In the

Supreme Court of the United States

CORNING GLASS WORKS,	)	
	)	
Petitioner,	)	
	)	
v.	)	Docket No. 73-29
	)	
PETER J. BRENNAN, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
and	)	
	)	
PETER J. BRENNAN, SECRETARY OF LABOR,	)	
	)	
Petitioner	)	Docket No. 73-695
	)	
v.	)	
	)	
CORNING GLASS WORKS	)	

Pages 1 thru 52

Washington, D. C.
March 25, 1974

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CORNING GLASS WORKS, Petitioner	
v.	No. 73-29
PETER J. BRENNAN, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR	
and	
PETER J. BRENNAN, SECRETARY OF LABOR, Petitioner	
v.	No. 73-695
CORNING GLASS WORKS	

Washington, D.C.

Monday, March 25, 1974

The above-entitled matters came on for argument at 10:14 o'clock a.m.,

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM O. DOUGLAS, Associate Justice
WILLIAM J. BRENNAN, JR., Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice
LEWIS F. POWELL, JR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice

APPEARANCES:

SCOTT F. ZIMMERMAN, ESQ., Reed, Smith, Shaw and McClay

[Continued]

APPEARANCES: [Continued]

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and Respondent in No. 73-695.

ALLAN A. TUTTLE, ESQ., Assistant to the Solicitor General, Department of Justice, Washington, D.C. 20530

C O N T E N T S

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments first this morning in No. 73-29, Corning Glass against Brennan and No. 73-695, Brennan against Corning Glass, consolidated.

Mr. Zimmerman, you may proceed whenever you are ready.

ORAL ARGUMENT OF SCOTT F. ZIMMERMAN, ESQ.,

ON BEHALF OF CORNING GLASS WORKS

MR. ZIMMERMAN: Mr. Chief Justice and may it please the Court:

I represent Corning Glass Works, Petitioner from an unfavorable decision of the Second Circuit Court of Appeals and Respondent to a petition filed by the Secretary of Labor from a decision of the Third Circuit Court of Appeals which was favorable to Corning Glass Works.

These cases arise under the Equal Pay Act of 1963, an amendment to the Fair Labor Standards Act. The Equal Pay Act, which is set forth in its entirety on page 5 of our blue brief, provides very briefly that an employer may not differentiate between men and women in the payment of wage rates where they are working on jobs the requirements of which require equal skill, effort and responsibility and are performed under similar working conditions.

The Secretary of Labor has the burden of proof to

show that skill, effort and responsibility are equal and that the jobs are performed under similar working conditions.

Both circuit courts agreed that the Act, the Equal Pay principle has no application unless the Secretary has successfully carried his burden of proof in respect to these elements.

The Act also contains affirmative defenses which we suggest are irrelevant to the issues involved in this case.

Finally, the Act requires that an employer may not reduce wage rates in order to come into compliance with the Act. There are three issues here presented for review.

The threshold issue is whether work on a steady night shift is performed under a similar working condition as work during the day within the meaning of the term "working conditions" as used in the Equal Pay Act of 1963.

As to this issue, the circuit courts of appeals disagreed. The Second Circuit held that the Act was not applicable if working conditions were not similar but concluded that, in fact, work on a steady night shift was a similar working condition to work during the day, applied the Act and held Corning to be in violation of it.

The Second Circuit Court of Appeals held that work on a steady night shift was not performed pursuant to a similar working condition as work during the day and

concluded that the Act was inapplicable.

The two remaining issues are compliance issues which were not reached by the Third Circuit Court of Appeals because it held that the Act was inapplicable.

The Second Circuit did reach these issues and they raised the question of whether Corning's conduct after June 1, 1966, when Corning was able to open all the steady night shift jobs to women, continued to violate the Act.

On June 1, 1966, when Corning made the steady night shift jobs available to women, it was a genuine integration of the jobs because within three weeks after that date, all of the women who had performed work on the steady day shift jobs, which were lower rated, had had an opportunity to accept steady night shift employment on the comparison jobs.

Only the most junior of them took the opportunity to perform that work.

I will discuss the facts in detail relative to each of these issues as I get to them, if I may.

The threshold issue on which the Second and Third Circuit Courts of Appeal disagreed involves identical facts in both cases. Reduced to their essentials, the facts are that only men worked on the steady night shift. Only women worked the day shifts, except during World War II, when the New York District Court found that women had been

employed on the steady night shift and had been paid the higher steady night shift wage rate when they performed the same work as the men.

The higher night shift rate was paid to all people who worked at night, and only to people who worked at night. The lower day shift rate was paid only for work during the day and was paid to all people who worked during the day.

This issue is purely a question of law for this Court involving the interpretation of this statute. The SEcretary in its brief has placed great emphasis upon evidence and findings by the Second Circuit that Corning entertained a deliberate discriminatory intent to pay wages based on sex.

The subjective intent of an employer is irrelevant on this issue. Work on a steady night shift is either performed under a similar working condition as work during the day or it is not. This is a matter of law. Subjective intent should be meaningless on this question.

Why did the Second Circuit conclude as it did that work on a steady night shift was performed under a similar working condition as work during the day? The Second Circuit in its opinion said that the issue was not free from doubt.

Judge Friendly said to me from the bench during

oral argument, "You'd have to pay me twice as much to work at night."

The commonsense understanding of all people is that there is not a similarity between working a steady night shift and working during the day. The medical and sociological theories which we have set forth in detail in our brief in pages 32 to 38, as well as the decisions of the War Labor Board, the decisions of arbitrators, and the decisions of the Court have recognized a substantial difference in these working conditions.

Steady night work, the medical authorities say, has a physical impact upon a human being. The circadian rhythms, as the doctors call them, are affected and disrupted, the bodily rhythms are disrupted by steady night shift work. There is an ascertainable medical effect of the work.

The Second Circuit arrived at the conclusion, which seems contrary to everything that we understand, based upon its reading of the legislative history, the Second Circuit concluded that the words "working conditions" as used in the Act, were used in a technical sense rather than in the common usage of words.

The legislative history relied upon was first the testimony of job evaluation experts who testified before the House of Representatives. These people talked about the

term "working conditions" and they did not address the subject of work on a steady night shift as opposed to day work. They were silent on that.

Judge Friendly of the Second Circuit concluded that because job evaluation plans did not discuss night and day as a difference under the term "working conditions," that the term "working conditions," because these gentlemen testified before the Congress, was used in a technical sense rather than the common usage of words.

Judge Friendly, in the Second Circuit's conclusion, said that these words were used in this statute in a technical sense is squarely inconsistent with the statements of Congressman Goodell. Congressman Goodell was one of the primary and perhaps the primary mover of this statute in the Congress. He read the committee report of the Committee on Education and Labor on this Bill into the Congressional Record.

Just before Congressman Goodell read the committee report into the Congressional Record, he stated on the same page of the Congressional Record a comment which is directly relevant to the Second Circuit's holding as to whether these words were used in the technical sense and this is set forth on page 24 of our blue brief.

Representative Goodell said this: He said, "This bill before us largely adopts my own personal views and most

of the words in this Bill derive from my proposal. I would like to make clear the legislative history and I think the Chairman of the Subcommittee agrees on these points."

Representative Thompson was the chairman of that subcommittee and he was sitting there participating in the debates, as a review of our Addendum A will show.

Thompson did not stand up and say, "I disagree with that."

Goodell went on to say, and this is directly relevant to the Second Circuit's findings insofar as the words being used in the technical sense. Number one, "Skill includes a myriad of factors. It is not limited to just a few. It includes training, experience, education, the qualities of the person himself and a good many other factors that are too numerous to put into the bill specifically so we used a generality in referring to them.

"The same is true of effort. The same is true of responsibility and the same is true of similar working conditions."

The author of the words and the Act, just before he read the committee report into the Congressional Record, stated that these terms and the very term that the Second Circuit concluded was used in a technical sense, that these terms are used as generalities.

Second, the Second Circuit relied upon a

paragraph from the committee report. It is significant that the Third Circuit Court of Appeals had the benefit of the Second Circuit's reasoning when the Third Circuit concluded that the Second Circuit had erroneously read this paragraph and erroneously understood this paragraph in the committee report upon which the Second Circuit relied.

The Third Circuit concluded that representative Goodell had explained the very paragraph that the Second Circuit relied upon in concluding that working conditions did not encompass a steady night shift work as compared with day work, that Representative Goodell had explained this very paragraph in the Congressional Record and this is set forth in our brief at Addendum B-34 where Goodell, immediately prior to reading the committee report into the Congressional Record stated:

"Mr. Chairman, here are examples and general guidelines as to the intent of Congress in enacting HR6060, the Equal Pay for Women Bill," and he listed 15 specific, well-prepared examples of the intent of Congress and they follow and then follows the committee report.

Number 9 which appears on B-35 directly tracks the Second Circuit's -- the paragraph of the committee report relied upon by the Second Circuit and you will see that the Third Circuit Court of Appeals set forth and tracked this material in its opinion and this appears on page 28 of our

blue brief where the Second Circuit Court of Appeals set forth on one side of the page of the Committee Report; on the other side of the page Congressman Goodell's explanation of the paragraph relied upon by the Second Circuit.

He said, Goodell said, "Ninth --" and this directly goes to the question involved in this case -- "Finally, standing as opposed to sitting, pleasantness or unpleasantness of surroundings, periodic rest periods, hours of work, difference in shift, all would logically fall within the working condition factor."

Goodell, explaining this very paragraph relied upon by the Second Circuit explicitly stated that the committee, in reporting this bill out to the House, when it used those words, was referring to the working condition factor.

We think that the conclusion is inescapable, that the Congress specifically intended that work on a steady night shift should constitute a different working condition than work during the day within the meaning of this Act.

The Government has argued to us in its brief that the term working condition means only hazards or physical surroundings. It seems to us absurd. We suggest that work during hours when human beings ordinarily sleep is under a similar physical surrounding as work during hours

when human beings are ordinarily awake.

We don't think that the Act will support that in its language. The legislative history clearly does not support that. The medical and sociological authorities, the War Labor Board decisions, the decisions of arbitrators, there is no support in these authorities for this proposition.

We respectfully request on this issue that the Second Circuit Court of Appeals be reversed and that this Court affirm the decision of the Third Circuit Court of Appeals, that work under a steady night shift is under a different -- is not under a similar working condition as work during the day within the meaning of the Act.

The remaining two issues involve questions, assuming a prior violation of the Act by Corning Glass Works --

QUESTION: Before you get to those, Mr. Zimmerman --

MR. ZIMMERMAN: Yes, sir.

QUESTION: Supposing that we were to conclude that the difference in shift does represent a working condition. Does that end the judicial inquiry, even though a finder of fact might conclude that notwithstanding the difference in working conditions, there was actually some sex discrimination built into the actual pay raise?

MR. ZIMMERMAN: Your Honor, in my judgment, it clearly does. The Secretary has raised the question in its brief that even if working conditions are similar, that

nevertheless the Act applies. I don't think that this can be supported on any basis.

First, a reading of the plain language of the Act, I think, will lead you to conclude that this should be rejected.

Second, the Secretary's regulations which are set forth in our red brief -- I believe it is on page 8 -- specifically state that in order for the Equal Pay standard to apply, the jobs must be performed under similar working conditions.

In other words, the Equal Pay standard, according to the Secretary's own regulations, simply doesn't apply unless skill, effort and responsibility are equal and working conditions are similar.

The legislative history also fully supports this and I think an even more significant reason supports it, your Honor, and that is reason, because there would be a profound effect upon the application of the Equal Pay Act if the Secretary's view of this issue were to be accepted and that is this:

Courts would be forced to judge whether a difference in skill, effort or responsibility or a difference in working conditions was justified or justified the difference in pay. That would mean the courts would be placed in the position of, in effect, evaluating the jobs,

judging the wage bargain struck by labor and management, and the Secretary could compare any jobs simply by arguing that the difference in skill was not commensurate with the difference in pay and I think that is the logical conclusion that you arrive at, at which you must arrive if you adopt that position.

Now, in addition, your Honor, I think it ties into your question, the Secretary has argued that because Corning Glass Works in 1944 agreed with the Union to pay a steady night shift differential designated in the contract, that that necessarily precludes a defense in this case.

Well, as far as I can see, that may go to the issue of intent. These jobs were created long prior to 1944 and this rate differential was planned on the base rate and was created in the years 1925-1930. I don't think the existence of that shift differential which came into existence in 1944 proves anything, particularly when you consider the fact that when the shift differential came into existence in 1944 the New York District Court had found that women were working on the steady night shift receiving the higher steady night shift base rate and the shift differential, too. So at that time both men and women were getting it because at that time the New York protective legislation permitted women to work at night during World War II.

The second two issues are compliance issues. They

were only reached by the Second Circuit Court of Appeals. They weren't reached by the Third Circuit, which agreed with us on the threshold issue and thus did not reach the compliance question.

The facts that underlie the first compliance issue are as follows: On June 1, 1966, the steady night shift jobs were opened to women. This was by agreement of Corning with the unions with which it bargained. I am referring now only to the facts in the New York case because they are the only facts that are relevant to these issues.

By June 20, 1966, every female who worked in the day shift jobs had the opportunity to accept employment on the steady higher-rated steady night shift inspection job. It was a genuine integration.

Now, there were only four women during the year 1966 who accepted work on these jobs but those four were the most junior employees, female employees -- three of those female four were the most junior/employees working in the steady day shift jobs. Under the plant rights seniority system in effect in Corning, New York, all of the other women who were senior to these girls who took the job, had the opportunity to take it and turned it down.

The Second Circuit reached the conclusion that -- I beg your pardon. Let me go back for just a moment if I

may. After that date, June 1, 1966, Corning did not differentiate on the basis of sex. The statute on its face was not violated. Corning didn't treat men differently than women after June 1. Corning didn't reduce the rates of anybody. It simply opened the jobs and paid women who worked on those jobs the higher rate. There was no rate reduction in terms of the reduction proviso, at least in terms of the language on it.

The Secretary has contended successfully in the Second Circuit that after that date, Corning continued to violate the Act because by opening the jobs to the women, it violated the proviso of the Act which states that an employer may not reduce the wage rates of an employee in order to come into compliance with the Act.

Really, that is the only way that the Second Circuit Court of Appeals could have reached that conclusion because clearly applying the language of the Act to those facts, there is no violation. It had to conclude that the reduction proviso was somehow violated.

How did it reach the conclusion that when nobody's wage rate was reduced, that the reduction proviso was violated?

It reached that conclusion on the basis of the legislative history. With respect to that, I just have two things to say.

First, we believe that resort to legislative history is improper where the statute is not ambiguous. Judge Friendly of the Second Circuit Court of Appeals did not find that the proviso precluding the reduction of wage rates was ambiguous.

We suggest that the Second Circuit's definition of the term "shall not reduce" to require that employers must increase the lower-rated job is not even a credible definition of the term.

The Second Circuit erred, and this is the reason why the Second Circuit made the mistake it did. The Second Circuit erred because it relied on legislative history which all occurred -- and this is the sole reliance that appears in the Second Circuit's opinion -- it relied on legislative history which all occurred in discussions concerning HR3861 which appears at Appendix C of the brief.

Now, HR3861 didn't become the Equal Pay Act. If you look at page C-5 of our brief, you will see that HR3861 specifically requires that wage rates of the lower rated job be raised to the high rated job over a two-year period of time. HR3861 -- and these are the discussions that the Second Circuit relied upon to compel -- to say that the rate reduction proviso requires that the lower rated job be increased -- states "Except where such payment is made pursuant to --" I beg your pardon. It says, "Provided that

an employer who on the date of this enactment is paying a wage differential which would be in violation of the Act on its effective date may adjust the lower wage rate as follows:" And then one, two, three, and the third one says, "Two years after the effective date of this Act, any remaining wage differential shall be removed."

So HR3861 specifically required the raising of the lower rate.

Judge Friendly of the Second Circuit -- I'm not sure whether they made the connection. It doesn't appear that they did -- they relied on that legislative history under that Bill which didn't become law, to say that the reduction proviso meant that you had to raise the rates.

Now, if you look at the legislative history and see the development and the evolution of this statutory language from HR3861 through to 6060, HR6060 which ultimately became law and that appears also in an addendum to our brief, you will see that this was a compromise, that both the Secretary of Labor -- Mr. Wirtz at that time -- and Congressmen were unhappy with the prospect of forcing employers to raise their wage rates, one. Two, the wanted to leave more latitude to the free processes of collective bargaining to resolve these problems because these types of problems which can involve seniority, can involve job bidding tendencies of employees, can raise serious questions in terms of industrial

relations for an employer and the Congress specifically pointed out a number of different locations and we have cited those in our brief -- that they wanted to reserve latitude to employers and unions to comply with the Act in a way which made sense in terms of their industrial relations situation. So they said, you must not reduce the rates of anybody.

We believe that you will find that the legislative history read as a whole favors the view that Congress intended to allow unions and companies to work out compliance within the terms of the restriction and the prohibition of the reduction proviso.

The statute required two things, that there be no differentiation on the basis of sex where the work is equal. Clearly, if there had been before, there was not after June 1, 1966.

The second thing the statute said was, "Do not reduce anyone's wage rate." We complied with both of the mandates of the statute.

The third issue involves conduct subsequent to January, 1969. Its legal aspects are similar to issue two.

I have very little time left and I would like to save the time that I have remaining for rebuttal. I think that issue three is adequately covered in our brief. I think that the legal precepts which are applicable to it are

largely derived from those which I have discussed in issue two.

Thank you.

MR. CHIEF JUSTICE BURGER: Very well, Mr. Zimmerman.

Mr. Tuttle.

ORAL ARGUMENT OF ALLAN A. TUTTLE, ESQ.,

ON BEHALF OF SECRETARY OF LABOR

MR. TUTTLE: Mr. Chief Justice and may it please the Court:

We believe that the Equal Pay Act forbids an employer to pay a higher base wage to men working at night than is paid to women doing the same work during the day when certain other conditions obtain.

That is, when that higher base wage paid to men working at night is paid in addition to a regular plantwide shift differential compensating all employees for night work.

QUESTION: Do you think there is any impediment in this Act to a straight differential for night work?

MR. TUTTLE: Absolutely not.

QUESTION: Compared to day work.

MR. TUTTLE: And that is -- the burden of my first few moments remarks is to try and make crystal clear, if I can, to the Court that the Secretary does not challenge the propriety of paying night differentials and indeed, there are some here.

I'd like to mention a second condition which we think makes this base wage illegal. In addition to the fact that this base wage which we are challenging is added on to a shift differential, there is the fact that it is historically shown to have been paid to induce men to do what the men considered female work.

Now, no one, least of all the Secretary of Labor, doubts that night work is more burdensome and in Corning's brief, you will find discussions of circadian rhythms and such things. We agree with all of that, that night work can be more burdensome, can be more psychologically stressful. And the Secretary has never questioned Corning's right to pay a night shift differential.

QUESTION: You do not concede that that is a working condition, though, as I understand it.

MR. TUTTLE: We do not concede that it is a working condition. The Act provides, in addition to a definition of equal work, provides a number of additional justifications for inequalities in pay and these can be under a system of rewarding merit or quantity or quality of production or any other factor other than sex and we would argue that time of day work is clearly a factor other than sex, which would justify a pay difference.

We do not believe it is a working condition because of the technical way in which we believe that term is

used in the Act.

Now, the Secretary's own regulations do recognize the propriety of paying night shift differentials and in fact, Corning has paid its night workers a shift differential since 1944. At the time of the trial, the shift differentials in this case, night shift differentials for regular non-rotating night work was 16 cents an hour and it is not questioned in this lawsuit.

We believe that the most crucial point that we would like to leave with the Court today is the fact that that 16 cents per hour, the negotiated shift differential, is not challenged in these lawsuits. We believe it is entirely proper and justified as a factor other than sex justifying a wage difference.

The pay difference we do challenge is a wholly different pay difference and we believe it is one that arose in a context in the setting which shows it to have been sex-based and illegal under the Equal Pay Act.

Now, a little of the history has been suggested to you already but there are a number of other factors which we believe require mention.

In 1920 to 1925, Corning did not have a night shift. It had a day and an afternoon shift and the women did all of the inspection work and they were paid about 20 to 30 cents an hour for that work.

When it became necessary to hire men for the night shift -- and that was necessary because of state protective laws forbidding women to work at night -- Corning started paying the men 53 cents an hour to do the same work, exactly the same work, and Corning's own witnesses testified that this was because the men just wouldn't work at the women's wage, that they considered inspection work demeaning, that they considered it feminine work and they would not work unless they were paid the going male wage, which they received.

Now, we think it is perfectly clear from this record that that double pay had nothing to do with the fact that the work was being done at night and we consider the proof of that the fact that in all of Corning's other jobs, in the all-male jobs, precisely the same pay was received on all three shifts and it was only the men doing the demeaning female work who got a bonus, who got paid twice what the women got for doing the inspection work.

Now, in 1944 Corning was unionized and did begin to pay a regular plantwide shift differential. At the time, that was 5 cents an hour but that differential was simply tacked on top of the higher base wage they were already receiving.

Now, the men inspectors at night were getting two premiums, one for doing female work and another for doing it

at night.

QUESTION: Mr. Tuttle, when we are talking about a night shift, is that the traditional swing shift, or is it a graveyard shift?

MR. TUTTLE: It is a 12:00 to 8:00 --

QUESTION: 12:00 to 8:00.

MR. TUTTLE: -- regular nonrotating night workers, 12:00 to 8:00.

Now, I want to stress again, perhaps too often, that that second differential, the regular night shift differential, is not challenged in these law suits.

Now, in 1944, after Corning was unionized, it undertook a process of systematic job evaluation. We consider this systematic job evaluation, done with outside consultants, to be of critical importance in this law suit, for two reasons. One, because it shows that Corning itself evaluated the day and night inspection work as equal and secondly, because as I'll be showing in a minute, Corning's own definitions of job evaluation were explicitly adopted by Congress when it was defining equal work in the Equal Pay Act.

When Corning evaluated day and night inspection work and gave points to every factor in the job, they gave exactly the same number of points to the day and the night work. They continued to pay a higher rate to men but they themselves evaluated the jobs as precisely equal in all

respects and most significantly, they evaluated it as equal in respective working conditions and working conditions Corning defined as physical surroundings and hazards and not, I should say, time of day work.

Now, the Equal Pay Act contains a definition of equal work which requires that the work be performed in a situation which requires similar or equal skill, effort and responsibility and that it be performed under similar working conditions.

It then has the exceptions that I mentioned, merit, seniority, quantity or quality of production or a factor other than sex.

Now, Corning's principal contention here today is that the same work performed at night and performed during the day is not performed under "similar working conditions" as that term is used within the Act. Corning concludes from this that the Act is simply inapplicable to it, no matter how discriminatory and sex-based its wage structure might be.

We think that the legislative history here shows that Congress knowingly adopted a technical meaning and a scientific meaning for the word, "working conditions." Since Congress explicitly adopted the language of job evaluation such as Corning, we believe that it adopted the word "working conditions" in the sense in which it was used and

is used to this day in job evaluation.

The original Bill, the original Equal Pay Bill, would have called for equal pay in circumstances where work was performed with equal skill.

Now, industry representatives objected to this. They claimed that it failed to take account of the relevant factors in job evaluation. Mr. Hester, who was at the time Corning's director of Industrial Relations Research, testified before Congress and he urged Congress to adopt the language of job evaluation and the elements of job evaluation. He said, skill is not enough. There are other factors to be considered and he urged Congress to define equal work in terms of skill, effort, responsibility and working conditions and he went further; he explicitly told Congress what working conditions were.

"Working conditions,"he said, "comprise the sub-factors of physical surroundings and hazards."

Now, time of day work is not a working condition within the language of job evaluation. One of Corning's other experts testified at trial that time of day work is what they call a wage condition. It is like working Saturdays or Sundays or working overtime but it is not a working condition as that is defined in systematic job evaluation.

Now, in response --

QUESTION: Are you suggesting that really, as

used in this statute, the term working condition means something different from what it means in the broad area of collective bargaining?

MR. TUTTLE: Well, I am saying that it had over the years acquired a specialized technical meaning that was incorporated into the Act. We are not suggesting for a moment that night work is not something other than day work and we are not suggesting for a moment that somebody who works at night shouldn't be paid, as Judge Friendly said during the argument below, "twice as much."

We are not concerned with the amount and that is a question for negotiation between the parties and here at the time of these lawsuits, the parties had negotiated a 16 cent per hour difference, for that difference.

QUESTION: Would your case be any different if the testimony before Congress about the meaning of working conditions had come from somebody other than a Corning witness?

MR. TUTTLE: No, no, that is just a cute element. We think that it is interesting and therefore brought it out in the briefs and here. No, what is important is what Congress did and if it had come from United States Steel, the question would still be, what was presented to them and what they did with what was presented to them.

QUESTION: Other statutes, other labor statutes

have the term working conditions. The National Labor Relations Act, for example. What you are saying to us, I gather, is that the meaning in that Act, of working conditions, is different because here it was given --

MR. TUTTLE: A specialized meaning.

QUESTION: -- specialized in the context of evaluation.

MR. TUTTLE: Yes, and I would like to elaborate --

QUESTION: That, then, is a narrower definition than would be given the same term in the National Labor Relations Act?

MR. TUTTLE: I think that is true, yes.

QUESTION: Mr. Tuttle, how do you dispose of Congressman Goodell's comments that Corning places such great reliance on?

MR. TUTTLE: I can't dispose of them, Mr. Justice. There is no question that he said what he said what he said. I think that our feeling is that this was a single remark by one Congressman who was not the sponsor of the Bill.

QUESTION: Well, when you say that, you say not the sponsor of 6060? He certainly was interested in this legislation, was he not?

MR. TUTTLE: He was involved in the legislation and in fact had introduced a Bill which differed in the

respect that it would have called for work under equal working conditions and not similar working conditions.

QUESTION: I doubt if you can relegate him to the back seat in Congress as an --

MR. TUTTLE: No, I don't propose to do that. What I do want to do is call your attention to certain suggestions and direct statements in the House Reports which we think show a direct response to the testimony that I have just outlined. The Bill, as you know, was amended to define equal work in just the terms that I have mentioned and that Mr. Hester mentioned, equal skill, effort and responsibility and the Congressional Reports specifically show that the language of job evaluation was deliberately adopted, thus in the House Report it was said, after they defined equal work in terms of the factors I have mentioned, "These factors will be found --" the report said, "In the majority of the job classification systems. Thus it is anticipated that a bona fide classification system that does not discriminate on the basis of sex will serve as a valid defense to a charge of discrimination."

Now, the Second Circuit found this persuasive as an explanation of how this Bill took shape and the Third Circuit ignored it altogether, focusing instead upon the remarks of Congressman Goodell, which have been outlined to you and our submission is simply that where a technical term

is deliberately adopted by Congress, it ought to be considered and it ought to be considered to have been used in the technical fashion.

QUESTION: Suppose hypothetically the Court should find that the night and day difference is, in fact, a working condition under this Act? Where does that take you in this case?

MR. TUTTLE: It takes me to my next point, Mr. Chief Justice.

QUESTION: All right.

MR. TUTTLE: Which is that even if the Court should find that time of day work were a working condition, we believe that under the peculiar circumstances of this case that the jobs are nonetheless equal. Now, it is plain that the higher base rate which I have described is a sex-based wage. As Judge Friendly said below, the plain fact is that the differentials here at issue arose because the men would not work at the low rates paid to women daytime inspectors to perform what the men called "female work."

QUESTION: You don't suggest that that is an attitude in industry generally on the part of employees in factories?

MR. TUTTLE: No, we are not making any suggestion about any other employer than this one and we are really, you have to go back into the history to even get this attitude.

This payment arose in the 1920's and '30's. It has historically been carried forward. I don't know what Corning's subjective motivation is now but a tradition was established where men were paid more. What Corning's attitude is towards women may have changed, but the fact is, they still discriminate against them. Now --

QUESTION: Well, is this alternative argument applicable also?

MR. TUTTLE: Excuse me?

QUESTION: Is your alternative argument also applicable to the Pennsylvania plant?

MR. TUTTLE: Yes.

QUESTION: Is there a similar record?

MR. TUTTLE: Oh, the records are virtually identical. The only difference is that the Pennsylvania court, having found --having defined this -- having determined this was not a working condition --

QUESTION: Well, suppose we should disagree with you on that?

MR. TUTTLE: Suppose --?

QUESTION: Supose we should agree with the Third Circuit that it is not a working condition?

QUESTION: That it is.

QUESTION: That it is a working condition.

MR. TUTTLE: Then you should consider whether or

not the factor here -- you see, our contention is that the factor of night work where it is separately compensated for by a negotiated difference is effectively eliminated from the Act as a consideration in evaluating the quality of the work.

Our contention -- our submission is that working conditions of time as a working condition are made similar by the fact of a payment of a discreet and complete separate compensation for that element.

The New York case, for instance, the District Court said in considering this question, "We believe that the element of working less desirable night hours was, in the language of the Court, taken care of by the fact of a payment of a plantwide shift differential.

Now, I'd like to suggest that --

QUESTION: Mr. Tuttle, I am still puzzled -- is there any difference between these two cases on this argument you are now making?

MR. TUTTLE: There is no difference on this argument.

QUESTION: Well, but you do have different records, don't you? I mean, so far as I could tell from the reports said, the District Court in Pennsylvania didn't get into the factual detail that the District Court in the Western District of New York did.

MR. TUTTLE: Well, once you -- if you were to

decide with us that time of day work was not a working condition, or if it was a working condition, that it was out of the case because it was separately compensated, then you would have to look at the record in that case to consider Corning's other defenses and the record is factually, in some respects, different. There is, in the Pennsylvania case, some evidence of difference in effort required in one of the job classifications, any how.

And it would require a further study of the record, although there have been supplemental findings made which would enable a determination to be made on all of Corning's defenses.

I wanted to add on this --

QUESTION: Mr. Tuttle, while you are interrupted --

MR. TUTTLE: Yes?

QUESTION: Let's put aside the peculiarities of the Corning case here, such as the claim that no matter what, the differential originated as a sex determination. Just in the ordinary case, what difference would it make whether a shift differential which you concede is warranted -- I take it you concede that higher pay for night work is not a violation of the Act.

MR. TUTTLE: Of course.

QUESTION: Now, what difference does it make whether you say the reason that it isn't is that it is a

working condition or that it is under the other more general --

MR. TUTTLE: You mean, the factors other than sex?

QUESTION: Yes.

MR. TUTTLE: Well, if you were to conclude that it was a working condition and if you were to reject my argument with respect to separate compensation taking that difference out of the case, then you would conclude that the Act was inapplicable.

Whereas, if you look at the factor other than sex justification and analyze this case and try and decide whether this difference is justified by a factor other than sex, I assure you, you will conclude that it is not.

QUESTION: Well, I know that is this case, but normally if you -- if a union and management negotiate for a separate identifiable additional compensation for night work, applicable to everybody who works at night, I take it that you would agree that --

MR. TUTTLE: I wouldn't be here.

QUESTION: Now, why would that differential not violate the Act?

MR. TUTTLE: Well, because --

QUESTION: And would it make any difference which answer you give, whether because it is a working condition or it is not a sex-oriented factor?

MR. TUTTLE: Only if you have the peculiar

historical anomaly, which you have here, of two different differentials.

QUESTION: All right, only then in a unique case such as this?

MR. TUTTLE: I think this case is quite unique. I am hard put to think of too many other circumstances where you will have a separately compensated factor where the difference in the value of that factor has been separately negotiated.

QUESTION: Supposing you have a shift differential where people on the night shift get $6 an hour, people on the day shift get $3 an hour, and you also show that the day shift is 50-50 men and women, the night shift is 90 percent men, 10 percent women. Now, under your version of the Act, is the Secretary or a private suitor entitled to have a factual finding as to whether what purports to be a shift differential, in fact, has a sex component in it?

MR. TUTTLE: No, I don't think so. One of the things I wanted to suggest is that I don't think our interpretation puts the court in the business of job evaluation. Here it is not the Court but it is the parties who have -- the Corning and the Union -- who have separately negotiated and agreed on the value of night work and they agreed on that when they negotiated a value of 16 cents an

hour for everyone doing night work. The only people who were getting 16 cents an hour, plus another 20 cents, are the people on the night shift doing the inspection job, doing the women's work at night and it is a case where the parties themselves have agreed on the value of that element and I don't think it will put the courts in the business of comparing loss of wages or deciding on what a fair wage is.

I have only a few moments left and I'd like to move to the second point, if I may, which is Corning's argument that it complied with the Act when -- well, it argues that assuming the jobs are equal, as we have argued, that Corning achieved compliance with the Act in June of 1966 when it began to permit women to bid for regular jobs on the night shift as vacancies occurred.

I should note they weren't able to simply move into those jobs. They had to wait for vacancies and then exercise their seniority.

Now, every appellate court that has considered this argument has rejected it. They have all rejected the contention that an employer can comply with the Act without equalizing wages, which is what Corning argues that it has done.

Now, the declared purpose of the Equal Pay Act is to correct depressed wages and living standards caused by the historic undervaluation of women's work. President

Kennedy said of the Act that it was designed to provide reasonable levels of income for women and in order to provide this, the Act has a -- what we have called the "No-reduction proviso." It doesn't allow you to achieve compliance by reducing anybody's wage and we submit that what that means is that you have to equalize the wages without reducing the preferential hire wage and that means to raise the lower wage to the level of the higher and indeed, the House Report on this case -- on this Act explicitly says that the lower wage must be raised to the level of the higher and that House Report has been relied upon repeatedly by the Courts that have found that that is what is required for compliance under this Act.

Now, we think the day inspection rate for women is demonstrably a depressed female wage. You can see this by looking at the record. For instance, although Corning has historically valued, when it began systematic job evaluation, has valued day and night and man and woman inspection work equally, it has always paid the women less for work that they value as equal; not only has it paid them less, but it paid the women less than male utility workers whose job evaluation points are even lower than the lowest woman inspector.

Our submission is that the vice of unequal pay for equal work can't be cured by allowing some but not all of

the persons receiving the lower wage to bid for an opportunity to do the same work at a higher wage. The Equal Pay principle is not satisfied by allowing some of the daytime inspectors to bid for an opportunity to do the same work at night at a higher wage. All the other daytime workers -- and in this case the record will show they are virtually all women -- in 1968, 211 were women and 3 were men on the daytime shift -- virtually all of these women are left receiving a depressed wage which is precisely what the Equal Pay Act was designed to remedy and in fact, there is even evidence of a more direct violation of the no-reduction proviso here because the record shows there are some instances where men earning the higher pay at night were transferred to the daytime shift and there they got the lower wage.

Now, I don't think that the discussion of the history of H.R. 3840, which you heard, indicates anything different about what is required by the Act because that Act, 3840, although it had a stepped system of raising wages, was not so terribly explicit that wages always had to be raised because it had a system of negotiated compliance which might have allowed, in certain circumstances, a negotiated compliance where the lower wages were not necessarily raised to the level of the higher and this feature, the absence of a flat ban on reduction, was criticized in this Bill and after it was criticized, the

Bill was redrafted to contain the flat ban against reduction which is now part of the Equal Pay Act and it was after that that the House said the lower wage rate must be raised to the level of the higher.

Cornings last argument is that it achieved compliance in January 20 of 1969 when it set new rates for all three shifts, day, afternoon and night and the rates were equal and of course, we agree that in January of '69, if that is all Corning had done, it would have achieved compliance. But Corning did not stop at this point. At the same time and by virtue of the same agreement, it established, retroactive to November 4th, a higher wage for nighttime inspectors, the higher retroactive rate being even higher than the January 20 rate.

It then red-circled those rates which is to say that it provided that any night shift inspector with seniority on January 20, 1969 would continue to receive the retroactively-established higher rate, even after the January 20th rates came into effect.

QUESTION: Well, absent the red-circle rates, would you be here?

MR. TUTTLE: You mean with respect to after January, '69? No. No, of course not. We agree that the leveling of the rates is exactly what is required, or would have been required but what we say is, this is simply a

technique, a device to perpetuate the same discrimination.

QUESTION: Well, let's assume with the red-circle rates that after a certain date, everybody was receiving the same pay.

MR. TUTTLE: No. No, what happened --

QUESTION: No what?

MR. TUTTLE: I am sorry, what happened is that on January 20 --

QUESTION: No what? Would you be here if everybody after a certain date had been receiving --

MR. TUTTLE: We would only be here for back pay.

QUESTION: How far back?

MR. TUTTLE: Well, there is a stipulation amongst the parties in the New York case that if back pay is owing, it is owing since November 1st of '64.

In the Pannsylvania case --

QUESTION: To whom?

MR. TUTTLE: -- which was brought later, it is --

QUESTION: Owing to whom?

MR. TUTTLE: Owing to the employees who received the discriminatory wage, the daytime inspectors.

You see, this is an amendment to the Fair Labor Standards Act .

QUESTION: I understand that.

MR. TUTTLE: It is a part of the remedies under

the Act, as I am sure, Mr. Justice, you are aware, is that where you have been paid a substandard wage, you can get back pay.

QUESTION: No, but I just wondered who would be entitled to back pay?

MR. TUTTLE: We believe that the day time inspectors are entitled to back pay.

QUESTION: Back to '60 --

MR. TUTTLE: Back to '64. They have all been receiving at least 20 cents or in the neighborhood of 20 cents less an hour.

QUESTION: And --

MR. TUTTLE: For work which is rated and by hypothesis is equal -- I mean, by hypothesis --

QUESTION: And also I suppose, night time inspectors who don't have the grandfather higher pay.

MR. TUTTLE: Well, there aren't any of those since January 20 because there were so many people on layoff that it is going to be some time before anybody gets this night time January 20 raise. They are all getting a higher raise and we believe that it is perfectly clear that this was not intended, as Corning has suggested --

QUESTION: And when was night time inspection opened up to everybody?

MR. TUTTLE: In New York, June 1 of '66.

QUESTION: In '66. Now, at that time, all nighttime inspectors were not being paid the same, were they?

MR. TUTTLE: No, nighttime inspectors received the same rate.

QUESTION: All of them?

MR. TUTTLE: Yes.

QUESTION: Even after -- when the nighttime differential went in, I thought that --

MR. TUTTLE: Well, the nighttime differential went in in 1944.

QUESTION: Yes.

MR. TUTTLE: The initial higher --

QUESTION: All right, how about the plant-wide --

MR. TUTTLE: In 1944 was when they adopted a plant-wide differential. It was in 1925 through 1930 that when men first went on night work they were paid a double wage. Twenty years later, in 1944, the night workers began -- not only night inspectors but everybody began to get a plant-wide shift differential and we have no quarrel with the shift differential. But the first differential has been maintained, one way or another, up to this very day.

QUESTION: Well, I agree with that.

QUESTION: Well, I thought you said '66 it all leveled off.

MR. TUTTLE: In 1966 women were allowed to

exercise their seniority.

QUESTION: I thought you said that, except for the night differential, all wages for comparable work leveled off.

MR. TUTTLE: No, no. Both differentials remained in effect until January of '69 and in January of '69, they established an equal wage on all shifts. Of course, there was still a night shift differential and that would have been compliance but for the fact of the red-circling of those rates.

QUESTION: So that on the same shift people were getting different pay.

MR. TUTTLE: No, because there was no one getting the January 20 --

QUESTION: The plan was that they would.

MR. TUTTLE: Eventually. Eventually. After January 20 of 1969.

QUESTION: Mr. Tuttle, if the red-circle system had not been taken care of from '69 on, would there have been an economic strike?

MR. TUTTLE: I'm sorry. Would you repeat the question?

QUESTION: If the red-circle system had not been --

MR. TUTTLE: Imposed.

QUESTION: -- carried on from '69 on, would

Corning have been subjected to an economic strike?

MR. TUTTLE: There is nothing in the record on that.

QUESTION: What do you think?

MR. TUTTLE: It would be speculation on my part. Our point with respect to that rate is -- I don't think there would have been because I think that since it is a subterfuge, it could have been explained -- it could have been avoided by explaining to the union that here we are required by federal law to achieve an equality and we are doing it and there is no way that we can protect a higher wage for you men working at night without being in violation of federal law and I don't think the union would have found that to be of sufficient basis to engage in an economic strike.

I have taken more than my time. I appreciate the Court's indulgence.

MR. CHIEF JUSTICE BURGER: Very well, Mr. Tuttle.

Mr. Zimmerman, do you have anything further?

REBUTTAL ARGUMENT OF SCOTT F. ZIMMERMAN, ESQ.

MR. ZIMMERMAN: Yes, I do, if I may, your Honor.

May it please the Court:

Basically, the Secretary's argument seems to be that it depends on what you call it. If you call the differential pay for night work a shift differential, it is all right, the Secretary says. It is not going to look behind

that word to see what the intent really was. I think Justice Rehnquist's question was a good question and showed the fallacy in the what-you-call-it argument.

The what-you-call-it argument is, I think, purely a semantical argument and without substance.

The Secretary spent approximately 10 minutes in the course of his oral argument discussing Corning's deliberate discriminatory intent in 1925. It would be a great injustice to have these cases turn on Corning's intent in 1925 when none of the witnesses who testified even worked for Corning Glass Works in 1925 and all of the testimony -- and there were only about three lines on this subject -- was pure speculation as to why Corning had to pay this higher rate.

The same witness who said that also speculated -- who said that the Government has suggested that it was paid in order to induce men to do this work which they regarded as demeaning female work. The same witness also said that it was paid in order to persuade them to work the undesirable hours and it was paid for a number of other reasons.

Now, I don't think that this case should, under this Act, turn upon how you label the rate differential. I don't think that the subjective intent of the employer has any relevance at all to the question of whether this is a working condition. I think that all of the evidence and all of the legislative history and the plain meaning of the

language of the Act will support it.

Certainly, there is a duty -- as Mr. Justice Brennan pointed out when he inquired after the term "working conditions" as used in other federal statutes. When Section 8(a)(5) of the National Labor Relations Act states that employers and unions have a duty to bargain over wages, hours and working conditions, I think that a union man and a management man in the National Labor Relations Board would burst out laughing if you were to suggest that work on a steady night shift if not a working condition out of which a duty to bargain arises.

Clearly, it is. I mean, this term as used by the Congress previously is -- clearly encompasses this term.

QUESTION: Well, if we were to hold that there may be a differential, whether unilaterally fixed by the employer or negotiated with a bargaining contract, under a bargaining contract, does that get you home free?

MR. ZIMMERMAN: Your Honor, I don't think so. I think the issue to which this Court must address itself or should address itself, I would suggest, is the question of whether work on a steady night shift is a similar working condition within the meaning of that term as it is used in the Equal Pay Act to day work.

Now, it is interesting enough that in the Congressional Record, Congress addressed itself to the problem --

to the question of the meaning of attaching this Act as an amendment to the Fair Labor Standards Act, Equal Pay Act.

It said -- and this deals directly with the Secretary's argument -- Mr. Goodell said, on page B-27 of our Addendum to our brief, "We do not expect the Department of Labor people to go into an establishment and attempt to rate jobs that are not equal. We do not want to hear the Department say, 'Well, they amount to the same thing,' and evaluate them so that they came up to the same skill in point."

Now --

QUESTION: I am lost a little bit, Mr. Zimmerman, I confess. Mr. Tuttle said that of course he agrees that a night shift can be paid a different rate from the day shift and you have spent a good deal of time in both your brief and your oral argument to that same effect.

Now, if you both agree on that, then it might not be difficult for the Court to agree with you. I am not sure, but it might not be.

MR. ZIMMERMAN: Well, I've been --

QUESTION: But I don't understand your last answer that seems to suggest that it does solve the problem and then it seems to go the other way, that it doesn't solve the problem.

MR. ZIMMERMAN: Well, perhaps I didn't fully appreciate the significance of your question, your Honor. I

think perhaps I have been thinking about this problem in terms of analyzing the statutory language so that I failed to appreciate a question ordinarily stated to me.

I think that a differential based -- I think that a difference in money which is paid for work on a steady night shift and only for work on a steady night shift, is not unlawful under this statute regardless of how it is labeled.

QUESTION: Well, I thought Mr. Tuttle agreed with that.

MR. ZIMMERMAN: Well, if he does, then I don't know why we are in this Court because I think that he has rejected that as a solution to this case.

QUESTION: You had two different ones. One was 16 and one was 20 more.

MR. ZIMMERMAN: Yes, your Honor.

QUESTION: Are you going to get to that?

MR. ZIMMERMAN: Well, I will, your Honor.

The history of this rate is interesting and I think I can state it briefly. In 1925, Corning Glass Works began to produce ware, its product, in such great quantities that it could no longer inspect it all during the day. Previously, it had been able to perform all the inspection work during the day, although as hot glass plants, as you can imagine, are working on rotating shifts around the clock,

but the inspectors were able to work during the day.

Women performed this work. Women were not permitted to work during the night because both in Pennsylvania and New York, New York and Pennsylvania protective legislation prohibited the employment of women at night.

The hours during which this night shift was established exactly coincided with the New York and Pennsylvania laws. The hours were 10:00 p.m. at night to 6:00 a.m. in the morning. They hired men to do it. Women could not be hired because of the New York law.

There was a difference in base rate paid. You can speculate as to the reasons. I don't think that this record will support that anybody really knows, with any degree of certainty at all, why this was done in 1925. There weren't any people around to testify who were in positions of authority who had any idea.

This rate differential continued through 1944 when Corning Galss Works was organized by the American Flint Glassworkers Union in both its Pennsylvania and New York plants. When the union organized the company and sat down and negotiated a contract in 1944, the contract provided for wage increases over and above the existing rates that were already paid so the result was that they applied a two or three percent wage increases to the existing base rates and solidified into the contract the prior differential that

had been paid only for steady night work and the record shows that the women received it when they worked during World War II.

This contract also provided for the first time a shift differential. Now, the union didn't go back and say, since we are negotiating a shift differential, we are going to let the company take this money back that it has been paying these steady night shift workers. It cemented that rate into the contract. The shift differential was applied on top of it and the shift differential was thereafter received by everybody.

The steady night shift differential and base rate which had its origin in 1925 was also received by everybody who worked at night and only by people who worked at night.

Now, on a deposition, a witness -- oh, I see --

MR. CHIEF JUSTICE BURGER: Go ahead. We need to know a little more about this.

MR. ZIMMERMAN: On deposition, a witness was asked the question, and this was a witness who was not employed by Corning Glass Works until some time in the very late 1930's, 1939-1940 -- was asked the question by the Government, why did Corning Glass Works pay this higher rate in 1925? Fifteen years before he went to work there, and he responded by saying a number of different things, one of which was -- "And I suppose that the men who were skilled glassworkers

considered this inspection work to be demeaning female work."

The Second Circuit hung its hat on that comment and the Government has lambasted us with it through two circuit courts of appeal. I think it would be a great injustice to have this case turn upon that kind of speculation when all of the objective evidence in the case shows that it has been paid only for work on a steady night shift and never for work during the day.

MR. CHIEF JUSTICE BURGER: Very well, thank you, gentlemen.

The case is submitted.

[Whereupon, at 11:19 o'clock a.m., the case was submitted.]