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The Creation of the Newark Plan

Gerard J. Clark

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The Creation of the Newark Plan*

Gerard J. Clark**

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** Assistant Professor of Law, Suffolk University School of Law; B.A. Seton Hall University, 1966; J.D. Columbia Law School, 1969; The author participated in the plan described herein while a staff attorney at the Newark-Essex Joint Law Reform Project.
I. INTRODUCTION

The construction which is currently in progress in the City of Newark is unique for one reason. Over 30% of the skilled craft journeymen are from minority groups and an additional 300 minority trainees are working side-by-side with the journeymen four days a week and receiving off-site skills and remedial training at a community-operated training school on $1 billion worth of construction projects. This is in sharp contrast to the situation just four years ago where all skilled construction work, with almost no exceptions, was done by white journeymen who were referred out of union halls with virtually all-white memberships.

The cause for this change was the development, of a strong, effective, affirmative action program pursuant to Executive Order 11,246 by the Newark minority community with the assistance of various government bodies. This is now commonly known as the Newark Plan. This article will describe the development of the Newark Plan, the applicable law, and its application for other cities.

II. HISTORY OF THE NEWARK PLAN

On the evening of July 14, 1967, a violent urban riot erupted in the City of Newark. The Lilly Commission1 cited the controversy which had been raging concerning the construction of the New Jersey college of Medicine and Dentistry (hereinafter referred to as the Medical School) on a 150-acre Urban Renewal Plot in Newark’s almost totally black Central Ward as one of the

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two major controversies\(^2\) which sparked the riots.\(^3\) A major community demand with respect to this construction project was that jobs be provided for minority Newark residents. This demand had been voiced by the minority community with respect to numerous public construction projects undertaken over the preceding ten years.\(^4\) The continued presence of all-white construction crews in Newark, whose population was over sixty percent non-white\(^5\) was still a major issue. The Lilly Commission specifically recommended that “the Federal, State, county and municipal governments should require and enforce effective integration of labor on publicly financed construction projects.”\(^6\)

Following the urban uprising in the summer of 1967, the Newark Community\(^7\) took up the Medical School controversy\(^8\) with renewed vigor.\(^9\) The

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2. The other known as the Parker-Callaghan controversy involved what the minority community viewed as an outright political deal in an appointment made by the Newark Board of Education. See REPORT FOR ACTION.

3. Some of the more fundamental causes of the riots included the following: one in three Newarkers were on some form of public assistance; 14 percent of the labor force was unemployed; another 25 percent was underemployed; Newark had 20,000 known drug users among its 380,000 residents. Its crime rate, venereal disease, and infant mortality rates are among the highest in the nation. See Taylor, Newark: Parasite Suburbs, 9 TRANSACTION SOCIAL SCI. AND MODERN SOCIETY NO. 10 (1972).

In 1960, whites in Newark had a nearly two-to-one edge. By 1970, the white population had dropped to 36.6 percent white, the black population rose to 54.2 percent with Puerto Ricans making up the remaining 9 percent. The flight of whites from Newark during the decade added to a net migration of 106,500 equal to four of every ten white Newarkers living in the city in 1960.


5. See note 3 supra.

6. REPORT FOR ACTION 6.

7. The term community, as used herein, operated on two levels: on one level, the community was comprised of a small number of individuals who were interested in the problem of integrating the construction trades. They negotiated with the State of New Jersey concerning the construction of the Medical School after the riots. On the other level Newark Community refers to a coalition of community leaders, minority tradesmen, young lawyers and many others. The make-up of the group changed and evolved over the period of the controversy. The Greater Newark Urban Coalition formalized the leadership element of the coalition into the Greater Newark Affirmative Action Coalition. In the later years the coalition even included lower level staff people from HEW and the State of New Jersey. This coalition attempted to support the work of those working at the other level, when an organization which had political clout was needed.

8. There were other issues involved in these negotiations such as housing for residents displaced by the Medical School, as advocated by the Newark Area Planning Association, which are not the subject of this article.

9. Negotiations began with the State of New Jersey, the builder of the school. The ensuing negotiations were viewed by Paul Ylvasaker, then Director of the New Jersey Department of Community Affairs, as a “process of collective bargaining between the present power structure and the Negroes . . . a process not dissimilar to labor bargaining with management.” Duhl, Newark Community or Chaos, A Case Study of the Medical School Controversy, 5 J. APPLIED BEHAVIORAL SCI. 537, 561 n.7 (1969).
position of the Community was bolstered with the designation of the site of the Medical School and the area surrounding it as a demonstration area under the Model Cities Act.\footnote{10}

In December 1967, the community filed an administrative complaint with the Department of Housing and Urban Development (HUD)\footnote{11} alleging among other things the failure by the Newark Housing Authority\footnote{12} to provide for citizen participation in the project decision making. This complaint marked the culmination of community pressure on every level of government to meet their demands: HUD funded the Urban Renewal necessary to clear the land; the Department of Health, Education and Welfare (HEW) was to fund the Medical School; the State of New Jersey was the builder of the Medical School; the Newark Housing Authority was the local Urban Renewal Agent; and the City government was granting the tax abatement.\footnote{10}

On January 10, 1968, HUD and HEW informed the State of New Jersey that no Federal grant-aid program shall be considered to be carried out in connection with such demonstration program unless it is closely related to the physical and social problems in the area of the city covered by the program and unless it can reasonably be expected to have a noticeable effect upon such problems. The specific amount of any such grant shall take into account the number and intensity of the economic and social pressures in the sections of neighborhoods involved, such as those involving or resulting from population density, poverty levels, unemployment rate, and degree of substandard and dilapidated housing.

Furthermore, HUD's Model Cities Planning Requirements, section 1.7, states the following:

Widespread citizen participation is a basic statutory requirement. Cities must work closely with neighborhood residents in all phases of the formulation of the plan as well as its execution. The process of involving residents in decision-making during the planning and program implementation should result in a program that is responsive to their needs and recognizes and develops their competence as individuals and citizens.


That no Federal grant-aid program shall be considered to be carried out in connection with such demonstration program unless it is closely related to the physical and social problems in the area of the city covered by the program and unless it can reasonably be expected to have a noticeable effect upon such problems. The specific amount of any such grant shall take into account the number and intensity of the economic and social pressures in the sections of neighborhoods involved, such as those involving or resulting from population density, poverty levels, unemployment rate, and degree of substandard and dilapidated housing.

\footnote{11. HUD, Administrative Complaint to Secretary Robert Weaver in Epperson v. Housing Authority of City of Newark (1967), reproduced in E. JARME, PROBLEMS IN THE LEGAL REPRESENTATION OF THE POOR 11-14 (1972). See also Williams, supra note 9.}

\footnote{12. Newark Housing Authority is the Urban Renewal Agent for the City of Newark.}

\footnote{13. See generally Williams, supra note 9.}
of new funding criteria for the Medical School construction. The seven requirements included: "... suitable plans for employment of neighborhood residents be made both in construction and operation of the [medical] center."\textsuperscript{14}

It was decided that the state, the federal government, the contractors, the unions and the community should come together into a body designated as the "Review Council" to formulate a comprehensive affirmative action plan which would cover all construction.\textsuperscript{15} The Review Council was constituted of the following representatives: two from the State of New Jersey, two from the local contractors associations, two from the unions, and eight from the community; one HEW representative was given ex-officio status.

At this point the State of New Jersey agreed to fund three agencies which played a significant role in subsequent events. The first was the New Jersey Contractor's Development Office. This office was set up to negotiate sub-contracts from the prime contractors on the Medical School and in turn assist various minority contractors in preparing the necessary prerequisites to a large construction job.\textsuperscript{16} The second was the Minority Group Journeyman Referral Service (MGJRS), which was established to find, recruit and refer the various minority journeymen in the area. The third was the Joint Apprenticeship Program (JAC) which was established to recruit and prepare minorities for entry into the apprenticeship programs pursuant to the commitments elicited from the State.

The MGJRS sought to reach out to all the minority skilled workers in the area and to organize them into a cohesive force. It did so by contacting

\textsuperscript{14. Letter from Robert C. Wood and Wilbur J. Cohen to Governor Richard J. Hughes, January 10, 1968.}
\textsuperscript{15. Three months of difficult negotiation ensued. Finally, the community won the following concessions:
1. a review council, composed of state, federal, contractor, union and community representatives, would be formed to define standards of compliance, conduct pre-award reviews of projected manning tables, and coordinate compliance efforts;
2. increased efforts to recruit qualified minority craftsmen with direct hiring by contractors to overcome anticipated union resistance;
3. enlarged apprenticeship classes in all trades;
4. establishment of apprenticeship program;
5. state to provide technical assistance and contract subsidies to enable minority contractors to work on the project;
6. designation of a full time compliance officer in the Treasury Department to enforce the above condition;
Agreements Reached Between Community and Government Negotiation Regarding New Jersey College of Medicine and Dentistry and Related Matters, as amended April 30, 1968. Reproduced in Duhl, supra note 9, at n.20.}
\textsuperscript{16. The record of the New Jersey Contractor's Development Office at 45 Branford Place, Newark, New Jersey 17102, under the direction of Gurney Nelson, has been impressive. I will forego any detailed discussion here.}
the minority contractors and obtaining lists of all the minority names from the unions in the area. Once these individuals were contacted, word quickly spread by the word of mouth.

It was not long before hundreds of minority journeymen were organized. Most never had unions books, but worked on a hand to mouth basis—working for non-union contractors, picking up odd jobs, and doing home service work. Many were craftsmen in the 1940's before they migrated from the South. At these MGJRS meetings, the community representatives of the Review Council were able to learn just how discrimination in the skilled trades worked. The journeymen themselves found the organization useful in exchanging ideas and job possibilities.

MGJRS was also able to obtain legal assistance\(^{17}\) to institute Title VII actions against the unions when needed.\(^{18}\) JAC, on the other hand, attempted to place its applicants with the various apprenticeship programs. Again, although JAC met with very little success, it quickly learned how the mechanisms of exclusions operated.

Construction on some temporary buildings began in 1968 but the promises of the State to encourage minority employment failed to materialize.\(^{19}\) As the result of community protest HEW finally notified the State\(^{20}\) on July 3, 1969, that HEW would not release any construction funds until the state had indicated compliance with Executive Order 11,246 by adopting procedures requiring bidders to submit projected manning tables.\(^{21}\) Faced with the possibility of losing all federal monies, the State moved quickly to develop a plan which would meet federal requirements.

Long negotiations between the community and the various government agencies finally culminated in agreement,\(^{22}\) after which HEW approved the

\(^{17}\) The lawyers were attorneys at three offices: the Newark-Essex Joint Law Reform Project, a legal services office; the Community Legal Action Workshop, established by the ACLU; and NAACP Legal Defense Fund.

\(^{18}\) Webb v. Hughes, Civil No. 1478-69 (D.N.J., filed Dec. 11, 1969); \(D'Meza\) v. Shultz, Civil No. 1479-69 (D.N.J., filed Dec. 11, 1969). These actions were suits against the State, the Secretary of Labor, the unions and contractors for violation of the plaintiff's rights guaranteed by executive order and the fourteenth amendment. \(Webb\) was voluntarily dismissed when the union involved admitted him to membership. \(D'Meza\) is pending in the United States Court of Appeals for the Third Circuit.

\(^{19}\) See N.Y. Times, June 19, 1969, § 1, at 41, col. 1.

\(^{20}\) Letter from Robert Miller, Director of Contract Compliance of HEW to Governor Richard J. Hughes, July 3, 1969.

\(^{21}\) Projected manning tables are lists prepared by a general contractor, broken down by months and containing his best estimate of what his manpower requirement will be for each trade for the life of the job. In the projected manning tables, the contractor committed himself to a certain percentage of minority workers on the job. The contractor also had to detail his efforts to obtain union cooperation in minority recruitment and training programs.

\(^{22}\) This six point compromise plan called for:
affirmative action program, and the State included it as an amendment to the general conditions and instructions to bidders published for Phase II construction on October 1, 1969. However, on November 26, 1969, the contractors secured a temporary restraining order from the New Jersey Superior Court to enjoin the State from opening bids.

In March 1970, at the behest of the attorneys for the Federal Government, the Office of Federal Contract Compliance (OFCC) of the United States Department of Labor announced that it would hold hearings on the extent of minority participation in the construction industry in Newark. On June 3, 1970, the hearing examiners announced their findings that minorities were seriously under-utilized in the construction industry in Newark. In June, the Plan was revised for the ninth time to include the OFCC

1. Contractor to secure a union agreement which would specify the hiring and referral procedure to be followed until minority group workers were reasonably represented on the construction site on each phase.

2. Contractors were required to develop manning tables which projected the size of the prospective work force and identified the number of workers required for each month by craft and race.

3. In the event a union was unable to provide a reasonable representation of minority group workers, contractors were to hire new workers on a one for one basis from the regular union referral list and from a preferential referral list of minority workers recruited by the Minority Group Journeymen Referral Service and state employment service.

4. Contractors were charged with the responsibility of developing a journeyman training program from minority group workers who lacked the experience to qualify as and did not satisfy the age or education requirements to enter apprentice programs.

5. Apprenticeship programs which insured preferential hiring of minority workers were to be developed.

6. Workers were to be qualified for employment only by experience, on-the-job tests, or written or performance examinations.


24. Joyce v. McCrane, 320 F. Supp. 1284 (D.N.J. 1970). The action was instituted in the New Jersey Superior Court by three contractor associations alleging that compliance with the plan would require them to breach their collective bargaining agreements with their unions. The injunction against opening the bids lasted for over a year, until December, 1970. The defendant State of New Jersey joined all of the unions involved, the Department of Labor, HEW, HUD, and the community representation on the Review Council. The federal defendants removed the case to the United States District Court for the District of New Jersey.

25. 35 Fed. Reg. 4231 (1970). It is clear from the court's opinion in Joyce that holding these hearings was absolutely essential to final judicial approval of the Plan. 320 F. Supp. 1284.

26. Some of the findings of these hearings were as follows:

Because of the exclusionary practices of some labor organizations in the Newark, New Jersey area, there traditionally has been only a small number of minorities employed in the construction trades. These exclusionary practices include:

1. Failure to admit minorities into membership.

2. Failure of the unions to refer minorities for employment, which has resulted in large measure from granting of priority in referral to union members and to persons who have had work experience under union contracts.
The final version, which became known as the "Newark Plan," was approved by HEW as complying with Executive Order 11,246 on June 24, 1970. Pursuant to its opinion of December 29, 1970 in *Joyce v. McCrane*, the federal district court in New Jersey dissolved the injunctions against the opening of bids and approved the Plan in its entirety.

**A. The Training Program**

Since the inception of the idea of the affirmative action plan, the community made it clear that their highest priority was an effective training mechanism which operated completely independent from the union structure to prepare minorities for union membership. After the victory in *Joyce*, the community sought to make good on the State's prior commitments to fund an independent, community-run training program because years of experience had shown that the traditional union run apprenticeship program was inadequate. The community's proposal called for a $1.4 million grant for an eighteen-month period. When the State identified funding sources, the community gained the desired control over the training program.

The Newark Construction Trades Training Corporation (NCTTC) was established to serve two essential functions: outreach and training. The

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3. Failure to admit minority group members in apprenticeship programs. 320 F. Supp. at 1288.

The Newark city population is estimated at 400,000 persons, of which over 60 percent are Negroes and 10 percent are Spanish surnamed Americans. In the section of the city within and immediately surrounding the model Cities area, (which includes the site of the Medical College facility) 84 percent of the population of approximately 100,000 persons is Negro and 10 percent is Spanish surnamed. The overall unemployment rate in Newark totals 9.1 percent while the Negro unemployment rate is 11.5 percent and the Spanish surnamed American unemployment rate approaches 13 percent. Unemployment figures for the model cities area reveal that 12.4 percent of all Negroes are unemployed and 19 percent of Spanish speaking persons are jobless.

Minorities have been excluded as members of construction trade unions and from apprenticeship programs. For example, according to 1970 statistics, of the major construction trade unions, two had no minority journeymen members, two more unions representing four trades had less than 1 percent minority journeymen membership, and two more unions had less than 2 percent minority journeymen membership. There had also been exclusion of minorities from apprenticeship programs. See also Sub—Appendix A, p. 490 infra.


28. *Id.* at 1287-88.


30. The State was to grant to NCTTC: $750,000 which was reimbursable from the Secretary of Labor under the Manpower Development and Training Program, 42 U.S.C. § 2625 (1970); $100,000 from allocations to the State under the Emergency Employment Act, 42 U.S.C. §§ 4871-83 (1973); $313,000 from the State's budget for regional vocational schools 18A N.J.S.A. §§ 545-10 (1968); and the balance from the legislative allocation to the New Jersey College of Medicine and Dentistry 18A N.J.S.A. §§ 64G-1 to 64G-31 (West Supp. 1973)
outreach program set up two offices in strategic areas in Newark's Central Ward. Advertising was done in the schools, the black newspapers and on some of the black radio stations. The response was overwhelming. Within the first six months of its establishment over 2,000 minorities had registered with NCTTC to become trainees. The NCTTC outreach program was set up and run by minorities to recruit minorities into a minority-run training program. When jobs were available, word spread quickly, and the fact that the applicant need not enter the hostile world of a union hall eliminated the single most difficult factor in the process. This was the essential difference between the NCTTC outreach program and union efforts to comply with Title VII decrees.

With respect to training, the community had to develop remedial and skills training for all trades covered by the plan. Consultants were hired and shops were set up. Essex County College offered assistance with the remedial training program.

A number of trades became concerned, however, that they had little or no control over the training of large numbers of individuals who would eventually enter the trade and probably their own union. As a result, these unions approached NCTTC and proposed to run the training program for them. NCTTC refused to give up overall control of program in light of the unions' past track record, but agreements were reached with two unions to date and the prospect for future agreements in the other trades looks promising.

This, of course, is the best of both worlds. The unions are probably the best qualified teachers of their trade. In addition, trainees trained outside of the union mechanism tend to cause antagonism on the job with union members. The fact that the union is doing the training under NCTTC auspices tends to relieve much of the tension on the job-site between the membership and the trainees.31

B. The Department of Justice

Shortly after the decision in Joyce, the community again heard rumblings to the effect that the unions would do everything in their power to sabotage the plan. Among a number of separate strategies used to combat this situation, the community met with officials of the United States Department of Justice and asked that several of the unions be investigated with an eye toward bringing Title VII actions.

In March 1971, the Department of Justice filed a large Title VII action

31. To date over 300 trainees are enrolled in NCTTC programs receiving skills training one day each week and working the job-site four days per week.
against four of the unions with the worst records of racial discrimination.\textsuperscript{32} The filing of these complaints started a long period of negotiations between the unions involved and the government which culminated in settlement agreements with all of the unions. The community kept itself abreast of these negotiations, frequently made suggestions to the Department of Justice, and even had some of the mechanisms of the Newark Plan written into the consent decrees.\textsuperscript{33}

The consent decrees against the four unions had the effect of softening all union opposition to the plan. In effect, the fight to keep minorities out of the unions was now beginning to be more trouble than it was worth.

C. Expanding the Plan

Meanwhile, the community, armed with its successful plan, was in the process of negotiating with virtually every major sponsor of construction in the area. The community successfully negotiated the plan with the Port of New York and New Jersey Authority, which was building three new airline terminals at Newark Airport. Subsequently the construction at Rutgers Newark, Essex County College, the Essex County Vocational Skills Center, all construction undertaken by the Newark Board of Education, and any construction receiving a tax abatement by the City of Newark were covered by the plan.

D. The Office of Federal Contract Compliance

In February 1972, the Office of Federal Contract Compliance in Wash-

\textsuperscript{32} United States v. United Ass'n. Local 24, Civil Action No. 444-71 (D.N.J.).

\textsuperscript{33} The use of the minority community as a monitor and enforcer of a decree of a federal district court arising out of an action filed by the Department of Justice is an example of the kind of prestige the Newark Community had developed. The consent decree between the United States and United Association, Local 24 Apprenticeship Trade School Committee, and the Mechanical Contractors Association of New Jersey Essex and Union County Divisions, included the following language:

5. Procedures.

(a) Application for Referral.

Local 24 shall require each person who enters its hiring hall seeking employment to complete, on the occasion of his first such visit . . . an application for referral. Such application shall contain . . . a summary of the applicant's work experience in the plumbing or related trades. If any question arises concerning the applicant's experience, the applicant shall be referred to the Craft Operator Committee (hereafter COC) which was originally established by the union, the EUD (the Mechanical Contractor's Association), and the community in conjunction with the New Jersey College of Medicine and Dentistry project. The COC shall determine within two (2) working days whether the applicant's experience qualifies him for referral.

The COC is also given the power to determine which applicants are qualified for union membership and when to place applicants in certain advanced apprenticeship categories.
ington promulgated their own Newark Plan. The plan was typical of the various home-town plans promulgated by OFCC: it was doomed to failure in the eyes of the community. The community of course feared that any implementation of the OFCC plan would seriously undermine its own plan on future work. Again the community quickly met with OFCC officials in Washington. After a strong presentation of the successes of the community plan, OFCC withdrew its own plan and agreed to allow the community plan to operate in its stead.

III. DRAFTING THE NEWARK PLAN—PROBLEMS TO OVERCOME

The Review Council established in 1968 had a mandate to adopt a strong affirmative action plan which would be an effective incursion into an area which had traditionally been controlled by the construction unions—the referral of individuals to construction contractors on the job site. It was decided that the Philadelphia Plan should be used as a model. The Review Council, as constituted, had a good deal of expertise in the area of concern. It contained representatives from the general contractors associations, the State Division of Building and Construction, the contractors compliance offices of the federal government and the community. The community representatives were able to draw on their experiences with the unions through the Minority Group Journeymen Referral Service, the Joint Apprenticeship Program, and the New Jersey Contractor Development Office. The natural starting point for such an inquiry was an examination of the construction trade unions as they operated in the Greater Newark area. It was their interest which was most adversely affected by the plan and the most opposition to the plan was expected from them.

36. The Philadelphia Plan was issued by the Secretary of Labor on June 27, 1969 and became effective on September 29, 1969. It covered six construction trades and applied to five counties in eastern Pennsylvania. The plan required that federal contracts and federally assisted construction contracts contain specified language obligating the contractor and his subcontractors not to discriminate against any employee or applicant for employment because of race, color, religion, sex or national origin. The plan further required that contractors and subcontractors take affirmative action to ensure that applicants were employed and employees were treated equally. When the total estimated cost of the construction project exceeded $500,000 each bidder had to "set specific goals of minority manpower utilization which meet the definite standard" included in the invitation for bids. Predicated upon public hearings, ranges were established within which the contractors' minority group employment goals were set: in the first year, employment was to range between four and nine percent; in the second year between nine and fifteen percent; in the third year between fifteen and twenty percent; and in the fourth and last year, between nineteen and twenty-six percent. In the event of failure to meet goals, contractors were given an opportunity to demonstrate that they had made every good faith effort to meet their commitments. Id. at ¶ 1706.
A. Newark Construction Unions

In the Greater Newark area the members of the construction unions are mainly white ethnics. They are largely the descendants of those who had done construction work since the 1920's and 1930's. At that time such work was non-union and quite low-paying. Through unionization by able leadership and a conducive political atmosphere, these individuals were able to organize unions which developed into formidable advocates for the rights of their memberships.

The bargaining unit in the construction industry is usually determined according to two criteria: craft and geography. The craft determination is done along traditional trade lines,37 but the determination of which jobs ancillary to the performance of that craft shall be included in the bargaining unit varies greatly from one collective bargaining agreement to another. The geographical size is the function of an almost infinite number of variables.38 Suffice it to say that there are no specific NLRB requirements other than "appropriateness" and, in New Jersey, the size of some construction crafts may be statewide or larger, while others may not even cover the boundaries of a small city.39

Certification gives the union a whole series of rights. Most important among them are the ability to compel collective bargaining40 and the right to be the bargaining representative of the appropriate unit exclusive of any other union.41


38. There are many processes by which a bargaining unit is determined. In the case of voluntary recognition of a union by an employer there will not be NLRB review. But in all other procedures—stipulation for certification, consent elections, petition for election upon 30% showing of interest—the NLRB does determine the appropriateness of the unit. The Board will limit such considerations to the petitions before them and national labor policy. In the case of stipulations for certification and consent elections in a stipulated unit often outside considerations such as community attitudes, individuals' preferences and public policy considerations outside labor policy are not made. In Tidewater Oil Co. v. NLRB, 358 F.2d 363 (2d Cir. 1966), the Court held that the NLRB has no discretion to fix the appropriate unit where the parties (union and employer) have stipulated as to the unit. The Board could review the unit on the grounds of appropriateness, as measured by labor policy considerations, with such review limited to the appropriateness of the stipulated bargaining unit.

39. Local 825 of the Operating Engineers covers the whole State of New Jersey and five counties in New York, while Local 502 of the Laborer's covers only three small towns in Essex County. See Agreement between International Union of Operating Engineers Local 825 and Grafton Construction Co. See also Agreement, Laborer's International Union, Local 502. Some of these smaller unions band together into district councils for purposes of collective bargaining.

40. 29 U.S.C. § 157 (1970). Section 7 of the NLRA protects union members in the exercise of their rights and section 8(a)(5) makes it an unfair labor practice for an employer to refuse to bargain collectively with the recognized representative (by certification or otherwise) of the bargaining unit.

As a result, the Review Council decided that any effort to organize a minority union or to operate outside the established union machinery would be unsuccessful. The process of de-certification\(^4\) could take years, and an attempt to completely circumvent the unions would probably produce so much on-the-job antagonism that no construction could take place.

B. Becoming a Union Member

If one of the basic goals to be achieved by the plan was going to be union membership by its minority participants, the Review Council sought to apprise itself of the admission policy of Newark's construction unions vis-à-vis non-minorities. The laws of supply and demand affect the decision of a union's membership to admit new applicants. The membership of any given union have an obvious incentive to keep its ranks small.\(^4\)\(^3\) This incentive is exacerbated by two factors:

1) Construction is by its nature seasonal. In the industry, ten months of work is all that most members can expect. The tendency, as a result, is to keep overall membership down to a number equal to the job expectations during the leaner months. 2) Unions tend to have a kind of "depression psychology." Union men always seem to fear that the work will all dry up in a future year.

These factors also contribute to the high initiation fees for entry into these unions.\(^4\)\(^4\) The manner in which one becomes a union member is often cloaked in great secrecy. Even among members in some unions, how one got his "book" is his own business. But there is a procedure established for the training and selection of new union members.

An apprenticeship program is set up by a committee made up of contractor representatives and union representatives (frequently called the joint apprenticeship committee). This committee decides if and when an apprenticeship program will open and which of the applicants will be chosen for it. The program usually lasts for five years, during which an individual is supposed to get classroom instruction and on-the-job training in all aspects of the particular trade.\(^4\)\(^5\) He is paid, while on the job, at a rate which is

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44. The initiation fee for Local 11 of the Ironworkers is $800.
45. This period is obviously much longer than necessary and appears designed to discourage entry into the program. See Levine, The Failure of Apprenticeship Training in Skilled Manpower Development, 16 LAB. LAW J. 635, 640 (1965).
some percentage of a journeyman’s wage depending upon years of apprenticeship as provided in the collective bargaining agreement. After serving his apprenticeship period, the membership decides whether to admit him or not.

Many unions open up their apprenticeship programs very infrequently. In fact, a very small percentage of the membership of most of Newark’s locals become members via the apprenticeship route. Union membership is often granted on the basis of one’s connections with the union hierarchy. Traditionally, the relatives of union members are favored. Some contractors with personal influence can also get individuals placed. It is not rare in some of the more highly skilled trades for a man completely unfamiliar with the trade to be placed upon the job at full journeyman wages.46 There are certain tacit agreements between the contractors and the union regarding such practices; the business agent can often arrange the delivery of a book to the right person with a telephone call.

As a result, the Review Council decided that some training mechanism completely independent of union control would have to be adopted. The plan would require that trainees be placed on the job and trained by union journeymen in a manner similar to the apprenticeship program, but control over the choice of trainees and the program as a whole would have to remain vested in the Review Council. Finally, a method to guarantee trainees union membership after their training period had to be devised.

C. The Union’s Position in Today’s Construction Industry

In terms of its mandate, perhaps the most important information the Review Council needed was an understanding of the relationship that existed between the unions and the contractors, and how this relationship gave the unions exclusive rights to determine who shall work.47

In New Jersey today, virtually every large construction contractor, with the exception of home builders, is a union contractor. There are several reasons for this.

1. Unions control the primary source of skilled construction labor. Large contractors need a continuous reliable source of journeymen. Men are hired only for as long as needed and then are discharged, at which time they await a new referral.

46. In spite of collective bargaining agreements setting the apprentice-journeymen ratio at one to five, many trades never send an apprentice to a job. See statistics cited in Levine, supra note 45, at 641.
47. The law supports the complete control over membership vested in the unions. Parish v. Legion, 450 F.2d 821 (9th Cir. 1971); Moynahan v. Pari-Mutuel Employees Guild, 317 F.2d 209 (9th Cir., 1963).
2. Many manufacturers will not guarantee their products unless they are installed by qualified workmen and the one acceptable test of qualification is journeyman status given by a union.

3. Non-construction workers such as material-men and truck drivers who are themselves unionized can be uncooperative with a non-union contractor.

4. Large construction jobs often have many tiers of sub-contractors on the site at the same time. Cooperation between these contractors and their work gangs is a must for smooth daily on-the-job performance. Union workmen generally will not cooperate with non-union workmen. The presence of non-union workers could result in 8(b)(7) proviso picketing, job-sabotage resulting in equipment and materials damage and threatened work slow-downs.

5. Any job which makes use of federal monies must comply with the Davis-Bacon Act, which requires the “going rate” be paid to the employees. The Secretary of Labor determines the “going rate” based on the collective bargaining agreement in the area. This Act forces non-union contractors to pay union rates on government work and lessens the incentive to be non-union. Practically speaking, therefore, most large contractors must be union contractors. A contractor achieves this status by signing a collective bargaining agreement with the unions who supply the kind of craftsmen he needs.

One of the most important sections of such an agreement is the union security clause which sets out how and where the contractor shall find his workers and whether those workers shall be required to join the union. A typical collective bargaining agreement contains the following language:

A Union shall establish and maintain at its own expense an appropriate registration facility, also known as a hiring hall, for qualified applicants available for employment as journeymen. The employer shall hire qualified journeymen by calling the Union. Whenever an employer requires a journeyman, he shall notify the Local Union office. In the event there are no journeymen registered on the out-of-work list or the union is unable to refer to the Employer the requested number of journeymen within forty-eight hours, the Employer shall be entitled to seek his journeymen from any other source.


51. Collective Bargaining Agreement between Mechanical Contractors Association of
This type of job security provision, referred to as a "hiring hall clause," is one of the most jealously guarded provisions in the collective bargaining agreement. It commits the contractor to using the union hiring halls as sole source of labor. This vests the union with almost absolute control over who shall be entitled to do construction work in a particular craft in a given geographical area. The only exceptions, of course, are states that have enacted "right to work" statutes. In all other jurisdictions section 8(a)(3) makes lawful union security clauses.

Sections 8(a)(3) and (8)(b)(2) of Taft-Hartley Act prohibit discrimination based on union membership in hiring or referral. But still, much of the referral out of union halls is done in an illegal fashion, especially in the winter months when work is not plentiful. When work is more plentiful non-union members are referred by way of a permit procedure, but even then the jobs which involve the most overtime, the least travel, and the most desirable overall work situation go to members.

Membership also entitles one to union fringe benefits which include a medical and hospital plan, strike benefits, and a pension plan, among many others. Individuals who work on permit [non-union members]
contribute to all of these union funds on an equal basis with members.\textsuperscript{59}

Workers referred out on permit pay for the benefits of the membership. Membership also entitles an individual to subtle on-the-job favors, frequently from the shop steward who acts as the union's representative at a particular job-site. He often assists the contractor in assigning men to particular jobs, and he also resolves disputes which may arise with on-the-job contractor. Such cooperation is necessary to insure essential labor stability on the job.

Based upon these factors, the Review Council realized that any plan designed to deal with this kind of strength would have to have very effective sanctions or the Review Council would be unable to enforce its position. In addition, the Review Council realized that the treatment of individuals referred to the job under the plan must be a valid subject of inquiry under the plan. The Council also sought to devise a method whereby it could refer individuals directly to the job without violating the hiring hall provisions of the collective bargaining agreements.

The type of plan being contemplated by the Review Council directly obligated the contractor; the union was obligated only indirectly through the employer with whom they had a collective bargaining agreement.

But the union is often in a better bargaining position than the employer.\textsuperscript{60}

The Review Council, therefore, gave long consideration to the question of

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59. Collective bargaining agreements provide for a procedure for repayment of these monies, but the repayment may be unavailable for a number of years and as a practical matter the repayment usually does not occur.

60. Coney at 32. The inequality in bargaining power between local unions and individual contractors leads to many unusual contractual provisions. For example: most unions have negotiated for the creation of certain jobs. At times, overtime provisions required high rates of pay for the shop steward, even if he were not present on the job. Construction collective bargaining agreements are meticulously precise even about how much time workers are to be allotted to clean tools. \textit{E.g.}, the collective bargaining agreement of Local 52 of the International Brotherhood of Electrical Workers, at 14 requires "when thirty (30) working journeymen are employed . . . there shall be one General Foreman, one Foreman and two sub-foremen." Local 825 of the Operating Engineers requires the presence of an oiler for each machine on the job; also, if five or more employees are present on the job, the contractor must hire a Lead Engineer and a Foreman engineer.

Other unusual provisions may include getting paid for travel to and from work if the job is outside the jurisdiction, the requirement that the employer supply all tools (Local 52 of the Electrical Workers), or the requirement that the employer supply raincoats and boats to his employees (Local 502 of the Laborers Union).
whether a plan which operates only indirectly on the unions through the contractor could succeed. A search for a method which would operate directly against the union was unsuccessful, however. It was decided to include as much language obligating the union as possible with an eye to convincing a court of its legality afterwards.

Given the rather formidable position of the skilled craft unions, it is not difficult to see that attempts at integration by minorities have been difficult. The reputation of these unions in the black community is "whites only." Thus, the minority worker who attempts to get admitted does so with the realization that the trade has established a reputation of antagonism toward him.

Typically, the minority applicant reports on the site for employment only to be told that he must get a union book or permit. When he seeks a permit from the union he is told that if he gets a job on the site he will get a permit or possibly a book. In the alternative, he may be told that it is a union job and only union members can be employed. If he inquire about how to become a member, he is told to submit an application for entry into an apprenticeship program and that if an apprenticeship program opens up in a year or so, he will be called. He quickly realizes that he has no chance of entering this kind of system, and seeks employment elsewhere. As a result, the Review Council realized that an ambitious recruiting mechanism would have to be set up to convince the skeptical minority that perhaps now times had changed and the possibility of finding work in the construction trades was a reality.

IV. THE PLAN ITSELF

The plan which the Review Council finally created took the form of a contractual obligation between the builder and the general contractor. When the job specifications are published with an invitation for bids, the plan is included in the job specifications. Just as the general contractor is obligated to use the materials set out in the job specifications, he similarly is obligated to comply with the requirements of affirmative action. The general contractor is responsible for the compliance of his subcontractors and must include the plan in his subcontracts.

The contractor must submit a projected manpower utilization table broken down by month and by trade. This document gives the Review Council an idea of what numbers of minorities it should recruit to comply with the plan. The contractor must specify what goals he can meet, and his goals

61. The latest version of the Newark Plan, now in effect on all building undertaken by the Newark Board of Education, is printed in full in the Appendix, pp. 482-90 infra.
must fall within the ranges specified in the plan. The contractor must also submit a statement from each union he expects to use on the job. If any union fails to comply, the contractor must state in detail the efforts he made to obtain the statement and what reasons the union gave for refusing. The contractor is then responsible for the submission of all these documents by his subcontractors.

The bid documents relating to affirmative action are reviewed by the Review Council and approved or disapproved depending upon compliance. If approved by the Review Council, the contracts are signed in the normal course.

By signing the contract, the contractor commits himself to a plan which is largely administered by a Review Council. The contractor is required to have a full-time compliance officer on the site to review compliance, and he frequently acts as the contractor's spokesman. The Review Council is represented on the job daily by the site-liaison officer who receives his salary from Newark Construction Trades Training Corporation (NCTTC). This individual also prepares weekly reports for the Review Council and tries to speak personally to all minorities on the job pursuant to the plan. The prompt implementation of the Review Council decisions is the result of high level representation from the respective parties.

The plan requires that the contractor make a good faith effort to comply with the plan. The element of good faith is to be determined by the Review Council, but in no event shall union opposition constitute good faith. The plan treats the contractor as the employer of his union employees. It assumes that his mandate on the site will be obeyed. The Council is not ignorant of the tremendous power of the unions, but takes the position that their power shall not deter the implementation of the plan.

With respect to journeymen, the plan requires that between thirty and thirty-seven percent be members of minority groups. The contractor must inform his union of the requirement and seek referrals that comply with the goals. If the union fails to refer what is required, the Review Council is contacted, which in turn contacts the Minority Group Journeymen Referral Service. The MGJRS then refers a minority journeyman to the job. He first goes to the union hall with the site liaison officer to be processed and then is referred to the job. If the union refuses to refer, he

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62. See p. 456 supra.
63. In litigation involving the plan, the Review Council is characterized as an administrative agency vested by the various governmental finding agencies with the power to review compliance. In addition, it is peopled by contractors, union people and the like. The court, as a result, should give great deference to its determinations. See, e.g., Borden Co. v. Freeman, 256 F. Supp. 592 (D.N.J. 1966).
goes to the job anyway and the contractor must hire. Naturally, if the Review Council and MGJRS can find no minority journeymen to fill the vacancies, the contractor has demonstrated the requisite good faith and then may fill the job with whomever he pleases.

With respect to apprentices, the contractor is required to hire fifty percent minorities. This provision has been virtually inoperable because the use of apprentices on the site is totally under union discretion and the unions have not seen fit to utilize many apprentices on the job.

The most important requirement of the plan is the training program. The plan defines two different types of trainees: "advanced trainee" and "basic trainee." An advanced trainee is a worker who has experience and skills used in construction work but lacks the skills to be qualified as a journeyman. The Review Council or one of its subcommittees makes this classification. The community included the classification of advanced trainees to deal with a large number of minorities who had rather sporadically worked in a trade over a period of time, possessed many of the skills of a journeyman, and needed perhaps only a year of training to become a journeyman. Such individuals would be unwilling to enter a trade at the lowest rank in light of their experience.

A basic trainee is an applicant for employment who does not possess the qualifications for entrance into an apprenticeship program but demonstrates an interest in pursuing a craft in the construction industry.

The contractor is required to employ one trainee for every five journeymen on the job. This trainee works side-by-side with the journeyman on the job four days per week. On the fifth day, the trainee attends skills training class at the NCTTC. He is evaluated daily on the job by the contractor, and his wages are based upon the apprenticeship scale. A subcommittee of the Review Council periodically evaluates the progress of the trainee and sets his wages accordingly. The unions are required to admit into membership individuals employed under this plan. And despite the bitter opposition from the unions in Joyce, the court approved the plan as written. With respect to all other conditions of employment on the job, the collective bargaining agreement controls.

The plan as revised has a number of sanctions written into it which can effectuate its requirements in the face of opposition. When the plan is being violated it calls for the issuance of an alert notice. If the alleged violation has not been cleared up within seven days a violation notice is

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64. The services of the NCTTC are maintained by the Review Council to recruit candidates for the training program in addition to providing the actual training. NCTTC employees also do much of the Review Council's administrative work.
issued. The contractor in question then has the right to a hearing before the Review Council with all the procedural safeguards required by due process. If the Review Council still finds non-compliance and an unwillingness to comply, it recommends one of a number of sanctions to the builder. 65

The fact that the Review Council only recommends the imposition of sanctions raises a very important problem. When attempting to have a builder include the plan in his job specifications, the proponents of the plan must make quite clear that they expect the Council recommendation of sanctions to be backed up by the sponsor. The commitment must come from the highest possible level of the building agency and the proponents must be satisfied that the commitment is made in good faith. 66

The sanctions include the following:

1) The withholding of contract payments;
2) The termination or suspension of the contract;
3) Damages caused by non-compliance, actual or liquidated. Liquidated damages shall be assessed by the builder on behalf of the minority individual injured by the non-compliance of the contractor or subcontractor. It shall be assessed at the rate of $500 per individual plus the full amount of back pay due the individual from date of referral. This shall not be deemed to exclude any other damages which the individual can demonstrate as a result of the non-compliance.
4) Requiring the developer to enforce his obligations under his contract with contractors and subcontractors, either by suit at law or in equity or by arbitration, whichever is appropriate;
5) Commencement of an action at law or in equity or proceeding in arbitration as third-party beneficiary. Further, the non-complying contractor shall indemnify the builder for any damages it may be found liable for vis-à-vis any of the other contractors or subcontractors on the job or any third party as a result of the imposition of the above sanctions.

The final provision gives the community the power as third-party beneficiary to enforce the plan if a builder fails to live up to his commitment.

65. If a union persisted in its opposition to the plan, it can be argued that the Review Council or the job sponsor could enjoin the union opposition under a tortious interference of contract theory. See UAW v. Russell, 356 U.S. 634 (1958). The union could also be brought before the NLRB for an unfair labor practices action. See generally Wilson & Co. v. United Packinghouse Workers, 181 F. Supp. 809 (N.D. Iowa, 1960). But no builder yet approached has been willing to grant complete authority to the Review Council to impose sanctions.

66. There is some question whether a governmental body is legally empowered to delegate the right to terminate contracts to some independent body.
V. AFFIRMATIVE ACTION AND THE APPLICABLE LAW

At one time or another, the community made use of virtually every law and every administrative agency which concerns itself with employment discrimination. In developing the Newark Plan they sought to create a scheme which provided an effective remedy to the problems posed in Newark and to concern themselves afterward with the exigencies of the law. As stated, the Philadelphia Plan was used as a preliminary model and the attorneys involved attempted to fashion the plan so that it would conform to Executive Order 11,246.

A. Executive Order 11,246

Executive Order 11,246 is the culmination of a whole series of Executive Orders designed to eliminate racial discrimination in employment performed under government contract. It requires that in all contracts in-


68. 3 C.F.R. 174 (Supp. 1973). The order was amended by Executive Order 11,375, 32 Fed. Reg. 14303 (1967) to include a prohibition against sex discrimination.


70. It is quite possible that the promulgation of Executive Order 11,246 is unnecessary. The Executive Branch has broad discretion in determining the recipients of federal contracts and under what conditions contracts will be granted:

Like private individuals and businesses, the Government enjoys the unrestricted power to produce its own supplies to determine those with whom it will deal, and to fix the terms and conditions upon which it will make needed purchases. Acting through its agents as it must of necessity, the Government may for the purpose of keeping its own house in order lay down guide posts by which its agents are to proceed in the procurement of supplies, and which create duties to the Government alone. Thus assumedly under the general right to contract, the federal government can effectuate national policy in fed-
volving federal assistance "[t]he contractor . . . take affirmative action to insure that applicants are employed, and that employees are treated during employment without regard to their race, color, religion, sex or national origin."  

The term "affirmative action" has been interpreted by OFCC to mean not only insuring present nondiscrimination, but also correcting the results of past discrimination and developing programs which broaden minority group participation in the contractor's operation. It may include any action which might prove necessary to achieve the result of social equality in the employer's job structure.

Judge Werner agreed with the OFCC interpretation in Contractors Association of Eastern Pennsylvania v. Secretary of Labor.

The heartbeat of "affirmative action" is the policy of developing programs which shall provide in detail for specific steps to guarantee equal employment opportunity keyed to the problems and needs of members of the minority groups, including when there are deficiencies, the development of specific goals and timetables for the prompt achievement of full and equal employment opportunity.

Part III of the Order is specifically applicable to construction contracts paid for in whole or in part with funds obtained from the Federal Government or borrowed on the credit of the Federal Government pursuant to such grant, contract, loan, insurance or guarantee, undertaken pursuant to any Federal program involving such grant, contract, loan, insurance or guarantee.

The regulations issued pursuant to the Order exempt contracts for less than $10,000.

The Order requires that the contractor (1) state in all advertisements that consideration for employment will be without regard to race, creed, color or national origin; (2) advise his unions of his commitments under the Order; (3) comply with the Order and the rules and regulations promulgated pursuant thereto; (4) keep records and permit access to his books


71. Section 202(1) of Exec. Order 11,246, as amended, supra note 68.

72. 41 C.F.R. § 60-1.40(a), (b)(1)-(3) (1968).


75. 311 F. Supp. at 1009.

76. § 301 of Exec. Order 11,246, as amended, supra note 68.

77. 41 C.F.R. § 60 (1970); see also Coney, at 7-17 for a detailed discussion of how this exemption applies to various sub-contracts and procurement contracts.
and records for the purpose of ascertaining compliance; and (5) include these obligations in subcontracts and purchase orders. The regulations broaden the above requirements to include the requirement that the contractor and the government agency develop a written affirmative action program after identifying problem areas in minority employment and analyzing opportunities for utilizing minority group personnel. The various local plans have been developed pursuant to this regulation.

B. The Hometown Plans

In February 1970, the Department of Labor announced its intention to mandate specific hometown plans on all federally funded construction in eighteen cities where the under-utilization of minorities in the skilled trades seemed most acute in order to implement the Executive Order. In the cities selected, OFCC encouraged local representatives of minority groups, unions and contractors to develop their own voluntary minority group area-wide plan. If such plans were not developed on a local level, OFCC would mandate its own plan. The advantage in this mechanism is that the plan developed covers all construction in the greater metropolitan area in question, whether federally funded or not.

The various government funding agencies are primarily responsible for the enforcement of the Executive Order. As a practical matter, all the Order requires is that the funding agency include the language of the Order in its funding document and see to it that the recipient of the funds includes the language in all of his contracts. The OFCC, along with the appropriate contracting agency, has the power to impose sanctions for non-compliance with the Order. Of the various sanctions available

79. 41 C.F.R. § 60 (1968). See also Note, Executive Order 11,246; Anti-Discrimination Obligation in Government Contracts, 44 N.Y.U. L. Rev. 590, 593 (1969), explaining that plans at Lockheed Aircraft Corp. and Burlington Industries Inc. were the forerunners of this regulation.
81. The cities involved were Atlanta, Boston, Buffalo, Cincinnati, Denver, Detroit, Houston, Indianapolis, Kansas City, Los Angeles, Miami, Milwaukee, Newark, New Orleans, New York, Pittsburgh, San Francisco, Seattle, and St. Louis.
82. 1 EPD ¶ 1718. Successful negotiation of hometown plans have occurred in Chicago, Pittsburgh, Boston, and Newark.
83. Overall supervisory authority is conferred upon the Secretary of Labor. The Office of Federal Contract Compliance (OFCC) was created in 1965 and the Secretary delegated his authority under the Executive Order to it in 1968. See § 201, Exec. Order 11,246 supra note 68; and Department of Labor, Secretary's Order No. 2665, 31 Fed. Reg. 6221 (1966).
84. See § 209(a), Exec. Order 11,246.
to OFCC or the contracting agency, only cancellation, suspension or termination of the contract, and debarment from future contracts with the agency involved provide a sufficiently effective impetus to insure compliance.

While these sanctions are certainly effective enough to force compliance, the complete failure on the part of OFCC to utilize them has in a sense rendered the Executive Order useless. As of the end of 1970 only seven debarment actions were instituted; only three actually got to the hearing stage and no sanctions were imposed at all. Although a hearing is required prior to the imposition of sanctions, "OFCC and the contracting agencies are ill-equipped to make use of the hearing mechanism." It also now appears that the enforcement power of the federal agencies is exclusive.

The question of sanctions points up another weakness in the Order. Contract termination and all the difficulties that go along with it tend to make either the federal funding agency or the job sponsor unwilling to impose such absolute sanctions upon a contractor who, in the face of vehement union opposition, fails to comply. The various federal funding agencies

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85. Other sanctions include publication of the names of non-compliers and reporting the non-compliers to the Department of Justice and the Equal Employment Opportunity Commission. § 209(a) through (4), Order 11,246.
86. Id. § 209(a)(5).
87. Id. § 209(a)(6).
88. In a memo of Sept. 15, 1972 directed to all department heads, James Hodgson, Secretary of Labor, said that goals based on a percentage of an area population were not to be used for determining the hiring of women and minorities. Herbert Hill, Labor Director of the NAACP charged "that the Nixon administration had abandoned the Philadelphia Plan and other compliance measures in the construction industry. . . ." N.Y. Times, Sept. 26, 1972, at 26, col. 4.
89. N.Y. Times, Dec. 19, 1972, at 1, col. 7, reported that a survey of the regional offices of the offices of Federal Contract Compliance indicated that the staff people were demoralized by what they perceived to be a lack of commitment on the part of the Administration and senior Labor Department official to back enforcement efforts of Exec. Order 11,246. Virtually every job now continues in spite of a lack of compliance. See also statements of Herbert Hill, NAACP labor director, N.Y. Times, July 7, 1972, at 18, col. 1.
90. U.S. COMMISSION ON CIVIL RIGHTS, FEDERAL CIVIL RIGHTS ENFORCEMENT EFFORT 68-69 (1971). See also Hadnott v. Laird, 463 F.2d 304, 309 n.13 (D.C. Cir. 1972). See also 463 F.2d at 313 (dissenting opinion). HEW however has debarred a contractor under Exec. Order 11,246; In re Eagley Products, Inc.
who are "primarily responsible" for the compliance with the provision of the Order, are usually more concerned with the progress of the construction than of the affirmative action plan. As a result there has been virtually no enforcement at that level.

The Executive Order also ignores the fact that the composition of the employment force for the contractor is dictated almost entirely by the union with whom he has an exclusive hiring hall collective bargaining agreement. Instead of having Part III of Executive Order 11,246 apply to the construction craft unions, the Order puts obligations on the contractors only.93 But there is no reason, for example, why the federal government could not require that, on government contracts, unions having collective bargaining agreements with contractors contracting with sponsors that receive federal funds for construction must have a certain membership of minorities if hearings established a pattern of exclusion by those unions.94 Sanctions could include fines, liquidated damages, decertification by the NLRB, or termination of the collective bargaining agreement as against the effectuation of national policy.

This would impose sanctions on the guilty party. Under the present system, the contractor is put in the unenviable position of attempting to get his union to depart from its jealously guarded prerogative of having exclusive control over job referrals.95

C. Judicial Decisions Affecting Executive Order 11,246

The case law surrounding the Executive Order, however, indicates that it can be an effective measure for integrating the construction trades. In a number of cases the courts have upheld the Order and the various plans prom-

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93. U.S. COMMISSION OF CIVIL RIGHTS, supra note 90, at 47. Nor does the order force a union to accept any equal employment obligations although the Secretary of Labor is directed to use his best efforts to cause a labor union performing work for a contractor to cooperate in implementing the affirmative action plan. See § 207, Exec. Order 11,246, supra note 68.


The unions here involved are for the most part responsible for supplying to the contractors the qualified personnel needed for the Medical School project; therefore, in any matter that deals with the regulation of this work force the unions must be proper parties. To rule otherwise would defeat the intention of the Exec. Order 11,246, in that the Government could bind the contractors to affirmative action yet this would be meaningless as the contractors could contract away this obligation through collective bargaining agreements with the unions. In order to enforce affirmative action then, the unions as controllers of the work force are proper parties.

95. See note 47 supra. Most construction contractors depend almost exclusively upon their unions to supply the needed craftsmen for the job. See generally Coney, at 30-33.
The reasoning of these cases can be summarized as follows: the United States Government, under its procurement power, has broad discretion to impose conditions upon those choosing to contract with it or those who intend to finance their project with federal monies. The Executive Order is authorized, or at least not forbidden, by Congress and is thus a valid exercise of executive authority. The particular requirements in each of the various plans before the various courts are not unreasonable in light of the hearings held prior to promulgation. The various contractors and unions had an opportunity to present their evidence at that time, and therefore there is no violation of due process. The placing of minorities on the various jobs is neither unconstitutional nor in opposition to Title VII of the Civil Rights Act of 1964. The goals represent not a preference, but a remedy of a past wrong. Goals are mere projections of what a particular contractor must make a good faith effort to achieve. His good faith will be reviewed by the courts if necessary. Seniority systems and union security clauses in the various collective bargaining agreements are not a bar to such plans, but are superseded to the extent to which they conflict with the plan. The various unions involved shall not interfere with the operation of this valid contractual obligation between the contractor and his sponsor.

Joyce v. McCrane, which approved the Newark Plan, expands these holdings by declaring that remedies against the unions themselves are appropriate. Joyce represents a major breakthrough in the law surrounding Executive Order 11,246 by holding that any union with a collective bargaining agreement with a contractor at the site of the New Jersey College of Medicine and Dentistry must admit to union membership any minority journeyman referred out to the job pursuant to the Plan. The court comes to that conclusion by stating the reality of the situation: the Plan concerns jobs and "the unions here involved are for the most part responsible for supplying to the contractors the qualified personnel needed for the ... project; therefore, in any matter that deals with the regulation of this work force the unions must be proper parties." Hearings had made findings (upon which the Plan was based) which showed exclusionary practices by the unions, and the Plan as promulgated was a reasonable administrative response to those practices. The decision also approved an

97. See pp. 470-71 infra for a more expansive discussion of the legality of goals.
extensive training program, apprenticeship goals and a rather powerful Review Council which monitors the progress of the Plan. The court approved the Plan in full as a reasonable response to the exclusionary practice found in Newark at the OFCC hearings. All the union arguments about security clauses and usurpation of union powers were unpersuasive to the court in light of the findings and the authority of the Order.

D. The Legality of the Goals\(^\text{101}\)

In spite of the amount of political controversy which racial goals in employment plans has caused,\(^\text{102}\) the case law supports the use of goals in achieving equal opportunity for minorities. It is clear that the federal courts are empowered under Title VII, upon finding of racial discrimination, to require the discriminating defendant to remedy the situation by achieving a specified percentage of minority employees within a specified time.\(^\text{103}\) The same rationale applies when the executive branch of the government holds hearings to find the degree of under-utilization of minorities and then sets goals to remedy the past under-utilization.

The court in Norwalk CORE v. Norwalk Redevelopment Agency\(^\text{104}\) made clear that the state may legitimately recognize race in exercising its affirmative duty to correct racial imbalance. Indeed, it may be argued that failure on the part of the executive branch to take such action would violate the fifth and the fourteenth amendments. The fourteenth amendment prohibits not only overtly discriminatory state action, but also the acquiescence of public officials in the discrimination of the private sector when it contracts with the federal government.\(^\text{105}\) The same standard of conduct binds the federal government under the fifth amendment.\(^\text{106}\) Ethridge v. Rhodes\(^\text{107}\) enjoined the entry of contracts by the state when the contracting companies satisfied their employment needs through unions that

100. 320 F. Supp. at 1291-92.

101. In the past few years a large number of excellent articles have been written on the subject of the legality of goals in Affirmative Action plans. Comment Race Quotas, 8 HARV. CIV. RIGHTS—CIV. LIB. L. REV. 128 (1973); Note, Constitutionality of Remedial Minority Preference in Employment, 56 MINN. L. REV. 842 (1972); Title VII and the Quota System—A New Approach to a Belabored Problem, 4 RUT. CAM. L. REV. 113 (1972); The Constitutionality of Benign Quotas, 40 TENN. L. REV. 55 (1972).

102. See N.Y. Times, August 12, 1972, at 1, col. 1, for the candidates’ positions during the 1972 presidential campaign.

103. See Castro v. Bleecher, 459 F.2d 725 (1st Cir. 1972); Carter v. Gallagher, 452 F.2d 315 (8th Cir. 1972); United States v. Iron Workers Local 86, 443 F.2d 544 (9th Cir. 1971); Asbestos Workers Local 53 v. Vogler, 407 F.2d 1047 (5th Cir. 1969).

104. 395 F.2d 920 (2d Cir. 1968).


practiced racial discrimination. *Todd v. Joint Apprentice Committee*\(^ {108} \) applied the same rationale to the federal government:

The defendant agencies in practice and in effect are permitting the union and the Joint Committee to practice racial discrimination and by so doing if not directly at least indirectly are denying plaintiffs their constitutional rights.\(^ {109} \)

The same argument can be made making use of 42 U.S.C. section 1981 and the thirteenth amendment.\(^ {110} \)

E. The Inadequacy of Judicial Enforcement of Minority Employment Rights

The Newark community made use of various judicial remedies against the unions and contractors on an *ad hoc* basis, but rejected the use of these remedies as an overall solution to employment discrimination in the construction trades. Initially, there is a paucity of plaintiffs. In order to become a plaintiff against a construction union, a member of a minority group must enter a world which he views as hostile. If he applies for membership in a union or for employment at the job-site he must be able to distinguish the various non-discriminatory reasons for refusing his application from those that are discriminatory and proscribed by law. If he decides that the reason for refusal was discriminatory, he must decide whether to attempt to vindicate his rights through the legal machinery. In a lawsuit a minority plaintiff seeks to have a court order a defendant employer to hire him, after the defendant has made it clear that the plaintiff is undesirable in the defendant's eyes. A plaintiff who has been subjected to such discrimination, however, usually is no longer interested in employment with the discriminatory defendant. Furthermore, the possibility of collecting money damages sometime in the distant future is no real incentive to bring legal action, especially when coupled with the belief that legal assistance is not available.\(^ {111} \)

Once litigation is filed the court must deal with very complicated facts in finding discrimination. The discrimination may exist in the psychological testing of job applicants. The discrimination may exist half-way between the referral union and the on-site contractor. The court in turn must distinguish the various acceptable excuses for not placing the applicant from those that are unacceptable and make out a case of racial bias. Frequently, highly sophisticated experts must find that a test is not job related. In


\(^{109} \) 223 F. Supp. at 22.

\(^{110} \) See pp. 473-74 *infra*.

\(^{111} \) Smith, *Justice and the Poor* 31-34 (1967).
addition, the selection and training of apprentices is extremely difficult to trace. Often, in order to develop one's case, it is necessary to depose many members of a union to find out how each became a union member—a very costly proposition. Also the remedy which the judicial approach does provide is usually not immediate. The minority applicant for employment is most frequently unemployed. He is seeking employment because of an immediate need for money. A procedure which does not promise an immediate remedy simply does not meet his needs. Thus the judicial approach to the problem is by its nature seriatim: it may or may not provide the remedy necessary to solve the problem, and the remedy which it does contain is too slow to meet the plaintiff's needs.

F. The Title VII Remedy

The benefit of the Title VII remedy, at least in its initial stages, is that the charging party can initiate the action at no financial cost to himself. However, the procedural morass which follows has caused victims of racial discrimination to lose their rights rather than to vindicate them.\textsuperscript{112} First, the charging party must file his complaint with the Equal Employment Opportunity Commission (EEOC) within 180 days of accrual.\textsuperscript{113} He must have initially filed with the state civil rights enforcement agency—or a similar agency if one exists.\textsuperscript{114} The state agency must attempt to concuritate

\textsuperscript{112} EEOC, \textit{Seventh Annual Report}, for the fiscal year ending June 30, 1972, indicates that 47,331 actionable charges were fixed during the fiscal year and that 726 case were successfully settled. At the time the report was written, the Equal Employment Opportunity Act of 1972, 42 U.S.C. §§ 2000e \textit{et seq.} (Supp. II 1972), had been in effect for only three months and EEOC had filed no lawsuits. See EPO, Report 39, (Supp. ed., Aug. 23, 1973).

A failure by EEOC to conciliate the matter is regarded by many victims of discrimination as the end of the matter. \textit{Legal Restraints} 74.

\textsuperscript{113} The Civil Rights Act of 1964, Pub. L. 88-352, 78 Stat. 253, \textit{as amended}, 42 U.S.C. 2000e-5(e) (Supp. II 1972). If the complainant is in a jurisdiction which does have a state administrative agency to process complaints of employment discrimination, then the complainant may file his complaint with the Equal Employment Opportunity Commission within 300 days after the alleged unlawful employment practice occurred. Prior to the passage of the 1972 Amendments to the Civil Rights Act of 1964, victims of employment discrimination had to file their complaints within 210 days if in a jurisdiction which has such a state administrative agency or within 90 days in a jurisdiction that does not have such a law. 42 U.S.C. § 2000e-05(d) (1970).

\textsuperscript{114} 42 U.S.C. § 2000e-05(b) (Supp. II 1972). \textit{See} \textit{Love v. Pullman Co.}, 404 U.S. 522 (1972). Deferral to the proper state agency has been held to be a jurisdictional prerequisite to the bringing of a suit in a federal district court. \textit{See} EEOC v. Union Bank, 408 F.2d 867 (9th Cir. 1969); Electrical Workers, Local 5 v. EEOC, 398 F.2d 248 (3d Cir. 1969).

Senator Humphrey of Minnesota, one of the floor managers in the Senate of the 1964 Civil Rights Act, explained the policy favoring deferral to the states of employment discrimination complaints as follows: "The basic philosophy of the bill is that . . . whenever possible, the problems dealt with by the bill should be resolved locally and voluntarily." 110 \textit{Cong. Record} 12,707 (1964).
the matter within the wholly inadequate period of sixty days.\textsuperscript{115} Needless to say, the efforts of the state division are usually unsuccessful.\textsuperscript{116} Then the complainant is referred to the EEOC, which has another 120 days to attempt to conciliate the matter.\textsuperscript{117} The conciliation procedure was intended to reach voluntary compliance in this very sensitive area,\textsuperscript{118} but settlement is rarely reached in conciliation; employers and unions are often advised by their attorneys that regardless of the outcome of the two conciliation proceedings, a law suit may follow.\textsuperscript{119}

After the conciliation, in which the charging party may be called in on a number of occasions, the still unsuccessful complainant is sent his ninety day notice to sue.\textsuperscript{120} Generally the victim regards the notice to sue as the failure of the EEOC to remedy his problem and thus the end of the matter.\textsuperscript{121} Congress amended Title VII in 1972 to allow the EEOC independent standing to initiate a civil action following the termination of unsuccessful conciliation efforts. EEOC's record in this respect has been less than exemplary.\textsuperscript{122} Too often the passage of time and the confusion created by having two or more agencies attempt to resolve the issue has led to a failure of enforcement.

G. The 42 U.S.C. 1981 Remedy\textsuperscript{123}

Given the fact that delay is frequently equivalent to a loss of rights and

\begin{itemize}
  \item \textsuperscript{115} 42 U.S.C. § 2000e-05(c) (Supp. II 1972).
  \item \textsuperscript{116} See generally Crosslin v. Mountain States Tel. & Tel. Co. 442 F.2d 1028 (9th Cir. 1970); Developments in the Law, Employment Discrimination and Title VII of the Civil Rights Act of 1964, 84 HARv. L. REV. 1109, 1215-16 (1971). See also Ethridge v. Rhodes, 268 F. Supp. 83 (S.D. Ohio 1967).
  \item \textsuperscript{117} 42 U.S.C. § 2000e-05(b) (Supp. II 1972).
  \item \textsuperscript{118} Legal Restraints, supra note 57, at 80. See also statements of Senator Humphrey, supra note 114.
  \item \textsuperscript{119} Developments in the Law, supra note 116, at 1215. Prior to the 1972 Amendments to Title VII of the Civil Rights Act of 1964, the complainant had only thirty days following the failure of conciliation within which to bring suit. It was at this stage that most victims of racial discrimination forfeited their rights. Working under a thirty day statute of limitations, attorneys also had great difficulties in meeting the deadlines; and even if the deadline were met, the final product may have been less than the attorney's best effort.
  \item \textsuperscript{120} 42 U.S.C. 2000e-5(f) (Supp. II 1972).
  \item Failure to file suit within the prescribed period after receipt of notice from the EEOC has been held to be a jurisdictional bar to the maintenance of a civil action by the aggrieved complainant. See Goodman v. City Products Corp., Ben Franklin Div., 425 F.2d 702 (6th Cir. 1970) and Choate v. Caterpillar Tractor Company, 402 F.2d 357 (7th Cir. 1968).
  \item \textsuperscript{121} 42 U.S.C. 2000e-5(f)(1) (Supp. II 1972). Under the 1972 amendments, the Attorney General of the United States is empowered to bring a civil action in cases where a government, governmental agency, or political subdivision is the alleged discriminator. Id.
  \item \textsuperscript{122} See note 112 supra.
\end{itemize}
that minorities tend to eschew officialdom, the remedy contained in 42 U.S.C. section 1981 \(^{124}\) is far superior to the Title VII remedy. The resurrection of the statute, originally enacted as part of the Civil Rights Act of 1866, was signalled by the U.S. Supreme Court decision in *Jones v. Mayer*. \(^{125}\) The court there held that section 1982, also part of the Civil Rights Act of 1866, provided an effective remedy against private discrimination in housing. Since *Jones*, a number of courts presented with the issue of employment discrimination against blacks have held such discrimination violative of the section 1981 right "to make and enforce contracts." \(^{126}\)

The issue of whether this section requires exhaustion of the EEOC procedure has not been resolved as yet, but the weight of authority appears to be in favor of treating section 1981 as a wholly independent remedy. \(^{127}\) This presents the possibility of quick injunctive relief for a victim of racial discrimination, \(^{128}\) which cuts through much of the time consuming administrative procedure required under Title VII.

VI. REMEDIES UNDER THE LABOR STATUTES

A. The Duty of Fair Representation \(^{129}\)

In the case of *Steele v. Louisville and Nashville Railroad Co.*, \(^{130}\) the Supreme Court interpreted the provisions of the Railway Labor Act as barring labor

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\(^{124}\) 42 U.S.C. § 1981 (1970) provides as follows:

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

\(^{125}\) 392 U.S. 409 (1968). *Jones* held that discrimination by private individuals, as distinguished from discrimination under color of state law, was violative of the Constitution, resurrecting the Civil Rights Acts of 1866, 42 U.S.C. §§ 1981, 1982 and declared them constitutional under the thirteenth amendment.

\(^{126}\) Brady v. Bristol-Meyers Inc., 459 F.2d 621 (8th Cir. 1972); Caldwell v. Nat'l Brewing Co., 443 F.2d 1044 (5th Cir. 1971); Young v. Int'l Tel. & Tel. Co., 438 F.2d 757 (3d Cir. 1971); Bourdreaux v. Baton Rouge Marine Contracting Co., 437 F.2d 1011 (5th Cir. 1971); Sanders v. Dobbs Houses, Inc., 431 F.2d 1097 (5th Cir. 1971); Waters v. Wisconsin Steel Workers of Int'l Harvester Co., 427 F.2d 476 (7th Cir. 1971).

\(^{127}\) Brady v. Bristol-Meyers, Inc. 459 F.2d 621 (8th Cir. 1972); Caldwell v. Nat'l Brewing Co., 443 F.2d 1044 (5th Cir. 1971); Young v. Int'l Tel. & Tel. Co., 438 F.2d 757 (3d Cir. 1971).

\(^{128}\) Caldwell v. Nat'l Brewing Co., 443 F.2d 1044, 1046 (5th Cir. 1971); Young v. Int'l Tel. & Tel. Co., 438 F.2d 757, 764 (3d Cir. 1971). Both of these cases noted that the issuance of preliminary relief under § 1981 might induce alleged discriminators to make use of the conciliation process under Title VII.


\(^{130}\) 323 U.S. 192 (1944).
organizations from failing to represent fairly the interests of all members of the bargaining unit while enjoying the privileges of an exclusive bargaining agreement. The Court stated:

So long as a labor union assumes to act as the statutory representative of a craft, it cannot rightly refuse to perform the duty, which is inseparable from the power of representation conferred upon it, to represent the entire membership of the craft. While the statute does not deny to such a bargaining labor organization the right to determine eligibility to its membership, it does require the union, in collective bargaining and in making contracts with the carrier, to represent nonunion or minority union members of the craft without hostile discrimination, fairly, impartially and in good faith.131

The duty of fair representation prevents a union from causing discrimination in discharges,132 job classifications,133 or other conditions of employment134 from unfair handling of grievances135 to accepting a discriminatory contract.136 The duty applies equally to such discrimination under the National Labor Relations Act.137 The Courts and the NLRB have concurrent jurisdiction to vindicate the rights of individuals claiming a breach of the duty.138

The Steele standard requires that the interest of non-union members be represented on an equal basis with union members. Since 8(b)(1)139 makes it an unfair labor practice for a labor organization to pervert the exercise of section 7 rights,140 it may be inferred that any union activity based on race which adversely affects the rights of any member to self-organization, to bargain collectively, and engage in concerted activity is proscribed by this standard.

The meaning of the doctrine as applied to the construction industry is not clear. Since the determinants of the bargaining unit are craft and geography,141 assumedly all non-union craftsmen in a geographical area are enti-

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131. Id. at 204.
141. See p. 454 and notes 37-39 supra.
tled to fair representation by the union which represents their trade. The determination of craft and who has achieved the requisite skill to be so represented remain open questions. As a practical matter, there is little incentive to represent non-members since they are barred from electing union officials who do the bargaining, from attending meetings, and from voting on issues which may affect them. The issue in Newark has been limited to an attempt to eliminate discriminatory referrals based on union membership. As yet, the doctrine has not been utilized to attempt to remedy discrimination in the choice of apprentices or union admissions policies.

B. Section 8 of The Taft-Hartley Act

As earlier stated, in addition to exclusive hiring halls, one of the more formidable obstacles to integration in the construction trade is the ability of a union to require union membership as a condition of continued employment after thirty days from the commencement of employment. Such agreements are sanctioned by section 8(a)(3) with the following qualification:

Provided further that no employer shall justify any discrimination against an employee for nonmembership in a labor organization if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members.

section 8(b)(2) places a corollary duty upon the union not to encourage an employer to violate section 8(a)(3). Thus, it can be argued, that in an area of high minority population but low minority membership in the unions, the employer is not bound by that part of the collective bargaining agreement which requires union membership of his employees. This, linked to the requirement that unions not discriminate in referrals on the basis of union membership, could make membership in a trade union entirely irrelevant to the hiring practices of a union contractor.

143. See LEGAL RESTRAINTS 177-203.
144. All references to statutory sections are to the National Labor Relations Act.
146. See LEGAL RESTRAINTS 164-67. See also Sovern, supra note 43, at 567-77.
147. See Parham v. Southeastern Bell, 433 F.2d 421 (8th Cir. 1970).
148. In the case of United Packinghouse Workers v. NLRB, 416 F.2d 1126 (D.C. Cir. 1969), cert. denied, 396 U.S. 903 (1969), Judge J. Skelly Wright found discrimination by an employer to be a violation of section 8(a)(1). He reasoned that employer discrimination inhibited the employees' ability to organize under section 7 by setting the employees of different races against one another. He further reasoned that such
C. Relief Under the Landrum-Griffin Act

The Labor-Management Reporting and Disclosure Act defines membership in a union as appropriate to "any person who has fulfilled the requirements for membership in such organization . . ." and has not withdrawn or been dismissed or suspended. The courts have in a number of cases forced labor unions to admit members of brother locals and to reinstate suspended members. In the latter situation the court interpreted the definition of member broadly:

This section is not limited to those persons who are recognized as members by the organization. Instead it provides equal rights and privileges to any person who has fulfilled the requirements, i.e., those who are members in substance despite the fact that the union officials have not performed the ministerial acts necessary to give formal recognition to a person's status as a member.

This broad reading of the statute may serve the needs of minorities who have practiced the trade for many years, but have never succeeded in obtaining a book or who were members of a local at sometime in the past. However, a number of courts have been unwilling to go so far, looking instead to 29 U.S.C. section 411(2) which states: "nothing herein shall be construed to impair the right of a labor organization to adopt and enforce reasonable regulations." Moynahan v. Pari-Mutuel Employees Guild denied relief to a non-union member seeking admission, because he had not received the favorable vote of two thirds of the current members, stating:

However, legislative history persuasively demonstrates that Congress did not intend Section 3(o) to limit the previously recognized rights of unions to choose their members.

However, even the broad reading of the Act would seem to give no relief to a minority seeking entry into the apprenticeship program.

D. NLRB Decertification Remedy

Hughes Tool involved the failure of a union to consider the griev-
ance of a minority based on racial discrimination. The NLRB held that such action constituted an unfair labor practice under section 8(b)(1)(A).\textsuperscript{158} But more importantly the Board cited \textit{Shelley v. Kraemer}\textsuperscript{159} in stating:

Specifically we hold that the Board cannot validly render aid under Section 9 of the Act to a labor organization which discriminates racially when acting as a statutory bargaining agent.\textsuperscript{160}

As for a remedy, the Board makes it clear that it considers decertification an appropriate remedy for discriminatory treatment.\textsuperscript{161} And perhaps more important for community groups,\textsuperscript{162} claimants against a union for its racially discriminatory practices could assumedly intervene\textsuperscript{163} in virtually any NLRB proceeding in which the discriminating union is involved and force the Board to either decertify the union or to simply deny the union enforcement of any rights it might have under the National Labor Relations Act.\textsuperscript{164}

\section*{VII. CONCLUSION}

The process just described has lasted five years. Many of the participants in the process have been with it throughout. The development of such a plan requires a great deal of effort and its implementation requires constant supervision. However, recognizing these facts, groups in other cities, wishing to tackle the problem of discrimination in the construction trades can apply the lessons of the Newark experiences to their own efforts.

There are a number of elements which are essential to the implementation of such a plan:

A. Participants in the Plan. The plan should be a cooperative effort between the community, the various levels of government, the job sponsors, the contractors and eventually the unions. Each of these constituencies should sit on the Review Council.

1. \textit{The Community}. The term community has been used on two levels throughout this article.\textsuperscript{165}

   a. At one level, it was the actual drafters and implementers of the

\begin{footnotesize}
\begin{itemize}
  \item \textsuperscript{159} 334 U.S. 1 (1948).
  \item \textsuperscript{160} 147 N.L.R.B. at 1577.
  \item \textsuperscript{161} \textit{Pioneer Bus Co., Inc.}, 140 N.L.R.B. 54 (1963).
  \item \textsuperscript{162} There appears to be no reason why government agencies charged with enforcing civil rights laws could not also intervene under 29 C.F.R. § 102.29 (Supp. 1973).
  \item \textsuperscript{163} 29 C.F.R. § 102.29 (Supp. 1973).
  \item \textsuperscript{165} \textit{See note 7 supra.}
\end{itemize}
\end{footnotesize}
plan. This group, numbering five or six, should have a thorough knowledge of construction. They must be indigenous to the community. Among them should be a lawyer and also an individual with at least a modicum of political clout. Initially, at least, each of these individuals should have an outside source of income, but also be free to dedicate a substantial amount of time to implementing the plan. These are the individuals who should eventually be the community's representatives on the Review Council.

b. At the other level, a broad coalition of virtually every civic, religious, political, and self-help organization in the city should be developed. They can be kept abreast of development through meetings and newsletters. They should be organized to back up the efforts of the implementing group. Their role is to act in an *ad hoc* way in matters where the influence of such a large political coalition is necessary—such as attempting to obtain government approval of the plan, or to get funding or to convince a particular job sponsor to implement the plan.

2. The Various Levels of Government. Government can play an essential role in implementing the plan on two levels:

a. Essentially the fifth and fourteenth amendments require that no level of government should countenance racial discrimination in a construction project in which they are even minimally involved. This includes funding, clearance of land, guarantees, tax abatement and the like. Thus, even without Executive Order 11,246, any level of government can condition their participation in a construction project upon compliance with a plan which creates a remedy for past discrimination. In such a role, however, the governmental body must be willing to improve sanctions, including stopping construction for non-compliance.

b. The other role that government can play is that of a funding source. The plan works best if it has independent administrative, training and outreach mechanisms and each of these require funding.

3. The Job Sponsor. If the government participant is unwilling to commit itself to the plan, it is still possible to achieve the desired result by attempting to get the commitment of the builder, or the recipient of the government assistance. It can further be argued that even a purely private builder receiving no governmental subsidy whatsoever is bound by Title VII and 42 U.S.C. section 1981, not to fund racial discrimination, and thus he should attempt to remedy the results of past discrimination by imposing the plan on his project.

4. The Contractors. The plan operates by obligating the General Contractor to oversee that the make-up of his work force complies with the plan. Thus, the backing of a general contractors association or a mechani-
cal contractors association can solve many problems. Their expertise is of great assistance in drafting the plan; their word can frequently convince a job sponsor to accept the plan; they can convince their membership of the wisdom of the plan; and they can often smooth out problems in the daily implementation of the plan.

5. The Unions. Although in Newark the unions have not been overly cooperative until recently, their cooperation, or at least lack of opposition can certainly make the whole process run more smoothly. Even the minimal support of just one union business agent can be very valuable. The unions are certainly the experts in every thing the plan is attempting to do. At a minimum, however, care should be taken not to alienate the unions and they should be enacted to participate in the plan at every level.

B. Provisions of the Plan

1. Findings. The legal posture of an affirmative action plan is that it is a remedy for a past wrong. In order for a plan to be legally valid, it must be a response to the findings of some governmental administrative body. These findings should be made pursuant to hearings. Unions and contractors should be given notice of the hearings and an opportunity to present their side of the case. The administrative agency should make formal findings of fact.

2. Goals. The plan should include a percentage requirement of minorities on a per hour basis for each trade and job category. The percentages should be based upon the findings. The percentages should vary as to journeymen, apprentices and trainees. The importance of the journeymen goals depends upon the number of non-union minority journeymen in a given area. The importance of apprentice goals depends upon the frequency with which the joint apprenticeship committees in a given area open up apprenticeship programs. The trainee goals are most important because these are the individuals who will be recruited by the plan and sent to the job.

3. Union Membership. The intent of affirmative action is to integrate the construction unions. Without a union membership provision, the participants will work only for as long as the plan is operative and then will have to find work elsewhere.

4. A Community-Dominated Review Council. The Review Council oversees the daily operation of the plan. It should meet at least bi-weekly. It should resolve complaints from any participant of the plan and see that all provisions are being complied with. The various representatives sitting on the Review Council can frequently resolve difficulties without recourse to
any of the formal proceedings in the plan. Representatives of the general contractor should be present at each meeting to report on job progress.

C. Funding. In Newark, there has been funding for two district functions of the Plan: administration and training.

1. Administration of the Plan. The size of the administrative apparatus is largely dependent upon the size and number of jobs the Review Council must oversee. This office should employ a sufficient number of site liaison officers, so that one officer can visit each job at least once a day. The administrative apparatus should also see to it that as much job continuity as possible is achieved. As one job slows down and the number of minorities is reduced, the minority worker should be placed elsewhere. The administrative apparatus should also serve the function of recruiting trainees, apprentices, and journeymen for the Review Council to refer to the job.

2. Training. Under the plan training contemplates skills and remedial training one day out of five in school outside of the union structure. The State of New Jersey and the federal government have funded a training school specifically for trainees under the Newark Plan. Since this is expensive other cities should explore the viability of having the training done in local high schools, colleges or vocational educational facilities.

D. Monitoring and Sanctions. If the plan is operating smoothly, the imposition of sanctions should not be necessary. However, in this difficult area, the power of the Review Council will be dependant upon the perceived willingness of the job sponsor to impose the ultimate sanctions of terminating the general contractor's contract and stopping the job. The proponents of the plan should make this perfectly clear to the job sponsor before he adopts the plan initially. The proponents of the plan should satisfy themselves that should the Review Council unsuccessfully exhaust its procedures for obtaining compliance and recommend sanctions to the job sponsor, the sponsor will honor the recommendation and apply the necessary sanctions.

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166. The site liaison officer accompanies the beginning trainee to the job site and reports to the Review Council on his progress. He acts in a sense as the eyes and ears of the Review Council and attends Review Council meetings.
APPENDIX

Affirmative Action Program Requirement of The Board of Education of Newark in the County of Essex

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I. GENERAL EMPLOYMENT POLICIES

The employment practices of contractors and sub-contractors on the project which is the subject-matter of this contract must meet the requirements of the laws of the State of New Jersey and the United States of America respecting equal employment opportunity.

In order to meet these requirements, a contractor working on any part of the project under a contract(s) or subcontract(s) exceeding $10,000 shall be required to meet the conditions and provisions included herein which are incorporated into and made part of each contract(s) and sub-contract(s).

II. PREAMBLE

The failure, historically, to employ, and the exclusion of, minorities on construction projects has resulted in the necessity for the development of an affirmative action program aimed at insuring that equal employment opportunities are afforded to all, regardless of sex, race, color, religion or national origin. Contractors, therefore, are required to exert a positive “good faith effort” in order to satisfy the requirements of this contract to insure such equal employment opportunity.

III. FINDINGS

The Office of Federal Contract Compliance, (OFCC), of the U.S. Department of Labor held hearings in March, 1970 on the racial composition of the skilled trades in the Greater Newark Area. While some progress has been made as a result of vigorous enforcement of affirmative action plans, the findings of facts made by the OFCC are essentially true at this time and the Board adopts them as their own.
There have been unique problems in enforcing the non-discrimination and affirmative action requirements of State Executive Order 21 and Federal Executive Order 11,246 in the construction industry. Contractors and subcontractors must hire a new employee complement for each construction job, and out of the necessity or convenience, they rely on the construction craft unions as their prime or sole source for their labor. Collective bargaining agreements and/or established custom between construction contractors and subcontractors and unions frequently provide for, or result in, exclusive hiring halls; even where the collective bargaining agreement contains no such hiring hall provisions or the custom is not rigid, as a practical matter, most people working in the construction industry are referred to contractors by the unions. Because of these hiring arrangements, referral by a union is a virtual necessity for obtaining employment in union construction projects, which constitute the bulk of commercial construction. Because of the exclusionary practices of some labor organizations in Newark, New Jersey area, there traditionally has been only a small number of minorities employed in the construction trades. These exclusionary practices include:

1. Failure to admit minorities into membership.
2. Failure of the unions to refer minorities for employment, which has resulted in large measure from granting of priority in referral to Union members and to persons who have had work experience under union contracts.
3. Failure to admit minority group members in apprenticeship programs.

The Newark city population is estimated at 400,000 persons, of which over 60 percent are Negroes, and 10 percent Spanish surnamed Americans.

The overall unemployment rate in Newark totals 9.1 percent while minority unemployment is substantially higher.

Labor force participation rates further illustrate the availability of minorities for employment in Newark. 84.9 percent of all Negro males in Newark are included within the labor force as are 82.9 percent of all Spanish surnamed male Americans.

As to the number of minority persons available for construction work, the total minority unemployment in the Newark area is approximately 14,000 while approximately 29,000 minority persons are presently underemployed. Over 1,300 minority persons have already indicated a desire to work in construction and it is estimated that substantially more would take advantage of the opportunity if it was freely granted.

It has also been estimated approximately 11,400 construction jobs requiring new manpower will be available by 1975 for an annual average of 1,900 new jobs, thus, establishing that substantial numbers of minority persons may be brought into the construction industry without displacing existing workers.

Thus, members of minority groups constitute a clear majority of the population in Newark, and there are substantial numbers of minorities available
as construction workers. However, minorities are seriously under-utilized on construction projects performed in Newark and are hardly represented as members in certain trade unions which by contract or custom control the referral of persons for employment in the construction trades in Newark.

Minorities have been excluded as members of construction trade unions and from apprenticeship programs. For example, according to 1970 statistics, of the major construction trade unions, two had no minority journeymen members, two more unions representing four trades had less than 1 percent minority journeymen membership, and two more unions had less than 2 percent minority journeymen membership.

There has also been exclusion of minorities from apprenticeship programs. Thus, for example, in 1970, three apprenticeship programs reported that they included no minority apprentices, two more covering employees in five trades included about 3 percent minorities and another about 5 percent.

It is concluded therefore, that the affirmative action program set forth herein is necessary to equal employment opportunity on construction sponsored by the Board of Education of the City of Newark.

IV. DEFINITIONS

For the purpose of the contract, unless the context indicates a different meaning:

(1) Minority means black, Puerto Rican, or Spanish surname Americans.

(2) Review Council is a body to be composed of no less than six minority members of the Newark community, who are to be appointed by the Board of Education of Newark, two representatives of the unions and so designated by them, two representing the interests of the contractors and so designated by them, and two representatives of the Board of Education and designated by it.

The Review Council shall review contract bids received by the Board from all contractors to determine whether the bidder has met the requirements of the Affirmative Action Program to insure compliance. It shall, from time to time, report to the Board of Education and make such recommendations as it deems necessary. The Review Council shall have such other duties in addition as are described herein.

The Board of Education will consult with the Review Council in the evaluation of documents submitted by bidders before the award of any contract for the construction of the project for the purpose of determining whether the bidder has met the requirements of these supplemental conditions.

The Review Council will receive referrals of journeymen from the Minority Group Journeymen Referral Service, and apprentices from the Joint Apprenticeship Program and trainees from the Newark Construction Trades Training Corporation (defined infra), and shall determine the qualifications and classify persons as journeymen, advanced trainees, and basic trainees for the purpose of applying the provisions herein. Individuals shall be deter-
minded qualified for employment as journeymen, advanced trainees, and basic trainees solely upon the basis of experience, on-the-job evaluation and, where necessary, oral or written or performance examinations approved by the Review Council. No arbitrary method of evaluation measuring qualifications other than a person's ability to perform work shall be valid.

3. The Newark Construction Trades Training Corporation (N.C.T.T.C.) at 222 Morris Avenue, Newark, New Jersey is a non-profit corporation funded by the State of New Jersey for the purpose of supplying off-site training to minority individuals who are receiving on-site training pursuant to the various affirmative action programs in the Greater Newark Area.

4. Advanced Trainee is a worker who has experience and skills used in construction work but lacks the skills to be a qualified journeyman and is classified by the Review Council, or a subcommittee thereof, as an advanced trainee.

5. Basic Trainee is an applicant for employment who does not possess the qualifications for entrance into an apprenticeship program but demonstrates an interest in pursuing a craft in the construction industry and is classified by the Review Council, or a subcommittee thereof, as a basic trainee.

V. CONTRACTOR'S CONTRACTING OBLIGATIONS

The Contractor shall submit to all contractors and subcontractors this Affirmative Action Program and shall make said Affirmative Action Program a part of his project specifications. He shall require that by submitting a bid, the contractor certifies that he will comply with this plan. In addition, to be responsive in his bid, the contractor must submit a statement to each union with which he has a collective bargaining agreement covering workers to be employed on the project, in accordance with paragraph IV below. Before the award of any subcontract is approved, the contractor will be required to submit such statement for each sub-contractor having a collective bargaining covering workers to be employed on said project, in accordance with the provisions of paragraph III. In either case, if no such statement has been obtained the contractor will submit documentation of his efforts to obtain such statement, in accordance with the provisions of paragraph IV.

1. The contractor, in hiring for this job, shall make every effort to employ persons residing within the geographical jurisdiction of the appropriate union in order to insure that persons employed on the project will be brought into the permanent construction industry labor force in the area.

2. The contractor shall not discriminate against employees and applicants for employment on the grounds of union membership, or on the grounds of race, color, religion, sex, or national origin.

3. Based on the findings made herein, the contractor will make every good faith effort to meet the following goals of minority journeymen utilization in the performance of his contract, whether or not the work is subcontracted.
4. The goals of this Affirmative Action Program in the selected trades shall be within the following ranges, all of whom shall be residents of New-
ark:

<table>
<thead>
<tr>
<th>Trade Description</th>
<th>Goals of Minority Journeymen Utilization Within these ranges</th>
</tr>
</thead>
<tbody>
<tr>
<td>Bricklayers</td>
<td>30-35 percent</td>
</tr>
<tr>
<td>Carpenters</td>
<td>30-35 percent</td>
</tr>
<tr>
<td>Cement Finishers</td>
<td>30-35 percent</td>
</tr>
<tr>
<td>Electricians</td>
<td>34-37 percent</td>
</tr>
<tr>
<td>Elevator Constructors</td>
<td>30-35 percent</td>
</tr>
<tr>
<td>Glaziers</td>
<td>29-32 percent</td>
</tr>
<tr>
<td>Insulators</td>
<td>30-35 percent</td>
</tr>
<tr>
<td>Ironworkers</td>
<td>31-34 percent</td>
</tr>
<tr>
<td>Lathers</td>
<td>30-35 percent</td>
</tr>
<tr>
<td>Operating Engineers</td>
<td>30-35 percent</td>
</tr>
<tr>
<td>Painters</td>
<td>30-35 percent</td>
</tr>
<tr>
<td>Plasterers</td>
<td>30-35 percent</td>
</tr>
<tr>
<td>Plumbers/Pipefitters</td>
<td>30-35 percent</td>
</tr>
<tr>
<td>Steamfitters</td>
<td>31-34 percent</td>
</tr>
<tr>
<td>Roofers</td>
<td>33-36 percent</td>
</tr>
<tr>
<td>Sheetmetal Workers</td>
<td>30-33 percent</td>
</tr>
<tr>
<td>Sprinkler Fitters</td>
<td>30-35 percent</td>
</tr>
</tbody>
</table>

On the attached form [Sub-Appendix B] the contractor will submit with his bid his goals of minority journeymen utilization in the trades, specified above in the performance of the contract. These goals shall be applicable whether or not the work is subcontracted.

5. The contractor will make every good faith effort to reach a goal of 50 percent minority group apprentices on the job in each trade listed in subparagraph 4 of this ARTICLE III in which apprentices are employed, and shall hold each of his subcontractors to this requirement.

6. The contractor will cooperate with the Review Council in providing on-site training for persons employed on the construction site and will provide on-site opportunities to basic and advanced trainees referred to him by the Review Council. Each trainee will be excused from work for one day each week in order to receive off-site training at N.C.T.T.C. The Review Council shall retain the Newark Construction Trades Training Corporation for the purpose of recruiting and supplying off-site training to minority trainees referred to in paragraph II (3) and paragraph II (4). The Review Council is also empowered to approve equivalent training programs from another source.

7. The contractor shall not be required to employ more trainees than the number permisssable under the apprentices to journeymen employment ratio specified in the applicable collective bargaining agreement, or if there is no applicable agreement the established ratio in the trade, or by industry usage in the area. Provided: No ratio requiring the employment of more than five (5) journeymen for each apprentice shall be applicable
8. Criteria for Measuring Good Faith

(a) The contractor will consider for employment as journeymen, basic trainees and advanced trainees, persons referred to him by the Minority Group Journeymen Referral Service, the Joint Apprenticeship Program, and the Newark Construction Trades Training Corporation, who have been classified by the Review Council. If the contractor does not employ any person so referred, he shall submit a written explanation by close of day to the Review Council.

(b) The collective bargaining arguments between the various contractors and sub-contractors and their various unions shall remain in force and effect except to the extent that they are inconsistent with the terms of the affirmative action plan. Where required by custom or agreement, the contractor shall send referrals from the Review Council to the union registrar for referral, or to the apprenticeship program for admission, pursuant to such agreement or arrangement. The unions will however have no right of rejection over Review Council referrals.

(c) The contractor will notify the developer and the Review Council whenever he has reason to believe that a union with which he has a hiring hall or referral arrangement or an apprenticeship program engages in such referral, membership, admission, or other practices as will substantially impede the contractor in his efforts to meet his Affirmative Action obligations under these Supplemental Conditions.

(d) A contractor shall not be deemed to have exercised good faith under this agreement solely because of union opposition, even if the unions threaten a work stoppage because of the implementation of this plan. It shall be incumbent upon the contractor as employer to see to it that referrals under this plan are treated fairly by the unions and their members.

9. The contractors (and each subcontractor whose contract(s) exceeds $10,000), shall develop and submit a Manning Table. This document shall identify his estimated manpower requirements for the duration of the job broken down by trade and month. The manning of the job shall be related to this document which shall be brought up to date as required but not less than once monthly.

10. The contractor shall submit copies of his collective bargaining agreements covering workers to be employed on the project, and copies of such bargaining agreements of each subcontractor.

11. The contractor shall designate a principal officer of his firm to be the Affirmative Action Officer who shall be responsible for administering the Affirmative Action Program detailed herein. This officer shall meet regularly or as may be required with all contractors, the Review Council, and the Board to insure attainment of the goals set forth herein and the implementation of the training program.

12. The contractors, and subcontractors agree that the Board and the
community as represented by the Minority Construction Coalition, who proposed this plan to the Board, shall be a third-party beneficiary with respect to the Affirmative Action provisions of all contracts relating to this project. They further agree that as third-party beneficiary, the Board and/or the Community may take such legal action to enforce the provisions referred to as it may deem necessary, without the approval or consent of the contractors, or subcontractors.

VI. UNION STATEMENT

The Contractor shall require that when the contractor has a referral agreement or arrangement with a union covering workers to be employed on this project, he shall submit with his bid a statement similar to Sub-Appendix A, signed by an authorized union official, in which the union agrees as follows:

1. The union will take such action as may be necessary with respect to the referral and the employment of minority group persons in order to enable the contractor to meet his obligations under these Supplemental Conditions.

2. The union will cooperate with the Review Council in providing on-site training on the construction site.

3. Minority group journeymen employed by the contractor shall be admitted to union membership within the time limits contained in the applicable collective bargaining agreements, union constitutions, and by-laws.

The contractor will promptly notify the developer and the Review Council of any failure of the union to comply with its statement. If a union has refused to sign the statement described above, the contractor will document his efforts to obtain such statement, including a description with the reason by the union for not signing such statement, and submit such documentation, together with his bid. A bid shall be unresponsive if it is unaccompanied either by an acceptable union statement or by documentation as to why such statement could not be obtained.

In addition, the award of a subcontract will not be approved if such contractor has not submitted such an acceptable union statement or an explanation of the failure to obtain such a statement.

The failure of the union to sign the statement described above does not excuse the contractor from his obligations to comply with the conditions and provisions of the Affirmative Action Program set forth herein.

VII. SUBCONTRACTORS

The contractors shall require that each prime contractor is responsible for the performance of his subcontractors for the implementation of the aforementioned equal employment requirements during the performance of the contract. Whenever the contractor subcontracts a portion of the work on this project the subcontract shall bind the subcontractor to the obligations contained in these Supplemental Conditions to the full extent as if he were the contractor. Furthermore, the contractor must include a provision in all
contracts with subcontractors to insure compliance with all other conditions included herein, as well as with the N.J. Executive Order 21, and N.J.S.A §§ 10.2-1 through 10.2-4, and Executive Order 11,246.

VIII. NON-DISCRIMINATION

The commitments of the contractor hereunder are for the purpose of satisfying his affirmative action obligation under these Supplemental Conditions and is not intended, and shall not be used, to discriminate on the basis of race, color, or national origin against any qualified applicant or employee.

IX. COMPLIANCE

In the event of failure by a contractor to meet his minority manpower commitments under these Supplemental Conditions, he shall be given an opportunity to demonstrate that he has made every good faith effort to meet his commitments. In any proceeding which such good faith is in issue, all of the actions of the contractor in seeking to comply with these requirements shall be reviewed and evaluated by the Review Council. Compliance with these conditions will be monitored by a full-time compliance officer employed the Board of Education.

(1) The Review Council will issue a written ALERT NOTICE to a contractor and appropriate unions whenever, in its opinion, a breach of these conditions appears to be developing.

(2) If the ALERT NOTICE is not removed by a correction of the deficiencies within the time specified in the notice, the compliance officer shall follow up the ALERT NOTICE by issuing a written VIOLATION NOTICE. Upon issuance of such notice, the contractor will have seven (7) working days to remove the violation. If the violation has not been removed within the period, the Review Council will inform the Board.

(3) Either or both notices may be removed if the contractor meets his obligations under these Supplemental Conditions or if he presents a satisfactory explanation in writing as to why such compliance is impractical, or impossible.

(4) Compliance will be monitored by the Review Council or one of its members acting on its behalf.

(5) Failure to satisfactorily remove a violation notice shall be heard by the Review Council and a determination by the Review Council that the contractor is not in compliance with this plan shall result in a recommendation of sanctions by the Review Council to the Board. Such recommendation shall be accepted by the Board unless it is deemed unreasonable. Such sanctions may include any or all of the following:

(1) the withholding of contract payments
(2) the termination or suspension of the contract
(3) damages cause by non-compliance: actual or liquidated. Liquidated damages shall be assessed by the Board on behalf of the minority individual injured by the non-compliance of the contractor or sub-
contractor. It shall be assessed at the rate of $500.00 per individual plus the full amount of back pay due to the individual from date of referral. This shall not be deemed to exclude any other damages which the individual can demonstrate as a result of the non-compliance.

(4) requiring the developer to enforce his obligations under his contract with contractors and subcontractors, either by suit at law or in equity or arbitration, whichever is appropriate.

(5) commencement of an action at law or in equity or proceeding in arbitration as third-party beneficiary. Further the non-complying contractor shall indemnify the Board for any damages it may be found liable for vis-à-vis any of the other contractors or subcontractors on the job or any other third party because of the imposition of the above sanctions.

SUB—APPENDIX A

SAMPLE UNION STATEMENT

The ___________ Union, being a party to a collective bargaining agreement covering workers to be employed on the project, in order to assure equal employment opportunity on such project, agrees as follows:

1. It will cooperate with the Review Council, the contractors with whom it maintains a collective bargaining agreement and the Board with regard to the full implementation of the terms of the Supplemental General Conditions Relating to Affirmative Action for Equal Employment Opportunity at the project (hereinafter referred to as Supplemental Conditions).

2. It will refrain from any practice or policy which has as its purpose or effect impeding the contractor or subcontractor and developer in meeting his Affirmative Action obligations arising out of the developer's contract with the Board.

3. It will take such action as may be necessary with respect to the referral and employment of minority group persons in order to enable the contractor, subcontractor and developer to meet their obligations under these Supplemental Conditions.

4. It will cooperate with the Review Council in providing on-site training.

5. It will admit to membership all minority group journeymen employed by the contractor within the time limits prescribed in the applicable collective bargaining agreement, union constitutions and by-laws.

SUB—APPENDIX B.

CONTRACTOR'S GOALS

SUB-CONTRACTOR'S GOALS

<table>
<thead>
<tr>
<th>Trade</th>
<th>Goal (in percent)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Bricklayers</td>
<td></td>
</tr>
</tbody>
</table>
Carpenters
Cement Finishers
Electricians
Elevator Constructors
Glaziers
Insulators
Ironworkers
Lathers
Operating Engineers
Painters
Plasterers
Plumbers; Pipefitters; Steamfitters
Roofers
Sheetmetal Workers
Sprinkler Fitters