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COURT OF APPEALS

STATE OF NEW YORK

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INTERNATIONAL UNION OF PAINTERS &  
ALLIED TRADES, ET AL.,

Respondents,

-against-

NO. 101

NEW YORK STATE DEPARTMENT OF LABOR,  
ET AL.,

Appellants.

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20 Eagle Street  
Albany, New York  
September 12, 2018

Before:

CHIEF JUDGE JANET DIFIORE  
ASSOCIATE JUDGE JENNY RIVERA  
ASSOCIATE JUDGE LESLIE E. STEIN  
ASSOCIATE JUDGE EUGENE M. FAHEY  
ASSOCIATE JUDGE MICHAEL J. GARCIA  
ASSOCIATE JUDGE ROWAN D. WILSON  
ASSOCIATE JUDGE PAUL FEINMAN

Appearances:

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Official Court Transcriber



1 CHIEF JUDGE DIFIORE: The next appeal is appeal  
2 number 101, International Union of Painters & Allied Trades  
3 against New York State Department of Labor.

4 Good afternoon, counsel.

5 MR. DEMUTH: Good afternoon, Your Honors. May it  
6 please the court, my name's Owen Demuth on behalf of the  
7 appellant, Department of Labor.

8 May I please reserve three minutes for rebuttal?

9 CHIEF JUDGE DIFIORE: You may, sir.

10 MR. DEMUTH: Thank you very much.

11 Your Honors, this case is about the prevailing  
12 wage law and the Department's statutory mandate, as the  
13 steward of that law, to do two things.

14 JUDGE STEIN: Counsel, as - - - as a steward of  
15 that law, the language, as I understand it from 220 - - -

16 MR. DEMUTH: 3.

17 JUDGE STEIN: - - - (3-e), right, was pulled from  
18 federal regulations under the Davis-Bacon Act. And is  
19 there any - - - do you have - - - know of any authority  
20 explaining how the U.S. Department of Labor interpreted or  
21 interprets this same language, sir? Is there anything on  
22 that?

23 MR. DEMUTH: I'm afraid that I can't provide any  
24 useful information about that, since that part - - - I know  
25 that it's very similar. Obviously, it's - - - the state



1 ones eventually became called little Davis-Bacon Acts  
2 because they were so similar, but I - - - I can't speak to  
3 the precise wording of - - - of the federal statute and - -  
4 - and any - - -

5 JUDGE GARCIA: Well, the federal statute - - -  
6 reg, I think it is - - - right, it's a regulation?

7 JUDGE STEIN: Yes.

8 JUDGE GARCIA: Is very close, almost identical,  
9 to the language that was enacted as (3-e), so have you  
10 looked at how the Labor Commiss - - - the Department of  
11 Labor in the federal level interprets nearly identical  
12 language?

13 MR. DEMUTH: No, Your Honor, because we stuck  
14 with what this court held in Monarch Electrical and what we  
15 - - -

16 JUDGE FEINMAN: So how is your interpretation  
17 consistent with Monarch, and is it a natural extension of  
18 it?

19 MR. DEMUTH: It is - - - thank, Your Honor. I -  
20 - - I think that - - - that's exactly what it is. It's - -  
21 - it's an extension of the harms that this court identified  
22 in Monarch Electrical. And again, this is - - - we - - -  
23 we agree with Presiding Justice Whelan that there is a - -  
24 - a slight ambiguity in the statute to the extent that it  
25 doesn't expressly say what a bonafide program is, but we -



1 - - we think one thing - - -

2 JUDGE GARCIA: Isn't that defined by how you  
3 define it? A bonafide program is something the Department  
4 of Labor approves. Doesn't that make it a bonafide  
5 program? Don't you have the authority to look at the  
6 Glazier's Program, or whatever program comes to you, and  
7 stamp it yes or stamp it no? I - - - they say in their  
8 papers that you - - - the Department of Labor, whatever  
9 office, develops the curriculum pretty much in  
10 consultation. So isn't a bonafide program what you say it  
11 is?

12 MR. DEMUTH: Yes, Your Honor, I think - - -  
13 again, and that's - - - that's giving the deference that  
14 the Fourth Department should have afforded the Depart - - -  
15 the Department here.

16 JUDGE GARCIA: Well, that's a little bit  
17 different.

18 MR. DEMUTH: But - - -

19 JUDGE GARCIA: But so if you control the program,  
20 then you can control what is - - - legitimately falls  
21 within work in that curriculum. So I don't understand what  
22 that ambiguity would be. As long as they're working within  
23 a curriculum that you've approved as an apprentice program,  
24 why don't you qualify under the statute?

25 MR. DEMUTH: Well, a little bit about that. The



1 - - - the apprentice program that they - - - called ATP in  
 2 our briefs - - - they look at - - - what they're concerned  
 3 about is - - - is - - - and again, these - - - these  
 4 programs are generally joint sponsors or private sponsors,  
 5 sometimes coalitions of unions and contractors.

6 So what the - - - and - - - and there exists one  
 7 for all of these trades. What the apprenticeship program  
 8 does for the Department is they try to focus on the tasks -  
 9 - - the work processes, and that's how plaintiffs have  
 10 confused this issue by referring to work processes, which  
 11 are really general categories of construction.

12 JUDGE GARCIA: And so just to stop you, because  
 13 I'm a little bit confused on that. So work processes may  
 14 be something fairly general, and have within it some other  
 15 tasks? So some may be glaziers, some may be ironworkers in  
 16 this case?

17 MR. DEMUTH: Yes. That's - - - that's it. It -  
 18 - - and again, the plaintiffs stop at the work-process  
 19 level, which is of no value in - - - in understanding the  
 20 statute, and understanding how prevailing-wage-trade  
 21 classifications are done, because the prevailing-wage-trade  
 22 classifications focus on the tasks. And - - - and although  
 23 plaintiffs consistently argue that curtain wall - - - we do  
 24 curtain wall in our programs, and - - - and it - - - that -  
 25 - - that's really not relevant. The - - - the fact is,



1 what are the tasks within - - -

2 JUDGE GARCIA: So let's say installation of  
3 curtain wall, right, one of the things here. So would that  
4 have tasks within it which you categorize as ironworker and  
5 as glazier?

6 MR. DEMUTH: Absolutely, Your Honor.

7 JUDGE GARCIA: So I have a glazier apprentice  
8 who's doing that, so for the things within that process  
9 that you would categorize as ironworker, then he's a  
10 journey worker, and then as glazier, now I'm an apprentice?

11 MR. DEMUTH: Yes.

12 JUDGE GARCIA: So while I'm doing this one thing,  
13 which is installing curtain wall, for these minutes where  
14 I'm doing this process, I'm getting paid as a journey  
15 worker ironworker, but for these minutes where I'm doing  
16 the glazier part of that process, I'm getting apprentice  
17 wages? And you have to keep that - - - track of all of  
18 that.

19 MR. DEMUTH: That's right. The contractor has  
20 the duty under the - - - under the labor law to keep those  
21 records.

22 JUDGE GARCIA: But you have approved that process  
23 - - - let's stick with installation of curtain wall - - -  
24 as part of the curriculum for a glazier apprentice?

25 MR. DEMUTH: Okay.



1 JUDGE GARCIA: That's true, right?

2 MR. DEMUTH: Yes.

3 JUDGE GARCIA: Okay. So now let me ask, okay,  
4 now in these - - - this time frame within that process  
5 where I'm doing "ironwork" and I'm a journey worker as an  
6 ironworker, in terms of ratios - - - and I don't pretend to  
7 understand those completely - - - but in terms of ratios,  
8 now do I count as a journey worker, so the employer can  
9 bring in an apprentice ironworker as a one-to-one ratio  
10 with me?

11 MR. DEMUTH: My understanding is you would only  
12 do it - - - the - - - the requirement that you - - - you  
13 pay the journey-worker wage is - - - is - - - is only for  
14 the purpose of making sure you're - - - you're paying  
15 according to the nature of the work performed. It doesn't  
16 affect the ratios, because that would necessarily affect  
17 the safety.

18 JUDGE GARCIA: So you - - - you have to - - - so  
19 you still have to comply with the ratios that I'm - - - I'm  
20 in - - - I'm still be counted as an apprentice for all - -  
21 - I'm in an apprentice program, I'm doing my apprentice  
22 curriculum - - -

23 MR. DEMUTH: Right.

24 JUDGE GARCIA: - - - I'm co - - - I'm counting  
25 towards the ratio that this employer has to comply, but I



1 don't - - - I don't count as a journey worker for the other  
2 side? I don't understand that. I'm getting paid as a  
3 journey worker, but I'm not counting for the employer as a  
4 journey worker for ratios.

5 CHIEF JUDGE DIFIORE: So counsel, allow me to  
6 interrupt for a second on the heels of that question and  
7 how intricate that question was.

8 MR. DEMUTH: Right.

9 CHIEF JUDGE DIFIORE: What level of deference do  
10 we give to the Agency?

11 MR. DEMUTH: Deference is - - - is certainly  
12 appropriate here, and - - - and the Fourth Department erred  
13 in finding a great - - -

14 CHIEF JUDGE DIFIORE: Interpreting a statute,  
15 right, not a regulation.

16 MR. DEMUTH: Yes, deference, which - - - in which  
17 case - - - and the reason why is because this case goes to  
18 the heart of the entire - - - the trade classifications and  
19 the process - - -

20 JUDGE FAHEY: But isn't - - - isn't it the  
21 problem - - - it's the welding problem. You know, almost -  
22 - - almost every profession on a construction site where  
23 you're building a large iron-latticed building, it - - -  
24 somebody's going to do a welding, whether it's an  
25 ironworker or it's a glazier. And - - - and - - - and so





1 the question is, when you're doing that work, does that  
2 mean that they're working out of title or they're working  
3 in title, and within their profession? And the question  
4 for us is, whose call is that to make? Isn't that really  
5 the def - - - the core of the deference problem?

6 MR. DEMUTH: Absolutely, it is, and that's why  
7 deference should have been afforded - - -

8 JUDGE FAHEY: Okay. Are there other concerns  
9 here in terms of - - - are there significant cost savings  
10 to anyone by calling someone who's a - - - a glazier - - -  
11 an apprentice glazier - - - doing ironworker's work? Are  
12 there significant cost savings to - - - to the construction  
13 companies, for instance?

14 MR. DEMUTH: If they were allowed and - - - and -  
15 - - yes. If - - - if they were allowed to continue to pay  
16 the apprentice-wage rates, even if they're doing something  
17 outside of the - - - of the trade that they're registered  
18 to learn, yes, there - - - there would be. And - - - and  
19 we submit that that's probably what - - - that's what's  
20 driving this entire case, because - - - because of a - - -  
21 there's an attempt to kind of revisit what you held in  
22 Lantry.

23 JUDGE GARCIA: Counsel, this law was passed in  
24 '66 or '67 time - - -

25 MR. DEMUTH: Two years - - -



1 JUDGE GARCIA: Two-year period?

2 MR. DEMUTH: It took two years to - - -

3 JUDGE GARCIA: Was this always the interpretation  
4 of the statute for fifty years or whatever it is? You have  
5 always interpreted the statute to mean this?

6 MR. DEMUTH: My understanding, Your Honor, is  
7 that they - - - they've consistently had this policy for at  
8 least thirty-five years, since the early '80s. It's been  
9 on their - - - it's been on their website since 2001.

10 JUDGE GARCIA: So - - -

11 MR. DEMUTH: And - - -

12 JUDGE GARCIA: - - - can you point to anything  
13 before that that shows that they were enforcing this  
14 policy, particularly in any other apprenticeship program?  
15 Any other enforcement action or finds or anything that you  
16 can point us to that shows that the Department of Labor was  
17 interpreting this statute this way for the first thirty  
18 years it was out there?

19 And again, we don't seem to have anything from  
20 the Department of Labor at the U.S. that they were  
21 interpreting it this way. The only case I could find  
22 suggests they don't. But what can you point to, to show me  
23 that when I'm deferring to your interpretation of this  
24 statute, that this isn't something that you thought of the  
25 first thirty years this thing was out there?



1 MR. DEMUTH: I'm afraid I can't point to anything  
2 before the early '80s, but - - - but I'm not sure how that  
3 would render the Department's interpretation of rational -  
4 - -

5 JUDGE GARCIA: Well, you weren't interpreting it  
6 the other way before that, were you? I mean, it wasn't the  
7 way that your opponent suggested to your - - -

8 MR. DEMUTH: No, not to my understanding. But  
9 again, I think just getting right back to the statute and -  
10 - - and that - - - the ambiguity, which is very small - - -

11 JUDGE RIVERA: Can I just clarify that? Your - -  
12 - your position is the ambiguity is bona - - - is what  
13 "bonafide program" means?

14 MR. DEMUTH: It's - - - it's also when is an  
15 apprentice working as such, and - - - and - - -

16 JUDGE RIVERA: Yes, I think - - -

17 MR. DEMUTH: - - - and that term is not to be  
18 applied generically.

19 JUDGE RIVERA: - - - that's really the strength  
20 of your argument.

21 MR. DEMUTH: I'm sorry?

22 JUDGE RIVERA: Yes, that - - - that strikes me as  
23 the strength of your argument. It's not "bonafide  
24 program"; it's "will be permitted to work as such", which  
25 begs the question - - -



1 MR. DEMUTH: Working as an apprentice.

2 JUDGE RIVERA: - - - do you mean an apprentice -  
3 - -

4 MR. DEMUTH: So you - - - so - - -

5 JUDGE RIVERA: - - - in a program or an  
6 apprentice in doing the kind of work that that person is  
7 seeking to learn through the apprenticeship program?

8 MR. DEMUTH: Exactly, Your Honor. So the  
9 legislature - - - you should - - - you don't read  
10 apprentice generically, working - - - before the "working  
11 as such" phrase. You - - - you substitute - - - the  
12 legislature contemplated it'd be a particular program. So  
13 following that example, a glazier apprentice is not working  
14 as such when he's performing work classified as ironwork,  
15 an ironworker apprentice is not working as such when he's  
16 performing work classified as glazier work, and - - - and  
17 the examples go on. So under that interpretation, which -  
18 - - which it was - - -

19 JUDGE STEIN: Can - - - can - - - could you have  
20 - - - require that the - - - the tasks that are part of the  
21 - - - let's see. You - - - you said there's a difference  
22 between a work process and a task.

23 MR. DEMUTH: Yes.

24 JUDGE STEIN: A task is part of a work process.

25 MR. DEMUTH: A task is more of granular - - -



1 granular level.

2 JUDGE STEIN: Okay. So here you have different  
3 tasks within one work process that are - - - that are  
4 performed by different trades, right? So in the curriculum  
5 for the apprentice program for the glaziers, does it have  
6 the - - - the detailed tasks that are only pertinent to  
7 glaziers? Or does it include the tasks that are pertinent  
8 to ironworkers?

9 MR. DEMUTH: Your Honors, there's nothing in this  
10 record, and certainly the plaintiffs have not identified a  
11 single task that they perform within curtain wall that is  
12 actually classified as ironwork. Again, they stay at these  
13 general rubrics, these general head - - - categories. But  
14 even if there were, and - - - and it may - - -

15 JUDGE STEIN: I guess my question is - - -

16 MR. DEMUTH: - - - it may be the case, Your  
17 Honor.

18 JUDGE STEIN: My question is, couldn't the  
19 Department of Labor just go in and say, you're - - - you're  
20 no longer allowed to teach this in your apprentice program?  
21 End of problem.

22 MR. DEMUTH: They could do that. But that - - -  
23 that - - - but that doesn't make it irrational for them  
24 also to be able to say, we want there to be a sufficient  
25 connection between the program that you're in and the trade



1 classification you're working in, because - - - again,  
2 apprentice is being such a vulnerable pot set of - - -

3 JUDGE GARCIA: You have to do, then, I think,  
4 Judge Stein's point is - - - and it seems to me we're  
5 confusing by saying, you know, this goes back to Monarch  
6 and these other cases, and defer to your classifications.  
7 There's two different types of things going on here. You  
8 can classify a task as ironworker or glazier or welder or  
9 whatever and defer to that, and there are two  
10 classifications of pay, let's say, for present purposes,  
11 journey worker or apprentice.

12 And this case seems to me to have some confusion  
13 over those two things. And you do control the rate of pay,  
14 apprentice versus journey worker, through - - - it seems to  
15 me, reading this statute - - - your approval of the  
16 program. So a fair reading to me of this statute is, once  
17 you approve a program for an apprenticeship, one - - - as  
18 long as - - - and it seems a fair reading - - - as long as  
19 that apprentice is working within your approved program,  
20 doing tasks you've approved, they get paid the  
21 apprenticeship rate.

22 MR. DEMUTH: No, Your Honor, I respectfully  
23 disagree with that interpretation. That is indeed, the  
24 limiting construction that plaintiffs have offered. That's  
25 not how the Fourth Department left the statute, but they're



1           trying to offer the limiting construction. But - - - but  
2           the apprenticeship - - - and this is the primary-policy  
3           thing I'd like to get across. The apprenticeship curricula  
4           do not determine prevailing-wage-trade classifications.  
5           And this is actually available, if you look on the  
6           Department's website, for every apprenticeship outline,  
7           they make that clear. They're saying - - -

8                   JUDGE RIVERA: But - - - but let's say this was a  
9           plausible interpretation. Aren't we back to - - - what the  
10          Chief Judge asked before: deference?

11                   MR. DEMUTH: Yes.

12                   JUDGE RIVERA: Your interpretation isn't  
13          irrational and unreasonable against, otherwise, the obvious  
14          import of the law, we defer to you?

15                   MR. DEMUTH: Absolutely. I think deference would  
16          largely dispose of this case, and in the Department's  
17          favor, again, making this small inferential step, and the  
18          phrase "apprentice working as such," which is well within  
19          the Department's interpretive authority. Then you have - -  
20          - you have a rational basis that's not inconsistent.

21                   And again, it's only the Department's  
22          interpretation that really fulfills the two fundamental  
23          goals - - - two of the most fundamental goals. One might  
24          be perhaps the most important, that you pay according to  
25          the nature of the work performed. The plaintiffs' argument



1 would not do that. They want to pay glazier-apprentice  
2 rates for work classified as ironwork. But what you're  
3 essentially doing is you're trying to backdoor - - - you're  
4 trying an end-run around the Lantry case, because you're  
5 trying to reclassify them. You're saying we - - -

6 JUDGE RIVERA: And what's the other goal? You  
7 said there were two. That was one. What's the second one?

8 MR. DEMUTH: Okay, the second one is they've now  
9 kind of backed off that. They're saying, okay, well, let  
10 us simply pay ironworker-apprentice rates when glazier  
11 apprentice does work classified as ironwork. But not only  
12 does that offend what this Court held in Monarch, this  
13 Court was very clear. It actually was upholding another  
14 Department construction of the statute, in that it held  
15 that all workers - - - apprentices - - - all workers  
16 covered by the prevailing-wage law are journey - - - are to  
17 be paid journey-worker wages. It's really - - - the  
18 prevailing wage law recognizes only two types of skill  
19 levels, unless you meet the special requirements of the  
20 apprenticeship statute. So you could - - -

21 JUDGE RIVERA: So everybody's paid as a journey  
22 worker unless they fit an exception?

23 MR. DEMUTH: That's right, so they're second - -  
24 -

25 JUDGE RIVERA: So the default is always a





1 journey-worker pay.

2 MR. DEMUTH: Absolutely. And that's - - - that's  
3 what you held in Monarch.

4 And Your Honor, I want to get back to what you  
5 said at the beginning, this - - - this is an extension of  
6 the harms identified by this Court in Monarch. In Monarch,  
7 it was - - - the concern was - - - the sham training  
8 programs, the people who weren't really apprentices.

9 Here, we have largely - - - maybe perhaps not as  
10 egregious, but we have a similar problem. We have - - -  
11 the way the Fourth Department left the statute, "a" means  
12 any program. A bricklayer apprentice is - - - is permitted  
13 to go out and do electrical work and still get the  
14 apprentice wage rates. And I see - - - but there's one  
15 reason - - -

16 JUDGE STEIN: It also has to do with the  
17 appropriateness of training and supervision, too, right? I  
18 mean, it's not just the wages that are being paid, but you  
19 want to make sure that the apprentices are being supervised  
20 and trained by people within their trade?

21 MR. DEMUTH: Exactly. And that - - - that - - -  
22 that offends that sense and says well, the general idea  
23 that we have these strict ratios is because we want to make  
24 sure they get adequate supervision. So if you have a  
25 bricklayer apprentice registered program, fine. He goes



1 out, the employer says - - - and nobody's saying these  
2 plaintiffs are doing that, but - - - but the interpretation  
3 applied to all - - - and - - - even - - - even the  
4 plaintiffs have admitted there were bad actors out there.

5 CHIEF JUDGE DIFIORE: Thank you

6 MR. DEMUTH: Oh, thank you.

7 CHIEF JUDGE DIFIORE: Counsel?

8 MR. GUZA: Your --

9 CHIEF JUDGE DIFIORE: Counsel, if we were to  
10 affirm, what's the consequences to all the other trades  
11 across the state?

12 MR. GUZA: Well, the consequence is that under  
13 Article 23, which provides the - - - which regulates, along  
14 with the regulations, regulates apprenticeship programs,  
15 they'll be - - - all the other apprenticeship programs  
16 across the state will be able to perform the work that's in  
17 their apprenticeship programs - - -

18 JUDGE WILSON: Well, but - - -

19 MR. GUZA: - - - because - - -

20 JUDGE WILSON: But I - - -

21 MR. GUZA: And if they don't - - - and the other  
22 consequence is, if they don't perform that work, the DOL  
23 will come and deregister their programs.

24 JUDGE WILSON: I want to - - -

25 MR. GUZA: Certainly, it has the authority and



1 the du - - - the duty to do that.

2 JUDGE WILSON: I want to make sure you're  
3 understanding the Fourth Department's holding the way I am,  
4 which is, I think, the way counsel had just explained it.  
5 That is, the Fourth Department says if you're an  
6 apprentice, you can do any kind of work, whether it's in  
7 your curriculum or not. Is that your understanding of what  
8 it held?

9 MR. GUZA: It is, but it's also - - -

10 JUDGE WILSON: And that's not - - -

11 MR. GUZA: - - - as the - - -

12 JUDGE WILSON: And that's not the position you're  
13 - - - you're not defending that, I think.

14 MR. GUZA: Well, I am defending it, but I also  
15 think that there's a reason why that's a rational decision.  
16 And the reason why is in Article 23 of the labor law, and  
17 the regulations thereunder, and the requirements that are  
18 in every apprentice agreement that every apprentice has to  
19 sign, and that are in the standards of apprenticeship and  
20 every apprenticeship program, which is - - -

21 JUDGE GARCIA: But I thought it was fairly clear  
22 from your brief that your position is that as long as  
23 you're doing work in a curriculum, and I think you make  
24 this point a number of times in your brief, that curriculum  
25 is approved by the Department of Labor, for the most part



1 in some consultation with different - - - other pe - - -  
2 folks, that as long as you're doing that work, you are  
3 getting paid apprenticeship rate.

4 MR. GUZA: Exactly.

5 JUDGE GARCIA: I think what Judge Wilson is  
6 asking is, are you defending the interpretation of that  
7 opinion that would say you're working in an electrician,  
8 you know, pro - - - apprentice program, and you just go do  
9 some other task, and since you're an apprentice, we're  
10 going to appren - - - pay you apprentice, you know, pipe  
11 fitting. Go do some pipe fitting for me, and we're going  
12 to pay you a - - - are you defending that interpretation?

13 MR. GUZA: Well, there's really two ways to - - -  
14 two answers to that question. There's one - - - I mean,  
15 looking at the plain meaning of Section 220(3-e), that's  
16 what it says. But that's not what Article 23 says or the  
17 apprentice pro - - - program regulations say. The - - -  
18 the - - - and those are what prevent this parade of  
19 horrors that the Department of Labor is worried about.  
20 They're claiming that all these apprentices from different  
21 programs - - -

22 JUDGE FAHEY: Right, but see, the - - - the way I  
23 understood this, and this is - - - I've been wrong before,  
24 but the way I un - - - understood your point of your - - -  
25 or the core of the argument is, is you've got somebody



1           who's a glazier; he's being paid apprenticeship wages to do  
2           glazier work. When he does ironman - - - ironworker's  
3           work, he gets paid ironworker-journeyman wages - - -  
4           journeyperson wages, and he does not get paid apprentice  
5           wages. What you're saying - - - your position is, with the  
6           Fourth Department that you can pay apprentice wages across  
7           the board, whatever position you're working in. Is that  
8           correct?

9           MR. GUZA: No, not exactly.

10          JUDGE FAHEY: Okay, so tell me what I have wrong.

11          MR. GUZA: So our - - - our position is this. So  
12          under 220(3), there's only two requirements - - -

13          JUDGE FAHEY: Right.

14          MR. GUZA: - - - for being - - - receiving  
15          apprenticeship pay on public-works projects. One, you're  
16          an apprentice registered in a - - - in a bonafide program -  
17          - -

18          JUDGE FAHEY: Right.

19          MR. GUZA: - - - and two, that that program is  
20          registered with the Department of Labor. There's no other  
21          requirement.

22          JUDGE STEIN: Okay, but do you have to be doing  
23          in - - - the way you interpret it, does that apprentice  
24          have to be doing work that is included within the  
25          curriculum for the particular trade in which the worker is



1 an apprentice?

2 MR. GUZA: Well, you do, but it doesn't say that  
3 under 220. It says that under Article 23 of the labor  
4 laws.

5 JUDGE FAHEY: So when I'm a glazier and I'm going  
6 out doing ironworker's work, what wage am I paid under - -  
7 - if I'm an apprentice gla - - - glazier?

8 MR. GUZA: Well, if you're doing - - - so curtain  
9 wall is classified as ironworker's work by the Department  
10 of Labor for prevailing-wage purposes.

11 JUDGE FAHEY: Just straightforward. Is it - - -

12 MR. GUZA: Yeah.

13 JUDGE FAHEY: Do you get paid ironworker's wages?

14 MR. GUZA: You get plaid - - - paid ironworker's  
15 - - -

16 JUDGE FAHEY: Journeyperson - - -

17 MR. GUZA: - - - apprentice rate.

18 JUDGE STEIN: Where does it say that?

19 MR. GUZA: Well, it says - - - it says, in 220,  
20 there are only two requirements for getting paid as an  
21 apprentice.

22 JUDGE FAHEY: Ah.

23 MR. GUZA: That you're registered in a program un  
24 - - - by the D - - -

25 JUDGE FAHEY: But isn't that the core - - -



1 MR. GUZA: - - - and that program - - -

2 JUDGE FAHEY: Let me slow you down a second.  
3 Isn't that core of the dispute, then? The core of this  
4 dispute is that you - - - not that you shouldn't be paid  
5 ironworker's apprentice wages; you should be paid  
6 ironworker's journeyman wages.

7 MR. GUZA: Well, that's the DOL's per - - -  
8 that's the DOL's - - -

9 JUDGE FAHEY: I - - - I understand that. I just  
10 want to know. Do you agree that's the core of the dispute  
11 between the two parties?

12 MR. GUZA: Between the two parties? Yeah.

13 JUDGE FAHEY: And they made a rule - - - they - -  
14 - they made an interpretation that said, apprentices, when  
15 they're working out of their specialty - - - out of their  
16 apprentice specialty - - - they have to be paid like  
17 anybody else.

18 MR. GUZA: Well, I think, though, to say that,  
19 there are conflating two things. And that's why I bring up  
20 Article 23. They're conflating Article 8 and Section  
21 220(3-e) thereunder, and Article 23, which governs  
22 apprenticeship programs. In this case, yes, so they want  
23 to - - - they want to - - -

24 JUDGE FAHEY: The reason I asked the - - - the  
25 reason I asked the question that way is I'm trying to



1 narrow in on the focus of what the dispute is between you,  
2 respectfully. This is the reason I'm asking that, is  
3 because it - - - it seems that if what I've said is the  
4 focus of the dispute, that it's a way to circumvent the  
5 prevailing-wage requirement that's in the Constitution.  
6 And maybe not for everybody, but generally, it would allow  
7 you to circumvent the prevailing-wage requirement. So it  
8 takes on a larger significance than a pure deference  
9 question to the Department. All right?

10 MR. GUZA: I - - - I understand.

11 JUDGE FAHEY: That's why I'm asking.

12 MR. GUZA: I understand.

13 JUDGE FAHEY: Okay. So you want to address that?

14 MR. GUZA: Well, yeah, to follow up on that. I  
15 mean - - -

16 JUDGE FAHEY: Yeah.

17 MR. GUZA: And that's the core of our argument,  
18 that they're - - - it's conflating those two different  
19 articles. And here we have - - - you know, we're told  
20 about this parade of horrors, which I won't get into - -  
21 - it's in the record - - - but - - -

22 JUDGE STEIN: But how can you separate those two  
23 articles? I mean, is - - - isn't the - - - the whole - - -  
24 the - - - aren't the purposes intertwined and so if - - -  
25 if we accept your interpretation - - - for example, how - -



1 - how are they going to enforce the ratio requirements - -  
2 - do we - - - you know, if somebody's working - - - getting  
3 paid as an ironworker apprentice, but they're there as a -  
4 - - as a - - - as a glazier apprentice, how do they count  
5 ratio-wise for one thing, and - - - and how does it further  
6 the whole purposes of the apprenticeship program that they  
7 be appropriately supervised and that they - - - that they  
8 get the appropriate training in their trade? The two  
9 things, I don't see how you can separate them.

10 MR. GUZA: Well, I don't think - - - I don't  
11 think you can separate them, but I don't think they're - -  
12 - that - - - I don't think they are separate. I think - -  
13 - and I think that's irrelevant to what the DOL is saying.  
14 Because if you look at 220(3-e), there's a provision - - -  
15 the sec - - - I believe it's the second sentence - - - that  
16 discusses ratios and talks about how you're - - - you know,  
17 that you're - - - you're limited to the ratios that are in  
18 your registered program. So that addresses the ratio  
19 issue, whenever someone is performing - - - an apprentice  
20 is performing work. You're - - - you're - - - it's the  
21 ratio in your program.

22 Two, you don't - - -

23 JUDGE GARCIA: So when they're doing - - -

24 MR. GUZA: You don't need - - -

25 JUDGE GARCIA: So - - - I'm sorry. So when



1 they're doing ironworker work, let's say, under your  
2 theory, and they're getting paid as an ironworker  
3 apprentice, what would the applicable ratio be? How would  
4 they count?

5 MR. GUZA: I think the ratio would be that the  
6 glazier program that they're in. They're - - - they're  
7 indentured in the glazier program.

8 JUDGE GARCIA: So you would maintain the same  
9 ratio?

10 MR. GUZA: You would.

11 JUDGE GARCIA: Even though I think ironworkers,  
12 if I understand this correctly, have a different ratio than  
13 the glazier.

14 MR. GUZA: I think so; it's slightly different.  
15 You'd maintain that ratio. But you - - -

16 JUDGE STEIN: So - - - so if that glazier  
17 apprentice was doing ninety percent of the work that that  
18 worker was doing on the project, was actually in the  
19 ironworker category, and getting paid as an ironworker  
20 apprentice, the ratio would still count for the glazier  
21 count?

22 MR. GUZA: Because that's the program they're in.  
23 And I mean, it - - - this kind of gets back - - -

24 JUDGE STEIN: But how does - - - well - - - then  
25 - - - then what is its meaning?



1 MR. GUZA: Well, this gets back - - - I mean, you  
2 asked some questions of the DOL, counsel for the DOL,  
3 concerning - - - concerning this very issue and - - - and  
4 the ratios. And he - - - he wants to say that - - - the  
5 DOL wants to say that there are certain tasks - - - tasks  
6 that fall under work processes, but the - - - that's not  
7 what the curricula that are approved by the DOL say. They  
8 say, curtain wall. They say store fronts, they say gla - -  
9 - pre-glazed windows, so this - - -

10 JUDGE STEIN: Well, doesn't that also apply to  
11 private contracts, that curricula - - - curriculum?

12 MR. GUZA: Well, ac - - - act - - -

13 JUDGE STEIN: To which the prevailing-wage laws  
14 don't apply.

15 MR. GUZA: Well, it would, yes.

16 JUDGE STEIN: Okay. So couldn't that have some  
17 purpose and meaning for - - - to that extent, and - - - but  
18 not be allowable in - - - in the context of public works?

19 MR. GUZA: I mean, I don't think so. I've  
20 haven't - - - I mean, I don't see any - - - any distinction  
21 there. I don't - - - I don't - - -

22 JUDGE RIVERA: Well, let - - - let's say we  
23 agreed with you on that one. What - - - why - - - I'm not  
24 really clear, this whole argument about the curriculum.  
25 What prohibits DOL from approving a curriculum that goes



1 beyond whatever are the tasks, the - - - the nature of the  
2 work that they've approved and recognized as falling  
3 within, let's take this example, the glazier - - -

4 MR. GUZA: Well, I don't think anything prohibits  
5 them in any - - -

6 JUDGE RIVERA: - - - training. Why - - - why  
7 can't they do that? But yet they've identified what are  
8 the tasks that a glazier does.

9 MR. GUZA: I think this, in another way, goes to  
10 the core of our argument in the dispute, is that nothing's  
11 stopping it from doing it. In fact, the record is replete  
12 with examples of how - - -

13 JUDGE RIVERA: Yes, but you said the consequences  
14 of that are that then that apprentice can be paid less than  
15 a journeyman - - - a journey worker - - -

16 MR. GUZA: Right, because he's performing - - -

17 JUDGE RIVERA: - - - as long as they doing  
18 something other than, for the purposes of this  
19 hypothetical, a - - - a glazier.

20 MR. GUZA: Right, because he or she is performing  
21 tasks that are included in the apprentice-program  
22 curriculum.

23 JUDGE RIVERA: But that's what I'm saying.  
24 You're assuming that the apprentice program is reflecting  
25 only tasks that a glazier - - - only a glazier does. No

1 one else does those tasks, and I don't think - - -

2 MR. GUZA: No, I'm not presuming that.

3 JUDGE RIVERA: - - - I don't think they've ever  
4 said anything like that.

5 MR. GUZA: No, I'm not presuming that.

6 JUDGE RIVERA: They're not taking that position  
7 about the programs.

8 MR. GUZA: All - - - all I - - - all we're - - -  
9 I'm sorry, Judge.

10 JUDGE RIVERA: Yeah.

11 MR. GUZA: All I'm saying is that those were  
12 processes - - -

13 JUDGE RIVERA: But how can that - - - how can  
14 that not be the consequence of your argument?

15 MR. GUZA: Well, those work processes are  
16 included in - - - in the curricula, and those curricula are  
17 developed in consultation and approved by the Department of  
18 Labor. So, I mean, the reality of this is that this work  
19 is done. I mean, when curtain wall is put up, it's - - -  
20 it's one - - -

21 JUDGE RIVERA: Yeah, but your position really  
22 boils down to the - - - the curriculum should trump  
23 whatever they have classified as the nature of work for a  
24 particular trade or a particular category. And we've  
25 already said they get to decide that.



1 MR. GUZA: Well, I'm not saying it should trump  
2 it, and that's - - - I mean, look. There's all this talk  
3 about Lantry, this is - - - this - - - Lantry is - - - the  
4 DOL brought up Lantry. We've said from the very beginning  
5 of this, we're not challenging Lantry.

6 What - - - what the DOL is doing when it  
7 classifies the work is determining what wage gets paid for  
8 the work, what the rate is. What - - - and we're not once  
9 - - - we haven't once, during this whole proceeding from  
10 the Supreme Court up - - - up till now, asked to be paid  
11 glazier rates. Actually, this was stated that - - -  
12 earlier. We're - - - we're never asked to be paid glazier  
13 apprentice rates - - -

14 JUDGE GARCIA: Isn't the curriculum, counsel, the  
15 approval - - -

16 MR. GUZA: - - - we said we paid the posted rate.

17 JUDGE GARCIA: The approval of the curriculum  
18 seems to me like DOL, in consultation with whomever, is  
19 saying, you need to be - - - you need to have training in  
20 these tasks in order to qualify as a journey-worker  
21 glazier, right? This is a four-year, whatever it is,  
22 program, and it's pretty much broken down into hours and  
23 tasks and processes, and you need training in these things  
24 to qualify as a glazier and then get this glazier journey-  
25 worker rate. That's how I read the curriculum.



1                   But I'd like to go back to a question I asked  
2                   counsel for the Department of Labor. Are you aware of any  
3                   - - - when did you become aware - - - or can you point to  
4                   something - - - when they, the Department of Labor,  
5                   interpreted this statute in the way they interpret it now?  
6                   Is this consistently their interpretation from 1967?

7                   MR. GUZA: I don't believe so. I think the  
8                   earliest is in the record. There's a letter - - - I think  
9                   it's a 2005 letter from - - -

10                  JUDGE GARCIA: I saw that letter.

11                  MR. GUZA: That would be the earliest that I'm  
12                  aware of.

13                  JUDGE GARCIA: Can you point to anything out  
14                  there that shows they had a different interpretation prior  
15                  to that?

16                  MR. GUZA: I can't point to anything, no.

17                  JUDGE GARCIA: Are you aware of how the federal  
18                  Department of Labor interprets their analogous regulation?

19                  MR. GUZA: I'm not, I'm not.

20                  CHIEF JUDGE DIFIORE: Okay, thank you, counsel.  
21                  Counsel?

22                  MR. DEMUTH: Very quickly. On - - - on the point  
23                  of - - - of why the curricula and the morass of different  
24                  things that they contain are - - - are not relevant and do  
25                  not determine the prevailing-wage classifications, Judge

1 Stein, you're correct. There's - - - there's - - - we need  
2 to understand the context in which the - - - and the very  
3 different purposes that the apprenticeship program served,  
4 as opposed to the prevailing-wage classifications that  
5 apply only on public-work jobs.

6 Apprenticeship programs are necessarily going to  
7 be broad and flexible, because they do understand the  
8 majority of these apprentices are going to go out and do  
9 private work, where you don't have to have work divided  
10 neatly into prevailing-wage-classification tasks. But  
11 that's what the Department has to do when they're enforcing  
12 the prevailing-wage law.

13 So we understand that there's going to be  
14 overlap. In fact, overlap is encouraged at that point. We  
15 want to train the apprentice in as many things as possible;  
16 we want them to be as well rounded as possible. But that  
17 doesn't change the fact that, when you're talking about the  
18 enforcement context, it's the tasks that control. And  
19 there's no basis from departing what this Court held in  
20 Lantry, that we're going to adhere to these tasks. These -  
21 - - this is what the Department is - - - is required to  
22 come up with.

23 And - - - and so a work - - - a work process such  
24 as curtain wall is of no benefit in understanding a - - - a  
25 classification. You have to get into the granular level to





1 do these classifications. Curtain wall is useful as a  
2 guideline, as a roadmap, in apprenticeship curricula. But  
3 the tasks - - - when it comes to Bu - - - what the Bureau  
4 of Public Work does, they're looking at, okay, are you  
5 putting metal framing into that curtain wall, then that's  
6 ironwork.

7 But there are a number of tasks that are still  
8 done and classified as glazier work, which if they do that,  
9 there would be no problem with them getting a glazier's  
10 apprentice rates, and that's any type of glass setting, any  
11 type of pressure plate or sealant that's put in that  
12 curtain wall. That's glazier's work. So that's the reason  
13 why it simply can't work that this limiting construction  
14 that they're asking for.

15 Another reason why is, I think, essentially, that  
16 is - - - although they purport not to challenge Lantry,  
17 this is foreclosed by Lantry. What they're seeking - - -  
18 in order for you to agree with their limiting construction,  
19 you'd have to say, in addition to the other things that  
20 you're allowed to consider, the nature of the work tasks  
21 and the collective bargain agreements, you now have to look  
22 at this labyrinthine curriculum, and look and see if  
23 there's anything in common. And that's the way it's been -  
24 - - and that - - - there's, of course, going to be things  
25 in common. That's going to be an administrative nightmare



1 for the Department to figure out. It's adding a  
2 requirement that - - - that you said in Lantry you don't  
3 need. There is - - -

4 JUDGE GARCIA: Counsel, just - - - I'm sorry,  
5 your - - - your light is on, but I - - - I'd like to just  
6 again, looking, as Judge Fahey was saying, is what you  
7 agree and disagree with, it seems to me, and correct me,  
8 please, you agree with your opponent in terms of the ratios  
9 that apply here. So a glazier in an apprentice program, no  
10 matter what that glazier apprentice is doing, com - - - has  
11 to comply with the glazier-apprentice ratios.

12 MR. DEMUTH: That's my understanding. That was  
13 never briefed or discussed. It was never part of any - - -  
14 any of the three years that this litigation has been  
15 ongoing, but I - - - I think that - - -

16 JUDGE GARCIA: That you would agree with that?

17 MR. DEMUTH: Right. And - - - and there, I - - -  
18 I think - - - I think, actually, I need to - - -

19 JUDGE GARCIA: So neither interpretation, then,  
20 is really going to affect how many work - - - journey  
21 workers are there at certain tasks or how many, you know,  
22 apprentices are there. You agree on that?

23 MR. DEMUTH: I don't think it would. But I'd  
24 like to explain that second sentence and - - - and it  
25 doesn't help their argument at all. There - - - there is a



1 kind of a - - - an historical antiquity in that argument -  
2 - - in that sentence, where it talks about the ratio can't  
3 be greater than. That actually reflects back to a time  
4 when there were different - - - for each trade, there were  
5 different - - - and we've explained this in our brief - - -  
6 that there are - - - there were different ratios for each  
7 trade.

8 Actually, in 1995, it was amended - - - the - - -  
9 the Department amended it to now require state for - - -  
10 statewide - - -

11 JUDGE GARCIA: So there were different ratios in  
12 each part of the state?

13 MR. DEMUTH: Right. And that's - - - and it  
14 still reflects that.

15 JUDGE GARCIA: That sentence is lifted from the  
16 federal regulation, so it's hard to see how it was an  
17 anachronism from the state.

18 MR. DEMUTH: Well, I'm - - - that's my  
19 understanding of what that harkens back to, that the - - -  
20 it supports the idea that they had different ratios. But  
21 because that's changed, it's kind of outdated in that  
22 sense, it doesn't support the plaintiffs' argument at all  
23 that, oh, any - - - the phrase "any craft classification"  
24 means that we can freely work outside, so long as we  
25 maintain the ratios. But this - - -



1 CHIEF JUDGE DIFIORE: Thank you, counselor.

2 MR. DEMUTH: Can I - - - can I get one more thing  
3 out, please?

4 CHIEF JUDGE DIFIORE: Yes, you may, sir.

5 MR. DEMUTH: Thank you very much, Your Honor.  
6 There's - - - there's just one overarching - - - again, the  
7 court's task is to - - - to afford this section the most  
8 practical sensible construction. And I want to offer this  
9 to you. I - - - I submit it would make no sense that the  
10 legislature would - - - would - - - and there's no dispute  
11 as to the two requirements about being a registered  
12 apprentice in a DOL-approved program. It would make  
13 absolutely no sense for them to put those requirements in  
14 and then be utterly silent about what trade the - - - that  
15 the - - - whether the apprentice should actually be working  
16 in the trade that's the subject of the program. That  
17 vitiates those two protections.

18 If you have a bricklayer apprentice who's  
19 registered in a DOL-approved bricklayer apprentice, and  
20 then under the Fourth Department's construction, and one of  
21 their constructions, can then go out and do electrician's  
22 work, where - - - where's the benefit of those first two  
23 protections?

24 CHIEF JUDGE DIFIORE: Thank you, counsel.

25 MR. DEMUTH: Thank you.



1 JUDGE GARCIA: I - - - I'm sorry.

2 CHIEF JUDGE DIFIORE: Yes?

3 JUDGE GARCIA: Just to follow up on that.

4 Just to go back to your administrative nightmare,  
5 though, but under your interpretation, they're doing this  
6 process and then they're going to have to keep track anyway  
7 of, you know, this particular thing is a glazier, and then  
8 I'm - - - I'm paying you for this. And then this  
9 particular - - - put the steel rod in here; that's  
10 ironworker work, so you're getting - - - so they're going  
11 to have to do that either way. They're going to have to  
12 keep track of that under your interpretation of where it  
13 is.

14 MR. DEMUTH: Well, that's the employer's job,  
15 Your Honor.

16 JUDGE GARCIA: Right.

17 MR. DEMUTH: That's right in - - - so the  
18 employer does that - - -

19 JUDGE GARCIA: But they have to do that - - -

20 MR. DEMUTH: Right, because - - -

21 JUDGE GARCIA: Even under his interpretation,  
22 though, they would have to do that, because they'd have to  
23 be keeping track of what are they paying apprenticeship  
24 wages for, as an ironworker or as a glazier. So you can -  
25 - - and I think there are blue books or something like



1 that, so why can't you just look at that and see, okay, you  
2 had this person paying, you know - - - you have this person  
3 doing this type of steel-rod implementation on a window  
4 frame. It's the same distinction, it's just what are you  
5 using it for.

6 MR. DEMUTH: Well, it's not the same, Your Honor,  
7 I submit because when you're looking at - - - when you're  
8 looking at what the employer has recorded as these tasks  
9 were done in these trades, it's understood that those were  
10 all the trade classifications. Now, if you accept their  
11 limiting construction, they have to now scour these  
12 apprenticeship curricula. It's - - - it's not just a  
13 matter of looking at the blue book.

14 JUDGE GARCIA: They still have to keep track of  
15 what they're doing.

16 MR. DEMUTH: They have to look at all of these  
17 different things, and some of them will overlap. How are  
18 they going to decide - - - what happens to the  
19 classifications at that point? They - - - they get  
20 undermined, if not destroyed.

21 CHIEF JUDGE DIFIORE: Thank you, counsel.

22 MR. DEMUTH: Thank you very much.

23 (Court is adjourned)

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C E R T I F I C A T I O N

I, Karen Schiffmiller, certify that the foregoing transcript of proceedings in the Court of Appeals of International Union of Painters & Allied Trades, et al. v. New York State Department of Labor, et al., No. 101 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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