ORIGINAL

OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE

THE SUPREME COURT OF THE UNITED STATES

DKT/CASE NO. 84-1656

TITLE LOCAL 28 OF THE SHEET METAL WORKERS' INTERNATIONAL ASSOCIATION AND LOCAL 28 JOINT APPRENTICESHIP COMMITTEE, Petitioners V. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, ET AL.

PLACE Washington, D. C.

DATE February 25, 1986

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IN THE SUPREME COURT OF THE UNITED STATES

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LOCAL 28 OF THE SHEET METAL :
WORKERS' INTERNATIONAL ASSOCI- :
ATION AND LOCAL 28 JOINT :
APPRENTICESHIP COMMITTEE, :
Petitioners, :
V. : No. 84-1656
EQUAL EMPLOYMENT OPPORTUNITY :
COMMISSION, ET AL. :

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Washington, D.C.

Tuesday, February 25, 1986

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 11:46 o'clock a.m.

APPEARANCES:

MARTIN R. GOLD, ESQ., New York, New York; on behalf of the petitioners.

O. PETER SHERWOOD, ESQ., Deputy Solicitor General of New York, New York, New York; on behalf of the respondent.

C O N T E N T S

P R O C E E D I N G S

CHIEF JUSTICE BURGER: We will hear arguments next in Local 28 of the Sheet Metal Workers' International Association and Local 28 Joint Apprenticeship Committee against Equal Employment Opportunity Commission.

Mr. Gold, I think you may proceed whenever you are ready.

ORAL ARGUMENT OF MARTIN R. GOLD, ESQ.,

ON BEHALF OF THE PETITIONERS

MR. GOLD: Thank you, Mr. Chief Justice, and may it please the Court, this case raises the long history of the desegregation of Local 28 of the sheet metal workers of New York.

This process of desegregation began in 1964, and I hope to demonstrate to you that it was essentially completed by 1975 in the sense that at that time all barriers to entrance into the union had been removed, and no acts of discrimination against any minority persons have been proved since that time.

Now, since 1975, however, this union has been under the strictest kind of court order involving the strongest measures of affirmative action. Those have included a 29 percent quota, which I want to talk about at some length, because this is clearly a quota case,

this is not a goal case, further race conscious remedies, and total loss of self-government.

Now, when the quota was not achieved by the deadline which was fixed by the District Court, then civil contempt remedies were imposed upon this union, and as a result of the fact that this was deemed to be civil contempt and not criminal contempt, the union was not able or permitted to defend itself by proving that it had not acted wilfully, and that it didn't have any control over the situation.

As a result of this, a strengthened program of further quotas was imposed, more race conscious remedies, 100 percent -- a fund to be used 100 percent for minorities, and which cannot in any way be used to benefit white people at all. Now, I hope to demonstrate to you that the reverse discrimination in this case is beyond all boundaries. It is beyond the boundaries of Title 7. It is beyond what Congress intended and set forth in speech after speech during the debates.

QUESTION: Mr. Gold, before you get into the substance of your argument, would you tell me which paragraph of the decree imposes the quota?

MR. GOLD: It is the decree which sets forth -- it is --

QUESTION: You quoted several paragraphs in

your reply brief. Is it in those paragraphs?

MR. GOLD: In our reply brief and in our main brief we set forth the specific -- we quoted the specific paragraph. I don't have the page number before me. We have got 1,000 pages printed. But it specifically -- the original quota specifically states in the court's decree that by July 1, 1981, the quota shall be achieved.

Excuse me. I do have it. It is A305. That is Page 305 to the appendix to the cert petition, I believe.

Now, there is one point that I really think must be put on the table in this case. Many people who look at this case seem to apply a presumption to it, the presumption that since this union has been in litigation for all these years over matters pertaining to civil rights, the presumption is that they must be bad people, and some of the language which has been used particularly in the amicus briefs goes beyond all facts.

One of the words which appears over and over again is egregious. I want to demonstrate to you that when you scratch below the surface here, what has happened is quite the reverse. This union has really been forced by virtue of this quota, by virtue of these other -- to engage in more reverse discrimination than

has been permitted in any case that I know about.

And to say that this union is a bunch of bigots who will go to any extent and any limit to avoid taking in minorities just avoids the facts. It ignores them completely. This union has done just the opposite. As a result of what has been imposed upon it, this union has taken in as much, as many minorities as possible, and continues to do so. They have gone so far and would go so far if permitted as to literally put up a sign at the entrance to the office where people could sign up for the apprentice program saying "Blacks only need apply."

That is because of the court order which has been imposed against them.

Now, it is important to bear in mind that sheet metal workers are a very skilled trade. As a skilled trade, it takes a sufficient -- it takes a significant amount of time for them to be trained. The apprentice program is four years. Not everyone can qualify for the apprentice program. The aptitude test that has been given for a good period of time now under the supervision of the courts' offices is at approximately the level of tenth grade math, tenth grade English, and that is just to get into the program.

Now, it would just be impossible, and no one

is claiming otherwise, to simply open the doors and permit anyone to come in and become a sheet metal worker. It is as if you wanted to do the same thing with a professional, the legal profession or the medical profession, and suppose a determination were made that there was an insufficient percentage of minorities in those professions, and the federal judge said, as a result of that, we are going to integrate. These professions are going to start to accept a larger percentage of minorities, and we will give you an out date, and by that date a percentage has to be achieved.

On a somewhat lesser scale, that is what happened in this case.

QUESTION: Well, are you challenging any finding that there was deliberate discrimination?

MR. GOLD: No, Your Honor.

QUESTION: So there was deliberate discrimination?

MR. GOLD: Your Honor, I began by --

QUESTION: And a remedy was called for.

MR. GOLD: Yes, sir.

QUESTION: Now, what was wrong with the remedy?

MR. GOLD: What was wrong with the remedy was that it went beyond what Title 7 permits.

QUESTION: In what respect?

MR. GOLD: In that to begin with it contained a quota. Next --

QUESTION: When you say the quota, you mean the 29.3 percent.

MR. GOLD: Well, it was originally 29 percent.

QUESTION: Anyway, you call it a quota, and you say that the court called it a quota.

MR. GOLD: Yes, Your Honor.

QUESTION: All right, so that is one. What else?

MR. GOLD: That is one. The next is the total loss of control over self-government by virtue of the administrator, and the others are a variety of minor provisions in the order and judgment and the affirmative action program -- that is seven paragraphs of them -- which direct that preferences be given to minorities in various aspects of hiring.

QUESTION: Do you make any claim that -- similar to the claim the United States makes that the remedy was excessive because it gave remedies to people other than victims?

MR. GOLD: Yes, sir.

QUESTION: Was that part of your argument?

MR. GOLD: That is part of our argument, Your

Honor. But we go beyond that, because if we look at the case, if you telescope it to look for a moment at what is going on now as a result of these enhanced and magnified orders which followed the contempt, here we have a situation now where the last acts of discrimination that anyone has proved or even alleged occurred prior to 1975, and nevertheless as as result of these orders this union is presently maintaining two lists of young people who are applying for entrance to te apprentice program, whites and non-whites, and when a person comes in the door, we have to put him on one list or another, and 45 percent --

QUESTION: If they have passed the test.

MR. GOLD: No more test.

QUESTION: Oh, I see.

MR. GOLD: Now there is a selection board.

QUESTION: Okay.

MR. GOLD: And 45 percent of each class of apprentices is now minorities. Now, who we --

QUESTION: Regardless of how they are graded by the selection board?

MR. GOLD: That's right. Now, who are we discriminating between? These are not the victims of discrimination.

QUESTION: Who do they choose first on the

white list and who do they choose first on the black list? Is it by grade?

MR. GOLD: There are no tests any longer.

QUESTION: I know, but --

MR. GOLD: There is a selection board, and what the selection board does is, it goes over the qualifications of all of these people, and if they --

QUESTION: But they rank them.

MR. GOLD: Yes. They are going to take 100 people, they are going to take 55 whites and 45 non-whites.

QUESTION: Yes, but the 55 whites who they believe are the best qualified.

MR. GOLD: Are the best qualified.

QUESTION: And similarly with the blacks.

MR. GOLD: Yes.

QUESTION: But they don't compare the two lists.

MR. GOLD: They don't compare the two lists. If they compared the two lists, it would not come out 55-45.

QUESTION: This is to get into the apprentice program.

MR. GOLD: That's right, which everybody acknowledges is today by far the major avenue into this

union. But the result of what has happened here is, who are these people that want to be admitted now? By no means are these the victims of past discrimination. You can't look at this case to expand that meaning in any way and come to that position. These are young people who are coming into the work force who are about 18 years old.

QUESTION: Who is on this board? Are they union people?

MR. GOLD: No. One is a person -- we have several boards and I have to keep them straight. I believe one is selected by the plaintiffs, that is, by the state, the city, and the EEOC, one by the union, and one by the administrator, who is the judge's representative, a special master.

Now, so we are discriminating between these young people who at the time of the last acts of discrimination that have been proved were approximately seven years old at most.

QUESTION: Or they weren't born at all.

MR. GOLD: Or maybe some of them weren't born at all. That is correct, Your Honor. And this is going on, and we continue to be forced by virtue of this quota, which we have now been threatened -- our very existence has been threatened if we fail to meet this by

August of 1987.

QUESTION: Why hasn't it been met up to date? Because 45 percent, allocating 45 percent to the black list doesn't augment the membership fast enough to get to the --

MR. GOLD: By no means could it possibly do it. This was doomed to failure from the first. And it doesn't make any mathematical sense to have thought that it could have worked from the beginning.

QUESTION: But you are not free to put any more than 45 percent blacks on the list?

MR. GOLD: At the moment, we are not, Your Honor. Now, we have tried to get permission to put more than 45 percent on the list. Right after the original decree was entered in 1975, the problems here became absolutely apparent. This is 1975, and so the --

CHIEF JUSTICE BURGER: We will resume there at 1:00 o'clock, counsel.

MR. GOLD: Thank you.

(Whereupon, at 12:00 o'clock p.m., the Court was recessed, to reconvene at 12:58 o'clock p.m. of the same day.)

AFTERNOON SESSION

CHIEF JUSTICE BURGER: Mr. Gold, you may resume your argument.

ORAL ARGUMENT OF MARTIN R. GOLD, ESQ.,

ON BEHALF OF THE PETITIONERS - RESUMED

MR. GOLD: Thank you, Mr. Chief Justice.

Before the luncheon recess, Justice White asked me why it was that during this period from 1975 until the contempt proceeding was filed in April of 1982, or it could even ask further until this very day why has this membership quota of 29 percent not been achieved, and that is an important question, and I would like to answer it.

Before I do that, I would like to tell you what the present figures are. These are not in the record that is before you, but they are filed with the Court in New York, the Southern District of New York, and I think that the Court can take notice of them.

The present figures, the total membership is approximately 3,100 members, and the overall membership, which is non-white as that term is defined in this case, is 15.5 percent. Now --

QUESTION: Mr. Gold, before you --

QUESTION: How is the 29 -- oh, excuse me.

QUESTION: Before you leave that point, Mr.

Gold, is one of the paragraphs to which you called my attention which sets forth the quota, it says by 1981 it had to be met, and of course obviously that date has passed. But am I correct that none of the contempt, specific findings of contempt against you are based on the failure to achieve the quota? Is that right?

MR. GOLD: Well, that is correct, that the specifications of contempt which the District Judge found against us and the Court of Appeals affirmed did not contain that. The notice of motion to hold us in contempt and the supporting affidavits by the attorneys for both the state and the city concentrated upon the failure to achieve the quota. That was the primary basis of their motion.

The court, the District Court instead said he is not finding us in contempt for failing to achieve a quota, underline not, and said, but he is convinced that the other failures, the specifications of contempt taken together made it impossible for other reasons we didn't achieve the quota.

QUESTION: But whatever he found you in contempt for, you nevertheless were under an order to achieve a quota. That is your submission.

MR. GOLD: That's correct.

QUESTION: And I am still interested in

knowing --

MR. GOLD: Why we didn't.

QUESTION: Yes. You say the figure was 15 percent now, just now?

MR. GOLD: Yes, as of January 31 of this year. Now --

QUESTION: Again, before you leave it, just so I have it clear in my mind, is there another paragraph that requires that the quota be met by a different deadline other than the --

MR. GOLD: Now there is, Your Honor.

QUESTION: And where is that?

MR. GOLD: That is in a more recent -- in the more recent order which emerges --

QUESTION: And then my second question is, have you specifically challenged that position of that order?

MR. GOLD: Absolutely. One of the orders which is on direct appeal to the circuit from which we filed this cert petition is the order which slightly altered the percentage to 29.32 percent, required that that percentage be achieved by August of 1987, and specifically threatened the union that its very existence would be in jeopardy by fine, by extraordinary fines if they failed to achieve it by that date, and

that is one of the primary orders which we are contesting here.

QUESTION: Mr. Gold, one of the things raised in your brief has to do with the order setting up a special fund --

MR. GOLD: Yes, Your Honor.

QUESTION: -- for use in connection with the apprenticeship program.

MR. GOLD: Yes.

QUESTION: Did you challenge the validity of the fund order under Title 7 in the Court of Appeals?

MR. GOLD: Yes, Your Honor.

QUESTION: And we find that challenge in the record some place?

MR. GOLD: The specific -- there was a direct appeal taken from that order itself to the Second Circuit, and the Second Circuit specifically dealt with it on that basis. I don't think that the Second Circuit in its majority opinion went into any analysis as to that order being valid under Title 7, but it was clearly what they considered, and that is evident from the dissenting opinion, which specifically states in no uncertain terms that it is invalid just on that ground.

QUESTION: Now, before lunch, you were talking about two lists from which applicants are accepted for

the program. Those lists were not ordered by the Court, were they? I thought those were voluntarily structured at the 45 percent level.

MR. GOLD: Well, I hardly think that that is voluntary, Your Honor. When you are living under a quota, with threats of the nature which are involved in this case, and in order to do your best to come as close to trying to comply with that you "voluntarily," I say in quotes, engage in reverse discrimination, I don't regard that as voluntary.

QUESTION: Well, at least the second circuit said that the defendant had voluntarily set up the 45 percent list.

MR. GOLD: The majority opinion said that, Your Honor, and that was their basis for invalidating a specific provision in the newly revised affirmative action plan creating a mandatory one-to-one, one minority, one majority. But as I say, that is hardly voluntary.

QUESTION: How is the term "non-white" defined in the order?

MR. GOLD: Non-white is a person of -- a Negro person or a person with a Spanish surname. Now, where did that definition come from? It came from the original complaint filed by the Department of Justice in

1971, in which they defined that term as such. The definition was carried forward in the pretrial order, which led to the District Judge's decisions. It has been carried on ever since.

Does that make any sense? I have difficulty with it. For example, this union now has a reasonable number of orientals. Those orientals are counted as whites. It had very few orientals, if any, back in 1964, when this whole business began.

QUESTION: Mr. Gold, have you answered yet the question why you had not achieved the goals?

QUESTION: He has given one reason. So you can -- can you go ahead?

MR. GOLD: Well, there are a couple of reasons. The primary reason is because during the period involved there were extraordinary economic reversals in the construction industry in New York, of which this union is one part. I am sure you will recall that during just this period from 1975 to 1980, which is the critical period here, the construction industry in New York was in terrible straits.

As a result, the membership of this union went from in excess of 3,000 members to approximately 2,000 members during that period of time, and there weren't any jobs

for anybody at times even for the membership. In the low point of this, 42 percent of the union members were employed, not unemployed, but employed. The rest of them were all unemployed. There just wasn't any construction going on in New York.

Now, at that time how is it possible to interest anyone, white or black or purple, in becoming a member of this union or in joining this business? That was the primary problem. But I think that this failure was inevitable anyway without the most extraordinary kind of reverse discrimination, which I think could never be tolerated.

QUESTION: Well, it was possible with extraordinary reverse discrimination, as you call it. The 45 percent you set, but I take it it was accepted by the special master or whatever you call him, the administrator.

MR. GOLD: It was accepted by the plaintiffs in 1981 as well.

QUESTION: Yes.

MR. GOLD: And the union had done it voluntarily before that, even though the class of apprentices had been very small as a result of the economic decline.

QUESTION: But you say it was inevitable

anyway, and so --

MR. GOLD: Yes, I think --

QUESTION: So the remedy -- does that translate into an assertion that a satisfactory remedy was impossible?

MR. GOLD: Well, I think that calling this civil contempt just -- and treating it the way the District Court did just mixed up civil and criminal contempt remedies.

QUESTION: This is a contempt argument, and I understand that is part of your argument, but that isn't much of a Title 7 argument.

MR. GOLD: Well, I am not sure that I understand your question then, Your Honor. The point with respect to the contempt is this. In a civil contempt situation, the purpose of it is to coerce somebody, to obey an order which is yet unobeyed. That is the primary purpose. In fact, as I read Section 1101, which is the contempt section under the Civil Rights Act, I think that is the only permissible purpose. That is the only basis on which this was sustained by the Second Circuit.

QUESTION: Mr. Gold, excuse me for interrupting you.

MR. GOLD: Yes, Justice Powell.

QUESTION: I have a question or two that may not be relevant but as a matter of interest. Did the District Court's order require any member of the union to be laid off?

MR. GOLD: No, Your Honor.

QUESTION: In what way, if any, did the order of the District Court discriminate against a particular member of the union?

MR. GOLD: I don't think that it did discriminate against any existing member.

QUESTION: You used the term "reverse discrimination." I would like to identify the impact, if any, on individual members of the union.

MR. GOLD: I think that the impact is on people coming into the union, who desire to come into the union.

QUESTION: Who are not in the union already.

MR. GOLD: Yes, Your Honor.

QUESTION: And who are wanting to get into the apprenticeship program.

MR. GOLD: Yes, Your Honor.

QUESTION: And it seems to me I read in one of the briefs that existing union members are required to pay for the apprentice program. Is that correct?

MR. GOLD: Yes.

QUESTION: Who pays for it?

MR. GOLD: They do, Your Honor, as they pay for everything else that is going on here.

QUESTION: They pay for the administrator, too, don't they?

MR. GOLD: They pay for the administrator. The administrator's fees as of the end of November had been close to $700,000 so far for his services. He has been involved in this on essentially a daily basis since he was originally appointed.

QUESTION: Has there been any problem about the availability of qualified nonwhites?

MR. GOLD: Absolutely, Your Honor. That is --

QUESTION: Does that enter into the achieving 15 percent instead of 29?

MR. GOLD: That certainly is a factor, Your Honor.

QUESTION: Is there material on that in the record?

MR. GOLD: There is, Your Honor. The material, we didn't print it, but it is reports that indicate that smaller percentages of non-whites than one would hope had passed the original -- had passed the entrance tests.

I would like to reserve --

QUESTION: Is that any place --

QUESTION: You say that it would have been impossible to achieve this 29 percent under any circumstances.

MR. GOLD: Yes. The only way that this could have been achieved is if there was an extraordinary boom in the construction industry in New York, and at the same time the union essentially said we are only going to take blacks or close to only blacks, and went out and --

QUESTION: Into the apprentice program.

MR. GOLD: Into the apprentice program. Now, as a result --

QUESTION: Didn't you run the apprentice program whether the construction industry was on the boom or in the --

MR. GOLD: We did, Your Honor, but during the lean years there were just a small number of apprentices who were in the program. Many who joined dropped out because they weren't able to get jobs. It is a four-year apprentice program, and during that period of time people have to work, and if there are no jobs it is very difficult to attract or keep people.

I would like to reserve a few moments -- a few minutes at the end of my time. Thank you.

CHIEF JUSTICE BURGER: Mr. Sherwood.

ORAL ARGUMENT OF O. PETER SHERWOOD, ESQ.,

ON BEHALF OF THE RESPONDENTS

MR. SHERWOOD: Mr. Chief Justice, and may it please the Court, listening to Mr. Gold this morning and the first part of this afternoon, I was struck by his characterization of the condition of the union that we have here before us today. I would think that neither the District Court nor the Court of Appeals would have recognized the union in its supposed compliance as described by Mr. Gold this morning.

References to the term "egregious conduct" comes not so much from the amici or the briefs filed by the respondents but rather is a term used by the lower courts in describing the conduct of this union.

For over two decades the courts have been prodding this reluctant union towards full compliance with local, state, and federal laws requiring equality of opportunity in employment. And our appearance here today is simply the latest stop along that arduous road.

This afternoon I want to focus on the meaning of Section 706(g) as it relates to the issues that are before the Court, and of course we stand on all of the arguments that we make in our brief. Initially, I want

to state briefly our position regarding Section 706(g). I intend to respond briefly to a few of the points made by Mr. Gold this morning and early this afternoon, and then return to a fuller discussion of Section 706(g).

To the extent that the Court determines that it should address the reach of the remedial authority of District Courts under Title 7, it is our position that Section 706(g) itself gives courts broad authority to grant relief that realistically will work to fully remedy the discrimination that it has found.

In some cases, and I suggest that this is one such case, that includes the power to order affirmative race conscious relief which benefits some people who are not the proven victims of the identified discrimination. Imposition of a per se rule that prevents the District Court from ordering such remedies in appropriate cases is at odds with the plain language of the statute itself.

As is evident in the decision to the Courts of Appeals that are charged with responsibility for implementing and overseeing implementation of the statute, such a rule would deprive the courts of the needed tools, the tools they need in order to carry out the statute's essential purpose of rooting out identified discrimination and its effects.

We believe, however, that the determination of whether or not non-victim-specific race-conscious remedies should be ordered should be left initially to the discretion of the District Courts. That is the scheme that Congress envisioned when it enacted and amended Title 7.

Of course, that relief should be tailored to cure the effects of the identified discrimination. Considerations that should attend that determination to impose prospective race-conscious remedies have already been suggested by this Court in Webber and by Justice Powell's opinion in Fullilove.

They include the efficacy of alternative remedies, the planned duration of the remedy, the relationship between the percentage of minority workers admitted to membership, and the percentage of minority group members in the relevant labor pool, the availability of waiver provisions if the hiring plan cannot be met, and the effect of that plan on third parties.

Regarding a number of the points that Mr. Gold made earlier, I would like to just make a few comments. One, the District Court's order here does not impose a quota. The 45 percent number that Mr. Gold referred to is one selected by the union. What the District Court

has ordered in this case is that the union move with dispatch towards overcoming the long history of discrimination that it has practiced.

QUESTION: How about the 29 percent figure?

MR. SHERWOOD: The 29 percent figure, Justice Rehnquist, is a number which the District Court said you shall move ahead with -- make regular and substantial progress, and those are the words the court used, towards getting to the 29 percent. It is a means by which the Court measured how long it would closely supervise this union's progress towards integration.

QUESTION: There was no time requirement --

MR. SHERWOOD: There is a time requirement which has been, incidentally, reset a few times now. The court recognized early on that conditions beyond the control of the union, such as conditions in the union, might require adjustment, and the court has done so, as I said, on two occasions.

What the court has required, and it has said so in several places in the record, is that it wants the union to move ahead and move ahead with dispatch.

QUESTION: Supposing the District Court had said I think you should aim for 29 percent and I think you should -- I am going to order you to attain it six years hence, would you say that is not a quota?

QUESTION: And if you don't, I will fine you.

QUESTION: Yes.

MR. SHERWOOD: Okay. I don't want to debate whether we are talking about a quota or a goal, because it seems to me that the terms, although many people use them, don't -- doesn't focus in precisely on the concept which we are talking about.

QUESTION: Would you say that is permissible?

MR. SHERWOOD: But let's call it a quota.

QUESTION: Was that permissible for the District Court to do under your view of 706?

MR. SHERWOOD: I believe so, yes. The District Court could do what it has ordered in this case. It has --

QUESTION: How did the District Judge come to 29.23?

MR. SHERWOOD: It came to 29.23 on the basis of the evidence it had before it that that was the proportion of -- the proper proportion of non-whites.

QUESTION: I assumed it was drawn from some such, but the fraction seems to be a little curious.

MR. SHERWOOD: That was the result of the particular evidence before the District Court in 1982.

QUESTION: But here this is a fluctuating -- the market is fluctuating. The number of people

employed at a given time is fluctuating.

MR. SHERWOOD: No, it is not.

QUESTION: Is that not so?

MR. SHERWOOD: The -- well, certainly the number of people in the market may fluctuate over time, but that 29.23 percent was fixed in 1982 as a result of, yes, a change in the relevant labor pool, and also, and most importantly, because the jurisdiction of the union had changed as a result of a merger of other unions into this union.

There was a proceeding before the District Court in which the union proposed that the proper end goal should be around 21 percent. The plaintiffs in the case asked for percentages ranging between 33 and 41 percent. The District Court had in the record before it testimony to the effect that the proportion of non-whites in the labor market, in the defined labor market who were within the appropriate age ranges was 29.23 percent, and that is where the number came from, so the District Judge picked a number which was in between that which the union was proposing and that which plaintiffs were proposing.

As I said, the --

QUESTION: But anyway the figure was supposed to match the percentage of available applicants in the

labor market.

MR. SHERWOOD: In the labor market. That is correct.

QUESTION: Of whatever was defined as minority.

MR. SHERWOOD: That's correct, and that was based on the evidence that was before -- presented to the District Judge.

Mr. Gold suggested that the fund sets up a 100 percent quota with respect to those items that are addressed in that particular order. I should point out that the District Court made quite clear that the union was free if it chose to extend those kinds of benefits to whites as well, but the Court was not going to itself impose -- require that the union extend those benefits to white individuals.

I should point out, too, that the selection board that selects people for the apprenticeship program are all union members. One is selected by the administrator. One is seleceted by the plaintiffs, and one is designated by the union, but they are all members of Local 28.

Importantly -- I think it is important to recognize precisely what --

QUESTION: Did the plaintiffs agree to the 45

percent at one point in this proceeding?

MR. SHERWOOD: The plaintiffs did acquiesce in that. Yes, Justice White.

QUESTION: And have they ever asked for a higher percentage?

MR. SHERWOOD: At one point the plaintiffs sought to obtain an order from the District Judge for a one-to-one ratio for placing people into the apprenticeship program, and the District Court --

QUESTION: And what did --

MR. SHERWOOD: I am sorry.

QUESTION: What did the judge say, no?

MR. SHERWOOD: The District Court did order that, but the Court of Appeals stripped that portion of the order for the reason that since the union was voluntarily indenturing non-whites at 45 percent, there was no need for that kind of ratio.

QUESTION: Would one-to-one have attained the 29 percent goal, do you know?

MR. SHERWOOD: By 1986? I don't think so, Justice White.

QUESTION: Any more than 45 percent? A little -- maybe a little more.

MR. SHERWOOD: I don't think the difference is signficant, but I think it is important to remember

precisely what led to this union being held in contempt. They were not held in contempt for not meeting the 29 percent goal. They were held in contempt for not trying particularly hard.

QUESTION: But they were still under an order.

MR. SHERWOOD: Pardon?

QUESTION: They were still under an order to attain that -- to shoot for that goal.

MR. SHERWOOD: Yes, that is correct, but that is precisely it. They are under an order to shoot for that goal. It required that they meet the 29 percent. It currently says they ought to meet the 29 percent by the middle of 1986. At one point in the past it said that they were to meet it by the middle of 1981, and it was then changed to 1982 because of conditions in the industry. And if there is evidence in the record --

QUESTION: Well, if the union had complied with all of the acts, all of the orders that they had been held in contempt for disobeying, would there have been any greater chance of achieving the goal or quota or whatever you call it?

MR. SHERWOOD: I cannot say that they would have achieved it. I can say with certainty that they would have been much further along the road, and it is for foot-dragging that they were held in contempt, not

for not reaching the goal.

It is important, too, to see what the District Court did here. The District Court ordered the union to not artificially close down the size of the apprenticeship program, and it is in order to provide greater opportunities for minorities to enter into the trade, and also to limit the impact of the court's order on third parties who are seeking to enter the --

QUESTION: Is the 29 percent union membership or part of the apprenticeship program? It is the union membership.

MR. SHERWOOD: Twenty-nine percent membership, which includes both journeymen and apprentices. The number is -- they are lumped together for purposes of making that calculation.

QUESTION: Can I ask you, Judge Winter said this, and I am sure you are aware of it, in dissent: "However, in light of the facts that large numbers of journeymen did not work during the period in question, or only worked meager hours, reactive fingerpointing at Local 28 is faintly camoflagued holding that journeymen should have been replaced by minority apprentices on a strictly racial basis."

Do you have any response to that?

MR. SHERWOOD: There is nothing in the court's

order that required the union to displace journeymen as such. The standard within the industry was generally, and this isn't a strict requirement now, that there be a ratio of apprentices to journeymen on roughly a one-to-four basis.

QUESTION: One-to-four, yes.

MR. SHERWOOD: What occurred during the time period that we are concerned about was that the ratio of apprentices to journeymen went way up. In some shops you were talking about one in 22.

QUESTION: Because there wasn't any work.

MR. SHERWOOD: And because the union kept the size of the apprenticeship program very low as compared to journeymen, and if you look at the hours worked by journeymen during that period of time, the curb goes way up. Again, the journeymen increased their hours during that time period, and the court, given that kind of evidence, concluded that what the union was about was shifting work from apprentices to journeymen to the disadvantage of and in violation of the court's order requiring that it move -- make regular and substantial effort towards integrating its membership.

Mr. Gold indicated that there is evidence in the record of an inadequate number of minorities applying for the apprenticeship program. He refers to

the fact that in 1981 the union indicated that minorities were not doing well on the test.

The reason why early on the court required that the union validate its selection procedures, the union elected not to attempt to do that. And so the bit of evidence that Mr. Gold is referring to is that the minorities were not passing this unvalidated selection procedure that the union had been using, and that is why it switched from using this paper and pencil test to the selection board.

And so I would say that there is no question in this case as to the unavailability of qualified non-whites to seeking admission into the union. I might point out that in the last couple of years the rate of application among minorities entering in this union seeking application, seeking membership in the union, has been running between 40 and 49, 50 percent and 75 percent, depending on which particular class you look at.

Returning to Section 706(g) itself. The provision is worded broadly, as broadly as one could imagine. It authorizes courts upon a finding of unlawful discrimination to order such affirmative action as may be appropriate, which may include but is not limited to reinstatement and so on, and any other

equitable relief as the court deems appropriate.

This sentence is the source of the court's power to award race-conscious relief which in appropriate cases may benefit persons who are not proven victims of discrimination.

There are, however, some policy choices that Congress built into the statute which operate to guide the discretion in awarding affirmative relief. One of those choices incorporated into the last sentence of Section 706(g) says in essence that a court should not require an employer to hire a particular individual who chooses not to hire for reasons other than unlawful discrimination.

The remedy which a particular individual may demand for himself is restricted to make whole relief. He doesn't require the right to employment simply because the employer was found guilty of discriminating against the group of which he is a member.

Another policy choice is that the statute is prospective in its application. It doesn't require the removal of employees who are hired as a result of the prior discrimination.

QUESTION: Where do you find that?

MR. SHERWOOD: We find that only in the legislative history of the statute where there is --

QUESTION: You think that restricts 706(g) so that you couldn't require the discharge of non-minorities to hire minorities to achieve a certain goal?

MR. SHERWOOD: That is what Congress in enacting the statute --

QUESTION: You think Congress intended not to permit that.

MR. SHERWOOD: That is what I understood Congress to --

QUESTION: Based on the legislative history.

MR. SHERWOOD: Based on the legislative history. I don't see anything in the statute itself that says that.

QUESTION: Whose statements do you rely on? Are they stated in your brief?

MR. SHERWOOD: I believe we may have mentioned it in our brief. What comes to mind is Senator Clark and Case's memorandum which refers to when the statute --

QUESTION: Do you think that is fairly authoritative?

MR. SHERWOOD: It is one of the authorities that is important. All I am saying with respect to that, however, is that it says that we are giving a one-year delay before the statute comes into effect, and

it makes reference to the fact that the statute is prospective, but there is nothing in the language of the statute itself that requires -- that says that one could not hire or discharge individuals who were hired because of discrimination.

QUESTION: Mr. Sherwood, do you think your view of 706(g) has been true ever since 1964, or do you think it was enacted in 1972?

MR. SHERWOOD: No, I believe it has been true since 1964.

QUESTION: So you don't rely on anything that happened in 1972 as having broadened the relief that -- of the kind you are talking about.

MR. SHERWOOD: Well, certainly the 1972 amendment has broadened Section 706(g). There is no question about that.

QUESTION: Well, by its terms, yes.

MR. SHERWOOD: By its terms, but it was not necessary for the Congress in 1972 to broaden the statute as it did in order for courts to award the kind of relief that we are talking about here.

QUESTION: So then you discount a good deal of what your opponents cite as legislative history to the 1964 Act, the statements by Congressman Seller and people like that that we are not authorizing quotas, and

we are not having any of that sort of thing.

MR. SHERWOOD: Congress in those statements were referring to and giving assurances to individuals who believe that this statute if enacted would require employers across the nation to achieve or maintain racial balance. That is what those statements --

QUESTION: Well, some of them referred to courts ordering this sort of thing as a kind of relief, I think.

MR. SHERWOOD: Indeed, courts can't enter an order that would maintain a racial balance, and the reason for that is that once the court has remedied discrimination, and it may include the use of -- in getting to full compliance, that may include the use of goals and other race conscious means. Having done that, and having fully remedied discrimination, a court order could not then go on and require that the employer maintain any particular racial balance.

QUESTION: Because that would violate the section itself, or because it just would be an exorbitant remedy, or both?

MR. SHERWOOD: Because it would no longer be remedial at that point. But there is no specific words in Section 706(g) that say a court may not maintain --

QUESTION: So you think the limits of 706(g),

you think at least we must refer to the legislative history for guidance?

MR. SHERWOOD: I think you don't have to look to the legislative history for the purposes of this case. We can decide this case on the basis of the plain meaning of the statute itself. There is no need to look to the legislative history for any of the issues that are before us here.

In some other factual contexts, perhaps there may be some need to look at the legislative history, but given this particular case and its facts, I think the plain meaning of the statute itself is all that is required. And indeed if one looks at the decisions of the Courts of Appeals and the consistent actions of the federal agencies that are responsible for enforcing Title 7, following the enactment of the 1964 Act, you would see that those agencies and those courts recognize that the courts had the power that I suggest that it has.

Indeed, in 1972, when Congress was amending the law, it recognized that the courts already had those powers, and that appears quite clearly in comments from Senator Javits and others.

QUESTION: When you say had those powers specifically, what powers?

MR. SHERWOOD: The power to order whatever relief realistically would work in order to remedy completely the identified discrimination that had been found.

QUESTION: Well, except discharging non-minorities, or what?

MR. SHERWOOD: With respect to discharging non-minorities, again --

QUESTION: Where do you get that limit on 706(g)?

MR. SHERWOOD: It has -- it comes out of -- the only place that I see is in the legislative history of the '64 Act.

QUESTION: All right.

MR. SHERWOOD: But not in Section 706(g) itself. What Congress did in 1964 is recognize the broad equitable powers of District Courts to order whatever relief would work, and the District Courts following 1964 have found that in order to fully remedy discrimination, it was necessary to have in appropriate cases the kinds of remedies that may extend to individuals who are not already the proven victims of discrimination.

Certainly the District Court's -- whether the District Court orders race-conscious remedies in a given

case, depends on the particular facts, and questions, considerations that would go into that determination should include whether or not other means that are available to the District Court would be effective to carry out that purpose.

Questions regarding whether or not -- how long -- the duration of the program. Certainly once the discrimination is remedied completely, there is no need to continue to use those specific race-conscious means. And so in that sense the program would necessarily be temporary.

The end goal should be properly fixed, and a way of determining that is seeing what condition this particular, in this case, this particular union would have been in absent discrimination. One would have expected in this case that the non-white membership of this union would be somewhere around 29 percent had it not been guilty of discrimination.

QUESTION: Did the union draw its membership only from New York City?

MR. SHERWOOD: Principally.

QUESTION: But not only?

MR. SHERWOOD: But not only. Some of its members did live outside New York City. That question was raised in the very first appeal in this case as to

the appropriate scope of the -- the appropriate dimension or scope of the labor market.

I should point out that no issues have been raised with respect to that particular question, the scope of the labor market on this appeal. It is a matter that was raised and resolved a decade ago, and no petition for writ of certiorari was sought at that time.

Of course, the degree of flexibility that should go into the fashioning of any particular plan is a matter that ought to be considered as well. I think the District Court did precisely that in this case.

And finally, the incidental effects that the program may have on others should be considered. What the District Court did in this case was to require that the union maintain an apprenticeship program of adequate size, realistically fixed in terms of the availability of work within the industry so that there would be a stream of minorities and non-minorities entering into full membership in the union.

It is that problem, the problem of constricting the size of the apprenticeship program itself, that has been a repeated problem in this case.

QUESTION: Mr. Sherwood, on Page 14 of the petitioner's brief, in their summary of argument, they

say that they are complaining about the geographical area.

MR. SHERWOOD: They are saying that now. All I am saying, Justice Rehnquist, is that they did not complain about that in the Court of Appeals. That is something --

QUESTION: They complained about it once in the Court of Appeals. And this is the same case that originally raised it. It is now here on certiorari. We are certainly not bound by what the Court of Appeals said.

MR. SHERWOOD: They raised it -- are you referring to when they raised it ten years ago?

QUESTION: Yes.

MR. SHERWOOD: Certainly they raised it --

QUESTION: There is no law of the case that binds this Court.

MR. SHERWOOD: We are not suggesting that law of the case applies here. What we say applies here with respect to that issue is res judicata.

QUESTION: There has never been a final judgment in this case, so it can't possibly be res judicata.

MR. SHERWOOD: There certainly has been a final judgment.

QUESTION: Is this not the same case that was litigated ten years ago?

MR. SHERWOOD: Yes, this is the same --

QUESTION: Then it is not res judicata.

MR. SHERWOOD: As I understand the principle of res judicata, once a case has been tried, and tried to judgment, and there has been the opportunity to appeal, and the 90 days that one gets in order to seek certiorari in this cases passes, that is --

QUESTION: Are you saying these people never took this issue to the Court of Appeals?

MR. SHERWOOD: They took it to the Court of Appeals in 1976.

QUESTION: But this Court can revise any part of this case that came along if it was once taken to the Court of Appeals.

MR. SHERWOOD: My understanding of res judicata is that once the time to appeal is over, following a trial on the merits, that after the time to appeal has expired, that is it, even if the court continues to maintain jurisdiction over the case.

QUESTION: Do you understand the difference?

MR. SHERWOOD: Fair enough. I see that my time is up.

CHIEF JUSTICE BURGER: Mr. Gold, you have four

minutes remaining.

ORAL ARGUMENT OF MARTIN R. GOLD, ESQ.,

ON BEHALF OF THE PETITIONERS - REBUTTAL

MR. GOLD: Thank you, Mr. Chief Justice.

One of the problems in this case is the fact that I believe the Second Circuit has misunderstood the difference between quotas and goals in the beginning of this case and even before.

The difference is set forth on Page 9, about 9 and 10 of our reply brief. And it comes from an authoritarian memorandum which was issued in 1973 by the EEOC, the Department of Justice, the Civil Service Commission, and the Office of Federal Contract Compliance. Those are the agencies which have federal responsibility for enforcing the law in this area.

There are really three elements to the difference. It is a quota if it is a fixed number or percentage which must be achieved, if that percentage must be achieved regardless of number of applicants or economic circumstances, and if there are sanctions for its failure to reach that percentage.

If, on the other hand, there is a numerical objective, and it is precatory, it is subject to change with experience and it is not subject to sanctions, then it is a goal.

Now, the Second Circuit adopted a different test in the Rios case in 1973. Their test doesn't look at any of those criteria. Instead, it says -- it looks at only one criterion, and that is, must the percentage of membership be maintained after it is attained. In other words, according to the Second Circuit, if there is an order, as there was in this case, directing a party to achieve numerical membership of X percent by a specific date, that is a goal, says the Second Circuit.

If, on the other hand, the order goes further, and states that that percentage must be thereafter maintained at that level, then the Second Circuit says that is a quota. I suggest to you that that just is plain wrong. That comes from the Rios case in 1973, and that is the rule that the Second Circuit was enforcing when it made that difference in this case.

Now, the various circuits that have looked at this issue all said, I believe, I believe every one of them says that quotas are no good and goals in certain circumstances are permissible.

QUESTION: Well, as I understand it, you would be making your argument here on whether this -- even if you agreed that it was a goal --

MR. GOLD: I would, Your Honor.

QUESTION: -- you would be making the same

706(g) argument.

MR. GOLD: I would, Your Honor, absolutely. I don't think that I have to go that far in this case.

QUESTION: Well, you may.

MR. GOLD: Perhaps I may. And I don't think that goals are very good, either. And I don't think that they are permitted under 706(g), and they have got some problems. They have got two very specific problems. One is, they tend to degenerate into quotas if they are enforced that way, and second is, the basic assumption for them seems to me to be fallacious.

The assumption is that if you have a work force with 29 percent of a certain background person, that in the absence of discrimination, that same percentage of those people is going to gravitate to each occupation, and that just is contrary to human experience. That is not the way that people line themselves up.

Now, one other point that I would like to make, Mr. Sherwood --

QUESTION: The one point that worries me is, this whole question of goals was established in a case that you didn't bring up here.

MR. GOLD: But we didn't bring it?

QUESTION: Yes.

MR. GOLD: The issue was --

QUESTION: You left it in the Court of Appeals, didn't you?

MR. GOLD: The issue of goals and quotas?

QUESTION: Yes.

MR. GOLD: The Second Circuit, which --

QUESTION: You didn't apply for cert, did you?

MR. GOLD: We didn't apply for cert in that --

QUESTION: Why?

MR. GOLD: I wasn't representing this party at that time, Your Honor, but I think the reason that people don't ask for cert is because they want to live without litigation if it is possible rather than go on endlessly if it proves to be necessary.

QUESTION: And lawyers are expensive.

MR. GOLD: Yes. Thank you. I see my time is up.

CHIEF JUSTICE BURGER: Thank you, gentlemen. The case is submitted.

(Whereupon, at 1:47 o'clock p.m., the case in the above-entitled matter was submitted.)

CERTIFICATION

Alderson Reporting Company, Inc., hereby certifies that the attached pages represents an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of The United States in the Matter of:

#84-1656 - LOCAL 28 OF THE SHEET METAL WORKERS' INTERNATIONAL ASSOCIATION AND LOCAL 28 JOINT APPRENTICESHIP COMMITTEE, Petitioners V.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, ET AL.

and that these attached pages constitutes the original transcript of the proceedings for the records of the court.

BY Paul A. Richardson

(REPORTER)