1980 order.

The net effect of these violations has been the continued denial of employment in the sheet metal trade to non-whites.

V. *Evidence of Violation of the Order and Judgments and the RAAP & O*

(a)

13. The Order and Judgment and the RAAP & O requires defendants to have undertaken an effective general publicity campaign designed to inform the non-white community of non-discriminatory opportunities in Local 28 and the Apprenticeship Program. Pursuant to ¶39 of the RAAP & O the defendants were to have submitted to the Administrator in April, 1977 a written plan for the implementation of the general publicity campaign. No such plan has ever submitted by the defendants.

14. In an industry such as the construction trades where discrimination has been long standing and judicially recognized, a court mandated general publicity campaign has special force. At the time of the Order and Judgment the construction trades were in a severe depression. Prior to the Order and Judgment defendants had taken no steps to insure that a pool of qualified non-whites would be available to hire when the industry improved. The required general publicity campaign would have been a major step to insure that such a manpower reserve would exist.

(b)

15. Defendants Local 28 and JAC have failed to achieve the remedial goals for non-white membership in Local 28 set forth

in the Order and Judgment and the RAAP & O. The Order and Judgment directed Local 28 and the JAC to achieve a non-white percentage of 29% in the combined membership of Local 28 by July 1, 1981. Subsequently, the defendants were granted in the RAAP & O an additional year to reach this goal. The RAAP & O established the following interim percentage goals:

July 1, 1976	5%
July 1, 1977	8%
July 1, 1978	11%
July 1, 1979	15%
July 1, 1980	19%
July 1, 1981	24%

16. Defendants admit a failure to comply with these goals. On April 1, 1977 non-white membership in Local 28 totalled 5.44%. (See, October 6, 1977 letter from Daniel Wilton to David Raff, a copy of which is designated as Exhibit "6".) As of December 30, 1978 non-whites comprised 6.58% of Local 28's total membership. (See, October 29, 1979 letter from Daniel Wilton to David Raff which is designated as Exhibit "7".) In July, 1980 the non-white membership reached 8.5%. (See, Exhibit "12"¶7). On May 7, 1981 non-white membership in Local 28 fell to 7.7%. (See, May 1, 1981 letter from Daniel Wilton to David Raff, a copy of which is designated as Exhibit "8".)

17. The defendants' own statistics underscore their complete failure to meet the interim goals. Since 1977 there has been a decrease in the number of non-white journeymen (See Exhibits "6" and "8"), as well as a substantial dropoff in the percentage of non-white apprentices in the JAC program. (See, Exhibits "6" and "8").

18. The 29% goal was established in accordance with the percentage of non-whites among New York City's population in 1970. In the intervening years New York City's non-white

population has increased to 45%, giving the defendants a larger pool of individuals to draw from.°

(c)

19. Defendants Local 28 and the Contractors' Association, as well as the individually named contractors recently entered into a collective bargaining agreement, the terms of which will result in those few non-whites presently in the union being among those first laid off. The relevant provision reads as follows:

> During periods of unemployment, there shall be a ratio of one man to every four men (1:4) to be fifty-two (52) years and older in the shop and field. (A copy of the collective bargaining agreement is designated as Exhibit "10.")

20. While the exact numbers of whites who are protected by this provision must await further discovery, upon information and belief it is expected that discovery will reveal that non-whites are disproportionately excluded from the provision's benefits. This conclusion is anticipated because (a) as of July 1, 1974 3.19% of Local 28's non-membership was non-white (see, *EEOC v. Local 638 . . . Local 28*, 401 F. Supp. 467, 474 [SDNY 1975]); (b) since July, 1975 the overwhelming majority of non-whites accepted into Local 28 entered via the apprenticeship program; (c) applicants for apprenticeship may not be older than 25 except for veterans of active military duty the age limit is extended one year for each year of duty up to age 30 and to 35 for non-whites applying for advanced apprenticeship standing who are citizens or permanent aliens. (See, Exhibit "2", RAAP & O ¶22.)

21. As a layoff system which discriminates against non-whites and which was established subsequent to the enactment of Title VII and the entry of court orders enjoining such a discrimnatory

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° Note, the City and the State challenged the accurancy of the 1980 census for New York. They maintained that non-whites were under-counted by more than 600,000 in New York City. *Carey v. Klutznick*, 508 F. Supp 420 (S.D.N.Y. 1980); rev'd 653 F. 2d 732 (2d Cir. 1981); *cert. den.* S. Ct. (March, 1982).

practice (See, Exhibit "2", RAAP & O ¶40), this collective bargaining provision violates the orders of this Court.

(d)

22. In several key respects defendants have not complied with the Order and Judgment, the RAAP & O and the AMO's reporting requirements. (A copy of the AMO is designated as Exhibit "3"). It is through records provided by defendants that the plaintiffs are able to evaluate defendants' compliance with the Order and Judgment and determine what methods can assist the defendants in compliance.

23. Paragraph 20(c) of the RAAP & O requires that Local 28 inform all the parties which whites and non-whites inquire regarding permits and which whites and non-whites receive such permits and the date of such inquiries and issuance of permits. Local 28 has not done so and continues not to do so despite repeated inquires by City's counsel at depositions, applications to the Administrator for permit men and conversation with City's counsel concerning the issue. (See, V(e) herein.) Only through the City's deposing Local 28 contractors and serving interrogatories upon Local 28 was the fact that journeymen had received permits disclosed. Between August, 1981 and February 1982 there were seventy-nine (79) permit men employed by Local 28 contractors. Plaintiffs were not notified that any of these individuals made inquiries.

24. The JAC has also failed to advise the parties and the Administrator whenever an employer receives a contract from the City, State or Federal governments. See, Exhibit "2", RAAP & O ¶20(d). Due to the defendants' failure to submit such information, it has fallen to the City to gather information concerning City contracts for the Administrator and the parties. The defendants have also failed, except on one occasion, to submit a bi-monthly listing of all current construction involving sheetmetal, as requested by the City on September 7, 1981 pursuant to ¶(e) of the AMO. In addition, defendants have never submitted quarterly and annual compilations of journeymen and apprentice hours of sheet metal work as required by ¶(c) of the AMO. Defendants also have disregarded ¶(a) of the AMO in that

they have supplied updated quarterly employee lists only once in the past two years.

25. The defendants have also ignored several provisions of the Order and Judgment and the RAAP & O requiring submission of certain data. The data includes the following:

(a) Quarterly reports with separate white and non-white data. (Last received July 7, 1980). Order and Judgment ¶21(e) RAAP & O ¶33(a-p).

(b) Listing, by race, of persons admitted to journeyman or apprentice status. RAAP & O ¶34(a).

(c) Census of Local 28 membership including the percentage of non-whites in each category. (Last received May 7, 1981). RAAP & O ¶34(b).

(d) Listing of persons (including name, race, telephone number and address) who requested or filed an application for each apprentice exam. (Only recived number of applicants by race January 7, 1981). RAAP & O ¶35(b).

(e) Report containing (a) name and race of each person rejected as apprentice applicant and the reason for rejection, (b) names of persons whose applications became inactive and why. (Never received). RAAP & O ¶35(b).

(f) Report containing names of non-whites terminated from the apprentice program, including the reason for termination, efforts made to retain them and their training and employment history while in apprentice program. RAAP & O ¶35(d). These reports are due twenty days after an apprentice is terminated. Plaintiffs received no such reports for 1979, early 1980 or after February, 1982. Reports were received concerning apprentices terminated in late 1980, all of 1981 and January, 1982. However, these reports were received in March, 1981 and February, 1982, months after they were due.

(e)

26. Pursuant to paragraphs 6 and 22(f) of the Order and Judgment and paragraph 17 of the RAAP & O the defendants must obtain the Administrator's approval prior to utilizing

permit men. While conducting discovery in connection with its Report the City found that several Local 28 contractors had permit men on jobs without prior approval from the Administrator. (See, Defendant Local 28's Responses to City's Interrogatories, dated June 15, 1981, a copy of which is designated Exhibit "14", ¶9.)

27. On May 1, 1981 Edmund D'Ella, counsel for Local 28, sought to obtain the City's consent for permit men to work for General Sheet Metal. This request came only after the City had deposed several contractors and raised the issue of unauthorized permit men. (See, e.g. April 27, 1981 Deposition of Sigmund Ansel, designated Exhibit "15"). The City withheld its consent for the permit men because Local 28 refused to provide it with information the City felt was necessary to evaluate the need for permit men. Despite having no authorization to do so Local 28 issued permits for six men to work for General Sheet Metal. These six joined five other permit men already working for General. (See, Exhibit "14", ¶9). At this time, two other Local 28 contractors also had permit men working without the Administrator's or the plaintiffs' approval. (*Id.*) All thirteen of these permit men are white.

28. In evaluating the seriousness of these violations of the Order and Judgment it must be considered that this Court has held the use of permit men has "the illegal effect of denying non-whites access to employment opportunities in the industry." *EEOC v. Local 638 . . . Local 28, supra* at 485. Inasmuch as Local 28 has continually failed to take required affirmative steps to assure a pool of qualified non-white journeymen (See, V(a) herein), its unauthorized utilization of permit men must be viewed as a continuation of past discriminatory practices.

(f)

29. Paragraph 20(d) of the RAAP & O requires that the JAC "take all necessary steps to seek out and apply for governmental manpower training funds." The JAC claims it has met this requirement in that it "has taken steps in connection with seeking out governmental manpower training funds." (See, Exhibit "12", p. 10). This position is based upon a letter dated

February 16, 1978 which states that in connection with seeking out governmental manpower funds the JAC has:

1. Actively participated in the Building Trades Counsels Committee established to obtain government funding.
2. Met with Sal Crivelli of the U.S. Department of Labor to explore avenues of funding.
3. Communicated with the manpower committees of Congress to obtain information as to what funding is available and what future legislation is contemplated.
4. Appointed Thomas Carlough, formerly Director of Local 400 JAC, to actively pursue funding possibilities.

30. No funding proposals or actual funding resulted from these efforts. (*Id.;* see also, Memorandum Decision of Judge Werker dated February 1, 1980, p. 2, designated Exhibit "16"). Due to this inaction on the JAC's part the Administrator was forced to apply to the state of New York in May 1979 for funding of $500,000 under the Comprehensive Employment and Training Act ("CETA") in order to provide training for 30 apprentices in the sheet metal trade. The JAC and Local 28 opposed the Administrator's action and, in part, caused a delay in the CETA application being processed. This delay has caused the loss of at least 30 potential CETA apprentices, most of whom it is assumed would be non-white, thereby preventing them from being trained in the sheet metal trade.

31. Only recently has a second CETA application been preliminarily approved. In the reduced amount of $160,000, this grant will provide for the training of only 12 CETA applicants. At no time has the JAC or Local 28 made any efforts to assure the acceptance of either of the Administrator's CETA applications, nor have they themselves made any application for governmental training funds.

32. In view of the fact that the parties have had difficulty in agreeing upon a validated apprenticeship test and that the last apprenticeship test resulted in low numbers of non-whites passing, the defendants' opposition to and failure to apply for the funding of governmental training programs such as CETA, which

traditionally have large numbers of non-white participants, can only be characterized as a serious violation of the requirements of the RAAP & O.

(g)

33. Paragraph 19(b) of the RAAP & O requires that the JAC submit its recommendation of the number of apprentices to be indentured in each apprentice class no later than 90 days before each class is to be indentured. The recommendation is to be accompanied with a report stating the basis for the recommendation.

34. During the past several years the JAC has not complied with ¶19(b)'s provisions. The JAC has made it a practice to state to the parties one or two weeks before the indenturing of a class that no less than a specified number of apprentices were to be indentured. The plaintiffs have not been informed of the exact number of apprentices or the exact date of indenturing until after the apprentices had been indentured. Reports setting forth the basis for the recommended number of apprentices have never been submitted by the JAC.

35. These practices of the JAC have made it difficult for the plaintiffs to intelligently plan how to deal with various manpower problems and issues. It also made it impossible to effectively evaluate the JAC's actual recommendation and has nullified the provision in ¶19(b) of the RAAP & O allowing plaintiff 15 days to object to the JAC's recommendations.

(h)

36. By an order dated September 10, 1980 the Administrator required that the defendants submit reports setting forth, *inter alia*, a "*detailed* proposed plan of action for the following two years." (See Exhibit "5"). While both the JAC and Local 28 filed reports with the Administrator neither report contained a detailed proposed plan of action. (See Exhibits "11" and "12").

37. Defendants' failure to set forth a detailed plan of action is consistent with their passive approach to improving the position of victims of their past discrimination. (See, V(a), (b) and (f)). When viewed together with defendants' deliberate acts of

noncompliance with this Court's orders, (See, V(c), (d), and (g)), such a passive approach evidences a contemptuous disregard for both the spirit and the intent of the Order & Judgment and the RAAP & O.

VI. *The Relief Sought*

38. The City and the State is seeking seven basic forms of relief pursuant to its contempt motion.

a. The undertaking by the defendants of an effective general publicity campaign to inform the non-white community in New York City of non-discriminatory opportunities in Local 28 and the Local 28 Apprenticeship Program, as required by ¶2(h) of the Order and Judgment and ¶39 of the RAAP & O;

b. The creation of a central job reporting system which would ensure that non-whites receive equal employment opportunities;

c. The appointment by the Court of an impartial individual to monitor, supervise and, if necessary direct the operations of the central job reporting system;

d. The enjoining of the provision in the current Local 28 Collective Bargaining Agreement which states that "during periods of unemployment, there shall be a ratio of one man to every four men (1:4) to be fifty-two (52) years and older in the shop and field," as violative of the Order and Judgment, the RAAP & O and Title VII;

e. The assessment of fines against the defendants and respondents to compensate non-whites for the harm caused them by defendants' and respondents' contemptuous acts, to coerce future compliance by the defendants and respondents and to implement the relief sought herein;

f. The creation of a special fund which would be used for scholarships to train non-whites in New York City in areas, other than the sheet metal trades in which job opportunities are expanding; and

g. An increase in the remedial goal to reflect the present relevant labor force.

(a)

39. *General Publicity Campaign.* The City requests that the defendants submit to the Administrator and the other parties a written plan for an effective general publicity campaign designed to inform the non-white community in New York City of non-discriminatory opportunities in Local 28 and the Apprenticeship Program. This plan would include, but not be limited to public service announcements, radio and newspaper advertisements, person to person outreach and would include information concerning the operation of a central job reporting system established pursuant to this motion for contempt. After comment by the other parties, and the Administrator having considered all submissions and revising the plan as necessary, such plan would be put into effect after the establishment of a central job reporting system. It is anticipated that some of the harm done by defendants' failure to undertake a general publicity campaign in 1977, such as the loss of good faith in the non-white community and a failure to develop a pool of qualified non-white sheet metal workers, can be overcome by defendants now undertaking such a general publicity campaign.

(b)

40. *Establishment of a Central Job Reporting System.* It is believed that the net effect of defendants' and respondents' actions have been to continue the exclusion of non-whites from employment in the sheet metal trade. Merely citing the defendants for contempt without changing their method of providing employment opportunities would not compensate the non-white community for the harm caused it or induce a greater participation by the non-white community in Local 28.

41. The central job reporting system would require that all sheet metal jobs be referred to Local 28 members on an equitable and non-discriminatory fashion.

42. To ensure that the establishment of a central job reporting system not be a punitive, but rather be a compensatory

measure, it is requested that such relief continue only until such time as the defendants have reached any remedial goal established by the court for non-white membership in Local 28.

(c)

43. *Central Job Reporting System Monitor.* The City requests the appointment, at the expense of the defendants, of an independent monitor to supervise, on a day-to-day basis, the operation of the central job reporting system. The evidence submitted on this motion demonstrates that Local 28 has violated this Court's orders concerning permit men and has controlled employment in the sheet metal trade to the detriment of non-whites. Neither the plaintiffs nor the Administrator are capable of providing the necessary detailed supervision that will be required to prevent violations of any rules implemented. After-the-fact inquiries are inadequate substitutes for daily compliance with the Order and Judgment and the RAAP & O. Consequently, it is necessary that the Court appoint an individual to monitor the central job reporting system daily in order to ensure that this Court's orders are enforced.

(d)

44. *Fines.* As detailed in Part V above, defendants and respondents have individually and jointly have violated this court's orders and caused non-whites to suffer a loss in employment opportunities and rights. To remedy this situation it is requested that the defendants and respondents be fined a total of $182,500, that is $100 per day for the period from July 1, 1977, the date the defendants first failed to meet an interim remedial goal until June 30, 1982. It is also requested that in order to coerce their future compliance, the defendants and the respondents be fined daily an amount deemed appropriate if they should continue to fail to meet this court's order after a specified date. The City and the State ask that such fines, as well as all other fines that may be imposed upon defendants and respondents not be payed to the Clerk of the Court, but rather be placed in a special fund. This fund would be monitored by the Administrator and would be utilized for the effectuation of all the relief requested herein.

(e)

45. *Injunction.* The collective bargaining provision described in Part (c) above, is in clear violation of the Order and Judgment's prohibition against acts which have "the purpose or the effect of discriminating in . . . advancement, compensation, terms, conditions or privileges of employment against any individual or class of individuals on the basis of race, color or national origin." (See Exhibit 1, Order and Judgment ¶s 1, 7 and 8). To prevent a continuing violation of the Order and Judgment it is requested that defendants be enjoined from enforcing the collective bargaining provision described in Part V(c).

(f)

46. *Special Training Fund.* The City and the State request that a special fund be created to be used for scholarships to train non-whites in New York City in areas, other than the sheet metal trades in which job opportunities are expanding.

(g)

47. *Revision of the Remedial Goal.* The 29% remedial goal was based upon the percentage of non-whites in the relevant labor force as evidenced by the 1970 census. As disclosed by the 1980 census the relevant non-white labor force has increased substantially. To more accurately reflect the position non-whites would have had in the sheet metal trade if defendants and respondents had not discriminated against them, it is requested that the remedial goal be increased to reflect the present relevant non-white labor force.

Costs and Attorney Fees

48. The City and the State also request that the costs and attorney fees incurred in the prosecution of this motion be taxed against the defendants and the respondents.

Conclusion

49. The evidence establishes that Local 28 of the Sheet Metal Workers' International Association, Local 28 Joint Apprenticeship Committee, Sheet Metal and Air-Conditioning Contractors' Association of New York City, Inc. and the

individually-named contractors have consistently violated the decrees of this Court. In so doing they have discriminated against non-whites in violation of outstanding Court orders and in violation of Title VII of the Civil Rights Act of 1964.

WHEREFORE, to ensure that such violations cease and to compensate those non-whites who have been injured as a result of these violations, the City respectfully requests that this Court grant its motion, find Local 28, Local 28 JAC, the Contractors' Association and the individually named contractors to be in contempt of court, and award the relief requested herein and any other relief the Court may find just and proper.

/s/ CHARLES R. FOY
CHARLES R. FOY
Assistant Corporation Counsel

Sworn to before me this 16th day of April, 1982

/s/ NOEL ANNE FERRIS
NOEL ANNE FERRIS
Notary Public,
State of New York
No. 31-4732736
Qualified in New York County
Commission Expires March 30, 1984

AFFIDAVIT OF SHEILA ABDUS-SALAAM
71 CIV. 2877
(HFW)

United States District Court
Southern District of New York

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, and
THE CITY OF NEW YORK,

Plaintiffs,

– against –

LOCAL 638 . . . LOCAL 28 OF THE SHEET METAL WORKERS' INTERNATIONAL ASSOCIATION, LOCAL 28 JOINT APPRENTICESHIP COMMITTEE . . . SHEET METAL AND AIR CONDITIONING CONTRACTORS' ASSOCIATION OF NEW YORK CITY, INC., etc.,

Defendants.

LOCAL 28,

Third-Party Plaintiff,

– against –

NEW YORK STATE DIVISION OF HUMAN RIGHTS,

Third-Party Defendant.

LOCAL 28 JOINT APPRENTICESHIP COMMITTEE,

Fourth-Party Plaintiff,

– against –

NEW YORK STATE DIVISION OF HUMAN RIGHTS,

Fourth-Party Defendant.

THE CITY OF NEW YORK, and NEW YORK STATE DIVISION OF HUMAN RIGHTS,

Plaintiffs,

– against –

ABBOTT-SOMMER, *et. al.*,

Respondents.

STATE OF NEW YORK }
COUNTY OF NEW YORK } SS.:

SHEILA ABDUS-SALAAM, being duly sworn, deposes and says:

1. I am an Assistant Attorney General in the office of Robert Abrams, Attorney General of the State of New York, attorney for the New York State Division of Human Rights (the "Division" or "State"). I submit this affadavit in support of the State's and City's motion for an order citing for civil contempt defendants Local 28 of the Sheet Metal Workers' International Association ("Local 28"), Local 28 Joint Apprenticeship Committee ("JAC"), the Sheet Metal and Air Conditioning Contractors' Association of New York City, Inc. ("Contractors' Association"), and one hundred twenty-one individually named Local 28 Contractors ("Respondents").

2. The State was named in the original action as a defendant by Local 28 and the JAC in third–and fourth–party complaints

because of administrative and judicial discrimination proceedings instituted by the New York State Attorney General in which they had previously been ordered to end racially discriminatory selection and admission practices under the supervision and direction of the State Division of Human Rights. *State Commission for Human Rights v. Farrell*, 43 Mis. 2d 958 (Sup. Ct. N.Y. Co. 1964)

3. The State adopts the allegations contained in that portion of the Affidavit of Charles R. Foy ("Foy Affidavit") which sets forth the background of this action. This affidavit focuses on defendants' and respondents'* violations of this Court's Order and Judgment, the RAAPO, the AMO and the Administrator's September 10, 1980 Memorandum and Order.

4. In violation of Order and Judgment ¶11 and RAAPO ¶2, defendants have failed to achieve any of the interim goals or the remedial goal for non-white membership in Local 28. The Order and Judgment directed Local 28 and the JAC to achieve a goal of 29% non-white representation in their combined membership by July 1, 1981. Subsequently, the RAAPO granted defendants an additional year to reach this ultimate goal and established the following interim goals:

July 1, 1976	5%
July 1, 1977	8%
July 1, 1978	11%
July 1, 1979	15%
July 1, 1980	19%
July 1, 1981	24%

5. Defendants' own membership records as reflected below demonstrate their complete failure to meet the remedial goals:**

Apr. 1, 1977	5.44%
Dec. 30, 1978	6.58%
July, 1980	8.5%
May 7, 1981	7.7%

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* The respondents are parties to this contempt motion because of the alleged discriminatory provision of their collective bargaining agreement with Local 28 and to enable this court to grant full relief.

** Exhibits 6, 7, 8, and 11. "Exhibit " refers to the exhibits identified in the Foy Affidavit and submitted under separate cover.

6. The 29% non-white membership goal was based on New York City's non-white labor force as determined by the 1970 Census. Labor force statistics from the 1980 Census are not yet available. However, according to the 1980 Census, New York City's present non-white population is 45%, an increase of 11.3% from 1970.* (See, 1980 Census of Population and Housing: Advance Reports, U.S. Department of Commerce, Bureau of the Census)

7. In violation of Order and Judgment ¶21(h) and RAAPO ¶39, defendants have failed to undertake an effective general publicity campaign designed to inform the non-white community of non-discriminatory opportunities in Local 28 and the Apprenticeship Program. In violation of RAAPO ¶39 defendants failed to submit to the Administrator in April, 1977, a written plan for the implementation of a general publicity campaign. Since 1975 the only publicity campaigns undertaken by defendants have been limited to recruiting applicants for the journeyman and apprentice tests as required by Order and Judgment ¶21(h) and RAAPO ¶38.

8. The result of defendants' failure to conduct a general publicity campaign is dramatically illustrated by the small percentages of non-white membership set forth above in ¶5 and the union's extensive reliance on permit men**, to fill job openings in Local 28's jurisdiction e.g., there were 79 permit men employed by Local 28 contractors between August, 1981 and

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* The City and State have challenged the accuracy of the 1980 Census for New York. They maintain that non-whites and the poor were disproportionately under-counted by more than 600,000 in New York City alone and by more than 400,000 in the rest of New York State. Carey v. Klutznick, 508 F. Supp 420 (S.D.N.Y. 1980), *rev'd* 653 F. 2d 732 (2d Cir. 1981), *cert. denied* S. Ct. (March, 1982).

** A permit or I.D. slip allows a member of a sister local or allied construction union such as plumbers or ironworkers to perform sheet metal work in Local 28's jurisdiction—New York City. Because of Local 28's use of permits to limit the size of its membership and thereby create substantial overtime opportunities for its members (over 96% of whom were white) and because of its discriminatory refusal to issue permits to non-white members of sister locals, Judge Werker held that the permit slip system "had the illegal effect of denying non-whites access to employment opportunities in the industry." 401 F. Supp. at 485.

February 1982; of these 79 permit men only five were non-white. (Exhibit 9)

9. In violation of Order and Judgment ¶¶1, 2, 7 and 21(g), Local 28, the Contractors' Association and the respondents entered into a collective bargaining agreement which provides, in relevant part:

> During periods of unemployment, there shall be a ratio of one man to every four men (1:4) to be fifty-two (52) years and older in the shop and field.

This provision has a discriminatory impact on non-white union members who are disproportionately under age 52 because most of them have been admitted since 1975 and have entered as apprentices. Applicants for apprenticeship may not be older than 25 years of age except veterans of active military duty, who are permitted an additional year for each year of military service up to age 30, and non-white applicants for advanced apprentice standing who may be as "old" as 35. (RAAPO ¶22)

10. In violation of the Administrator's September 10, 1980 Order, defendants have failed to submit reports containing a detailed proposed two-year plan of action for reaching the 29% goal.*

11. The Order and Judgment and RAAPO require defendants to maintain records and submit regular reports in order to permit the Court, the Administrator and the plaintiffs to evaluate defendants' compliance with the Court's orders. Defendants have failed to comply with several key record keeping and reporting provisions of the Order and Judgment and the RAAPO.

(a) In violation of the Order and Judgment ¶21 and RAAPO ¶¶33(a)-(p), defendants have failed to submit quarterly reports with separate white and non-white data concerning union members, applicants for membership, and inquiries from persons seeking information about membership

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* Local 28 and the JAC only partially complied with this order. On December 15, 1980, they filed reports with the Administrator detailing their efforts since 1975 to meet the RAAPO's interim goals. (Exhibits 11 and 12, respectively.)

with and job opportunities with or through the union. The last such report was received by plaintiffs in July, 1980.

(b) In violation of RAAPO ¶34(a), defendants have never submitted a listing, by race, of persons admitted to journeyman or apprentice status within five days of their admission.

(c) In violation of RAAPO ¶34 (b), defendants have failed to submit a bi-annual census of Local 28's membership, including the percentage of non-whites in each category. The last census was received by plaintiffs in May, 1981.

(d) In violation of RAAPO ¶35(a), defendants have failed to submit a listing of persons (including name, race, telephone number and address) who requested or filed an application for each apprentice test given since 1975. Such lists should be submitted within 7 days after the last date for filing applications. Plaintiffs received only the number of applicants by race in January, 1981.

(e) In violation of RAAPO ¶35(b), defendants have failed altogether to submit reports within 20 days after indenturing of an apprentice class containing the name and race of each person rejected as apprentice applicants with the reasons for their rejection, and the names of persons whose applications became inactive and the reasons therefor.

(f) In violation of RAAPO ¶35(d), defendants have failed to submit timely reports containing names of non-whites terminated from the Apprentice Program, including the reasons therefor, the efforts made to retain them, and their training and employment history while in the Apprentice Program. These reports are due 20 days after an apprentice is terminated. In March, 1981 and February 1982, months after they were due, plaintiffs received only two reports concerning apprentices terminated in late 1980, all of 1981 and January, 1982. Plaintiffs received no reports concerning apprentice terminations for 1979 and early 1980 or after February 1982.

12. In violation of AMO ¶(a), defendants have failed to submit updated quarterly employer lists indicating association and non-association companies and their specialties (e.g., roofing, ventilating or other). Plaintiffs received one such list in October, 1981.

13. In violation of AMO ¶(c), defendants have failed to submit quarterly and annual compilations of journeyman and apprentice hours of sheet metal work. Plaintiffs have never received this data.

14. In violation of AMO ¶(e), defendants have failed to submit a bi-monthly listing of all current construction involving sheet metal. Plaintiffs received one such listing in October 1981, after a special request was made by the City in September 1981. On February 25, 1982, the State requested that defendants submit to it missing data and reports described in ¶¶11-13 above. (Exhibit 13) Defendants have failed to comply with the State's request.

15. In violation of Order and Judgment ¶¶6 and 22(f) and RAAPO ¶17, defendants assigned sheet metal work to permit men without obtaining the Administrator's approval. (Exhibit 14, ¶9) All such unauthorized permit men were white.

16. On May 1, 1981 Edmund D'Elia, counsel for Local 28, sought the City's consent for permit men to work for General Sheet Metal. This request came only after the City protested the assignment of unathorized permit men. (Exhibit 15) The City refused to consent to the permit men because Local 28 refused to provide the information necessary to evaluate the need for them. Despite the lack of authorization to do so, Local 28 issued permits for six men to work for General Sheet Metal. Again, all six unauthorized permit men were white. These six joined five other permit men (all white) already working for General Sheet Metal. (Exhibit 14, ¶9) At the same time, two other Local 28 contractors also had unauthorized permit men working for them. (*Id.*)

17. In violation of RAAPO ¶20(d)(ii), the JAC has failed to "take all necessary steps to seek out and apply for governmental manpower training funds." * No funding proposals were ever

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* The JAC admits its only funding efforts were as follows:

a. Actively participated in the Building Trades Counsels Committee established to obtain government funding.

b. Met with Sal Crivelli of the U.S. Department of Labor to explore avenues of funding.

Footnote continued on following page

submitted and no funding was ever obtained. (Exhibit 12 and Exhibit 16).

18. In violation of RAAPO ¶19(b), the JAC has failed to submit its recommendation for the number of apprentices to be indentured in each apprentice class at least 90 days before the indenturing of the class. The required recommendation is to be accompanied by a report stating the basis for the number recommended. It is the JAC's practice to indenture the class before informing plaintiffs and the Administrator of the exact number of apprentices indentured. The basis for this number is never explained. This practice had made intelligent evaluation of various manpower issues and the JAC's recommendation extremely difficult, if not impossible, and has nullified ¶19(b)'s provision allowing the plaintiffs 15 days to object to the recommendations. °

19. In violation of the Administrator's order dated September 10, 1980, defendants have failed to submit reports setting forth, *inter alia*, a "*detailed* proposed plan of action for the following two years" (1981 to July 1982) to reach the 29% goal. (emphasis added) (Exhibit 5) While both the JAC and Local 28 filed reports with the Administrator, neither report contained a "detailed proposed plan of action." Both defendants stated they would continue their past efforts and rely upon an improvement in the economy and a decrease in unemployment to improve the status of non-whites in the sheet metal trade. (See, Exhibits 11 and 12). °°

Footnote continued from previous page

c. Communicated with the manpower committees of Congress to obtain information as to what future legislation is contemplated.

d. Appointed Thomas Carlough, formerly Director of Local 400 JAC, to actively pursue funding possibilities.

° The size of the apprenticeship class is critical because the Apprenticeship Program is the most effective way of bringing non-whites into the union.

°° On April 15, 1982 at 4 p.m., as these papers were being typed, Local 28 hand-delivered to the State some data including, among other things, the most recent census (April, 1982) of the union membership which appears to show that the non-white membership is 11%—still 18 percentage points below the 29% remedial goal.

WHEREFORE, the State requests this Court to hold defendants and respondents in civil contempt and to grant the following relief:

a) require defendants to pay compensatory fines in the amount of $182,500, calculated at the rate of $100 per day from July 1, 1977 (when defendants failed to meet the 8% interim goal) for non-white union membership through June 30, 1982 (when defendants will inevitably fail to meet the ultimate remedial goal of 29%);

b) require defendants to pay coercive fines in such amounts as this Court deems appropriate to ensure prompt compliance with this Court's orders;

c) require the respondent contractors to notify Local 28 of each Local 28 member hired, and to state for each such hire: name, address, phone number, race, contractor's name, and length of job for which hired; and to require the union to report quarterly to plaintiffs and the Court on all such new hires. Such reporting will permit the plaintiffs and the Court to monitor employment opportunities in the sheet metal industry and ensure that those opportunities are equally available to non-whites;

d) require the defendants to conduct an effective general publicity and outreach campaign designed to dispel the union's discriminatory image and to inform non-whites of non-discriminatory opportunities in the sheet metal trade and industry;

e) enjoin enforcement of the age requirement in the present collective bargaining agreement because of its discriminiatory impact on non-whites;

f) increase the non-white union membership goal to reflect the increased non-white minority labor pool;

g) award the State its attorneys fees and costs; and

h) such other and further relief as this Court deems appropriate to ensure prompt compliance with its orders and to ensure non-whites equal employment opportunities in the sheet metal trade and industry.

/s/ SHEILA ABDUS-SALAAM

SHEILA ABDUS-SALAAM

Sworn to before me this
16 day of April, 1982

/s/DEBORAH BACHRACH
Assistant Attorney General

71 Civ. 2877 (HFW)
REPLY MEMORANDUM
OF DEFENDANTS IN
SUPPORT OF THEIR
MOTION TO TERMINATE
OPERATION OF THE JUDGMENT

United States District Court
Southern District of New York

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, and
THE CITY OF NEW YORK,

Plaintiffs,

– against –

LOCAL 638 . . . LOCAL 28 OF THE SHEET METAL WORKERS'
INTERNATIONAL ASSOCIATION, *et al.*,

Defendants.

Introduction

On June 3, 1982, plaintiffs City of New York ("City") and State of New York, Attorney General's Office ("State") responded to the motion by defendants Local 28 of the Sheet Metal Workers International Association ("Local 28"), the Local 28 Joint Apprenticeship Committee ("JAC"), and the Sheet Metal and Air Conditioning Contractors Association of New York City ("Contractors Association") to terminate the Court's judgment in this action.

Some of the issues raised by plaintiffs have previously been raised by them before the Administrator, pursuant to the mechanisms and procedures established by the Court. The Administrator considered these issues; the Administrator did not rule in favor of the plaintiffs; the plaintiffs did not pursue their right of appeal, as provided for in the Revised Affirmative Action Program & Order

Effective Date	Number of Whites	Number of Non-Whites	Total Membership	Non-White % of Membership
7/1/74	3,553	117	3,670	3.19%
1/1/76	3,268	292	3,560	8.2%
7/1/76	3,115	281	3,396	8.2%
4/1/77	2,514	165	2,679	6.1%
6/30/78	2,419	266	2,685	9.9%
12/30/78	2,384	287	2,671	10.7%
3/31/79	2,353	297	2,650	11.2%
7/80	1,871	292	2,163	13.5%
5/7/81	2,040	289	2,329	12.4%
4/12/82	2,105	369	2,474	14.9%

Utilizing plaintiffs' proposal, as modified by the legal requirements as ordered by the Court, 12 FEP Cases 742, 751, plaintiffs would achieve only about half of the nonwhite membership goal. The result of such a practice, in reality, would have had the unintended result of increasing total membership while decreasing job opportunities for members of all races. The more positive--and far more remedial--practice has been that employed by defendants: to increase total nonwhite membership 209 percent, while maintaining a reasonable rate of job opportunities for sheet metal workers of all races. Plaintiffs' proposal would have provided increased membership and a gross dilution of employment--a hollow victory indeed for nonwhites.

MEMORANDUM IN REPLY
TO DEFENDANTS' MEMORANDUM IN
OPPOSITION TO PLAINTIFFS' MOTION
FOR A CONTEMPT ORDER AND IN SUPPORT OF
DEFENDANTS' MOTION TO TERMINATE
THE JUDGMENT ORDER

United States District Court

Southern District of New York

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, and
THE CITY OF NEW YORK,

Plaintiffs,

— against —

LOCAL 638 . . . LOCAL 28 OF THE SHEET METAL WORKERS'
INTERNATIONAL ASSOCIATION, *et al.*,

Defendants.

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71 Civ. 2877
(HFW)

CHART D

Year	Avg. No. of Apprentices	Percentage Unemployed	Avg. Hrs. Per Week	Avg. Weeks Worked
1965	230	5%	35	46
1966	165	5%	35	46
1967	110	5%	35	46
1968	180	5%	35	46
1969	360	3%	35	41
1970	500	3%	35	46
1971	540	3%	35	46
1972	575	6%	35	36
1973	450	7%	35	46
1974	340	20%	32.5	32.5
1975	269	40%	30	44
1976	134	-- data not provided by defendants --		

CHART D
(continued)

Year	Avg. No. of Apprentices	Percentage Unemployed	Avg. Hrs. Per Week	Avg. Weeks Worked
1977*	73	6.7%	32***	39
1978*	108	4%	34	52
1979	111	3.6%	33	47
1980	125	.059%	33	48
1981*	199	0	33	46
1982**	291	0	34	17

* Excludes data unavailable for the following months/years: January, February and September, 1977 June 1978 April 1981

** All 1982 data is through April, 1982 only.

*** Average hours per week for 1977 - 1982 excludes hours worked by apprentices during the first month of indenture.