

The Seattle Building Trades Order: The First Comprehensive Relief Against Employment Discrimination in the Construction Industry*

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Mr. Tobin: "Total membership in the Union (Plumbers' Union No. 12, in Boston) . . . is approximately 1,200 working on building construction."

Rev. Drinan: "And the minority membership is what?"

Mr. Tobin: "Eleven apprentices and two journeymen."

Rev. Drinan: "How does that compare with ten or fifteen years ago?"

Mr. Tobin: "Excellent. In other words, it is a hundred percent improvement."¹

I. THE CONSTRUCTION INDUSTRY

No industry has been the object of more protest and litigation concerning employment discrimination than construction. Nonetheless, neither the basic ingredients for confrontation nor employment patterns generally²

* © 1974 by William B. Gould. This Article will form the basis for a chapter in a forthcoming book by the author entitled *Black Workers in White Unions: The Roles of Law and Private Initiative*.

On March 12, 1974, after this Article went to press, Judge Lindberg signed four Supplemental Consent Orders which propose to respond to a number of the problems and issues raised in the Article. See *United States v. Local 86, Ironworkers*, Civil No. 8618 (W.D. Wash. Mar. 12, 1974). The following are the most important of the reforms instituted on March 12th: (1) The regular and special apprenticeship programs are integrated. All apprentices are now to be selected under the regular program, which will have the same duration as at the time of the original decree in 1970. (2) Joint Apprenticeship Sub-Committees involved in the selection of apprentices shall include one minority member appointed by the minority members of the Court Order Advisory Committee. (3) In addition to the specific timetables for the graduation of black journeymen, which are no longer simply "anticipated," a new ranking procedure is to be authorized by the Joint Apprenticeship Committees from a "pool" of black applicants. (4) The Ironworkers' fifth-man dispatch rule is eliminated and blacks as well as whites are to be referred from the hiring hall on a "first in-first out" basis.

I am particularly grateful to Mr. Tyree Scott, Mr. Kenneth McDonald, former counsel to the Court Order Advisory Committee, and Ms. Sally Kenyon, Department of Justice, Seattle, Wash., for their willingness to provide information and interviews in connection with the preparation of this Article. I also acknowledge the research assistance provided by Oscar Rosenbloom, Class of 1975.

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1. U.S. COMM'N ON CIVIL RIGHTS, CONTRACT COMPLIANCE AND EQUAL EMPLOYMENT OPPORTUNITY IN THE CONSTRUCTION INDUSTRY 266-67 (1969) (transcript of open meeting in Boston, Mass., June 25-26, 1969, before the Massachusetts State Advisory Committee to the United States Commission on Civil Rights).

2. Recent developments have been chronicled in U.S. COMM'N ON CIVIL RIGHTS, FEDERAL CIVIL RIGHTS ENFORCEMENT EFFORT (1970); U.S. COMM'N ON CIVIL RIGHTS, FEDERAL CIVIL RIGHTS ENFORCEMENT EFFORT: ONE YEAR LATER (1971); U.S. COMM'N ON CIVIL RIGHTS, THE FEDERAL CIVIL

have altered during the past decade. In fact, the attitudes of the participants have hardened. The unions, reluctant to do more than negatively fend off charges of discrimination until 1967-68, are now content to assert that their affirmative undertaking negates allegations of racism. Blacks and other minorities, noting the institutional barriers which effectively exclude blacks as well as the slow numerical trickle of minorities into the trades, are hardly convinced that either moral or legal obligations are being met.

Despite plans and programs, little has been done to alter the institutional rigidity which limits black access to construction. To be sure, progress has been made in some trades. Equal Employment Opportunity Commission data for the most skilled crafts, from which blacks have been traditionally excluded, indicate that combined membership as of 1970 was 1.9 percent black and 3.3 percent Spanish surnamed.³ The year before, the statistics reported that 1.6 percent were black and 3.2 percent Spanish surnamed.⁴ These figures represent a measure of progress, but the pace is far too slow to have significance for this generation of minority-group workers.

A. *Minority Emphasis on Construction Jobs*

Before one examines the institutional roadblocks to minority employment in construction, it is important to explain why the minority communities have given so much attention to the construction industry. There are many industries that rival and even exceed construction's record of discrimination: trucking, electric power, and banking are just a few examples. Moreover, as AFL-CIO President George Meany and some of the other dominant craft union elements in the AFL-CIO delight in pointing out, even progressive unions like the United Automobile Workers have a record that in some respects may be regarded as inferior to that of the construction trades.⁵

Yet construction occupies center stage. The migratory drift of blacks, pushed off the farm by mechanization, into northern inner cities has

RIGHTS ENFORCEMENT EFFORT—A REASSESSMENT (1973). Recent debate has focused upon the extent of black worker progress. Compare Wattenberg & Scammon, *Black Progress and Liberal Rhetoric*, 55 COMMENTARY 35 (1973), with lecture by A. Brimmer, *Employment and Income in the Black Community: Trends and Outlooks*, University of California, Los Angeles, Mar. 2, 1973.

3. Data provided by the Technical Information Division, Equal Employment Opportunity Comm'n, Mar. 16, 1973; see Equal Employment Opportunity Comm'n, Local Union Report EEO-3, 1970. These percentages are based on statistics from the following trades: Elevator Constructors, Ironworkers, Plumbers, Pipefitters, Boilermakers, Electricians, and Sheet Metal Workers. Preliminary data for 1971 indicate that 1.7% of the workers are black and 3.0% are Spanish surnamed. Letter from Valentina Jackson, Technical Information Division, Office of Research, Equal Employment Opportunity Commission, Feb. 25, 1974.

4. See Equal Employment Opportunity Commission, 1969 Data on Minority Union Membership, Feb. 9, 1971; BNA LAB. REL. REP. (News and Background Section).

5. For an analysis supporting Meany's position, see D. BOK & J. DUNLOP, *LABOR AND THE AMERICAN COMMUNITY* 116-37 (1970). For an excellent critique of this book, see Summers, *Straw Men of Union Leadership* (Book Review), 80 YALE L.J. 687 (1971).

brought a large congregation of urbanized blacks face to face with construction and repair work performed by all or predominantly white work crews under the union banner. The visibility of such projects and workers has made both solid targets for blacks excluded from the best employment opportunities in all sectors of the economy. More importantly, blacks have more leverage when the struggle takes place in the ghetto, where whites are surrounded by hostility.

Another reason for the disproportionate amount of attention given to construction is the extraordinarily high wage rates of the building trades. These wages are substantial—in excess of \$10 per hour for the mechanical trades in most northern cities. To be sure, the wages quoted are on a per hour basis in an industry noted for its seasonality. Moreover, the emergence of nonunion construction work during the past few years, along with the Nixon administration's wage restraint policy, has had a dampening impact upon the upward movement of construction wages. Nevertheless, construction remains an attractive area of the economy, especially for minority-group workers trapped in the despair of welfare and unemployment.

Further, the Federal Government provides an enormous amount of financial assistance to the construction industry. Of \$150 billion expended in construction each year, approximately \$30 billion is federally assisted. Of this \$30 billion, approximately \$7 billion goes to projects which are completely federal such as the construction of federal buildings. The remaining \$23 billion consists of matching federal and state grants in projects such as highway programs, where normally the Federal Government assumes a lion's share of the cost.⁶ The injustice of racial exclusion is perceived more clearly where such huge outlays of federal money are involved.

B. Institutional Roadblocks to Minority Employment

Although Department of Labor estimates indicate that there will be a substantial increase in the manpower demand in construction in the 1970's,⁷ institutional roadblocks make it likely that job competition will be severe for black workers. Most incumbent black construction workers are disproportionately congregated in the Laborers Union and trowel trades, where employment is declining. The traditionally lily-white trades are the areas of real job opportunities,⁸ and the multiunion nature of the construc-

6. These statistics were provided in a lecture by Nathaniel Pierson, former Director of the Special Construction Unit, Office of Federal Contract Compliance, Department of Labor, in the Employment Discrimination Seminar at Stanford Law School, Oct. 1972.

7. BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, OCCUPATIONAL OUTLOOK HANDBOOK 601 (1972-73 ed.).

8. R. ROWEN & L. RUBIN, OPENING THE SKILLED CONSTRUCTION TRADE TO BLACKS: A STUDY OF THE WASHINGTON AND INDIANAPOLIS PLANS FOR MINORITY EMPLOYMENT 18 (1972) (report to the Dep't of Labor, Manpower Adm'n).

tion industry precludes a promotion ladder by which blacks can ascend into one of the more desirable trades.⁹

The apprenticeship system, the main access route for minority group workers¹⁰ to the building trades, contains selection criteria which also have an adverse impact upon black applicants. Requirements of written examinations and a high school diploma and transcript eliminate competent black workers, and subjective interviews allow latent political, cultural, and racial biases to emerge.¹¹ Moreover, the heritage of previous discrimination has an exclusionary effect upon blacks.¹² Age requirements, by fencing out otherwise qualified black applicants who are beyond the age limit of 25 and who lost their chance to compete because openly discriminatory policies were practiced when they were in the acceptable age bracket, further limit black access to the construction industry.¹³ Finally, the apprenticeship class size established by the local has the effect of restricting the advance of minority workers because if the number of new entrants is pegged at an artificially low level, blacks are unable to make up their past losses.

9. Black Laborers Union members often assist skilled tradesmen such as plumbers, sheet metal workers, and ironworkers and, in some instances, actually perform this work. If they were to consent to transfer not only would they have to begin at the bottom of any priority group referral list in existence, but also might well relinquish fringe benefits such as pension rights. This imposition of a penalty upon a minority-group worker where the transfer has been previously denied on the grounds of race is a violation of Title VII. See *United States v. Local 36, Sheet Metal Workers*, 416 F.2d 123 (8th Cir. 1969).

Similar problems involving multiunion structure have arisen in the railroad industry. See, e.g., *United States v. Chesapeake & O. Ry.*, 471 F.2d 582 (4th Cir. 1972), *cert. denied*, 411 U.S. 939 (1973); *United States v. St. Louis-S.F. Ry.*, 464 F.2d 301 (8th Cir. 1972); *United States v. Jacksonville Terminal Co.*, 451 F.2d 418 (5th Cir. 1971), *cert. denied*, 406 U.S. 906 (1972). There are difficulties even when the hurdle is simply different bargaining units involving different locals of the same international union. See, e.g., *Belt v. Johnson Motor Lines*, 458 F.2d 443 (5th Cir. 1972); *Witherspoon v. Mercury Freight Lines*, 457 F.2d 496 (5th Cir. 1972); *Bing v. Roadway Express*, 444 F.2d 687 (5th Cir. 1971); *Jones v. Lee May Motor Freight, Inc.*, 431 F.2d 245 (10th Cir. 1970), *cert. denied*, 401 U.S. 954 (1971); *United States v. Pilot Freight Carriers, Inc.*, 6 F.E.P. Cases 280 (M.D.N.C. 1973); *United States v. Navajo Freight Lines, Inc.*, 6 F.E.P. Cases 274 (C.D. Cal. 1973); *United States v. Central Motor Lines, Inc.*, 338 F. Supp. 532 (W.D.N.C. 1971).

10. See, e.g., D. MILLS, *INDUSTRIAL RELATIONS AND MANPOWER IN CONSTRUCTION* 147, 159, 162-63 (1972). See also R. ROWEN & L. RUBIN, *supra* note 8, at 143. In most of the building trades, white journeymen have not served as apprentices. See Foster, *Nonapprentice Sources of Training in Construction*, 93 MONTHLY LAB. REV., Feb. 1970, at 21. This assessment, however, may not be accurate with respect to the critical crafts cited in note 3 *supra*. Unfortunately, no data exist on this subject.

11. See *United States v. Local 86, Ironworkers*, 315 F. Supp. 1202, 1210 (W.D. Wash. 1970), *aff'd*, 443 F.2d 544 (9th Cir.), *cert. denied*, 404 U.S. 984 (1971). See also *United States v. Local 10, Sheet Metal Workers*, 6 F.E.P. Cases 1036, 1041 (D.N.J. 1973); *United States v. Local 24, Plumbers*, 6 F.E.P. Cases 366 (D.N.J. 1973).

12. See Z. DYCKMAN, *AN ANALYSIS OF NEGRO EMPLOYMENT IN THE BUILDING TRADES* (1970); R. MARSHALL, *THE NEGRO AND ORGANIZED LABOR* (1965); D. MILLS, *supra* note 10; H. NORTHRUP, *ORGANIZED LABOR AND THE NEGRO* (1944); Hill, *The Racial Practices of Organized Labor—The Age of Gompers and After*, in *EMPLOYMENT, RACE, AND POVERTY* 365 (A. Ross & H. Hill eds. 1967). Like D. BOK & J. DUNLOP, *supra* note 5, Mills renders far too charitable an explanation of building trades intentions in this arena. See Northrup, *Book Review*, 46 J. Bus. 471, 472 (1973). Illustrative cases include *Sims v. Local 65, Sheet Metal Workers*, 6 F.E.P. Cases 1141 (6th Cir. 1973); *United States v. Local 357, IBEW*, 6 F.E.P. Cases 388 (D. Nev. 1973); *United States v. Local 638, Steamfitters*, 6 F.E.P. Cases 319 (S.D.N.Y. 1973); *United States v. Local 10, Ironworkers*, 6 F.E.P. Cases 59 (W.D. Mo. 1973). For an example of the legacy of discrimination in the automobile industry, see *Rowe v. General Motors Corp.*, 457 F.2d 348 (5th Cir. 1972).

13. See, e.g., *United States v. Local 86, Ironworkers*, 315 F. Supp. 1202, 1215-16 (W.D. Wash. 1970), *aff'd*, 443 F.2d 544 (9th Cir.), *cert. denied*, 404 U.S. 984 (1971).

Very much related to the question of black access to the trades is the matter of referral by craft unions. A substantial number of collective agreements in construction provide for exclusive hiring hall arrangements in which the union has the exclusive right to refer applicants, at least for a limited period of time.¹⁴ Most agreements appear to give the union sole authority with regard to eligibility to register on the referral list.¹⁵ Moreover, a substantial number either permit the union to determine whether the applicant possesses minimum qualifications or to establish criteria which are vague and subjective in their refusal to enunciate the level of training or experience required.¹⁶ Workers are often referred on the basis of priority groups which accord preference to those who have the most experience in the union's jurisdiction.¹⁷ Such systems dampen aspirations of minority-group tradesmen and apprentices, who must go to the bottom of the referral ladder and wait their turn while others, who were admitted under an exclusionary policy, enjoy the best work opportunities.¹⁸

C. Federal Efforts To End Discrimination

The first substantial effort by the Federal Government to deal with discrimination and lack of affirmative action in the construction industry took place under the authority of Executive Order 8802.¹⁹ There have been a number of executive orders issued since 8802.²⁰ In 1961 affirmative action

14. U.S. DEP'T OF LABOR, EXCLUSIVE UNION WORK REFERRAL SYSTEMS IN THE BUILDING TRADES 21-26 (1970). See also Local 357, *Teamsters v. NLRB*, 365 U.S. 667 (1961); 29 U.S.C. § 158(f) (1970). Even in the absence of an exclusive hiring hall, discrimination is rampant. See, e.g., *United States v. Local 638, Steamfitters*, 6 F.E.P. Cases 319 (S.D.N.Y. 1973).

15. U.S. DEP'T OF LABOR, *supra* note 14, at 29. As a practical matter, union authority in the hiring hall means that membership is generally required as a condition of employment. Thus the hiring hall creates a de facto closed shop which is prohibited by Taft-Hartley. See 29 U.S.C. §§ 158 (a)(3), (b)(2) (1970). This prohibition, however, is circumvented by the hiring hall, which is lawful. See, e.g., Local 357, *Teamsters v. NLRB*, 365 U.S. 667 (1961); 29 U.S.C. § 158(f) (1970). The building trades openly acknowledge their defiance of Taft-Hartley. See *NLRB v. Local 2, United Ass'n of Plumbing & Pipefitting Indus.*, 360 F.2d 428 (2d Cir. 1966), *enforcing* 152 N.L.R.B. 1093 (1965); *United States v. Local 638, Enterprise Ass'n*, 347 F. Supp. 169 (S.D.N.Y. 1972); *Building & Constr. Trades Council*, 164 N.L.R.B. 313 (1967).

16. U.S. DEP'T OF LABOR, *supra* note 14, at 29.

17. *Id.* at 37-42.

18. See, e.g., *United States v. Bethlehem Steel Corp.*, 446 F.2d 652 (2d Cir. 1971); *Robinson v. Lorillard Corp.*, 444 F.2d 791 (4th Cir. 1971); *United States v. Local 36, Sheet Metal Workers*, 416 F.2d 123 (8th Cir. 1969). Especially relevant to the construction industry are the railroad cases involving transfers in multiunion situations. See cases cited note 9 *supra*. Cases discussing seniority in the context of layoffs include *Watkins v. Local 2369, Steelworkers*, 7 F.E.P. Cases 90 (E.D. La. 1974), and *Jones v. Pacific Intermountain Express*, Civil No. 73-2296 (N.D. Cal., filed Dec. 20, 1973).

19. Exec. Order No. 8802, 3 C.F.R. 957 (1938-43 Comp.). A. Philip Randolph's threatened march on Washington induced President Roosevelt to accept the principle of nondiscrimination on the part of government contractors. See Comment, *The Philadelphia Plan: A Study in the Dynamics of Executive Power*, 39 U. CHI. L. REV. 723, 725 (1972).

20. See, e.g., Exec. Order No. 9001, 3 C.F.R. 1054 (1938-43 Comp.); Exec. Order No. 9346, *id.* at 1280; Exec. Order No. 10,210, 3 C.F.R. 390 (1949-53 Comp.); Exec. Order No. 10,277, *id.* at 739; Exec. Order No. 10,231, *id.* at 741; Exec. Order No. 10,243, *id.* at 752; Exec. Order No. 10,281, *id.* at 781; Exec. Order No. 10,298, *id.* at 828; Exec. Order No. 10,308, *id.* at 837; Exec. Order No. 10,479, *id.* at 961; Exec. Order No. 10,557, 3 C.F.R. 203 (1954-58 Comp.).

obligations were imposed upon government contractors.²¹ In construction, however, these principles had little effect until the promulgation of the Philadelphia Plan in 1969.²²

This plan required planning tables to be submitted by contractors. In such tables contractors were obligated to set forth the number of minority-group workers to be employed on the project in question. The Government set no standard regarding the acceptability of any particular number. Contractors, the construction unions, and the Comptroller General contended that these affirmative action obligations were too vague.²³ The Department of Labor attempted to remedy this defect by establishing more specific goals and timetables for the recruitment of minority tradesmen. This "second" Philadelphia Plan obligated all contractors working on federally assisted construction projects exceeding \$500,000 to adhere to goals and timetables.²⁴ Yet at this point the protest grew even louder; the Comptroller General, for example, declared the second Philadelphia Plan to be illegal.²⁵ Nevertheless, it was approved by the Attorney General²⁶ and upheld by the Court of Appeals for the Third Circuit in *Contractors Association v. Schultz*.²⁷

In late 1969 and early 1970, however, before the courts upheld the constitutionality of the second Philadelphia Plan, the Nixon administration devised the "hometown approach," which it felt was the "best solution" to the problem of minority recruitment in the skilled construction trades. The hometown approach had a number of advantages over the Philadelphia Plan. Most importantly, it was voluntarily negotiated by all parties: the unions accepted willingly the same quotas that they had railed against when they were imposed by the Philadelphia Plan. In addition, the hometown plans devised obligations which related directly to unions as well as to contractors. Unions were required through the negotiation of such plans to

21. Exec. Order No. 10,925, 3 C.F.R. 448 (1959-63 Comp.).

22. Comment, *supra* note 19, at 725-26. The Philadelphia Plan was promulgated pursuant to Exec. Order No. 11,246, 3 C.F.R. 173 (1973), and 42 U.S.C. § 2000e (1970).

23. See Comment, *supra* note 19, at 739-43.

24. For the text of this Plan, see *Affirmative Action—Compliance in Construction*, 1 CCH EMP. PRAC. ¶ 1708 (1973).

25. 49 COMP. GEN. 59 (1969).

26. 42 OP. ATT'Y GEN. No. 37 (1969).

27. 442 F.2d 159 (3d Cir.), *cert. denied*, 404 U.S. 854 (1971); *accord*, *Illinois Builders Ass'n v. Ogilvie*, 471 F.2d 680 (7th Cir. 1972); *Associated Gen. Contractors v. Altshuler*, 6 F.E.P. Cases 1013 (1st Cir. 1973); *Carpenters v. Conforti & Eiselle Inc.*, 3 F.E.P. Cases 1218 (D.N.J. 1971); *Joyce v. McCrane*, 3 F.E.P. Cases 111 (D.N.J. 1970). I have dealt with the question of the constitutionality of goals and quotas as well as with their compatibility with Title VII in W. GOULD, *BLACK WORKERS IN WHITE UNIONS: THE ROLES OF LAW AND PRIVATE INITIATIVE* (forthcoming). For an excellent discussion of quotas as remedies, see *Morrow v. Crisler*, 479 F.2d 960, 968 (5th Cir. 1973) (Goldberg, J., dissenting). Other treatments of this question include *Bridgeport Guardians, Inc. v. Bridgeport Civil Serv. Comm'n*, 482 F.2d 1333 (2d Cir. 1973); *Commonwealth v. O'Neill*, 473 F.2d 1029 (3d Cir. 1973); *United States v. Local 46, Wood Lathers*, 471 F.2d 408 (2d Cir.), *cert. denied*, 412 U.S. 939 (1973); *Carter v. Gallagher*, 452 F.2d 315 (8th Cir. 1972); *Vulcan Soc'y v. Civil Serv. Comm'n*, 5 F.E.P. Cases 1229 (S.D.N.Y. 1973); *Harper v. Mayor & City Council*, 5 F.E.P. Cases 1050 (D. Md. 1973); *NAACP v. Allen*, 340 F. Supp. 703 (M.D. Ala. 1972).

accept minority employees as "trainees." Such workers were presumed to be on a track which led to a journeyman's card and thus to relative economic security.²⁸ These trainees, however, were referred to work as "permit" workers and did not have rights equal to those of journeymen and apprentices.²⁹ Nonetheless, where a hometown plan was in effect "motorcycling" or "checkerboarding" was substantially eliminated.³⁰ What mattered under such negotiated plans was not the number of minority workers on a particular project but rather the number of minority employees moving into a training program which would culminate in the possession of substantial credentials. Under the Philadelphia Plan and other imposed plans,³¹ employees often made no progress toward union status because employers could satisfy the plans by hiring nonunion workers.

An additional advantage of the hometown approach is that it included the minority community, as well as labor and management, as signatories to the construction contracts. Its originators felt that the involvement of the minority community in programs which benefited it would help guarantee implementation. Moreover, the hometown approach highlighted other deficiencies in the imposed variety. For example, until 1971 the Philadelphia Plan applied only to minority employee participation on federally supported construction projects above a specified dollar amount. No minimum figure was necessary for contractors to be covered by hometown plans.³² Finally, the hometown plans included mandatory training programs and the Department of Labor generally made federal financing available to support them.³³ Although the Philadelphia Plan also contemplated the establishment of training programs, they were not required in the first instance. Indeed, Assistant Secretary of Labor Fletcher announced a year after the establishment of the Philadelphia Plan that the Department of Labor regulations provided the craft unions with a veto over training funds in their locality whenever the program was not to their liking.³⁴ This veto power helped slow down the Philadelphia Plan inasmuch as the unions were extremely anxious to see it fail and were willing to do all in their power to achieve that objective.

28. A journeyman—often, but by no means always, the product of an apprenticeship program—can transfer his card from one geographical jurisdiction to another. Moreover, journeymen receive preferential treatment against layoffs.

29. One obvious problem was that permit workers must relinquish their jobs before either journeymen or apprentices. See *United States v. Local 638, Pipefitters*, 347 F. Supp. 169 (S.D.N.Y. 1972).

30. These terms refer to moving minority workers from one construction project to another in order to satisfy the separate requirements at each job site.

31. See, e.g., Washington Plan, 41 C.F.R. pt. 60-5 (1972); San Francisco Plan, *id.* pt. 60-6; St. Louis Plan, *id.* pt. 60-7; Atlanta Plan, *id.* pt. 60-8.

32. *Affirmative Action—Compliance in Construction*, *supra* note 24, ¶ 1706, at 1474 (1973).

33. *Id.* ¶ 1721, at 1509.

34. See Calame, *Labor Agency Seeks to Avoid Unions' Right to Veto On-the-Job Training of Minorities*, Wall Street Journal, Dec. 21, 1970, at 7, col. 1.

Despite these advantages, the hometown approach has not been successful. In large part this is because the hometown plans were a surrender to racist employment practices. They placed authority for both negotiation and enforcement in the hands of the parties whose very wrongdoing had given rise to the need for the plans. Four years after its much heralded announcement, the Chicago Plan, a hometown plan which had been praised by George Meany as the answer to the Philadelphia Plan,³⁵ was not even off the ground. Indeed, the Justice Department has recently instituted Title VII actions against some of the leading Chicago building trades locals.³⁶ Most of the hometown plans have floundered because the Department of Labor's Office of Federal Contract Compliance lacks the resources³⁷ and the Nixon administration does not have the political will to see that such plans are enforced. In addition, none of the plans attempt to alter the institutional discrimination to which the courts have addressed themselves.³⁸ Consequently, most of these plans are in disarray. Nevertheless, they have served a useful purpose by bringing in more minorities than otherwise would have been admitted. More importantly, they have prompted the judiciary to indicate that it is more willing to fashion quota remedies where a training program which itself speaks in terms of numbers already exists.³⁹ Although most of the progress made in the equal employment area has derived from litigation brought under Title VII,⁴⁰ the voluntary

35. Meany stated that the Chicago Plan was a "significant forward step in the AFL-CIO's campaign to recruit, train and place more minority group workers in the construction industry . . ." and that the agreement was "substantially in line" with AFL-CIO policy. Letter from George Meany to C.J. Haggerty, Jan. 14, 1970. That same week Meany denounced the Philadelphia Plan. See AFL-CIO News, Jan. 17, 1970, at 1, col. 1.

The second voluntary plan in Chicago failed in late 1973. See N.Y. Times, Oct. 23, 1973, at 20, col. 2.

36. United States v. Local 73, Sheetmetal Workers, Civil No. 73-C2039 (N.D. Ill., filed Aug. 10, 1973); United States v. Local 17, Heat & Frost Insulators, Civil No. 73-C2020 (N.D. Ill., filed Aug. 9, 1973).

37. Not only has the Office of Federal Contract Compliance refused to create new positions, it has also failed to fill existing ones. For instance, for 2 years the position of Area Coordinator in the Office of Federal Contract Compliance in Detroit has been open.

38. See Gould, *Black Workers Inside the House of Labor*, 407 ANNALS 78 (1973); Gould, *Blacks and the General Lockout*, N.Y. Times, July 17, 1971, at 23, col. 3. Indeed, the federal courts have noted the poor performance of such plans. See, e.g., United States v. Local 638, Steamfitters, 6 F.E.P. Cases 319, 327 (S.D.N.Y. 1972): "The New York plan has not been an unqualified success. Trainees are not told that they will automatically become members of the A Branch when they complete the program, and only one non-white has become an A branch member. In January, 1973, New York City withdrew from the plan on the grounds that the small numbers of trainees placed was unacceptable." For an acknowledgment of deficiencies in the Boston plan, see Associated Gen. Contractors v. Altschuler, 6 F.E.P. Cases 1013, 1016 (1st Cir. 1973).

39. See, e.g., United States v. Local 212, IBEW, 472 F.2d 634 (6th Cir. 1973); United States v. Local 169, Carpenters, 457 F.2d 210 (7th Cir.), cert. denied, 409 U.S. 451 (1972).

40. See Gould, *Black Workers Inside the House of Labor*, 407 ANNALS 78 (1973); Editorial, *Closed Door*, N.Y. Times, July 29, 1972, at 24, col. 1.

On the law of Title VII as it relates to construction discrimination, see M. SOVERN, *LEGAL RESTRAINTS ON RACIAL DISCRIMINATION IN EMPLOYMENT* (1966); Gould, *Racial Discrimination, the Courts and Construction*, 11 INDUS. RELATIONS 380 (1972); Gould, *Seniority and the Black Worker: Reflections on Quarles and its Implications*, 47 TEXAS L. REV. 1039 (1969); Hill, *The New Judicial Perception of Employment Discrimination—Litigation Under Title VII of the Civil Rights*

process which has been stimulated by the hometown approach also has played a significant role.

D. *The Seattle Title VII Decree*

The Seattle building trades decree,⁴¹ the earliest and, at the time of its issuance, the most comprehensive Title VII decree rendered by any court, illustrates the potential effectiveness of Title VII litigation compared to efforts by the executive branch in attacking discrimination. Predictably, the AFL-CIO lost no time in maligning it. The decree's potential, even more than its accomplishment, poses a substantial threat to the AFL-CIO's position that the law is not a viable way to overcome labor discrimination, that the best method of bringing minorities into the construction trades is through the unions' own apprenticeship plans such as Project Outreach. The Seattle decree not only eliminated existing institutional rigidities in the unions' apprenticeship plans; it also required that the rate of integration be accelerated beyond the "deliberate speed" prescribed for school desegregation by the Warren Court in *Brown v. Board of Education* [II].⁴² Like all novel and ambitious ventures, the decree has had more than its share of difficulties. Nevertheless, experience under the decree indicates that the law can have a substantial impact in providing equal employment opportunities.

II. PRELUDE TO LITIGATION: THE SEATTLE DEMONSTRATIONS⁴³

When Tyree Scott got his discharge papers from the Marine Corps in 1966, he returned to Seattle and went to work with his father, a nonunion electrician, in what he describes as "just about a one-man shop."⁴⁴ That year the Scotts, who are black, grossed \$9,000. Within 3 years the construction boom of the late 1960's had given the Scotts substantial new opportunities, and they began to obtain some large contracts. In 1969, they were earning more than 10 times as much as they had in 1966. Some skilled journeymen had been hired and Scott had decided that in order to compete for the big

Act of 1964, 43 U. COLO. L. REV. 243 (1972); Peck, *Remedies for Racial Discrimination in Employment: A Comparative Evaluation of Remedies*, 46 U. WASH. L. REV. 455 (1971); Rosenthal, *Employment Discrimination and the Law*, 407 ANNALS 91 (1973).

41. *United States v. Local 86, Ironworkers*, 315 F. Supp. 1202 (W.D. Wash. 1970), *aff'd*, 443 F.2d 554 (9th Cir.), *cert. denied*, 404 U.S. 984 (1971).

42. 349 U.S. 294 (1955).

43. During the period Jan. 1971 through Feb. 1974, numerous interviews were conducted with Tyree Scott and Harley Bird, both of the United Construction Workers Association, Alice Paine of the American Friends Service Committee, Sally Kenyon, Stuart Pierson, and Frank Petramalo, all of the Department of Justice, Kenneth McDonald, former counsel to the Court Order Advisory Committee, Donald Close, of the Electrical Contractors Association, Austin St. Laurent, President of the Seattle Building Trades Council, and Professor Luvern Rieke, Chairman of the Court Order Advisory Committee.

44. Interview with Tyree Scott, in Seattle, Wash., Feb. 1, 1971, at 3 [hereinafter cited as Scott Interview] (on file with author).

contracts he had to come to terms with the International Brotherhood of Electrical Workers (IBEW), Local 46. In Seattle and other cities, the larger and more financially lucrative commercial contracts cannot be obtained without having a collective bargaining agreement with a union: the unions which bargain with the general contractor and other sub-contractors pressure their own employers to, in turn, force the nonunion contractor to bargain collectively—often as the result of a threatened or actual picket line.⁴⁵ The sanction in this situation, of course, is a refusal to cross the picket line.

In August 1969, two black youngsters came into the Scotts' shop and asked for jobs. Says Scott about this encounter: "These guys . . . asked me about a job and I explained that you had to belong to the union, and we had exclusive hiring hall procedures with the unions, and we couldn't hire people just right off the street. And these guys spent another 15 minutes talking to me and then they walked out of the shop."⁴⁶ But when they left, says Scott, "the office secretary, who had sons about their age, started talking about their problem: 'You know darned well the white contractors can't hire them.' And I went out in the street and caught up with these guys and told them I wasn't going to turn nobody else down—that I would hire them regardless of the damn union."⁴⁷

This event triggered a series of incidents which has exposed the strengths and frailties of the judicial process. Scott became involved in the Central Contractors Association, an all-black construction employers group in the Seattle area. When he related his story about the black applicants at a meeting of the Contractors Association, he struck a responsive chord with some of the other members. They were concerned about the exclusion of black employees as well as about the fact that black employers found it difficult to get work on construction projects. The association decided to publicize their grievances.

The next day, Scott, along with 13 black contractors, successfully closed down a swimming pool project which was being built for Seattle's black high school by an all-white work force. The high school, located one block from the spot where Seattle's 1967 riots had been sparked, was hardly the place at which white workers wanted to deliberate fully on a request by blacks to leave. The white construction workers departed quickly.⁴⁸ The following day, between 150 and 200 blacks and whites went downtown to a site at which a courthouse was being constructed. Here Scott informed the

45. See D. MILLS, *supra* note 10, at 33; NLRB v. Denver Bldg. & Constr. Trades Council, 341 U.S. 675 (1951); Building & Constr. Trades Council, 164 N.L.R.B. 313 (1967).

46. Scott Interview, *supra* note 44, at 4.

47. *Id.*

48. *Id.* at 5.

contractors that employers and unions had an obligation under the President's Executive Order⁴⁹ to employ blacks where federal funds were involved in construction. Construction stopped and momentum increased. From the courthouse the crowd went on to the King County Hospital, the objects being to stop traffic and to ask workers to leave. Again, they succeeded.⁵⁰ Traffic was snarled and white workers left the construction site. Direct action was having an impact. However, when black trainees were brought onto the job sites subsequent to these demonstrations, the building trades members walked out despite a no-strike clause. The Central Contractors Association and Scott sued in federal district court to enjoin these walkouts, and Judge William Lindberg held that an injunction was an appropriate remedy. According to Judge Lindberg, because the walkout was designed to thwart the hiring of black trainees in the respective trades, it was not a labor dispute within the meaning of the Norris-LaGuardia Act.⁵¹

The Nixon administration—not yet locked into its alliance with the white hardhat unions⁵²—had promulgated the Philadelphia Plan during the summer months.⁵³ One of its leading black officeholders, Assistant Secretary of Labor Arthur Fletcher, threatened its extension to other cities where employers and unions did not take affirmative action.⁵⁴ The winds of Philadelphia were being felt throughout the land. The belief that the unions and contractors had obligations to recruit minorities, obligations which could be effected only if “goals” and “timetables” for minority hiring were established, was reflected both in the acceleration of black demands and in a new-found inclination by the white building trades and contractors to negotiate plans. For the first time, a climate which favored meaningful efforts to alleviate employment discrimination was beginning to develop.

The combined impact of Judge Lindberg's injunction and the reverberations of the Philadelphia Plan led the mayor, the county commissioner, and representatives of labor and management to sit down with

49. See note 22 *supra*.

50. Scott Interview, *supra* note 44, at 6.

Seattle was not the only city where such events occurred during the late summer and fall of 1969. Street gangs roamed Chicago's South Side chasing white workers from construction sites in the ghetto. N.Y. Times, Sept. 23, 1969, at 56, col. 3. “Black Monday” marches took place in Pittsburgh. *Id.*, Sept. 16, 1969, at 36, col. 2. Black “hardhat” demonstrators protested job discrimination in Detroit. Detroit Free Press, Oct. 11, 1969, at A3, col. 2. In urban areas throughout the country, the same demands were heard.

51. Central Contractors Ass'n v. Local 46, IBEW, 312 F. Supp. 1388, 1391 (W.D. Wash. 1969), construing 29 U.S.C. § 107 (1970). For a criticism of this approach, see Gould, *Black Power in the Unions: The Impact upon Collective Bargaining Relationships*, 79 YALE L.J. 46 (1969). See generally Gould, *On Labor Injunctions, Unions, and the Judges: The Boys Market Case*, 1970 SUP. CT. REV. 215.

52. This alliance originated with Peter Brennan's “hardhat” demonstrations in the spring of 1970. See Gould, *Labor & Nixon: Moving the Hard-Hats In*, NATION, Jan. 8, 1973, at 41.

53. See text accompanying notes 19–27 *supra*.

54. N.Y. Times, Sept. 30, 1969, at 1, col. 2.

the black demonstrators in Seattle. The result was an agreement immediately to hire 60 blacks into the mechanical trades at a number of construction sites throughout the city. But the agreement became meaningless once blacks realized that individual black employees—whose place would not be filled by others if they quit or were dismissed—were the only beneficiaries. Accordingly, 2 weeks later, black demonstrators were back in the streets.

Two of the same projects were closed down again. At this point, the protest began to spread to construction at the University of Washington, where national television recorded the overturning of bulldozers. Scott was well aware of the lesson learned by the unions themselves in the 1930's: if work ceased, negotiations took place. Says Scott: "[I]f [the projects] were closed, they would meet every day. If they were open, they would want to meet on a weekly basis, or whatever."⁵⁵

Almost simultaneously with the university shutdowns, Scott's group started to protest the exclusion of blacks at airport construction projects.⁵⁶ Their tactic was to line up in single file and march onto the runways so that the planes could not land. Further negotiations and another agreement resulted.⁵⁷ After it became clear that this new agreement would not be implemented, Scott called for more direct action at the airport. In December, an assembly of 300 blacks and some white supporters tied up ticket counters with phony ticket purchases. The police moved in and arrested Scott along with approximately 50 others.⁵⁸ The next day the Department of Justice—which had begun to look at Seattle's building trades when the demonstrations began and whose investigatory pace had quickened as blacks escalated the conflict—brought suit against five unions: Local 86, Ironworkers; Local 99, Sheet Metal Workers; Local 46, IBEW; Local 32, Plumbers and Pipefitters; and Local 502, Operating Engineers.⁵⁹ Two months later, Judge Lindberg, the same federal judge who had previously issued an injunction against the building trades walkout,⁶⁰ found that the unions and their Joint Apprenticeship Committees (JAP's) (except that of Local 46, IBEW) had violated Title VII of the Civil Rights Act of 1964. Relief was fashioned on June 16, 1970.⁶¹

55. Scott Interview, *supra* note 44, at 8.

56. *Id.* at 9.

57. *Id.* at 11-A.

58. *Id.* at 13-15.

59. *United States v. Local 86, Ironworkers*, 315 F. Supp. 1202 (W.D. Wash. 1970), *aff'd*, 443 F.2d 554 (9th Cir.), *cert. denied*, 404 U.S. 984 (1971). The Operating Engineers entered into a consent decree without trial. For an examination of the progress made under the Consent Decree, see Report to the Court on Progress under Judgment and Decree, Oct. 24, 1973.

60. See text accompanying note 51 *supra*.

61. 315 F. Supp. at 1202.

III. JUDGE LINDBERG'S ORDER

The order provides relief which, at the time of its issuance, was more comprehensive and detailed than that set forth by any other judge in any employment discrimination case in the United States.⁶² The court, having

62. State agencies have also attempted to combat employment discrimination, but they have generally been even less successful than the courts. The experience of Howard Lewis, a black welder with 30 years of experience, illustrates both the nature of union discrimination and the inadequacies of administrative remedies.

Lewis was employed as a permit workman; he was obligated to pay dues to the local Ironworkers Union, but he had no status as a union member. In order to gain job security, he applied for membership. The union sent him a letter which stated an examination date but did not contain any instructions concerning the nature of the examination or other prerequisites to membership. At the examination Lewis was informed that he would have to return with a withdrawal card from a union to which he previously belonged, certification papers, and a letter of recommendation from a supervisor. Nothing more was required.

The following month Lewis again appeared before the examination board. One of the board members specifically stated to him: "There is no question about your welding. We know that you are a damn good welder." Yet he was asked whether he could tie knots and was advised that he could not become a member of the union unless he knew how to do so. At the conclusion of this second examination, the examining board offered to assist Lewis in learning to tie the required knots. He could not take advantage of this offer, however, because he worked too far away. Although none of the union workers who worked on the same job could tie the knots he was forced to learn, a nonunion machinist finally taught him. After practicing for more than a month, Lewis received a third examination.

At this examination Lewis proceeded to demonstrate his knot-tying ability by tying seven different knots. He was then asked to tie a knot which he never knew existed. At this point his patience and good faith efforts collapsed. When asked if he wished to return to the examining board after further practice, he stated: "No, I do not, because I think regardless of what I do I am not going to pass this board."

The Washington Board Against Discrimination regarded the knot-tying requirement as an arbitrary hurdle which had been placed in Lewis' way: "Mr. Lewis' successful work at the Wells Dam project, as well as construction work performed both before and after that time, establish that the work of a welder Ironworker does not involve knot-tying to any significant extent, and that it can be performed without the extensive knowledge and skill required to pass the examination which the Union purportedly gave all applicants. The Union has suggested that knot-tying abilities are required not only for performance of a welder's work but also for the protection of the individual workman as well as other workmen who might be injured if a welder undertook to move material with a line improperly tied. Such an argument might be entitled to weight if it were not evident that the Union has during the past years referred hundreds of 'permit' welders to work on construction sites without attempting to determine their abilities at knot tying." *Lewis v. Local 86, Ironworkers, BNA DAILY LAB. REP.* No. 55, at D-6 (Wash. State Bd. Against Discrimination 1969). The Board also found a pattern of racial discrimination by the union: "The almost total absence of outside Negro Ironworkers sharply contrasts with the 300 to 400 Negroes working as welders in Seattle manufacturing plants, shipyards, and even in construction work as sheetmetal workers." *Id.* at D-9.

It concluded that the knot-tying requirement had been applied in a discriminatory manner in the Lewis case and that "some limitation" needed to be imposed upon the use of such tests in connection with future applications. The examiners' substantial discretion in choosing difficult or easy knots for the applicant to tie permitted them to discriminate on the basis of race. The State Board Against Discrimination left the type and number of knots to be determined by the examination board but insisted that requirements be applied uniformly to all applicants. Further, the union was required to prepare a written statement of its standards and procedures in connection with the examination of applicants. The purpose of this requirement was to insure that the subjects and degree of knowledge would be publicized and that applicants would be in a position to prepare—something that Lewis had been unable to do.

The Board also noted that because of the union's discrimination, future referrals based upon either union membership or length of service would be the equivalent of a referral on the basis of race and therefore would constitute an unlawful practice. It concluded that the referral system could be reinstated only when the proportion of blacks employed in the trade reached the 10% proportion which blacks constitute in the area where the union's members live. Finally, the Board stated that no further changes were to be made with regard to referral policies without its approval.

The Board's decision, often referred to as the "knot-tying decision," was an important one. It

carefully documented its findings of fact in a 42-page opinion, obligated the defendant craft unions to open up membership to blacks who had been unlawfully excluded from journeyman status.⁶³ More importantly, Judge Lindberg ordered the unions and their apprenticeship committees to recruit blacks into their apprenticeship programs so that a specific number of graduates could be reasonably anticipated on an annual basis.⁶⁴ The court also altered the grounds for admission at the journeyman level and ordered the immediate admission of 45 black journeymen.⁶⁵ These requirements were designed to remedy the disadvantages imposed upon blacks by the existing union structure.

A. *Findings of Fact*

Judge Lindberg found numerous occasions of union discrimination.⁶⁶ The Ironworkers Union, for example, had "on a continuous basis" denied blacks its hiring hall and provided black applicants and workers with false information about employment conditions.⁶⁷ The union also referred white workers with little or no experience, enabling them to avoid an apprenticeship and learn valuable skills on the job.⁶⁸ Moreover, Judge Lindberg concluded that union estimates of training requirements were considerably exaggerated, noting that the white workers who received preferential treatment had often been referred successfully without going through any apprenticeship program.⁶⁹ In the apprenticeship program itself, the sons and relatives of union members—all of whom were white—had an automatic preference for acceptance.⁷⁰ The court also found that aptitude tests imposing higher standards than those in effect prior to 1967 were "at least in part racially motivated" and noted the disproportionate impact that such tests had upon blacks as opposed to whites.⁷¹

The Sheet Metal Workers Union, like the Ironworkers, gave preference to friends and relatives of union members and union contractors, often by violating its own regulations.⁷² One particularly ingenious ex-

suspended referral procedures until a quota was implemented, and it attempted to clarify membership application procedures. The fact remained, however, that it was binding upon only one of Seattle's building trades. The Board also established very little in the way of substitute referral criteria or guidelines for such criteria. Moreover, the thrust of the Board's order related only to two black workers who had been adversely affected and did not deal with broader problems of employment discrimination.

63. 315 F. Supp. at 1239-43.

64. *Id.* at 1247.

65. *Id.* at 1239-45.

66. For a complete description of the court's findings of union discrimination, see *id.* at 1204-35.

67. *Id.* at 1207.

68. *Id.* at 1208.

69. "The bulk of the work which a rodman does consists in the placing and tying of rods on reinforcing jobs. The evidence establishes that the skills ordinarily required of a rodman can be learned and developed on the job in considerably less time than [sic] the two year minimum contended for by the union." *Id.*

70. *Id.* at 1210.

71. *Id.* at 1211.

72. *Id.* at 1215-16.

clusionary device employed by the union's apprenticeship committee was allowing some white workers to apply while the application books were officially closed. The court noted that blacks were consistently discouraged from applying for entry into the apprenticeship program.⁷³

At the time of the trial the number of black construction members in each union was as follows: Ironworkers, 1 out of 920 members; Sheet Metal Workers, 1 out of 900; Electricians, 1 out of 1,715; and Plumbers and Pipefitters, 1 out of 1,900.⁷⁴ The Plumbers Union had 93 black members, significantly more than the other unions, but virtually all worked in the non-construction trades⁷⁵ where hourly wages were significantly lower than in construction.⁷⁶

The International Brotherhood of Electrical Workers employed similar kinds of discrimination. For example, the local applied more stringent standards to black marine electricians than to whites seeking construction referral.⁷⁷ Moreover, qualified blacks had been refused referral to higher paying construction work.⁷⁸ Black applicants were often required to have letters of recommendation from electrical contractors before they could be referred, whereas white marine electricians were regularly referred to construction jobs merely on the basis of their union work records or dues receipts.⁷⁹

B. *Conclusions of Law*

Judge Lindberg made numerous conclusions of law from the evidence of widespread racial discrimination on the part of the skilled construction unions. He held unlawful any attempts by a union or its apprenticeship committee⁸⁰ to give false, misleading, or incomplete information with regard to membership, work referral opportunities, and apprenticeship training.⁸¹ Recruitment programs aimed only at whites and other preferential

73. *Id.* at 1217-18.

74. *Id.* at 1204, 1212, 1219, 1228.

75. The union often told experienced black laborers that no work was available in the construction trades when there was in fact a shortage of skilled workers. *See id.* at 1221. Moreover, white workers with significantly less experience were referred. *Id.*

76. Virtually all of the blacks were employed as marine pipefitters, where the hourly wage for journeymen was \$4.18. The hourly rate for journeymen in the construction trades, where only one black worker was employed, was \$6.25. *Id.* at 1219.

77. *Id.* at 1231-33.

78. *Id.* at 1232-33.

79. *Id.*

80. Apprenticeship committees are legally distinct from their respective unions. *See generally* D. MILLS, *supra* note 10, at 187. Judge Lindberg found, however, that the unions were at least partially responsible for the discriminatory racial policies of the apprenticeship committees: "In practical effect the unions' policies and practices have established the framework within which the apprenticeship committees have worked. Union influence has been further supplemented by equal representation on each committee, by physical proximity to apprenticeship offices, and by varying degrees of control over the day to day operation of committee functions." 315 F. Supp. at 1234.

81. 315 F. Supp. at 1235-36.

treatment restricting black employment opportunities were also declared illegal.⁸² In addition, application of higher standards or more stringent procedures to blacks than to whites was outlawed by the decree.⁸³

Judge Lindberg imposed further limitations on union activities. He prohibited unions which had engaged in racially discriminatory practices from requiring blacks to have experience in the industry as a condition of referral or membership. Such a condition, he reasoned, would perpetuate past discrimination.⁸⁴ Moreover, all prerequisites to membership, referral, or apprenticeship training "must bear a reasonable relationship to skills required on the job," and the necessary qualifications need only be comparable to those "generally demonstrated by white applicants or members."⁸⁵ Judge Lindberg also concluded that a union's reputation and statistical evidence regarding its racial composition are relevant and admissible in proving a policy of discrimination.⁸⁶ Finally, he held that a union which has engaged in racial discrimination "must not only refrain from future discrimination but must also undertake whatever affirmative action may be necessary to assure those discriminated against the full enjoyment of their right to equal employment opportunities."⁸⁷

C. *Remedy by Decree*

Judge Lindberg issued two decrees based on his findings of fact and conclusions of law. The first dealt with standards and procedures relating to journeyman referral and membership; the second, with apprenticeship and training.

1. *Decree No. 1: journeyman referral and membership records.*

The court required all the defendant unions to maintain thorough records.⁸⁸ It held that all workers seeking employment had to complete an application for referral with the union which would automatically become a permanent part of the applicant's file.⁸⁹ Only those persons with applications on file were eligible for placement on the out-of-work lists and referral; the locals also had to maintain a register of all requests by contractors for each trade classification of employees.

In addition, the court ordered the unions to transmit copies of items such

82. *Id.* at 1236.

83. *Id.*

84. *Id.*

85. *Id.*

86. *Id.*

87. *Id.* at 1236-37.

88. *Id.* at 1237-38.

89. The applications were to be serially numbered and had to contain at least the following information: "name, address, telephone number, age, race, union affiliation (if any) and summary and explanation of the applicant's experience in the particular union's trade or any related trade." *Id.* at 1237.

as referral applications and hiring hall dispatch slips to the Department of Justice. The names of all black applicants not placed on the out-of-work lists or referred for work had to be reported to the Government and the decisions justified by the union. Finally, the Department of Justice was instructed to review the data every 6 months and submit a statistical summary and analysis to the court and the relevant local.⁹⁰

Dissemination of information. Judge Lindberg tried to insure the effectiveness of his decree by ordering dissemination of information to prospective black employees. He required each local union to prepare a brief written statement describing its referral system and its membership requirements for blacks, also indicating that membership is not a prerequisite of initial referral. In addition, the unions had to set forth various employment opportunities and the current rate of pay. The judge obligated the unions to furnish a copy of this statement to each black applicant for employment as well as to the Government. The unions also had to place advertisements in newspapers "identified with serving the black community."⁹¹

Provisions for local unions. In addition to these general requirements imposed on all the defendant unions, the court announced specific standards and procedures for journeyman membership and referral in each local. The Ironworkers local, for example, was ordered to offer journeyman status to blacks who had obtained 700 hours of construction welding, rod work, or structural ironwork experience. The initiation fee charged qualified blacks had to be the most favorable terms offered by the local in the previous 5 years. Moreover, black applicants for membership were no longer required to provide names of union sponsors or to pass an examination.⁹²

With respect to journeyman referral procedures, the court gave the local the option of preserving priority groupings⁹³ in the operation of its hiring hall. If the union retained the priority system, the court held, it would have to place black applicants in groups according to experience "reasonably related to the ironwork trade" irrespective of membership status. If the priority system were abandoned, all referrals would have to be made chronologically according to the date the applicant signed the out-of-work list. The court instructed the union not to require any examination or previous experience under the collective bargaining agreement as prerequisites to referral; a black applicant could be referred on the basis of his own statement of experience.⁹⁴ Finally, Judge Lindberg allowed contractors, apart from

90. For a more complete description of these provisions, see *id.* at 1237-38.

91. *Id.* at 1238.

92. *Id.* at 1239-40.

93. A priority grouping is a work referral system based upon criteria such as length of previous employment in the particular field. U.S. DEP'T OF LABOR, *supra* note 14, at 58.

94. The union, however, retained the right to verify the applicant's relevant statements. 315 F. Supp. at 1240.

any established rights to call a worker out of order, to employ blacks without regard to their place on the out-of-work list or prior experience with a particular contractor. He felt such an extraordinary provision was justified by the fact that black journeymen generally had been denied the opportunity to work with contractors.⁹⁵ Similar considerations were spelled out for the other local unions.⁹⁶

2. *Decree No. 2: apprenticeship and training.*

Judge Lindberg also ordered the local apprenticeship committees to develop two apprentice programs to meet their affirmative action responsibilities. Judge Lindberg imposed separate requirements and procedures on each program.

The regular program. The court compelled the union apprenticeship committees to broaden access to their regular apprentice programs, which train unskilled workers for journeyman status. The unions had to "consider qualified" all applicants for apprenticeship who met the age, education, health, residency, and examination standards set forth by Judge Lindberg.⁹⁷ No other standards could be used by the unions.⁹⁸

In addition, Judge Lindberg required the apprenticeship committees to bring enough black applicants into apprentice programs "to insure a reasonable level of participation sufficient to overcome the present effects of past discrimination."⁹⁹ He ordered at least 30 percent of each apprenticeship class to be black, and applied this "minimum participation" figure to the "class of persons remaining in the program for more than three months" as well as to the entering class.¹⁰⁰ Judge Lindberg also obligated the committees to replace blacks whose apprenticeships terminated before 3 months with newly indentured black apprentices to insure the required quotas would be met.¹⁰¹

The special program. Judge Lindberg also forced the union apprenticeship committees to develop and implement special apprenticeship programs. These programs were designed to emphasize on-the-job training for

95. *Id.*

96. *See id.* at 1240-44.

97. The Plumbers and Pipefitters apprenticeship committee and the Sheet Metal apprenticeship committee were ordered to "consider qualified" all applicants who were between the ages of 18 and 25, had a high school diploma or its equivalent, passed the aptitude test administered by the Washington State Division of Employment Security, and had no disabling physical defects. For the Ironworkers apprenticeship committee, eligible applicants needed to be between 18 and 30 and have 10 years of school, a high school transcript, a passing score on the aptitude test, no physical disabilities, and residency in the jurisdiction of the local for 1 year. *Id.* at 1246. The court did not find discrimination against blacks by the Electrical Workers apprenticeship committee and therefore did not impose specific admission standards upon it. *See id.* at 1251.

98. *Id.* at 1247.

99. *Id.*

100. *Id.*

101. *Id.*

two groups of black applicants whose needs could not be met by the regular programs: "overage black applicants with no previous experience or special skills in the trade"¹⁰² and "any black applicant of apprenticeable age or older who has some previous experience or special skills in the trade but does not meet journeyman standards."¹⁰³

Each apprenticeship committee was permitted to impose "reasonable limitations" upon the size of special apprenticeship classes. The court held, however, that ceilings on class size could not fall below specified minimums.¹⁰⁴ In addition, the unions had to shorten the training period for the special apprentices in order to speed their access to journeyman status.¹⁰⁵ The court also specified that the assignment of special apprentices to a construction project had to be "in addition to, and not in lieu of" regular apprentices or other employees already on the payroll.¹⁰⁶

3. *The Court Order Advisory Committee (COAC).*

An important innovation in the court's decrees was the creation of an advisory committee. The committee was to be composed of nine members—two each from labor, the contractors association, the black community, and the interested owners.¹⁰⁷ The court required the ninth person to be from "some minority group other than black."¹⁰⁸ It required the unions and the contractors associations to defray the expenses of the committee until governmental or private funding became available. The advisory committee was delegated the following responsibilities: (1) to communicate within the minority communities both the contents of the court order and the general progress being accomplished in its implementation; (2) to cooperate and consult with the appropriate apprenticeship committees, unions, and contractors associations in attempting to formulate "new or altered apprenticeship training programs"; (3) to submit reports to the court expressing its views on the special apprenticeship programs once they were drawn up by the apprenticeship committees; and (4) to issue letters of

102. *Id.* The overage applicants, however, had to be below the age of 45.

103. *Id.*

104. A class size from which one could "reasonably anticipate" an annual graduating class of at least 25 workers was imposed on the Plumbers and Pipefitters committee. A goal of 20 graduates was imposed on the Ironworkers and Sheet Metal Workers committees. *Id.* at 1248. The Electrical Workers committee was not required to form special apprenticeship programs because it had not discriminated against blacks, but the court encouraged the contractors' association and the Department of Justice to persuade the committee to establish one in order to achieve uniformity among the unions. *Id.* at 1251. The court instructed the Electrical Workers to set a goal of 25 graduates in the event it formed a special program. *Id.* at 1248.

105. The court required a 2-year maximum for all the special programs except for the Plumbers and Pipefitters', on which a 3-year maximum was imposed. *Id.* at 1248.

106. *Id.*

107. The court defined the interested owners as the State of Washington, King County, and the Port of Seattle. *Id.* at 1249.

108. *Id.*

recommendation for applicants who in its judgment were "likely" successfully to complete the special apprenticeship training programs.¹⁰⁹

4. *Retention of jurisdiction.*

Finally, the court retained jurisdiction "for such further relief as may be necessary or appropriate to further effectuate equal employment opportunities."¹¹⁰ At any time subsequent to June 30, 1973, however, any defendant affected by the order could move the court for its termination or modification depending upon the circumstances. Thus, while the court did not anticipate that equal employment opportunity obligations under Title VII would be completely met by 1973, it acknowledged that enough progress might have been made to enable a defendant local to relieve itself from requirements imposed by the 1970 decree. In fact, none of the defendants made enough progress to take advantage of this provision.¹¹¹ Nevertheless, by the summer of 1973 more than 200 black workers were employed in the crafts covered by the decree. This figure represents a considerable accomplishment, especially in a city with such substantial unemployment during the past 3 years that it has been described as an economic disaster area. Much of the improvement in the racial composition of the Seattle building trades has come despite inherent weaknesses in Judge Lindberg's order itself and the unions' failure to meet the quotas the order established.¹¹² The scope and detail of the decrees are in large part responsible for the successes, but Judge Lindberg's order would not have been implemented at all were it not for the militancy of Seattle's relatively small black community¹¹³ and the emergence of a black workers organization, the United Construction Workers Association. Without street demonstrations and sit-ins by an aroused black community when the order was not complied with, the judge's decrees would have been disobeyed even more than they have been.¹¹⁴

IV. MAKING THE LAW A REALITY: THE ROLE OF THE UNITED CONSTRUCTION WORKERS ASSOCIATION

The lawsuit had been instituted, violations had been found, and a remedy had been devised. Yet the remedy still had to be implemented. Only

109. *Id.* The court also allowed the committee to designate other persons or organizations to issue such letters.

110. *Id.* at 1250.

111. The aggregate of the quotas established by the 1970 order would be 483 black apprentices. As of June 11, 1972, there were 85 special apprentices and 10 operating engineer trainees, 388 fewer positions than prescribed in the 1970 order. *Seattle Post-Intelligencer*, June 11, 1972, at A18, col. 1.

112. See text accompanying notes 156-93 *infra*.

113. As of 1970, blacks constituted 8% of Seattle's population. UNITED STATES BUREAU OF CENSUS—CHARACTERISTICS OF THE POPULATION, pt. 49, at 59 (1970).

114. The black community's willingness to engage in self-help has generally been devoid of the black nationalist rhetoric which has drained many other new organizations. This absence of rhetoric accounts for much of the effectiveness of black action in Seattle.

then could the law become a reality for potential black apprentices and journeymen in Seattle—and the city's black community knew that reality required much more than a judge's order.

Shortly after Judge Lindberg's order was entered, Tyree Scott split with the Central Contractors Association, which had been so actively involved in the 1969 demonstrations against the building trades.¹¹⁵ The Association had become preoccupied with its own entrepreneurial problems.¹¹⁶ Referring derisively to "black capitalism," the promotion of small and often marginal businesses for blacks, Scott noted that Seattle's black contractors were "not totally sold on the job thing."¹¹⁷

After leaving the Central Contractors Association, Scott organized, with the help of the American Friends Service Committee, a black workers' organization called the United Construction Workers Association (UCWA). Its avowed purpose was to monitor the court decrees and to supply the apprenticeship committees with able applicants.¹¹⁸ The UCWA has been busy the past 3 years meeting its self-appointed responsibilities.

A. Publicizing Noncompliance

By August 15, 1970, it was already clear that the aspect of the court's order dealing with the hiring of preapprentices was not being implemented.¹¹⁹ One of the principal reasons for this lack of progress was that the unions and contractors, through their representatives on the COAC, had begun to negotiate a plan which would cover crafts in addition to those named in Judge Lindberg's decrees. The new approach—completely unauthorized by Judge Lindberg's opinion—broadened the enormous problems and complexities already involved. The attempt to devise a Seattle plan under the court's auspices was something of a disingenuous frolic for the unions and employers. It was a little like former Attorney General John Mitchell's efforts to make voting rights legislation applicable to the North as well as to the South. By stretching one's resources too far, one undermines, sometimes knowingly, the ability to accomplish anything at all.

At the same time that the unions and contractors were evading the court's order, Scott was arrested for charges arising out of the earlier airport demonstrations that provoked the Department of Justice to litigate

115. See text accompanying notes 48–61 *supra*.

116. Typical employer concerns included bonding, technical assistance, and opportunities for joint ventures.

117. Scott Interview, *supra* note 44, at 12.

118. *Id.* at 27–29.

119. Judge Lindberg ordered the union apprenticeship committee and the contractors with whom the unions had collective bargaining agreements to establish "preapprentice" programs for blacks. These interim programs were designed to provide training for black workers pending the implementation of the more comprehensive special apprenticeship programs, which would eventually supersede them. The court's order contemplated the placing of employees on contractor payrolls within 2 months. Yet by August 15, 2 months had passed and nothing had been done by either the unions or the contractors. For a discussion of the preapprentice program, see 315 F. Supp. at 1248–49.

against the unions in the first place.¹²⁰ Demonstrations and picketing organized by the UCWA underlined a very dramatic and important point: the law was being enforced against the civil rights groups but not against the unions and contractors. The Seattle media brought this theme to public consciousness during Scott's imprisonment in September, and the Department of Justice was once again propelled into action. On a motion of the Department, Judge Lindberg threatened the Association of General Contractors with contempt of court if a substantial effort to hire 90 blacks were not made by October 1.¹²¹ The threat worked; 90 positions were filled by blacks by the court's deadline.

B. Recruitment Efforts

The UCWA also worked actively to recruit black applicants, thereby anticipating the frequently used excuse in construction and other industries that blacks have not been hired because no candidates are available for existing opportunities. The recruitment effort made the black community more conscious of the employment opportunities provided by the court order,¹²² but the UCWA leadership was convinced that successful implementation could not be achieved without its own formal participation. The UCWA therefore proposed that it be hired to perform the recruiting and screening functions of the COAC. It pointed out that most potential applicants for the special apprenticeship program were already members of the UCWA. It also argued that these applicants should have a "direct say" in the operation of the program designed for their benefit and that UCWA involvement would be the most effective way to insure such input. Finally, the UCWA reasoned that the reluctance of the unions and contractors to develop the preapprentice program without outside pressure underlined the fact that UCWA participation was a necessary ingredient for any progress in implementing other aspects of the order.¹²³

On October 7, 1970, the COAC requested that Scott and the UCWA be engaged to "assist in the day-to-day counseling and troubleshooting of problems related to the Special Apprentices until such time as a program is approved and funded by the Labor Department."¹²⁴ Donald Close, of the

120. See text accompanying notes 56-58 *supra*. Scott was arrested for criminal trespass at the demonstrations. He was tried subsequently and fined \$175, but he refused to pay. When a warrant was issued for Scott's arrest in late August 1970, he surrendered and fasted in jail for 8 days.

121. 3 F.E.P. Cases 428, 429 (W.D. Wash. 1970).

122. The UCWA built substantial solidarity among black workers and could effectively encourage applications. Word-of-mouth communication, traditionally the means through which good jobs have been preserved for whites, was used for the first time by blacks. Tyree Scott has reported the impact UCWA meetings have had on spreading information about employment opportunities. See Scott Interview, *supra* note 44, at 31-32.

123. See note 119 *supra*.

124. Minutes of COAC Meeting, in Seattle, Wash., Oct. 7, 1970, at 1. The vote was six in favor and one opposed.

Electrical Contractors Association and chairman of the COAC, opposed this request.¹²⁵ He believed that UCWA involvement would be divisive and would undermine the cooperation contemplated in Judge Lindberg's order. He also made the technical argument that approval by the Department of Labor should be obtained before the COAC subcontracted any work to the UCWA. Austin St. Laurent, the president of the Seattle building trades and a COAC member, opposed this proposal on the ground that the COAC would be fostering dual unionism if it delegated these functions to the UCWA.¹²⁶ Yet dealing with the UCWA could not be regarded as dual unionism in the traditional sense of the term—although its existence both in 1970 and today quite clearly embarrasses and challenges the established trade union order. The UCWA, however, never planned to bargain over wages, hours, and conditions of employment for workers or to organize workers with the promise to do so. While it charges dues and has had meetings, the actual dispatch or referral of workers is through the union hiring hall, which generally controls employment opportunities in construction. By December 1970, the Close-St. Laurent views prevailed, and the COAC voted down the UCWA proposal. At this point minorities walked off the committee, creating a crisis situation before the COAC had really begun to operate.

C. Reorganization of the COAC

Donald Close then resigned because of what he correctly perceived to be a lack of confidence in him by the minorities. Judge Lindberg assigned Judge Volin, a bankruptcy judge in Seattle, to chair committee meetings on a temporary basis and in February 1971, after consultations with the parties, amended the order insofar as it related to the COAC. The most important modification was the designation of a "nonvoting, impartial chairman, appointed by the Court, who shall be in addition to the nine voting members,"¹²⁷ and who would have the authority to make recommendations to the court. Judge Lindberg appointed Professor Luvern Rieke of the University of Washington Law School to this post. He also specifically instructed the COAC to "monitor the progress of each of the special apprentices under this Order, including all phases of recruitment, training and entry into journeyman status."¹²⁸ The court hoped to eliminate the acrimony which had arisen toward the end of 1970 through the creation of the new impartial chairman and more specific responsibilities for the COAC. In

125. Interview with Donald Close, in Seattle, Wash., July 19, 1973.

126. Minutes of COAC Meeting, *supra* note 124, at 1.

127. Order of Feb. 16, 1971, at 2, *United States v. Local 86, Ironworkers*, Civil No. 8618 (W.D. Wash. Feb. 16, 1971).

128. *Id.* at 4.

fact, the amended order did have some effect: the minority members and Close rejoined the committee, and the meetings became less strident in tone. Moreover, the Court of Appeals for the Ninth Circuit, in a very broad and approving opinion, affirmed Judge Lindberg's order.¹²⁹ Yet the UCWA proposal for a formal role in recruitment was rejected,¹³⁰ and other practical difficulties were immense. It soon became clear that the order simply was not working well enough to provide the numbers of minority workers which it had envisioned.

D. *Further Problems in Implementing the Decrees*

One of the principal reasons why the order proved ineffective was that the numbers established for the special and regular apprentices had been selected without designating a population parity goal or any other ultimate reference point. They had been arrived at on the basis of conferences held between the court, the Department of Justice, and the other parties to the litigation and were the result of nothing more substantial than guesses about future manpower requirements in the construction trades.

A further difficulty was that the case went to trial and was decided when construction jobs were plentiful in Seattle. In fact, the boom in the construction economy provided the court with the decisive proof of discrimination. For example, blacks were being rejected for "lack of experience" when unions and contractors were searching desperately for tradesmen and referring whites with little or no experience—sometimes even as journeymen. In 1971, however, Seattle construction work began to decline, increasing competition between whites and blacks, and making it more difficult to enforce a decree which attempted to promote equal employment opportunities for black tradesmen.

Moreover, throughout 1971 and early 1972, the reports which the court had ordered to be provided by the Department of Justice were simply not forthcoming.¹³¹ In the Seattle building trades case, as in every litigation in

129. "In his carefully written and excellent opinion, covering some 50 pages, Judge Lindberg made separate findings of fact as to each party, carefully analyzing the supportive evidence found in the record. In these findings of fact Judge Lindberg has pointed out by page reference to the record, the testimony, stipulations, admitted facts, and exhibits upon which his findings were based. . . . Having reviewed the findings and the record before us, we are fully convinced that the findings are amply supported by the evidence." *United States v. Local 86, Ironworkers*, 443 F.2d 544, 550 (9th Cir.), *cert. denied*, 404 U.S. 984 (1971).

130. *See* Order of Feb. 16, 1971, at 4; *United States v. Local 86, Ironworkers*, Civil No. 8618 (W.D. Wash. Feb. 16, 1971).

131. *See* text accompanying note 90 *supra*.

Judge Lindberg later recognized this problem himself: "Such a report was not furnished by the plaintiff until approximately one year after the entry of the Decree [July 1971] and then only as a result of solicitation and urging by the Court. The plaintiff, United States, has never assigned a full time Assistant United States Attorney to monitoring its Decree. As a result, when emergencies have developed, the plaintiff has sent Mr. Petramalo, who is not stationed in Seattle, here to deal with emergency situations, obviously after they have occurred. Mr. Petramalo is an able, dedicated

which the Department of Justice has been the plaintiff under section 707, it was extremely difficult to keep on top of the developments from Washington, D.C. Because the Department of Justice had no one in Seattle with full-time responsibility for the implementation of the decree, it remained ineffective.

Understandably, the UCWA became increasingly disenchanted. After the trial, Judge Lindberg had denied it standing to intervene. The organization remained active in monitoring enforcement of the decrees, even though it had been excluded from a formal role in 1970 with the rejection of its contracting proposal. Arguments and disputes broke out with the union and contractor representatives concerning the number of construction jobs that were actually available in the Seattle community. The UCWA and the minority community continuously took the position that there were many more jobs available than labor and management contended.¹³² As there was little data regarding this matter, these debates could not be resolved.

Around the beginning of 1972, however, the UCWA began to sound a theme which would not go away: it maintained that the decree was being violated by the unions which had flouted the law in the past. The best evidence, said the UCWA, was the fact that white apprentices were being indentured while contractors were claiming that they did not have enough work for the number of black apprentices established in the order.¹³³

The UCWA also argued that the metering system was being abused by the unions. This system was designed to limit the number of apprentices coming into the trade at a given time by keeping out new applicants unless an adequate number of hours were "metered" for incumbent apprentices. Though the system itself made good sense—it prevented situations in which too many apprentices were working with too few hours to split among them—the UCWA felt that the unions were using it to cover up their failure to incorporate as many new black apprentices as possible into their employment rolls.

By April 1972 none of the trades were indenturing a sufficient number of black special apprentices and all were indicating that they would refuse to take in any more. The Plumbers and Pipefitters apprenticeship committee was supposed to have taken in 50 black apprentices by April 1972. The actual number according to COAC reports was 21—and of those, only 18 were working while attending school. The Ironworkers were to have 40 and had only 12; the Sheet Metal Workers had brought in 18 toward their

lawyer but he has other obligations of a most substantial nature which prevent his attending to this matter, which itself requires substantial commitment in terms of time and ability." *United States v. Local 86, Ironworkers*, 4 F.E.P. Cases 1152, 1153 (W.D. Wash. 1972).

132. *Seattle Post-Intelligencer*, June 11, 1972, at A18, col. 1.

133. See text accompanying note 175 *infra*.

goal of 40.¹³⁴ The Electricians' goal was 50, and although they had 50 special apprentices on their roles, the COAC estimated that only 34 were both employed and attending school. Thus, the number of special apprentices established by the court order in the summer of 1970 was not complied with in the spring of 1972. While union representatives at COAC continued to claim that they had done everything to comply with the law, contractor representatives, particularly Close, began to sense the deterioration that had set in and came forward with new proposals. The most important of these proposals related to the journeyman-apprentice ratio. It was accepted by the COAC during the spring of 1972.¹³⁵

Close and other contractors recognized that the best method through which employment for apprentices could be obtained—albeit at the price of some unemployment for the less efficient journeymen—was to require that the ratio of apprentices to journeymen be increased. The contractors' idea—later to be adopted by Judge Lindberg¹³⁶—was that the journeyman-apprentice ratio be altered from 10-to-1 to 5-to-1 and that it be made compulsory rather than permissive. Previously, the contractor was obligated not to employ more than 1 apprentice for every 10 journeymen, but the contractor did not have to employ that 1 apprentice. The proposed change meant that the contractor would be obligated to employ at least one apprentice for every five journeymen. Pressure to employ more was important because small contractors could resist recruiting any apprentice by simply hiring qualified journeymen from the street. Before the court could rule on this proposal, however, the UCWA had once again taken to the streets in an effort to insure compliance with the order. At this time the principal difference between the UCWA position and that of some of the contractors was due to UCWA uncertainty about the impact of an alteration of the journeyman-apprentice ratio by itself.

E. *The 1972 Summer Demonstrations and the Judicial Responses*

On June 1, 1972, the UCWA brought to the public the message that the decree was not being enforced by closing down a number of projects on Seattle's Interstate 90 and cutting off traffic across a major traffic artery to Seattle. Traffic was stopped for at least 2 hours. More protests aimed at stopping work were promised. On June 2, demonstrators were successful in closing projects at Safeco Tower in the university district and once again on seven building projects at the University of Washington campus. Two days

134. Special Plumbers and Pipefitters Subcommittee Report, Apr. 24, 1972, at 1; Ironworkers Special Apprentice Program Report, Apr. 24, 1972, at 1; Sheetmetal Special Apprentice Program Report, Apr. 24, 1972, at 1; Electrical Apprenticeship Subcommittee Report, Apr. 21, 1972, at 1.

135. Minutes of COAC Meeting, *supra* note 124, at 1.

136. See text accompanying note 139 *infra*.

later vandalism erupted in connection with a demonstration at Edison Hall on the Seattle Community College campus, causing \$15,000 damage.¹³⁷

Meanwhile, the court had begun to respond to minority pressure in a manner reminiscent of the fall of 1970.¹³⁸ On June 7, Judge Lindberg ordered the journeyman-apprentice ratio altered in accordance with the COAC proposals.¹³⁹ Moreover, the court now gave the COAC the responsibility for making recommendations directly to the court to expedite changes in the order. It also instructed the COAC to conduct hearings to determine whether individual employers were employing special apprentices. In those cases where the COAC found compliance was not adequate, a second hearing would be held before the court, which could employ the following penalties for failure to employ: (1) fines not to exceed \$1,000 per day, (2) an order to comply under sanction of contempt proceedings, and (3) such other and further remedies as the court might deem just and proper.¹⁴⁰ Significantly, the court reaffirmed its intent to obtain compliance with the numbers set forth in the 1970 decree.¹⁴¹

Of almost equal importance was the fact that the court enjoined the UCWA from interfering with the order by organizing demonstrations involving physical interference with the performance of construction work and ordered a show cause hearing relating to "why they [the UCWA and its leaders] should not be added as parties defendant for purposes of relief."¹⁴² Yet the court opened the possibility for UCWA involvement in implementing the order by allowing the COAC to act through agents or associations "as it deems appropriate" so as to require the employment of apprentices as mandated by the court order.¹⁴³

Nevertheless, the UCWA kept up its protest, for the June 7 order did not specifically resolve the question of whether that organization would be involved in referral dispatch of black apprentices. COAC's Chairman Rieke predicted that 10 to 15 black trainees would be at work by June 10, but Scott replied: "We don't just want the jobs . . . we want some control over them."¹⁴⁴ On June 12, however, Judge Lindberg refused to sign an order proposed by the Department of Justice which would have provided the UCWA with some authority.¹⁴⁵

137. Seattle Post-Intelligencer, June 8, 1972, at A3, col. 1.

138. See text accompanying notes 48-61 *supra*.

139. United States v. Local 86, Ironworkers, 4 F.E.P. Cases 1147, 1148 (W.D. Wash. 1972).

140. *Id.* at 1149.

141. "In order to meet the goals of this Court's orders of June 16, 1970, the COAC shall exercise fully its power under this and prior orders in this case to require the acceptance of a sufficient number of special apprentice applicants to bring the total number of actively participating special apprentices up to at least the following levels by July 7, 1972: Electricians, 50; Ironworkers, 40; Plumbers, 50; Sheet Metal Workers, 40." *Id.*

142. *Id.*

143. *Id.* at 1148.

144. Seattle Post-Intelligencer, June 10, 1972, at A1, col. 3.

145. Seattle Times, June 13, 1972, at A17, col. 1.

UCWA supporters began an around-the-clock vigil on the lawn of the federal courthouse that day. In meetings with Judge Lindberg 3 days later, the unions sought complete abolition of COAC.¹⁴⁶ The contractors accepted the UCWA monitoring "in principle," but they believed that this was "a matter requiring careful definition of authority and avoiding unnecessary conflicts."¹⁴⁷

When Judge Lindberg delayed his decision again on June 15, Scott told supporters in front of the federal courthouse: "We have waited and we have talked to them and the unions refuse to talk to us. The [judge] said, 'Wait some more.' We're not going to wait. We're not waiting any more."¹⁴⁸ On June 16, the UCWA organized demonstrations at a variety of construction sites and shut down jobs at 27th and East Alder, the Federal Office Building project, and a low-income project at 6th and Washington.¹⁴⁹

On June 21, new demonstrations took place. Forty-nine demonstrators affiliated with or supporting the UCWA were arrested for trespassing at the Seattle Central Community College construction site. Three more were arrested at the Bank of California building construction site the following day.¹⁵⁰ In response to these arrests, the court issued a new order on June 27 in the form of a temporary injunction against UCWA demonstrations, noting that there was a "high probability that property damage, physical injury and construction interruption [would] result."¹⁵¹

On July 7, 125 UCWA supporters paraded to the courthouse steps, demanding the right for the UCWA to dispatch black apprentices. At this time Scott took the position that, despite the June 27 order enjoining further demonstrations, such activities would resume unless the court moved forward and met UCWA demands. Said Scott: "We know that these courts can function (quickly) when they want to function We're here to tell the court it better start to act—and give us what we need and what we got coming."¹⁵²

On July 13, the court finally heard testimony citing racial prejudice on work sites and the problems which plagued black apprentices under the present training system. These difficulties included obtaining books and tuition fees as well as paying the costs of transportation to and from the Seattle Community College's Northgate campus. The court responded by giving the UCWA an opportunity to demonstrate its "ability to recruit and

146. Seattle Post-Intelligencer, June 16, 1972, at A11, col. 1.

147. *Id.*

148. *Id.*

149. United States v. Local 86, Ironworkers, 4 F.E.P. Cases 1150, 1150-51 (W.D. Wash. 1972).

150. Seattle Post-Intelligencer, June 23, 1973, at A1, col. 2.

151. 4 F.E.P. Cases at 1151.

152. Seattle Times, July 8, 1972, at A4.

counsel special apprentices and to observe or monitor the dispatch procedures used in referring such apprentices to jobs.”¹⁵³ On July 17, the court clarified its order and stated that all special apprenticeship applicants were to be initially referred to the UCWA for screening and counseling purposes. The UCWA was then to forward lists of applicants for each of the four trades to the COAC staff office for review and recording. The COAC staff was to transmit the lists “promptly” to the appropriate apprenticeship committee or its subcommittee for final evaluation and acceptance into the program. When any special apprentice was unemployed for 5 days, the court’s order instructed him to first report to the UCWA for counseling. The UCWA would then refer him to the appropriate union or apprenticeship committee for redispach.¹⁵⁴ Finally, the court required the United States attorney in Seattle to provide reports every 90 days on the progress made under his orders.¹⁵⁵ From this point on—with the court looking to Seattle rather than to Washington, D.C., for its assistance and guidance from the Government—the Department of Justice began to play a much more active role in the administration of the decree.

V. AN EVALUATION OF THE ORDER’S EFFECTIVENESS

The basic purpose of Judge Lindberg’s initial order and its numerous supplements, particularly the creation of the special apprenticeship program, was to insure that sufficient numbers of black workers would achieve the economic security and geographical mobility afforded by journeyman status. The June 7, 1972, order, reflecting impatience with the rate of compliance, required that each union’s special apprenticeship program include a fixed number of actively participating blacks by July 1972.¹⁵⁶ The September 1972 report issued by the United States attorney¹⁵⁷ indicated that substantial progress had been made during the summer of 1972; by September the unions appeared close to meeting the July 1972 standards. Yet the number of apprentices decreased by March 1973.¹⁵⁸ The March 1973 United States attorney’s report concluded that “only the Electricians have continued to meet the standards for minimum enrollment set last June, and that none of the programs is close to graduating the number specified in the original decree.”¹⁵⁹ Moreover, it seems highly unlikely that the goals for-

153. *United States v. Local 86, Ironworkers*, 4 F.E.P. Cases 1152, 1153 (W.D. Wash. 1972).

154. *Id.* at 1154.

155. *Id.* at 1154-55; see note 131 *supra* and accompanying text.

156. See note 141 *supra*.

157. U.S. Attorney’s Report to the Court on the Special Apprentice Program, Sept. 11, 1972.

158. U.S. Attorney’s Quarterly Report to the Court on Apprentice Programs, Mar. 1973.

159. *Id.* at 3.

mulated by the initial 1970 court order will be complied with in the foreseeable future.¹⁶⁰

A. *Barriers to Effectiveness*

The failure of the Seattle building trades order to have more impact is attributable to a number of factors. A recession in the construction industry, inherent weaknesses with the admittedly innovative special apprenticeship concept, and continued discrimination both in referral and in the indenture of white apprentices account for much of the order's ineffectiveness.

1. *The recession in construction.*

The dramatic decline of work in the construction industry which began in 1971 continued through the spring of 1973. Lack of steady employment has had a substantial impact on the high rate of attrition among apprentices; in fact, the rate of attrition has been to some degree inversely proportional to the rate of employment. For instance, from November through December 1972, Ironworker apprentices worked an average of 12.8 days. Fifteen apprentices were dropped and the rate of attrition was 44.1 percent. Electricians worked 29.9 days and the number of apprentices dropped was 12. The rate of attrition was 17.6 percent. For Plumbers the average days worked was 23.1, the number of apprentices dropped was 5, and the rate of attrition 15.6 percent.¹⁶¹

2. *Practical problems in the special apprenticeship programs.*

The special apprenticeship concept, perhaps the most innovative aspect of Judge Lindberg's initial order, has also been responsible for many of the practical difficulties in achieving his goals. Judge Lindberg had perfectly understandable reasons for creating a dual system of apprenticeship—the regular and special programs. Substantial evidence was presented at the trial which indicated that there were large numbers of blacks who were too old to qualify for the existing programs or who had some experience in the

160. U.S. Attorney's Quarterly Report to the Court on Apprentice Programs, Dec. 1973, at 3:

	<i>Ironworkers</i>	<i>Plumbers</i>	<i>Sheetmetal</i>	<i>Electricians</i>
Specials				
Class I	0	3	6	10
Class II	4	7	5	14
Class III	12	10	14	20
Class IV	15	4	13	28
Subtotal	31	24	38	72
Black Regulars	8	15	12	0
Graduates	9	8	5	6
Total	48	47	55	78
No. Required	78	96	81	75
Ratio of Participation to Goal	61.5%	49.0%	67.9%	104%

161. U.S. Attorney's Quarterly Report to the Court on Apprentice Programs, Mar. 1973, at 5.

trade but did not meet journeyman standards.¹⁶² The age limitations of the regular apprenticeship programs were unreasonable for those workers who had been unfairly excluded when they did meet the age qualifications. Moreover, the duration of the existing programs was unnecessary for those workers who had already developed some expertise.

Qualifications of special apprentices. Generally, black workers who entered the special apprenticeship programs with some experience performed satisfactorily.¹⁶³ Yet the court's assumptions concerning the skill of the average special apprentice did not work out in practice. A substantial number of black skilled tradesmen in Seattle did not come forward to enter the special apprenticeship program. The most probable explanation of their reluctance is that such workers, often protected from layoffs by pressure from the federal government contract compliance agencies, did not wish to risk their current jobs in a declining construction industry where blacks were traditionally less likely to obtain steady employment than whites. In addition, many black workers in related industries considered themselves close to the journeyman's level already. They did not want to lose what status they had in their current job to enter an experimental apprenticeship program. Ironically, those for whom the special program was created were generally deterred from applying.

The result was that the black special apprentice, far from having more skills and experience than the average white apprentice, was often at a considerable disadvantage. Special apprentices often tended to be younger than the white regulars, not older as had been contemplated. Moreover, since black apprentices were less likely to have a white relative or friend who had taught them the trade in the past or who could do so in the future, they did not have the same kind of knowledge and motivation which gives one a competitive edge in the employment arena. Such workers, who probably needed a more substantial training program, were saddled with a program which was inferior to that being given to white regular apprentices.

Curriculum. Moreover, the crafts refused to make a serious effort to revise their apprenticeship programs in order to shorten them in a meaningful fashion for black specials, and the Department of Justice, the COAC, and Judge Lindberg did not require them to do so. As a result, the trades simply lopped off the end of their existing training period. The special apprenticeship program became nothing more than an incomplete regular one. No attempt was made to readapt the curriculum or to determine whether the curriculum was properly job related. In the Electricians' special program, for example, the lab portion of the regular apprenticeship, which

162. 315 F. Supp. at 1247.

163. Special Report of COAC, Sept. 13, 1973, at 5.

gives the worker a chance to practice what he will be doing on the job, was entirely cut off. Only the 2 academic years of the regular program were retained.¹⁶⁴ Since many black specials did not have a strong formal education and were therefore less likely to perform well academically, the program devised for them could not have been worse.¹⁶⁵

Union referral. The union referral systems, particularly the one employed by the Ironworkers, illustrate further disadvantages with the special apprenticeship concept. The Ironworkers dispatch special apprentices from a hiring list. The dispatcher maintains one list for regulars and another for special apprentices. When an employer simply requests an apprentice without specifying an individual by name, a regular apprentice is always dispatched. Special apprentices are referred with every fifth journeyman, whether or not they are requested by the employer.¹⁶⁶

Since union dispatchers do not inquire whether the black special apprentices they send out are needed, they often knowingly refer specials when there is obviously no work for them. The United States attorney's September 1972 report noted that "at least one first class special apprentice had been sent back to the hall without employment sixty or seventy times."¹⁶⁷ Many employers felt the fifth-man dispatch rule saddled them with employees whose services were worthless or superfluous. They had the special do relatively unskilled routine work for a day or two and then sent him back to the hall.¹⁶⁸ Thus, while special apprentices were dispatched 35 times as often as regulars, they only worked 55 percent as much.¹⁶⁹

164. U.S. Attorney's Quarterly Report to the Court on Apprentice Programs, Summer 1973, at 22-23.

165. Professor Rieke has remarked that lack of work experience was a deficiency of all special apprenticeship programs: "[W]ork experience is a major part (perhaps $\frac{3}{4}$) of apprentice training. A special apprentice gets only $\frac{1}{2}$ of the work experience of a regular apprentice. Thus, even though it may be possible to condense a school curriculum, it is impossible to condense work experience. This problem is compounded by the fact that the first year of apprentice experience is often spent doing nonsubstantive chores as the low man on the totem pole. The first year is often useless. This is not a great problem in a four year course, but it is in a two year course." Interview with Luvern Rieke, in Seattle, Wash., July 18, 1973.

166. U.S. Attorney's Report to the Court on the Special Apprentice Program, Sept. 11, 1972, at 12.

167. *Id.*

168. U.S. Attorney's Quarterly Report to the Court on Apprentice Programs, Summer 1973, at 13: "There are several aspects to employment under the 5th-man dispatch rule, the main source of jobs for specials, which are disturbing. First, the special sent out under that provision has not been requested by the employer, which indicates that he may not be needed on the job. If this is the case, the dispatch will not provide a good training situation, and the unwanted apprentice will be laid off as soon as possible. Secondly, the opening exists only because the employer has not maintained the proper journeyman/apprentice ratio, a fact suggesting that he is not particularly sensitive to his responsibilities in the area of apprenticeship. It is therefore even less likely that he will try to provide good training, or that he will keep the special any longer than necessary. In contrast, an employer who voluntarily asks for an apprentice has a real need for such an employee, or at least has recognized an obligation to hire one; he can more logically be expected to provide good training and a longer term of employment. Obviously, there will be many exceptions on both sides, but it seems reasonable to assume that jobs obtained under duress, through the 5th-man dispatch rule, may be inferior in quality and shorter in duration than jobs filled at the employer's request."

169. U.S. Attorney's Report to the Court on the Special Apprentice Program, Sept. 11, 1972, at 16.

These patterns persist to the present. The figures cited in the summer 1973 United States attorney's report indicate that the hours worked by black special apprentice Ironworkers continue to be substantially below those of regular apprentices.¹⁷⁰ The fact that special apprentices in unions which do not use the fifth-man dispatch rule also work less than regulars indicates that dispatchers may be using their discretion to send specials to inappropriate jobs or to good jobs at bad times.¹⁷¹ Moreover, black regulars in all the unions work less than their white counterparts, which suggests that subtle forms of racial discrimination are involved even within the regular program.¹⁷²

Indenture of white apprentices. The fact that the unions have continued to indenture a substantial number of white apprentices at the very time that blacks were dropping out as a result of discouragement over inadequate training and referral opportunities illustrates another weakness of the special apprenticeship program. The Sheet Metal Union, for example, indentured a class of 31 regulars in 1973, of which only 4 members were black. Only three apprentices were indentured into the special class.¹⁷³ The figures for the regular program obviously do not meet the 30-percent "reasonable level of participation" required by Judge Lindberg's initial order.¹⁷⁴ More importantly, however, the admission of a large class of regular apprentices in an industry with limited job opportunities precludes the indenture of a reasonably sized class of special apprentices. As the United States attorney's report pointed out, "if only 30 new apprentice opportunities per year are available, their allocation to a largely white regular class to the exclusion of a fair sized special class is at variance with the affirmative obligations of the decree."¹⁷⁵ The more new whites indentured, the longer it takes to train properly the required quota of black apprentices. If the dual apprenticeship system did not exist, union evasion of the order's numerical goals could not be accomplished in so effective a manner. Even with the elimination of a dual program, however, problems will abound until and unless ratios are established under which the number of whites indentured and retained is limited in relationship to the number of their black counterparts.¹⁷⁶

170. U.S. Attorney's Quarterly Report to the Court on Apprentice Programs, Summer 1973, at 5.

171. *See id.*

172. *See id.*

173. *Id.* at 19, 27.

174. *See* text accompanying note 100 *supra*.

175. U.S. Attorney's Quarterly Report to the Court on Apprentice Programs, Summer 1973, at 27.

176. The strongest decrees requiring ratios of whites to blacks are set forth in the orders of Judge Peckham in *Officers for Justice v. Civil Service Comm'n*, 6 F.E.P. Cases 1285 (N.D. Cal. 1973), and Judge Keith in *Stamps v. Detroit Edison Co.*, 6 F.E.P. Cases 612 (E.D. Mich. 1973). *See generally* Report to the Court on Progress Under Judgment and Decree, Oct. 24, 1973.

3. *Theoretical weaknesses of a dual system.*

Many of the problems encountered in implementing the court order can be traced to the very notion of a dual system of apprenticeship. The same issue raised by the school desegregation cases also arises in the union discrimination area: can separate but equal ever be equal? In *Sweatt v. Painter*,¹⁷⁷ even more clearly than in *Brown v. Board of Education*,¹⁷⁸ the Supreme Court seriously questioned the proposition that separate facilities for the races could ever be equal for blacks. Because *Sweatt* involved segregated law schools, the Court easily understood that the black graduate would not be able to avoid the stigma of separation in a world dominated by whites.¹⁷⁹ Yet the *Sweatt* reasoning should apply to craftsmen as well as to professionals. Black special apprentices, like the graduates of the black law school in *Sweatt*, are stigmatized as inferior. Moreover, there are objective and subjective components in both contexts. Blacks in the labor market are harmed by the belief of employers that their skills are inadequate—whether this assumption is accurate or not¹⁸⁰—as well as by their own history of isolation and deficient training.

Without a unitary apprenticeship system, therefore, black workers are destined to suffer the consequences which the Court perceived so clearly and correctly in *Sweatt*. On the other hand, a conflict exists between the importance of a unitary system and the special need of black workers for an abbreviated training program. It thus appears that abbreviation of unitary apprenticeship programs through the revision of union training procedures

177. 339 U.S. 629 (1950).

178. 347 U.S. 483 (1954).

179. "Whether the University of Texas Law School is compared with the original or the new law school for Negroes, we cannot find substantial equality in the educational opportunities offered white and Negro law students by the State. In terms of number of the faculty, variety of courses and opportunity for specialization, size of the student body, scope of the library, availability of law review and similar activities, the University of Texas Law School is superior. What is more important, the University of Texas Law School possesses to a far greater degree those qualities which are incapable of objective measurement but which make for greatness in a law school. Such qualities, to name but a few, include reputation of the faculty, experience of the administration, position and influence of the alumni, standing in the community, traditions and prestige. It is difficult to believe that one who had a free choice between these law schools would consider the question close.

"Moreover, although the law is a highly learned profession, we are well aware that it is an intensely practical one. The law school, the proving ground for legal learning and practice, cannot be effective in isolation from the individuals and institutions with which the law interacts. Few students and no one who has practiced law would choose to study in an academic vacuum, removed from the interplay of ideas and the exchange of views with which the law is concerned. The law school to which Texas is willing to admit petitioner excludes from its student body members of the racial groups which number 85% of the population of the State and include most of the lawyers, witnesses, jurors, judges and other officials with whom the petitioner will inevitably be dealing when he becomes a member of the Texas Bar. With such a substantial and significant segment of society excluded, we cannot conclude that the education offered petitioner is substantially equal to that which he would receive if admitted to the University of Texas Law School." 339 U.S. at 633-34.

180. Many Seattle contractors, for example, expressed satisfaction with the performance of black specials on their own payroll. At the same time, however, they complained that most specials were substandard. U.S. Attorney's Quarterly Report to the Court on Apprentice Programs, Summer 1973, app. F.

which are not justified by a business necessity provides the key to increased black employment. (Of course, in light of the difficulties of revising union training programs and the judicial trepidation in imposing new apprenticeship programs on the unions,¹⁸¹ quotas and timetables are also essential.)

The question therefore becomes whether the courts would be justified in requiring abbreviated, unitary training programs. In *Griggs v. Duke Power Co.*,¹⁸² the Supreme Court concluded that neutral employment requirements must be job related when they have a discriminatory impact. The Court found that passing a standardized intelligence test as a condition of employment did not "bear a demonstrable relationship to successful performance of the jobs for which it was used"¹⁸³ and therefore outlawed the test. In *Griggs*, the Court referred approvingly to EEOC guidelines which require validation for each race. According to the guidelines, tests are only valid if the results are correlated with job performance.¹⁸⁴ Although dual standards which are predictive for job performance have been adhered to in the written examination context itself,¹⁸⁵ some of the progeny of *Griggs* outside the examination area have not followed the same route. In the arrest record cases the courts have ordered employers to disregard the arrest records of all employees and not simply blacks—even though the discriminatory impact is to be found only with regard to blacks.¹⁸⁶ Similar treatment has been accorded the dismissal of employees because of wage garnishments.¹⁸⁷

If training programs of substantial duration adversely affect blacks because they are already experienced, as Judge Lindberg thought in *Local 86, Ironworkers*, or because they are more likely to drop out earlier because of the culturally felt need for instant economic gratification,¹⁸⁸ only blacks are harmed. The creation of a remedy for blacks alone, however, may present substantial difficulties because of (1) the practical problems involved in administering two procedures and (2) the discord that is likely to arise

181. See, e.g., *United States v. Local 3, Operating Engineers*, 4 F.E.P. Cases 1088 (N.D. Cal. 1972).

182. 401 U.S. 424 (1971). The Court emphasized that the consequences of employment practices rather than the motivation behind their adoption is the test of discrimination. It noted that "good intent or absence of discriminatory intent does not redeem employment procedures or testing mechanisms that operate as 'built-in headwinds' for minority groups and are unrelated to measuring job capability." *Id.* at 432.

183. *Id.* at 431.

184. *Id.* at 433 n.9, citing EEOC Guidelines on Employee Selection Procedures, 29 C.F.R. § 1607.4(c) (Supp. 1973).

185. See, e.g., *United States v. Georgia Power Co.*, 5 F.E.P. Cases 587 (5th Cir. 1973); *United States v. Jacksonville Terminal Co.*, 451 F.2d 418 (5th Cir. 1971).

186. See, e.g., *Gregory v. Litton Systems, Inc.*, 316 F. Supp. 401 (C.D. Cal. 1970), *aff'd as modified*, 472 F.2d 631 (9th Cir. 1972).

187. See, e.g., *Johnson v. Pike Corp.*, 332 F. Supp. 490 (C.D. Cal. 1971).

188. See generally Yacger, *Litigation Under Title VII of the Civil Rights Act of 1964, the Construction Industry, and the Problem of the "Unqualified" Minority Worker*, 59 GEO. L.J. 1265 (1971).

between the races in this event. The testing situation can be distinguished from the problems involved here inasmuch as in the testing situation the employer or union is giving all applicants the same examination. It is simply using different cutoff scores in connection with a single application to correlate performance on the job and performance on the test; this may be the only appropriate way in which the test can be validated. On the other hand, very different problems arise in conducting two training programs, problems which the courts have recognized would occur if the employer had separate application forms only one of which called for information about arrest and conviction records or separate procedures with regard to wage garnishments. Moreover, the lesson of *Local 86, Ironworkers* is that racist trade unions are enabled to engage in evasive action when there are two programs. By refusing to reform the special program for blacks they have made it virtually impossible for black graduates to perform as journeymen and moreover make it more likely that blacks will not compete on the same level as white apprentices. It would therefore seem that, under the authority of the *Griggs* progeny, a unitary and abbreviated program could appropriately be established for both races. While in a testing situation a uniform standard might well work to the detriment of blacks, in a training situation the disadvantages outweigh the advantages of absence of uniformity. (Establishment of an abbreviated unitary program, of course, has nothing to do with the standards that are to be applied in connection with admission to the program: dual admission standards for the races may well be appropriate inasmuch as standards may be differentially predictive.)

Another argument in favor of the compatibility of *Griggs* and its progeny with a unitary approach is that one is never precisely certain about the scope of the class that should benefit from the decree. That is to say, it is always arguable whether individual blacks, who benefit from the decree, would have been harmed had there been no discrimination in the first instance. This is especially true in craft union cases where unidentifiable workers came forward to reap the benefits. Indeed, although the age limit for the special apprenticeship program in *Local 86, Ironworkers* was pushed to 45 to compensate those who had been wrongfully excluded and were over normal apprenticeship age, the special apprenticeship program appears to be dominated by young participants. Since imprecision about the affected class raises the specter of preferential rather than remedial treatment,¹⁸⁹ it seems entirely appropriate to provide the same benefits to whites

189. It should be noted that an argument that blacks are receiving preferential treatment partially breaks down when one recognizes that a major rationale for quota remedies such as that in *Local 86, Ironworkers* is to prevent potential future violations as well as to compensate for past discrimination.

even though they are not proportionately excluded by virtue of the arbitrarily long apprenticeship program. It thus appears that there is no legal obstacle under *Griggs* to a unitary program. The problem with reversing exclusionary practices for both races is that the remedy is aimed at correcting societal inequities imposed upon blacks. If one reverses the practice for whites as well, the imbalance or disadvantage which was supposedly harming the black worker's competitive status at least partially reappears. The very disability which was the object of judicial concern is resurrected because previous discrimination has put blacks at a competitive disadvantage. However, this problem is not particularly troublesome in this context because one is balancing an unfounded advantage for whites against an unfounded advantage for blacks, *i.e.*, the windfall to black beneficiaries who were not harmed in any sense by defendant's previous unlawful practices.

4. *Other judicial errors.*

Apart from the recession in the construction industry and problems arising out of the special apprenticeship concept, other factors contributed to the ineffectiveness of the decrees. Judge Lindberg made a serious error in failing to create a specific apprenticeship ratio between blacks and whites. Establishing goals for blacks alone simply invites evasion. The defendant locals, for example, equated the goal for black apprentice recruitment with the goal for the graduation of black apprentices to journeyman status. This interpretation practically insured an insufficient number of black journeymen. Union training programs throughout the country suffer a substantial amount of attrition¹⁹⁰ even without the unique problems encountered in Seattle. Accordingly, a COAC report noted that it was necessary for the recruitment goal to be twice as high as the graduation goal in order for the latter to be successfully implemented within a reasonable period of time. This proposal has never been implemented nor adopted as part of the court's order.¹⁹¹

In addition, Judge Lindberg did not use his contempt powers. Theoretically, one of the comparative advantages of Title VII over Taft-Hartley is that the judge who tries the case is subsequently called upon to fashion contempt sanctions if that proves necessary. The judge has a stake in his own decree and is familiar with the facts which gave rise to the litigation. Yet Judge Lindberg, proud of his landmark decree but tired of continuous disharmony, has avoided contempt proceedings whenever possible. He has now begun to use the United States attorney's office in Seattle as a kind of special master or mediator to act as a buffer against excessive judicial in-

190. See U.S. BUREAU OF APPRENTICESHIP AND TRAINING, *DROPOUTS FROM APPRENTICESHIP* (1960), cited in D. MILLS, *supra* note 10, at 231 n.24.

191. Special Report of COAC, Sept. 13, 1973, at 10-11.

v involvement in disputes.¹⁹² Whether this should be the Department of Justice's role is somewhat questionable inasmuch as it is supposed to be an advocate. In the Seattle case, the Department of Justice has been extremely timid about instituting contempt proceedings. Either Judge Lindberg or the Department could have made the decree work more effectively if they had not allowed their legitimate concern with integrating blacks into the unions to paralyze their will to act. Both understandably feared antagonizing the unions, from whom some measure of cooperation seemed necessary. Yet the unions did not cooperate voluntarily. Use of the contempt power, while creating unfortunate animosity, would at least have increased the chances that the order would be enforced.¹⁹³

B. *The Positive Impact of the Seattle Order*

The failure of Judge Lindberg's order to have all of the practical impact he had intended can be traced to external forces such as pervasive racism and serious unemployment as well as to his own errors in judgment. The deficiencies of the order and the results it produced, however, must be evaluated against a long history of unsuccessful attempts to combat employment discrimination.¹⁹⁴ In fact, Judge Lindberg's opinion is, on balance, the most ambitious and effective approach yet devised.

The principal significance of the Seattle order is that it provided the first decrees which were not content with existing institutions. It went beyond a quota system by devising a comprehensive remedy. Unlike AFL-CIO supported programs, which moved blacks over a number of hurdles previously struck down as discriminatory by the courts, Judge Lindberg's Seattle order assaulted the entire union program. His effort was not an unqualified success, but some progress has been made. Moreover, the Seattle experience has uncovered a good number of the problems which future courts are bound to encounter. Even in his misjudgments, therefore, Judge Lindberg has made a substantial contribution. A weaker order would have taught far less. It is also important to recognize that Judge Lindberg's order was the first indication that the courts operating under Title VII had

192. 42 U.S.C. 2000e-5(f)(5) provides for judicial appointment of masters in Title VII cases. For the problems with labor arbitration and Title VII issues, see *Alexander v. Gardner-Denver Co.*, 42 U.S.L.W. 4214 (U.S. Feb. 19, 1974); *Oubichon v. North Am. Rockwell Corp.*, 482 F.2d 569 (9th Cir. 1973); *Rios v. Reynolds Metals Co.*, 467 F.2d 54 (5th Cir. 1972); Gould, *Labor Arbitration of Grievances Involving Racial Discrimination*, 118 U. PA. L. REV. 40 (1969); Gould, *Judicial Review of Employment Discrimination Arbitrations*, in *LABOR ARBITRATION AT THE QUARTER-CENTURY MARK* 114 (B. Dennis & G. Somers eds. 1972); Note, *Judicial Deference to Arbitrators' Decisions in Title VII Cases*, 26 STAN. L. REV. 421 (1974).

193. Judge Lindberg might have been cautious because he feared that relief could not cover the international unions, which were not parties to the litigation. He might have been concerned that Seattle journeyman credentials would not be recognized in other cities. One possible answer to this problem is to join the international for purposes of relief. See, e.g., *United States v. Chesapeake & O. Ry.*, 471 F.2d 582, 592-93 (4th Cir. 1972), cert. denied, 411 U.S. 939 (1973).

194. See text accompanying notes 2-40 *supra*.

learned the lesson of *Brown v. Board of Education* [II].¹⁹⁵ It took 14 years for the Supreme Court to realize that racist defendants cannot be trusted to act "with all deliberate speed." Not until *Green v. County School Board*¹⁹⁶ did the Court issue a detailed, sophisticated desegregation order to a southern board of education. Yet Judge Lindberg delivered his comprehensive order only 5 years after the effective date of Title VII. He understood that quotas, though a necessary first step, must be supplemented by specific programs in order to insure implementation. Hopefully, other courts will follow his lead and act more quickly against discrimination than they did against school segregation.

Judge Lindberg also recognized that it is important for the black community to be involved in implementing the decree. The establishment of the COAC¹⁹⁷ was the first effort to create an institution which could assist a court in enforcing a Title VII decree.¹⁹⁸ Blacks, as well as unions and contractors, participated on the board. Their involvement kept pressure on the other groups to insure enforcement¹⁹⁹ and allowed some cooperation among the previously adversary parties. Moreover, despite initial reluctance, Judge Lindberg gave a black workers' organization, the UCWA, an official role in assuring the decree's effectiveness.²⁰⁰

VI. CONCLUSION: THE PROMISE OF PRIVATE ACTION

As a result of the 1972 amendments to Title VII, the Department of Justice participation in litigating employment discrimination cases will be phased out.²⁰¹ The Equal Employment Opportunity Commission has been given authority to sue,²⁰² but it has a substantial backlog and is simply un-

195. 349 U.S. 294 (1955).

196. 391 U.S. 430 (1968). The same vigilance and impatience is demonstrated by the Court's decisions in *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1 (1971), and *Alexander v. Holmes County Bd. of Educ.*, 396 U.S. 19 (1969).

197. See text accompanying notes 107-09 *supra*.

198. The second effort is Judge Keith's order in *Stamps v. Detroit Edison Co.*, 6 F.E.P. Cases 612, 642 (E.D. Mich. 1973).

199. The minority members who walked off the COAC in December 1970, for example, provoked modification of the Committee's structure and function. See text accompanying notes 127-28 *supra*.

200. See text accompanying notes 143-54 *supra*. Although there have been difficulties involved in the failure of unemployed black apprentices to contact the UCWA, the UCWA role, on balance, has been constructive and effective. Both prior and subsequent to the July 1972 order which gave it an official role, the organization played a critical role in the placement and counseling of black apprentices. The agitation of its founders in 1969 was responsible for the Department of Justice's instituting suit in the first instance. Its demonstrations and agitations in the streets as well as involvement in both the COAC and the special screening subcommittees have been of critical importance in the implementation of the decree. They have filled the vacuum which would otherwise have been left by the Department of Justice's sporadic involvement and the limits that are inherent in legal intervention.

In *Stamps v. Detroit Edison Co.*, 6 F.E.P. Cases 612, 642 (E.D. Mich. 1973), Judge Keith gave another black workers' organization, the Association for the Betterment of Black Edison Employees, an official role in implementing his decree.

201. Civil Rights Act of 1964, § 707(c), 42 U.S.C. § 2000e-6(c) (1970).

202. *Id.* § 707(c), 42 U.S.C. § 2000e-6(c) (1970).

able to take the overwhelming percentage of its meritorious cases to court.²⁰³ Further, the EEOC has not been able to try any case on its merits in the 2 years that it has had authority to sue because of procedural objections raised by defendants. The primary burden for enforcement of Title VII, therefore, must rest on the shoulders of private parties and perhaps, increasingly, minority workers' organizations like the UCWA.

How will private actions be encouraged? Although the courts have begun to attract some attorneys through the award of attorney's fees²⁰⁴ and large back pay judgments²⁰⁵ and punitive damages²⁰⁶ for victorious plaintiffs, these inducements may not be sufficient. An attorney may not know what kind of case he has and therefore whether there is a reasonable prospect of financial recovery until after the expenditure of a large amount of money and the hard and detailed investigatory work that goes into getting the facts.²⁰⁷ It is here, as well as in the critical area of enforcement, that organizations like Seattle's UCWA can play such an important role. The association literally brought the Department of Justice to Seattle and made their task considerably easier; it stirred Judge Lindberg to action during the summer of 1972.²⁰⁸ It would be of similar aid to private attorneys.

203. The backlog is now approaching 80,000 cases. Lecture by Professor John J. Pemberton, former EEOC Deputy General Counsel, in the Employment Discrimination Seminar at Stanford Law School, Oct. 23, 1973. The problem has been judicially acknowledged in *Bauman v. Union Oil Co.*, 6 F.E.P. Cases 212, 217 (N.D. Cal. 1973).

204. The leading cases are *Johnson v. Georgia Highway Express*, 7 F.E.P. Cases 1 (5th Cir. 1974); *Malone v. North Am. Rockwell Corp.*, 457 F.2d 779 (9th Cir. 1972); *Lea v. Cone Mills Corp.*, 438 F.2d 86 (4th Cir. 1971); *Clark v. American Marine Corp.*, 437 F.2d 959 (5th Cir. 1971); *United States v. Local 3, Operating Engineers*, 6 F.E.P. Cases 984 (N.D. Cal. 1973). These cases follow the lead of the Supreme Court decision in *Newman v. Piggie Park Enterprises*, 390 U.S. 400 (1968).

205. *Moody v. Albemarle Paper Co.*, 474 F.2d 134 (4th Cir. 1973); *Head v. Timkin Rolling Bearing Co.*, 6 F.E.P. Cases 813 (6th Cir. 1973); *Brown v. Gaston County Dyeing Mach. Co.*, 457 F.2d 1377 (4th Cir.), *cert. denied*, 409 U.S. 982 (1972); *Robinson v. Lorillard Corp.*, 444 F.2d 791 (4th Cir. 1971). However, the Eighth Circuit has taken the view that a good faith defense or a case where blacks who are entitled to relief may need training constitutes a situation in which no back pay may be appropriate. See *United States v. National Lead Indus., Inc.*, 5 F.E.P. Cases 823 (8th Cir. 1973); *United States v. St. Louis-S.F. Ry.*, 464 F.2d 301 (8th Cir. 1972), *cert. denied*, 409 U.S. 1107 (1973). But see *Rose, The Challenge of Civil Rights*, 29 Bus. Law 34-45 (1973).

206. In *Stamps v. Detroit Edison Co.*, 6 F.E.P. Cases 607, 643 (E.D. Mich. 1973), Judge Keith fashioned a punitive damages award of \$4,250,000.

207. The Fifth Circuit has recently allowed plaintiffs' lawyers access to the files of the Equal Employment Opportunity Commission prior to the filing of a complaint. See *H. Kessler & Co. v. EEOC*, 472 F.2d 1147 (5th Cir. 1973). Such information provides counsel with names, addresses, telephone numbers, and communications between the EEOC and witnesses. See, e.g., *EEOC v. Mobil Oil Corp.*, 484 F.2d 1339 (8th Cir. 1973); *Motorola, Inc. v. McLain*, 6 F.E.P. Cases 469 (7th Cir. 1973); *Local 104, Sheet Metal Workers v. EEOC*, 439 F.2d 237 (9th Cir. 1971). An attorney investigating union discrimination would want to discover facts relating to the racial composition of the work force. See, e.g., *McDonald Douglass Corp. v. Green*, 411 U.S. 792, 805 n.19 (1973); *Huff v. N.D. Cass Co.*, 485 F.2d 710, 712 n.3 (5th Cir. 1973); *Burns v. Thiokol Chemical Corp.*, 483 F.2d 300 (5th Cir. 1973); *Parham v. Southwestern Bell Telephone Co.*, 433 F.2d 421 (8th Cir. 1970); *Jenkins v. United Gas Corp.*, 400 F.2d 28 (5th Cir. 1968). The rights of lawyers to communicate more directly with members of the affected class is being litigated in *Jones v. Schnacke*, Civil No. 74-1292 (9th Cir. Feb. 27, 1974), *denying an interlocutory appeal in Jones v. Pacific Intermountain Express*, Civil No. 73-2296 (N.D. Cal., filed Dec. 20, 1973). Similar struggles had already been undertaken in the South before the passage of Title VII. See generally H. KALVEN, *THE NEGRO AND THE FIRST AMENDMENT* (1965).

208. See text accompanying notes 144-55 *supra*.

All of this costs money, of course. In Seattle the American Friends Service Committee assisted the UCWA project. One would hope that federal agencies like the Equal Employment Opportunity Commission and private foundations would find minority organization activity worthwhile enough to finance on a substantial basis in the future. One would also hope that actions will be instituted in which organizations like the UCWA can play a role. For it is that creative interplay between tough court orders and black workers' organizations which holds the greatest promise. The decree without the UCWA would have been nothing more than an intellectual exercise; without the decree, the UCWA would have floundered like the minority organizations which operate under (and are so often frustrated by) the Nixon administration's hometown plans.

Whether financial resources will be made available to private parties who have the kind of dedication displayed by the UCWA is problematical. But one thing is clear: with the Nixon administration in the saddle for the next 3 years²⁰⁹—elected without black support and avowedly hostile to minority group aspirations—the hard slugging must be done by individuals outside of Government if the law is to be enforced. That too is a lesson—perhaps the principal lesson to be derived from the Seattle construction litigation and the few “agitators” who simply would not let the expectations produced by the June 1970 order flicker out of existence.

209. The recent ouster of EEOC Chairman William Brown indicates that the Nixon administration is adopting an even more cautious posture on racial discrimination litigation. See Delaney, *Action Reviewed on Bias Charges*, N.Y. Times, Feb. 12, 1974, at 34, col. 2.

I assume the current administration's policies and attitudes will remain intact even if President Nixon resigns or is impeached during the coming months.

