In the

Supreme Court of the United States

International Brotherhood Of Teamsters, Petitioner, v. United States, et al., Respondents.		
and		
T. I. M. E.- DC, Inc., Petitioner, v. United States, et al., Respondents.		No. 75-672

Washington, D. C.
January 10, 1977

Pages 1 thru 81

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IN THE SUPREME COURT OF THE UNITED STATES

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, Petitioner, v. UNITED STATES, et al., Respondents.	No. 75-636
and	
T.I.M.E.-DC, INC., Petitioner, v. UNITED STATES, et al., Respondents.	No. 75-672

Washington, D. C.,

Monday, January 10, 1977.

The above-entitled matters came on for argument at 11:06 o'clock, a.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, 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
JOHN PAUL STEVENS, Associate Justice

APPEARANCES:

ROBERT D. SCHULER, ESQ., Matheson, Bieneman, Parr, Schuler & Ewald, 100 West Long Lake Road, Suite 102, Bloomfield Hills, Michigan 48013; on behalf of T.I.M.E.-DC, Inc.

L. N. D. WELLS, JR., ESQ., Suite 200, 8204 Elmbrook Drive, Dallas, Texas 75247; on behalf of the International Brotherhood of Teamsters.

LAWRENCE G. WALLACE, ESQ., Deputy Solicitor General, Department of Justice, Washington, D. C. 20530; on behalf of the Respondents.

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P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in 75-636 and 672, Teamsters against United States and T.I.M.E.-DC against United States.

Mr. Schuler, you may proceed whenever you're ready.

ORAL ARGUMENT OF ROBERT D. SCHULER, ESQ.,

ON BEHALF OF T.I.M.E.-DC, INC., PETITIONER

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

I represent the company in a consolidated case which involves also Petitioner International Brotherhood of Teamsters. I wanted to make a preliminary comment. We have not filed a Reply Brief in this matter because of the press of time. Without intending any criticism, we received the brief of the government on December 21st, and its original due date had been September 10th, I believe.

If the Court believes that it is desirable, we will submit a Reply Brief.

This involves a claim against a nationwide trucking company that has terminals in -- that has 51 terminals throughout the country; and it is a claim under Title VII of the Civil Rights Act of 1964, that T.I.M.E.-DC and its predecessors have been guilty of discrimination in the assignment of minorities to lower-paying jobs than non-minority employees. Discrimination by refusing transfer and maintaining a seniority

system under contract with the International Brotherhood of Teamsters that perpetuates the effect of discrimination.

The Teamsters were also charged with being parties to a contract that locks in the effects of prior discrimination.

This suit was filed in early 1971, and as the amicus brief on behalf of the NAACP group indicates, three Justice Department attorneys spent a year and a half developing evidence. They were aided by the Post Office in obtaining copies of compliance reports by T.I.M.E.-DC. They received aid from the EEOC in the form of complaints that had been filed with the EEOC, and they received aid from the FBI in copying over a thousand documents in the possession of T.I.M.E.-DC, whose files were willingly opened for the examination by the FBI and the Justice Department.

We are also told in that amicus brief that there were 60 depositions, 150 witnesses, in addition to the deponents, were interviewed by the Justice Department attorneys, and that the Justice Department itself copied over a thousand documents.

I mention this only to point out that this case received the full benefit of the plaintiff, the Justice Department, in presenting evidence as to a pattern or practice of discrimination and in presenting evidence not only as to liability but also as to remedy.

Then, at the trial, there was a consent decree that took care of the issues of back pay, which we think is a very significant feature. And in regard to that, virtually all of the persons who were entitled to back pay accepted the back pay and signed releases. The other issue taken care of by the consent decree was the issue of future hiring, and the company agreed to hire minorities for all of its job classifications at all terminals on a one-to-one ratio with non-minorities.

The consent decree specifically left open whether there was in fact discrimination by the company and the identification of discriminatees, if any, who were suffering presently from the past effects of discrimination.

At the trial the Justice Department submitted a list, in response to the request of the district court, of the discriminatees for whom specific relief was sought.

Immediately following the trial, the district court also asked the Justice Department for a list of all of the discriminatees, including class discriminatees, for whom relief was sought. And such a list was submitted in June of 1972.

It is significant to note that that list, which is shown in the Appendix, has the names of each of the individuals who are in the alleged class of city employees at those terminals where T.I.M.E.-DC has road operations, and beside each of their names is an indication that the relief sought

-- in virtually all cases -- the relief sought is a transfer to a road position with seniority for competitive status as of the date the person originally became an employee of the company.

QUESTION: Where -- on what page of the Appendix is that list?

MR. SCHULER: Your Honor, that is in Volume I of the Appendix, page 195.

QUESTION: Thank you.

MR. SCHULER: The very first person listed there is a man named J. F. Johnson, of Hayward, California, terminal; the relief sought for him is to be offered a vacancy in a line driver job on the basis of his company seniority date. Mr. Johnson was not a witness at the trial.

QUESTION: It begins on page 191, doesn't it? Or not?

MR. SCHULER: Page 191, Your Honor, is the first list that was submitted at the trial, --

QUESTION: Unh-hunh.

MR. SCHULER: -- of persons for whom individual relief was sought.

QUESTION: I see.

MR. SCHULER: Apart from class relief.

QUESTION: It starts on 196.

MR. SCHULER: Well, Your Honor, I was asked about what appeared on page 191, and that was the first list that was

submitted at the trial of those for whom individual relief was sought. The later list, at 195, is the list submitted after trial in response to direct request by the district court of all discriminatees, class and individual.

The district court conducted a trial on all issues of liability and remedy, and ordered relief in the way of finding the company guilty of discrimination based upon statistical evidence in the testimony of those who did testify at the trial plus deposition testimony.

The district court then awarded relief in the remedy stage, which was combined with the liability stage, to three categories, on Appendices A, B and C.

The first two consisting of individuals who had testified or had been deposed, who were given awards of -- the right to transfer and awards of seniority as of the effective date of the Civil Rights Act of 1964.

The third category, the so-called Appendix C, authorized transfer of all minority city employees to road vacancies based upon taking competitive status seniority with them as of the date they entered the particular road vacancy.

Now, on appeal, the Circuit Court of Appeals completely dismantled the decree of the district court. The Circuit Court, first of all, viewed the proceedings below as being a bifurcated trial. And replete in the Circuit Court decision are references to the liability stage of the trial,

and that proof should have been saved to the remedy stage of the trial, as if there were going to be another trial contemplated by the district court.

This is definitely not the case. Everything that was done in that district court proceeding was in the nature of proving or disproving liability as well as remedy. The Circuit Court of Appeals then set aside the Appendix A, B and C lists and the relative awards of seniority, and indicated, in line with previous decisions that all the city employees who were on the Appendix C list were to be -- and the other list as well -- were to be considered and to be given full competitive seniority upon transfer to the road.

In our view, the Circuit Court erred seriously in several respects, and the view of the government is not sound for several respects, as well.

First, on the issue of --

QUESTION: Before you proceed there, I want to be sure I understand. The Court of Appeals order, that the seniority be given, even though that seniority might have -- the beginning of employment might have antedated the enactment of the Civil Rights Act of 1964?

MR. SCHULER: The -- you mean the --

QUESTION: Let's say somebody was hired in 1960, he was given seniority beginning with 1960?

MR. SCHULER: That is correct. His full seniority, to

antedate the --

QUESTION: Is that issue still in the case?

MR. SCHULER: Yes, I believe it is, Your Honor. We take the -- because we take the view that the -- even if we assume, arguendo, liability, that the proper remedy is to reinstate the district court decision which would limit the amount of seniority --

QUESTION: To the effective date of the Act.

MR. SCHULER: -- to the effective date of the Act.

QUESTION: Maximum.

MR. SCHULER: For one class, and to later dates for the two other classes, on Appendices B and C.

QUESTION: Did the Court of Appeals, in according seniority, include bidding and layoff rights as requested by the government?

MR. SCHULER: Yes, it did, Your Honor. They -- it was exactly as the government had requested, based upon prior decisions in cases such as Bing vs. Roadway, the so-called qualification date of seniority.

QUESTION: So that amounts to what is sometimes called bumping?

MR. SCHULER: No, it does not amount to bumping, Your Honor, because persons --

QUESTION: There has to be a vacancy?

MR. SCHULER: There has to be a vacancy --

QUESTION: Right.

MR. SCHULER: -- before a person under the Fifth Circuit view can move in with qualification date seniority.

QUESTION: Right.

MR. SCHULER: The thing I do want to emphasize is that we believe that liability must be proven in a case such as this, not just through statistics. We believe that your decision in McDonnell Douglas indicates that statistics are merely helpful. And that the legislative purpose is not for racial balance but simply nondiscriminatory hiring after 1965.

We have pointed, throughout our brief, to the statistics that will show that, by the government, that there were simply so many people in certain jobs as of March of 1971. We believe the burden was on the government to show what happened between 1965 and 1971. How many openings were there for jobs, and how were those filled, and were they filled in a discriminatory or a nondiscriminatory manner?

That proof was not put in. I will not go into all of our counter statistics, but we believe that we showed there was a definite decline in business and in job openings from 7200 to 6400 employees from 1967 to 1972, and yet the utilization of minorities went from 7 percent in 1967 to 10 percent in 1971, and today there are 16 percent minorities on the payrolls of T.I.M.E.-DC.

Now, the other evidence of liability was said to be

massive by the Circuit Court, and to be in support of the statistical evidence.

Twenty-one terminals were involved. At 11 terminals there was no evidence at all, by any witness. At ten terminals there were depositions of 34 witnesses, and they were mostly at four places: Atlanta, Nashville, Memphis and the two Los Angeles terminals.

QUESTION: Mr. Schuler, on this point you are challenging the findings of the district court as well as of the Court of Appeals, is that right?

MR. SCHULER: That is correct, Your Honor.

QUESTION: Let me ask, Mr. Schuler: You are conceding there is some testimonial evidence. Your case was not decided exclusively on statistical evidence.

MR. SCHULER: That is correct, Your Honor.

We raise the statistical evidence point for several reasons: one, we do not believe the court has made a definitive statement as to whether statistics themselves may be completely dispositive of the case; secondly, we believe the statistics were the major reason for the decision here.

Turning again to the other evidence, --

QUESTION: Before you do that, it's possible to hypothesize a case where there has just been no new hiring since 1964, and so you look at the labor force in 1975 and see that it was all white; but that that wouldn't be any evidence

whatever of a violation of the '64 Act.

MR. SCHULER: That is our reason, one of our main reasons, for saying that the statistical evidence was deficient, in addition to the other things.

There was one man that we indicated, a man named Stinson, who had in fact applied in San Francisco, and there were no openings after his time of application until the time of the trial.

The time I had reserved for direct comments is up. In this proceeding I am reserving five minutes for rebuttal.

Thank you.

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

Mr. Wells.

ORAL ARGUMENT OF L. N. D. WELLS, JR., ESQ.,
ON BEHALF OF INTERNATIONAL BROTHERHOOD OF
TEAMSTERS, PETITIONER

MR. WELLS: Mr. Chief Justice, if the Court please:

The Teamsters Union has been found to have violated the Title VII of the Civil Rights Act by only the entering into and enforcement of a collective bargaining contract, which provided seniority rights to employees represented by the union.

There is no other evidence, nor is there any other contention, as to any unlawful act by the Teamsters.

I want to address myself to two matters in this oral argument. One, is there a violation in so far as Teamsters are

concerned of Section 703(c), which is the provision of the statute which defines a union unlawful activity. We say there is not.

I then want to address myself to the question of proper remedy if the employer has indeed violated the Act.

I want to put it in context. Unions don't hire people; employers do. The federal law, for some time, has restricted unions with respect to hiring halls, et cetera. Most of T.I.M.E.-DC operations are in right-to-work States, where there is just flat prohibition against the union doing anything with respect to hiring or allocation of employees.

So the sole responsibility, with respect to hiring an allocation, is the employer's.

Now, who is this employer? He has 1800 road drivers on the nation. He has 2600 city people, dockmen, hostlers, city drivers. He has 400 of those 2600 who are either blacks or Spanish-speaking Americans -- I'll call them "browns" in this argument.

The 400 -- well now, let me back up just a moment as to what was done below.

There was evidence by way of statistics that showed horrible statistics, certainly as of the time that the Act was passed, and very little improvement up to 1971, but some improvement.

QUESTION: Well, they weren't horrible so far as the

federal law went, putting aside Section 1981, prior to 1964, were they?

MR. WELLS: Prior to 1964, of course, they could not have violated the Act, which was --

QUESTION: It might have been morally horrible in some people's opinion, but they were certainly not illegal, were they?

MR. WELLS: And this, of course, is not a 1981 case. And they were not illegal.

QUESTION: Right.

MR. WELLS: They were bad from a moral point of view, certainly, and they were bad from the point of view of the theory of this statute.

We say, however, that any statistics are to be judged not as of 1964, when the Act was passed, or '65 when it became effective, but after 1965, when it became effective. And the statistics here are what the situation was in 1971. Now, they don't mean anything unless you have a baseline against which to judge them.

Now, in addition to the statistics, there were some 50 people, individuals, claimed to have been discriminated against out of this, some 400 of the minority people, and perhaps a few --

QUESTION: They were all in the city units, were they?

MR. WELLS: Yes, sir, they were.

QUESTION: Yes.

MR. WELLS: Some may have been in the mechanics unit, but at least they worked in the city and they didn't work on the road, and there were very few people who did work on the road.

Now, --

QUESTION: Yes, there were very few minority people, if any, who worked on the road, is what you mean?

MR. WELLS: That's correct.

QUESTION: Yes.

MR. WELLS: There were two or three, but a minimal amount.

QUESTION: Yes.

And how many did you just tell us had claims of actual discrimination, in your view?

MR. WELLS: Well, counsel referred to those two pages in the record.

QUESTION: Yes.

MR. WELLS: The first was a list of some 20 or 30 people who they claimed were individual discriminatees. The second is a list of every minority person, who they claim was a class discriminatee. And they claim, the government claims, that inasmuch as there was a pattern in practice of hiring and job allocation by the employer, that that rubbed off on

every one of the 400-some-odd blacks and browns, and they all were victims of discrimination.

QUESTION: And they were all, even in the government's view, they were all employees of this employer, weren't they?

MR. WELLS: Yes.

QUESTION: None of them was -- there's no plaintiffs here who claim discrimination in that they were not hired at all, are there?

MR. WELLS: In this case, at this stage, we're talking about punitive transferees and not about --

QUESTION: And all of them are employees of this defendant employer?

MR. WELLS: Yes.

Now, the period from 1965 on was a period of merger of some, of a great number of other freight lines, T.I.M.E.-DC was coming from a little one down in Texas to a big one that went nationwide. And they were taking on other people's rights and other people's employees. And so it was not a period of hiring from the outside. As a matter of fact, the number of employees went down when they were merging into this national situation.

So, as far as the union would view the matter, there were less employees and a larger percentage of minorities during this period. So unions were certainly not on notice of any gross disparate hiring practice from and after the period that

the Act --

QUESTION: A higher percentage on the road?

MR. WELLS: A very little higher percentage on the road, very few people --

QUESTION: So it didn't affect that at all.

MR. WELLS: -- only three or four people, Mr. Justice Marshall; very few.

But they weren't hiring on the road then, as far as this record shows.

QUESTION: But in all of this period you're talking about, that number didn't increase?

MR. WELLS: Perhaps two or three, but minimally.

But the point was they weren't hiring, and that the statute prospectively applies to -- requires that hiring and job placement not be discriminatory. And their statistics don't go to that issue.

But I want, against that background, for the Court to understand what happened below.

The district court did what we understand is the proper approach, although we don't agree with some of these findings. He looked at individuals and he found that 30 of them were the victims of discrimination. He found that four or five others were probably discriminated against, but he couldn't be real sure, but there was enough of an indication that he was going to give them some relief, but less.

He found that six or eight of them just flat were not discriminated against, and he found, as to the three or four hundred others, that there was no evidence at all that they were the victims of discrimination.

Now, he did find that the statistics and the 30 people that he had found out of 6,000 who were discriminated against did amount to a pattern of practice, and the employer, as Mr. Schuler has indicated, had entered into a consent decree which took care of their back pay obligation and which provided for future injunction and provided for hiring on a quota basis, 50/50, and that left for the district court's determination: who were the victims of the discrimination, and what was the remedy?

And he found, as I have indicated, there were these 30-some-odd that he gave transfer, city to road; he gave seniority from the effective date of the Act. With respect to the smaller group that were possibly discriminated against, he permitted transfer, but less seniority. With respect to the large group, as to whom there was no evidence of discrimination, he at first issued an order saying: You can go to the road along with any white people on a 50/50 basis. But then he entered an amended order in which he said, in effect -- or said specifically that these three or four hundred people could go to the road ahead of other people.

Now, he did, however, -- we think he erred in that

last instance, but he did focus --

QUESTION: You said "ahead of other people", you mean ahead of any new hiring?

MR. WELLS: No. On his amendment, Mr. Justice Brennan, he said "ahead of the white city people".

QUESTION: I see.

MR. WELLS: And we think this was error.

But we get to the Court of Appeals. They jettison this approach of individual discrimination. They said that statistics plus the individual findings here amounts to pattern and practice. And they don't understand that we have tried damage and -- liability and damage both below. Somehow there originates in the Court of Appeals some idea that this is a bifurcated trial, which it was not, if you will look at the pretrial order, if you will look at everything in the district court, it was just not bifurcated.

But the Court of Appeals says a pattern and practice is shown here. There is a seniority system which perpetuates that pattern and practice. Everybody who is minority gets to move to the road to a vacancy and gets full carryover seniority provided only that he shows that he is qualified.

Now, we say that there is error there.

We say, in the first place, that --

QUESTION: I thought seniority -- as of the date the person was transferred to the road, the seniority he would

have, effective as of that date, would reach back to -- how far, under the Court of Appeals?

MR. WELLS: Under the Court of Appeals, if a man became the city man in 1950, --

QUESTION: Yes?

MR. WELLS: -- he would have 1950 road seniority, and while he would go to --

QUESTION: I see. Effective as of the date he actually -- that there was a vacancy on the --

MR. WELLS: He would go to the next vacancy on the road, that's correct. But then when you set that in the context of the contract, where runs are up for grabs every six months or every year, he would go to the top of the road list, --

QUESTION: Exactly.

MR. WELLS: -- under the Court of Appeals' opinion, although there is no evidence at all that he was a victim.

QUESTION: Well, yes, but the 30 that the district court identified as having been discriminated against would be in that position, under the district court's --

MR. WELLS: However, the district court specifically found --

QUESTION: Although they --

MR. WELLS: -- when they applied or when they had filed a EEOC charge or when they had opted to go to the road. And the district court did what was one in the Franks case here,

there was some definition of when the seniority would start, and didn't go clear back to the first time he went to the city.

QUESTION: He went back to '65, did he?

MR. WELLS: Only to '65.

QUESTION: For the 30; for the 30?

MR. WELLS: Yes, sir. Well, then he went to specific dates, depending on what they showed in those periods.

QUESTION: But no farther back than '65?

MR. WELLS: That's correct.

QUESTION: And the probable ones back to '71 or something?

MR. WELLS: Yes, sir. That's correct.

And this large group --

QUESTION: Well, how about this large group that would go in ahead of others, of white city -- what seniority would they have?

MR. WELLS: They would have seniority --

QUESTION: As of that date?

MR. WELLS: -- as of the date they went into -- they go into --

QUESTION: I see.

MR. WELLS: But of course they blocked whites from going in.

QUESTION: Then the Court of Appeals, in effect, just said all of them are going to have the same seniority?

MR. WELLS: That's correct. There's a --

QUESTION: Mr. Wells, is that right? Isn't it --

QUESTION: The principle, the rule would be the same.

MR. WELLS: The principle that they indicated was that what the district court had done in focusing on individuals was an error; that once you find, in a pattern and practice case, that there has been a pattern and practice of discrimination, then everybody is a victim. It has to go back to the district court to find out when the particular victims were qualified.

Now, we say nobody is a victim until he proves the --

QUESTION: Yes, but who gets -- under the Court of Appeals view, who would get the first crack at the first opening?

MR. WELLS: I am not sure they are clear about that. They said they didn't agree with the A, B and C lists, and that --

QUESTION: Well, wouldn't that depend on the --

MR. WELLS: --it was going to have to go back to the district court to find out.

QUESTION: Would that depend on their unit seniority? Or do you know?

MR. WELLS: Well, I -- the Court of Appeals says the whole works will get all the seniority that they had in the city, provided only that they were qualified.

QUESTION: I understand that. But who gets the -- who occupies the first positions that open up?

MR. WELLS: The Court of Appeals didn't tell us that.

Now, we have seen --

QUESTION: Mr. Wells, before you go on, could you just clarify something for me? Even under the Court of Appeals approach, it's necessary to make individual determinations as to qualifications, is that it?

MR. WELLS: Only that, yes, Your Honor.

QUESTION: And they may be different dates, of course. It could be different groups for different --

MR. WELLS: Yes.

QUESTION: Now, under the district court analysis -- I want to get the difference between the two as best I can -- what was the test the district court applied to determine whether or not an individual was a "victim"? Was it whether he made an application, or was there some other test?

MR. WELLS: He didn't talk in terms of his test, he didn't spell them out, except as you may derive them from what his findings were with respect to each person. He had evidence that somebody had made an application, or that somebody had filed an EEO charge, or that somebody had indicated that it was futile to do so because his buddy next to him had asked to go on the road and had been told that he couldn't go on the road.

He had specific evidence like that, which he geared to the findings and he did what you would expect a chancellor to do, he stated that --

QUESTION: Well, let me change the question just a little bit, and then, I don't mean to interrupt, but --

MR. WELLS: Sure.

QUESTION: You disagree with the Court of Appeals approach of qualification, what do you say is the correct test of whether an individual should get relief?

MR. WELLS: I think that the test is forty years of experience under the Labor Act, which this Court has said is the model on which Title VII was drafted. I think anybody who is going to show an application or some option to go on the road, some wish to be there, who is going to show it at a time when he was qualified, who is going to show that there was a vacancy, and when he shows it against a background of --

QUESTION: Well, would it be correct to summarize is that they should show, in addition to qualification, either a specific application or a specific reason for not applying at a given time?

MR. WELLS: Yes, indeed. As a matter of fact, following generally what the Court said in McDonnell Douglas or what forty years of experience under the NLRB has indicated.

My lights are flashing here, if the Court please,

and there's something I really want to get to in my case in chief.

This union didn't do a thing but enter into a seniority system which the government now concedes is a bona fide system.

We take 30 or 40 pages in our brief showing why it's bona fide, how it developed, and so on. And so we have what everybody agrees is a bona fide seniority system, and the issue is: Is it unlawful to apply a bona fide system here, when the employer, if you find that the employer engaged in a pattern and practice?

Now, we say, we analyze it two ways: we say, No. 1, that pre-Act it is not. Conceivably, there may be problems under 1981, but the legislative history that this Court talked about in Franks made very, very clear that the statute is prospective, that they couldn't have gotten the statute passed unless they had put 703(h) in the statute. And so it may be unfortunate, the Congress may have made a bad judgment, but the Congress made a judgment that the seniority listing, as of July of -- as of June of 1965, is the way it's going to be, and what is going to happen is in prospect with respect to the application of this law.

So now I address myself to the period that comes after the effective date of the Act.

This Court, in Franks, gave the answer there. Anybody

on July 3, 1965, the day after the Act was effective, who wanted to go on the road could go on the road and this seniority system did not stop him. All he had to do was ask. And if he didn't get it, and if he could make the showings that would be required under the criteria that I've adverted to, if he doesn't get it, he has Article 38 in his contract which gives him a grievance then, a contract remedy; if he doesn't like that, he's got the remedy which this Court gave in Franks, to go on that road any time.

Now, it's a --

QUESTION: There has to be a vacancy, doesn't there?

MR. WELLS: Well, I can conceive of a situation where there's a gross showing that -- of a discrimination, where there may not even have to be a vacancy. I would go that far. Although the courts generally, I think, have properly --

QUESTION: You mean he could bump someone out?

MR. WELLS: No. It would be hard for me to assume a state of facts, but I can assume a state of facts where he might do that, where the fellow he was bumping out was really profiting from the discrimination.

But, under Franks, as I understand it, you've got an equitable problem in terms of -- you've got to take some account of the people who are in those jobs.

QUESTION: Well, what seniority would he take with him? None?

MR. WELLS: He would take the seniority that he would have had, had there been no unlawful discrimination. [sic]

Now, if he applied on January 4th of '65, he would take that, at such time as there was a vacancy thereafter, within a period of time. If there was a vacancy and if there were the other criteria shown.

I'm sorry, my time has gotten away from me; I want to reserve some time for rebuttal, if I may.

Thank you.

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

Mr. Wallace.

ORAL ARGUMENT OF LAWRENCE G. WALLACE, ESQ.,

ON BEHALF OF THE RESPONDENTS

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

The government has filed a single brief on behalf of the United States and the Equal Employment Opportunity Commission in this case, and in the companion case to be heard next, the Rodriguez cases. These briefs represent the mature views of both the Equal Employment Opportunity Commission and the Department of Justice.

I wish to apologize to the Court and to the parties again that it took as long as it did, in light of our other responsibilities, to arrive at this position. But we have been able to file a unified brief representing those views.

MR. CHIEF JUSTICE BURGER: If Mr. Schuler wishes to file a Reply Brief, we will leave that entirely up to him.

MR. WALLACE: We have no objection.

MR. CHIEF JUSTICE BURGER: But he has that leave.

MR. WALLACE: The petitioners have filed --

QUESTION: You are parties in this case and not parties to the next companion case.

MR. WALLACE: That is correct, Your Honor, but the Equal Employment Opportunity Commission had filed an amicus brief in the Rodriguez cases in the Court of Appeals, --

QUESTION: Yes.

MR. WALLACE: -- stating the views that in some respects differ a little from the views we have now stated in the brief we have filed.

QUESTION: Did you file one here?

QUESTION: Yes.

MR. WALLACE: Yes, we have filed one here, a joint brief in this case.

The Teamsters have filed a Reply Brief, which is still being printed, as I understand; it's been filed and served in typed script.

QUESTION: On January 7th, this one?

MR. WALLACE: That is correct.

Now, the first thing to be said about the submissions made thus far is that the fact that the over-all employment of

T.I.M.E.-DC was declining in the post-Act years does not mean that no line drivers were being hired. To the contrary, the record shows that numerous line drivers were being hired during these years.

QUESTION: Mr. Wallace, suppose that there were 400 parties to the suit or in the class, and it was shown in the evidence that only 200 had been hired, or there had only been 200 vacancies in the period -- in the relevant period; would all 400 be entitled to some relief?

MR. WALLACE: Well, under the Court of Appeals judgment here, when a vacancy occurs, it's to be filled --

QUESTION: I understand that.

MR. WALLACE: -- by a member of the class, and, in that sense, all 400 would be entitled to the opportunity to fill each vacancy as it comes along; but only one can fill each vacancy that arises.

QUESTION: Well, I understand, but what if there could only have been 200 acts of discrimination in the relevant period? In short, no more than 200 people could have been excluded from a transfer or a hiring on account of race.

MR. WALLACE: Well, all members of the class would still be presumptively entitled to relief under this --

QUESTION: Why is that?

MR. WALLACE: Well, I suppose the short answer --

QUESTION: I know that's your position, but --

MR. WALLACE: The short answer is that you can't tell whether the other 200 of the 400 would have opted to make the transfer.

QUESTION: Well, I know, but there were only 200 vacancies -- I'm positing only 200 vacancies.

MR. WALLACE: Yes, you can't -- if you had 400 in the class discriminated against, you can't tell that more than 200 of them would have wanted to fill vacancies. And our experience in applying the relief given in these decrees is that fewer than half of the eligible peoplewill actually opt to make a transfer when a vacancy arises.

QUESTION: Well, I understand that, and it would make a lot of sense if you had 400 vacancies, that if there had been 400 possible acts of discrimination in that relevant period.

MR. WALLACE: But, you see, you only needed 200 possible acts of discrimination against a class of 400, presumably, --

QUESTION: Why?

MR. WALLACE: -- because 200 of them wouldn't have transferred anyway.

QUESTION: Why?

MR. WALLACE: Well, that's the experience that we have had. You can't tell how many of them would want to transfer.

QUESTION: Well, I know, you're going to give relief to 400 people.

MR. WALLACE: Theoretically; but they don't actually all get the relief, and they don't all opt for the relief. I mean, they are only presumptively entitled, they are entitled to a choice when the time comes, if indeed it comes during their work time at all.

QUESTION: Doesn't your answer to Justice White's question suggest at least some arguable difficulty with your definition of a class of 400?

MR. WALLACE: Well, it's a difficulty that I think the Court put behind it in the Franks case, in talking about the stages of trial, of a class action in this context. Where a pattern and practice was established in Franks, and you go back to see whether individuals, who are part of the class discriminated against, can be shown not to be entitled to relief because they were not actual victims of discrimination.

If that can be shown, that's a burden of proof that, under Franks, has shifted to the defendants, once the showing --

QUESTION: Well, weren't these people here -- the people in Franks had all made some, either effort to obtain employment or had been discouraged by a refusal to employ, you don't have that limited a criteria here, do you?

MR. WALLACE: We do not have a situation where the Court of Appeals has required prior applications from the class

discriminated against here. For several reasons. In Franks, you were dealing with people from the public at large, who were not employees of the discriminating company. You had to have some basis for separating out a class of individuals who were discriminated against; otherwise you would be into a situation of possible allegations of people who would have liked to have a job there, but didn't think it was worth applying.

Here you have a pool of persons who were working for the company under a situation in which they knew the company restricted them to certain jobs and excluded them from other more desirable jobs, and it would be futile to apply, coupled with the fact that the separate lines of departmental seniority built in a great impediment to risking their livelihood by transferring and going to the bottom of a seniority roll, which --

QUESTION: But after 1965, they knew it was a violation of federal law for the company to follow that policy, if it did follow it.

MR. WALLACE: Well, they might have known that. If they had wanted to take on law enforcement responsibilities of that kind on their own. These are not individuals who were acting on the advice of counsel and going ahead with what they recognized to be the existing practice of the company.

QUESTION: Mr. Wallace, do I understand the Court of

Appeals on remand would have permitted proof by the company that certain people were not in fact discriminated against?

MR. WALLACE: That is our understanding of the Court of Appeals opinion.

QUESTION: So it's just a question of burden of proof on discrimination, on actual discrimination?

MR. WALLACE: What the Court of Appeals has upheld here is the establishment of a prima facie case of a pattern and practice of discrimination against the class discriminated against.

QUESTION: So that once -- so the government doesn't have to take on the job of proving individual discriminations, but the company can get out of liability of certain people by proving they weren't discriminated against?

MR. WALLACE: That is our position, and in this respect the Court of Appeals anticipated this Court's decision in Franks, which had not been rendered, but the case was pending in this Court at the time the Court of Appeals acted.

QUESTION: Mr. Wallace, as I visualize what would happen, there would be any number of sort of private litigations, depending on how many people applied, and you've just said the company would have the burden of proving, if it wished to assert it, that there had been no discrimination. Would the employee have the burden of proving that he was qualified to drive over-the-road -- or is there any presumption on that?

MR. WALLACE: I'm not clear where the burden lies on that under this opinion. The Court of Appeals has specified how the qualification date is to be determined, and --

QUESTION: That's the date of employment, isn't it?

MR. WALLACE: The qualification date is the date when the individual would have qualified for the job from which he was excluded, from the line driver job, when he would have had the requisite experience and then the next vacancy in a line driver job after that time is the qualification date, and that's the date of seniority that's carried over, not his date of initial employment.

It could coincide with it, but it doesn't necessarily.

QUESTION: Yes. Well, this is where I have so much difficulty with visualizing how the decree would be implemented. There are four local unions. One included city drivers, another included clerks, and another included garage people. A clerk, presumably, might have some difficulty showing a qualification date. How would you go about that?

MR. WALLACE: Well, --

QUESTION: You're the district judge, what would you do?

MR. WALLACE: -- the --

QUESTION: Who would have the burden? The clerk or the company?

MR. WALLACE: I should think that there is some

burden on the applicant in this situation, to show that he is qualified for the job that he's now applying for. It's only the time when the vacancy arises that there can be disputes of this kind.

QUESTION: But wouldn't the burden have to be there? Suppose the man comes in and says, I was qualified on the 19th of February, 1966. The company doesn't have any way to refute that, does it?

MR. WALLACE: Well, the company has his employment records.

QUESTION: Yes.

MR. WALLACE: Qualifications for the line driver jobs are relatively minimal. There's a certain amount of experience driving certain types of trucks.

QUESTION: Driving those enormous trucks requires minimal?

MR. WALLACE: Yes. Well, the city drivers have been driving trucks of that kind, or should have had opportunities to drive, which they will now have. In many instances, the line drivers have been recruited or taken from the ranks of the white city drivers. They have been able to get the requisite experience in the course of their work as city drivers. And to the extent one's qualification has been delayed, through discrimination of that kind, in not giving them the requisite experience, then an estimate has to be made of when he would

have had the requisite experience for purposes of computing his seniority carryover date.

All of that is contemplated by the Court of Appeals opinion.

QUESTION: Where, in this record, would we find any evidence that the qualification that there's only a minimal difference, I think you said, between the qualifications for over-the-road, the line driving, and city driving? That is, in the city driving, presumably at 35 miles an hour speed limits, smaller trucks generally; and, on the road, up to 80 miles an hour, as we know from practical observation.

MR. WALLACE: We have cited in Footnote 38 of our brief, on page 29, several depositions in the record to that effect. And --

QUESTION: That there's minimal difference?

MR. WALLACE: And the accompanying text in the statement of our brief, page 29 of our brief in this case: "There was no evidence that the exclusion of minority employees from line driver jobs was due to any valid job requirement; the only significant requirement for a line driver position was experience driving tractor-trailer equipment", that is documented with Footnote 38, several depositions in the record, "experience which many of the city drivers either had when they applied for a job at T.I.M.E.-DC", and there are Appendix references there, "or acquired as a result of city driving." And there is

another footnote with Appendix references, Mr. Chief Justice.

QUESTION: But you still would have to have that.

MR. WALLACE: You still would have to have it, and there was a finding here that in some instances, --

QUESTION: But a clerk would not have it.

MR. WALLACE: It isn't the clerks who have been found excluded from these particular jobs, there have been other instances of discrimination found in this record; but the main one is keeping the city drivers from becoming line drivers. There have been other kinds of discrimination: in the training of service people in the national terminal, et cetera.

The main one is in excluding the city drivers from the line driver jobs, and that is what the attention of the Court of Appeals was focused on.

QUESTION: And is that the class?

MR. WALLACE: The class includes all persons who have been discriminated again in one way or another, and it's whatever discrimination is against the individual that's to be remedied.

QUESTION: They are all present employees in the class?

MR. WALLACE: All present employees.

QUESTION: Quite unlike Franks.

MR. WALLACE: They were all incumbent employees during the time of the discrimination. And once the company hired

minority line driver, the first minority line driver at one of these terminals, that's the cutoff date for members of the class. Subsequent employees are not members of the class, minority or majority.

Now, --

QUESTION: How many -- does the record tell us how many city drivers there were, how many were black and how many were white?

There's a figure the union referred to, about 2400, 400 were black, but that's not --

MR. WALLACE: Yes.

QUESTION: -- city drivers.

MR. WALLACE: No, that's not city -- that's not city drivers. We have -- city drivers you want?

QUESTION: Yes. Because that's what you say is the primary -- they are the primary victims of the failure to go to over-the-road driving.

MR. WALLACE: Yes, they are the primary victims.

We have in the first Appendix to the district court's opinion -- no, I'm sorry, it's Appendix B of the district court's opinion -- no, I guess I was right the first time. Appendix A, starting on page 68 in the Appendix to the Petition for Certiorari in this case.

QUESTION: Page what?

MR. WALLACE: Starting at page 68 is Appendix A.

And starting at the bottom of page 69, you get, by individual terminals, that are the main ones involved in this litigation, figures of black and white city drivers, and Spanish-surnamed ones. You know, the first one happens to be for Hayward, California, outside of San Francisco, where there were 33 white city drivers, 3 Negro and 9 Spanish-surnamed Americans. And it goes on.

Some of these had a substantial number of Negro city drivers; others had very few.

QUESTION: Would you say that the white city drivers were included in the class?

MR. WALLACE: The black ones?

QUESTION: The white city drivers, included in the class?

MR. WALLACE: Only in the Memphis terminal, where there was evidence that during a certain period whites as well as black city drivers were not permitted to transfer to line driver jobs for racially motivated reasons, where they were afraid that they wouldn't be able to deny blacks the transfer right if they gave it to whites, and so there were white victims of that racially discrimination. And those whites are members of the class, along with one individual white, who was discriminated against in other ways at the Denver terminal, because of his support of the racial discrimination concerns of the blacks there.

QUESTION: But the lock-in transfer system would affect the whites as adversely as it would the blacks, wouldn't it? If you can --

MR. WALLACE: If they were locked in, if they were not permitted to transfer.

QUESTION: Yes.

MR. WALLACE: It was only at Memphis that there was a finding that the whites were not permitted to transfer. The evidence is replete with examples of whites who had transferred from city driver to line driver jobs.

QUESTION: Yes. In that case, where there was no transfer; is that it?

MR. WALLACE: That's my understanding. I didn't prepare that one in detail.

QUESTION: But, of course, a lot of these SSA's, or all of them, presumably, are -- well, they are not Negro, they are white or brown.

MR. WALLACE: Spanish-surnamed Americans, yes.

Now, I do want to say that the record shows numerous instances of post-1965 hiring of line drivers, because some confusion has been raised about that here. And because of the size of the record, the relevant portions of it have not been reprinted in the three-volume Appendix on file with the Court.

QUESTION: Mr. Wallace, excuse me, is it the

government's position that individuals employed prior to 1965 are includable in the class?

MR. WALLACE: That is not only our position, it's the position of all eight of the Courts of Appeals that have ruled on this issue, and it was a matter that was before Congress in 1972, when they were aware of it, and re-enacted the law with amendments that in no way repudiated that, and we think showed their approval of it.

QUESTION: They were employed prior to 1965, --

MR. WALLACE: That's correct.

QUESTION: -- so, presumably, they were not discriminated against in their employment, by hypothesis.

MR. WALLACE: They were discriminated -- they were confined to the jobs that were made available for them.

QUESTION: Well, is it the government's position that those who were prevented from transferring prior to 1965 are covered?

MR. WALLACE: Well, if they were prevented after 1965 as well.

QUESTION: No, no; before.

MR. WALLACE: No, not that they -- no, they are not covered by the Act unless there was an act of discrimination against them after 1965.

QUESTION: After '65.

MR. WALLACE: That is correct.

QUESTION: And there was no discrimination in their original hiring by definition.

MR. WALLACE: But, you see, the union comes back with -- that is correct.

MR. CHIEF JUSTICE BURGER: We will resume there at one o'clock.

[Whereupon, at 12:00 noon, the Court was recessed, to reconvene at 1:00 p.m., the same day.]

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AFTERNOON SESSION

[1:00 p.m.]

MR. CHIEF JUSTICE BURGER: Mr. Wallace, you may continue.

ORAL ARGUMENT OF LAWRENCE G. WALLACE, ESQ.,

ON BEHALF OF THE RESPONDENTS -- Resumed

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

If the Court please, I think many of the bits and pieces of the case that we have been discussing will fall into place if I proceed now to explain what I see as the basic difference between the parties, and that is as to what we and the courts below considered to be the post-Act violation committed by both petitioners with respect to all members of this class, and that inheres in the application of the seniority provisions to transfers by these members of the class, so that they would be locked in if they attempted to move into these jobs, these more desirable jobs from which they have been excluded. They would be locked into a situation where they would be forever behind not only their contemporaries but persons who rightfully would be much junior to them in terms of service to the company, in bidding for jobs, and in layoff rights and, indeed, would have to, in many instances, put their economic survival on the line because of the possibility of layoff and the need to forfeit all of the rights that they had accrued through their employment in the company.

This view of the use of job seniority systems to apply to persons who have been discriminatorily restricted and excluded from these jobs constituting a violation of Title VII is one of the oldest doctrines in the application of Title VII recognized, as I started to say before lunch, by eight Courts of Appeals and without any to the contrary; and in the reenactment in 1972 by Congress.

It dates back nine years to the decision on January 4th, 1968, in Quarles v. Philip Morris Company, decided by Circuit Judge Butzner sitting by designation in the district court in Virginia. And then was adopted in two Court of Appeals decisions subsequent to that, in 1968, the first of which was the Fifth Circuit decision in Local 189 of the Papermakers.

And the unions in the present case, who are the principal parties in interest, because all monetary liability has already been taken out of this case by the consent decree. The issue now is seniority carryover.

QUESTION: Was everyone in agreement that the district court and the Court of Appeals held that the union had violated the Act?

MR. WALLACE: That is correct. As far as I know, everyone is in agreement, and that's why the union is petitioner here.

QUESTION: And how do you all agree the union -- how

do you all agree that the Court said the union violated the Act?

MR. WALLACE: Through being a party to the application of this seniority system to keep these people in a permanently disadvantaged seniority status, which would perpetuate the prior discrimination.

QUESTION: You mean that by virtue of the making of the contract, the collective bargaining contract initially, or the practices --

MR. WALLACE: By adhering to and enforcing the contract.

QUESTION: Anything illegal about the contract?

MR. WALLACE: Only its application to perpetuate discrimination. Other than that, the contract is -- we don't challenge the legality of the contract, except as it is applied to perpetuate discrimination against the class that was found to be the victim of discrimination here.

QUESTION: But the union isn't party to the initial discrimination, I gather?

MR. WALLACE: In some instances it may have been.

QUESTION: Well, was it ever?

MR. WALLACE: I don't have specific findings on that here. That isn't the legal issue as it was viewed by the courts below. The union is part of the perpetuation of discrimination through the application of this seniority system.

This is wholly apart from discrimination in hiring. That --

QUESTION: Those two statements seem to me not compatible with what you answered first and what you answered second to Mr. Justice White.

MR. WALLACE: The holding against the union is that it has perpetuated the discrimination through the application of the seniority system. It's not a holding that the union has discriminated in hiring. The union doesn't hire people. We recognize that. The union argued that, but that has nothing to do with the holding in the case. That is my answer.

QUESTION: Mr. Wallace, could I ask you a question about that? Your theory is that the seniority, separate seniority for city and over-the-road drivers deterred the black drivers from giving up their city jobs with seniority and taking over-the-road jobs.

Did it not equally deter white city drivers?

MR. WALLACE: In some instances it did.

QUESTION: And if there were more white city drivers --

MR. WALLACE: But in other instances white city drivers did move into the line driving.

QUESTION: Aren't they the ones who got the job rather than the blacks?

MR. WALLACE: In many instances, they did. Sometimes they were hired off the streets.

QUESTION: Well, then, how was that deterrent

discriminatory in its impact on the black drivers?

MR. WALLACE: Because of its continuing nature. At the time a white would move, he would have built up relatively little seniority as a city driver and would not be giving up as much.

But there was this continuing impediment while the black city driver built up many years of seniority, all of which would have to be forfeited if he didn't have the opportunity to move when the first vacancy arose.

QUESTION: I see. The theory is that the seniority in the city positions generally speaking was much greater for the blacks than for the whites; and therefore he had a higher cost to pay --

MR. WALLACE: Well, those whites who wanted to move to line driver jobs would have done so relatively early. It's typical that those jobs are taken relatively early in a man's career, when he's willing to go on the road and before he has established a family, et cetera. It's a way of life.

QUESTION: Does the evidence show that the -- what the average seniority of the white transferring from city to road was, as compared to the relative seniority of the black?

MR. WALLACE: There are seniority rosters in the record, which is not reproduced in the Appendix, which I was trying to refer to before the lunch break.

QUESTION: Well, that's critical to your whole

position.

MR. WALLACE: Not really. Because the findings --

QUESTION: Well, if they had equal seniority, what would the argument be?

MR. WALLACE: -- the findings are that there was a prima facie showing of discrimination by locking in blacks who did not -- who wanted to transfer, whereas whites were not locked in. If they built up seniority as city drivers, it was because they chose to, not because they were discriminated against.

Except in the one instance in Memphis.

QUESTION: But, is it your point that a black couldn't move over, even if he were willing to forfeit all of his accumulated seniority?

MR. WALLACE: That is correct.

QUESTION: Whereas a white who was willing to forfeit his, or surrender his --

MR. WALLACE: And in many instances did. So it was a free choice on the part of the non-minority people.

QUESTION: Mr. Wallace, I want to be sure. Did I understand you correctly to say that the issue of monetary liability on the part of the union is out of the case?

MR. WALLACE: Yes. All of that was covered by the consent decree, with a maximum award of $1500 to any individual, and some of them receiving considerably less.

What these people are interested in is job opportunities, not financial windfalls.

And the issue here is --

QUESTION: Which would be obtained by injunctive relief.

MR. WALLACE: That is correct. And that is the contested issue here.

QUESTION: Well, Mr. Wallace, wouldn't you say that if the union violated the Act, as you said it did, it would have been liable and could have been made liable for back pay also?

MR. WALLACE: Well, that's another question that isn't in the case now. And unions are liable for back pay, have been held liable in other cases, because of their role in perpetuating a discriminatory system. And it's just not the issue here.

The unions here --

QUESTION: I wish you would say again, Mr. Wallace, what's the violation of the Act of which the union is guilty?

MR. WALLACE: That's exactly what I am trying to get to. It's the same as what the employer has been found guilty of: applying this job seniority system in a manner that perpetuates the discrimination of previously excluding these minority people from the more desirable jobs, so that when they now take the job, if they are willing to take it at all,

it will be at the price of being permanently and forever subordinated to more junior people in the company who are not discriminatorily excluded from the job. And in every bid that they have to make for a job from the board for the rest of their career, that discrimination will be perpetuated in its effects on their livelihood.

QUESTION: Yes, and where the black is now slotted, in terms of what he has in the way of seniority standard, is a consequence of an agreement between the employer, the discriminating party, and --

MR. WALLACE: And the union.

QUESTION: -- and the union.

MR. WALLACE: The collective agreement specifies --

QUESTION: And that makes the union also a discriminating party, is that it?

MR. WALLACE: In perpetuating this discrimination, that is correct; that is the holding. And that, as I say, has been the uniform holding of eight Courts of Appeals since the Quarles decision nine years ago.

And I want to go very briefly through this chronology for the Court, because the union, in this case, is saying that the Quarles line of decisions should be distinguished as not involving a bona fide seniority system, as involving seniority systems that were used only for the purposes of discrimination. And then they refer, in their Reply Brief, to a brief filed this

week by the AFL-CIO, not in this case, but in United Airlines v. Evans, a brief that has not been distributed yet, which asks this Court to repudiate the whole Quarles line of cases on the premise that if the Court can't find that they are distinguishable from the kind of case involved here.

Well, the first point is, in Quarles itself and in many of the subsequent cases the courts recognized that the job seniority or departmental seniority systems serve legitimate purposes, and were not adopted solely for the purpose of discrimination.

And I want to just very quickly, in Quarles itself, refer the Court to 279 F Supp, pages 513 and 519, in which those findings were specified in Quarles itself.

Nonetheless, the Court held, that, despite its legitimate aspects, because it also had this function of perpetuating discrimination, it could not be applied so as to accomplish that result. But the Court was very careful in Quarles not to set aside the departmental seniority system in its entirety. It preserved the system in so far as it could be applied without having this effect of perpetuating discrimination.

QUESTION: Can you summarize briefly what the reasoning of these Quarles line of case is? Why the Act requires this result with respect to the union.

MR. WALLACE: I can, indeed. That was the next thing

I was about to do.

In Local 189 of the United Paperworkers, which is the first Court of Appeals decision on the subject, the Fifth Circuit -- and this is, to me, the key decision, for reasons I'll explain in a moment -- the Fifth Circuit endorsed Quarles and adopted it in that Court of Appeals. There are several points that were made here, partly quoting the Quarles decision.

First, it was pointed out that the references in the legislative history to the preservation of seniority systems -- and this is all before the '72 Amendment -- were to employment seniority in general, and none of the excerpts in that history referred specifically to departmental seniority as something that was to be preserved.

Then the proviso to Section 703(h) expressly states that the seniority system must be bona fide, and the rationale of these cases is that to the extent that application of the system perpetuates discriminatory effects on individuals who were discriminated against, to that extent the application is not bona fide within the meaning of this.

QUESTION: But doesn't "bona fide" denote a state of mind rather than a consequence?

MR. WALLACE: That, too, was addressed in this case. There was a specific portion of the case devoted to the contention that it was not adopted with the intent to discrimin-

ate. Roman numeral V of the opinion, beginning on page 995 in 416 Fed 2d. They found unpersuasive the argument that whatever its operational effects, job seniority is immune under the statute because it was not imposed with the intent to discriminate, and that was largely on the basis of the kind of rationale later used by this Court in Griggs v. Duke Power, in talking about facially neutral, or even neutral in intent criteria that nonetheless have a discriminatory effect as being part of what the Act prohibits.

And there are two things that the Court pointed out here. One is that every time a Negro worker hired under the old segregated system bids against a white worker in his job slot, the old racial classification reasserts itself, and the Negro suffers anew for his employer's previous bias; and the other point is quoting the Quarles decision, the Court of Appeals pointed out that the Act does not condone present differences that are the result of intention to discriminate before the effective date of the Act. And the result doesn't mean that the seniority system itself had to be intended to discriminate. Although such a provision could have been included in the Act, had Congress so intended.

Now, later in 1968, the Seventh Circuit adopted the same rationale and the same holding, the same seniority carryover in Bowe v. Colgate-Palmolive. And all of these cases involve carryover of pre-Act seniority, including all the ones

I'm about to talk about.

Then a petition for certiorari was filed in Local 189 of the United Paperworkers case, in which this was the principal issue raised. And I have looked at our brief in opposition that we filed at that time, -- by that time, I mean January 1970 -- and we did not deny the importance of the issue; instead, we were able to point out that there were now three Court of Appeals decisions unanimously holding this, because the one contrary district court opinion, which had been rendered in North Carolina in Griggs v. Duke Power Company, had been reversed by Judge Boreman's opinion for the Fourth Circuit.

This was all before Griggs came to this Court on another issue. And we argued that those decisions were clearly correct in their interpretation of Title VII, as applying in this manner. And this Court denied certiorari in Volume 397 of the U. S. Reports.

The following term, Griggs came up on the testing issue; the other issue didn't even come to this Court, and was later decided.

Then, in the course of the 1972 reenactment, the legislative history of which is recounted in some detail in this Court's opinion in Franks v. Bowman Transportation Company.

These cases were referred to in both the Senate Committee Report and the House Committee Report, and the

principle that they embodied was described in some detail. I have now turned to a lengthy footnote on pages 764 and 765 of this Court's opinion in Franks, 424 U.S. The principle that they embodied was stated in some detail as follows:

First, there was a quote from the Senate Committee Report, stating that employment discrimination is viewed today as a complex and pervasive phenomenon, experts familiar with the subject now generally describe the problem in terms of systems and effects, rather than simple intentional wrongs. And the literature on the subject is replete with discussions of, for example, the mechanics of seniority and lines of progression, perpetuation of the present effect of pre-Act discriminatory practices through various institutional devices, and testing invalidation requirements.

Now, the literature is replete with that. We cited some of that literature in our brief, three prominent Law Review articles on the subject are cited in our brief. I won't bother with reference to them now. One of them was the 1967 note in the Harvard Law Review, which is the seminal one on this issue.

Then, the rightful place principle was articulated in the Conference Report. It's true that this first excerpt from the Senate Committee Report accompanied a bill that was changed with respect to the changes being made in the enforcement mechanisms for Title VII, but the substantive

provisions of Title VII were not changed from the way they were reported out at that time, in any significant respect. The basic thrust of the legislative history of the 1972 reenactment is that the Congress was satisfied with the substantive standard being applied under Title VII, but felt a need to enforce the remedies. And the difference was whether that should be through cease and desist power or through enabling the EEOC to sue in court.

QUESTION: Mr. Wallace, I take it that the government's objectives could be obtained against the union if the union were a party to the suit only for the purposes of a remedy. I mean, in the sense that the seniority problem, the seniority provisions don't really get in anybody's way until and unless there's a transfer. And if the company never transfers, the seniority system isn't at fault.

And you really have the problem with the union only because it's a party to a collective bargaining contract.

So why do you have to say that they violated the Act?

MR. WALLACE: I'm not sure that we have to. But that is -- but, as I'm explaining, that is the basic way of interpreting this statute for the past nine years.

QUESTION: But it doesn't make a whole lot of sense, Mr. Wallace, to say that the union violated the Act, when the seniority system doesn't hurt anybody, it's the discrimination.

MR. WALLACE: But, you see, it's the perpetuation of the discrimination, --

QUESTION: Oh, I understand that.

MR. WALLACE: -- that's the violation --

QUESTION: I know, but that --

MR. WALLACE: -- otherwise you have to find some other post-Act violation. And the Courts have applied this to pre-Act seniority in all of these cases.

QUESTION: Why would -- you say you must -- in order to have a remedy against the union to keep it from enforcing the collective bargaining contract, you have to find that it violated the Act?

MR. WALLACE: You have to find a post-Act violation of the Act, in the uniform course by either, I mean, you have to -- it has to --

QUESTION: You have to find it by both?

MR. WALLACE: All the company is doing is adhering to the collective agreement that the union is a party to.

QUESTION: I understand, but must you find a post-Act violation by the union?

MR. WALLACE: I find it hard to see how the union escapes from --

QUESTION: I'm not saying they should escape from having to modify the collective bargaining contract.

MR. WALLACE: Right. If you say the company's

adherence to the agreement is a violation, you don't have to find that the union's adherence to the agreement is a violation for Title VII purposes; but I don't see the logical distinction.

QUESTION: But the seniority problem, the perpetuation, doesn't even take place until there has been a transfer into the road jobs.

MR. WALLACE: Well, it's the impediment to transfer. It's the thing that suppresses people.

QUESTION: Well, I know, but that -- it hasn't suppressed anything if the company just never hired -- will never take a transfer from a Negro. Doesn't suppress anybody.

MR. WALLACE: Well, of course, that in itself is a present violation, if the company won't do it. If you've got that situation, you don't need the contract, because the contract is just an additional violation.

QUESTION: Are you arguing here that the union was ineffective in representing the interests of the members in connection with the seniority?

MR. WALLACE: Well, it's not an argument about effectiveness of representation, it's an argument that in applying this --

QUESTION: Then, what should the union have done that it did not do? Or what did it do that it should not have done?

MR. WALLACE: It should have reformed the application

of the seniority provision so as to cease perpetuating the discriminatory effect on the class that has been discriminated against.

QUESTION: Well, isn't that a matter of effective representation of a particular --

MR. WALLACE: It should have used its best efforts to do that, and, to the extent it didn't, that was the violation. That was the violation held in Local 189, which was a case against a union.

What I need to say on the rest of this is that the rightful place principle then recognized in this legislative history had its origins not in the context in which this Court approved it in Franks v. Bowman Transportation, but in this context: it was always recognized in these early cases, and throughout the history of litigation under this Act as a principle to be applied in carrying over seniority of incumbant employees when they transfer in.

And the difficult question in all of the literature, in all of the cases, was whether it could also be applied in the context of Franks v. Bowman, whether you could have what was referred to in Local 189 itself as fictional seniority for someone who didn't ever work for the company; whether that would be consistent with the legislative history of the Act. It was always agreed, in all of these cases, and in the literature, that the seniority actuall earned in a company

could be carried over; and that was the origin of the rightful place doctrine. That language was first used in that way in the note in 1967 Harvard Law Review, and by the Fifth Circuit in Local 189.

And when Congress said, in 1972, in any area -- and this was accompanying the Conference Report -- in any area where the new law does not address itself, or in areas where a specific contrary intention is not indicated, it was assumed that the present case law, as developed by the courts, would continue to govern the applicability and construction of Title VII.

It's hard to know what they possibly could have been referring to, other than this line of cases, which was the most prominent line of appellate cases at that time, and was discussed in the three leading articles on the subject at that time, and were cited in this.

QUESTION: Well, do they support more than the fact that you are just and warranted in having a remedy against the union?

MR. WALLACE: They hold that the union was violating the Act.

QUESTION: Isn't it true, Mr. Wallace, that in some, at least, of those cases -- not all of them -- there were two elements that are not present here: first, evidence that the union itself had been racially motivated, discriminatorily

motivated; and, secondly, that the system was one that held people in inferior subordinate jobs and interfered with promotion, unlike this case where these are parallel jobs, some people -- it's just like people who grew up in Liverpool a half-century ago, some of them wanted to go to sea and some of them didn't. If you went to sea, you got more pay, but you had a different kind of a life.

This is not a kind of promotion, these are side-by-side jobs, a lot of the people, as you told us, only half of them, if given the opportunity, would transfer.

So this is different --

MR. WALLACE: Many of them did not.

QUESTION: -- from those cases in that respect, and isn't it different, also, in the respect that there is absolutely no evidence and no possibility of finding here of any racially motivated discrimination on the part of the union?

MR. WALLACE: Well, many of these cases do involve the trucking industry in precisely what is involved here. And we have cited all these cases from all these Courts of Appeals -- I am not going to have time to go into them now.

But the findings in this case are very clear. They are in the district court's opinion. That the line driver job was by far the more desirable job, it was the higher paying job, --

QUESTION: Because of a lot of overtime.

MR. WALLACE: -- and it was more desirable because they didn't have to load and unload their trucks, the way the city drivers did.

QUESTION: But the city drivers could come home at night.

MR. WALLACE: That's right. Some people might find one more desirable, --

QUESTION: Right.

MR. WALLACE: -- some may find another desirable.

QUESTION: Exactly.

MR. WALLACE: The whites had their choice, and blacks did not.

And that is the essence of the discrimination that occurred here, and that the union perpetuated. And this whole series of cases has agreed that --

QUESTION: Mr. Wallace, could you help me on one more thing? I know your light is on. But say you have a black who was a dockman for ten years, something like that, a non-driving job, then a city driver for a year, at which time he becomes qualified, then, because of discrimination, he doesn't get the line driving job for several years.

Now, the rightful place, it seems to me, would quite clearly say he should get seniority to the time -- back to the date when he was qualified. Why should he get seniority all the way back to the date of his first employment? Why

doesn't that produce a disparity as compared with white workers?

Do you understand my question?

MR. WALLACE: Well, he gets seniority from the time that he was qualified for a vacancy, which exists --

QUESTION: I thought -- no, I thought he got -- if you do not enforce this city driver versus line driver seniority, he gets company seniority from the time he was an employee, doesn't he? Under the decree of the court. The decree that the Court of Appeals ordered.

MR. WALLACE: The decree --

QUESTION: I thought they lifted this rule as applied to him entirely. Am I wrong? Did I read it wrong?

MR. WALLACE: The decree specifies as the qualification date for seniority the date of the first vacancy after the person became qualified as an employee of the company for the job from which he was excluded.

QUESTION: So he does not get a complete transfer of his company seniority, then?

MR. WALLACE: No, only --

QUESTION: I'm sorry, I must have misread that.

MR. WALLACE: -- so far as it goes back to that.

QUESTION: He might. He might.

MR. WALLACE: He might. It might be the same thing --

QUESTION: Well, I understand. If he was qualified from the outset, yes.

MR. WALLACE: In our view, whether a white subsequently transferring in the same way should be able to carry over that seniority would be a subject for free collective bargaining now. There would be no need for the Court here to answer that one way or the other. Whites who had already transferred over could, if the district court found it equitable to do so, be awarded carryover seniority, so as to be able to compete with the transferring minority city drivers.

We took that position in the Ninth Circuit in the Navajo Freight case, and that relief was given on remand, over the objection of the Equal Employment Opportunity Commission, I may say.

It's not relief against discrimination, but it's part of the equity power of the Court in seeing to it that you don't get racial disparities as a result of the relief that's needed in these cases.

And we think that that's a proper exercise of the equitable discretion in formulating a decree. This case hasn't reached that stage yet.

Thank you.

MR. CHIEF JUSTICE BURGER: Are you going to share the rebuttal time?

MR. SCHULER: Yes, Your Honor, I'm going to use five minutes and Mr. Wells will use five minutes.

MR. CHIEF JUSTICE BURGER: We will enlarge each of you by three minutes, to balance out our time over whatever you had remaining.

REBUTTAL ARGUMENT OF ROBERT D. SCHULER, ESQ.,

ON BEHALF OF T.I.M.E.-DC, INC.

MR. SCHULER: Thank you, Your Honor.

We were just told that we have not reached the stage of the proceeding where certain types of proofs are relevant.

We believe that the government has not faced this issue as to whether we have reached that stage of the proceeding, whether there will be -- where there will be proofs put in on the issue of remedy. There has been no explanation by the Solicitor General's office as to how the government can proceed at trial on the basis that all the issues of liability and remedy are being tried, and now, when the Circuit Court comes out with a decision that says remedy is to be delayed to a later time, that now the Solicitor General says, Oh, we have only tried liability, now we are going to go back, some later time, to try remedy.

We don't think that is the fact here, and we don't think that has been addressed by the government.

The government has also assumed certain things that we do not believe are true in this case.

There has been an assumption that there is a large pool of white and black city drivers to -- from which road applicants can be obtained. There is a long list of additional requirements in the Appendix, Volume III, from pages 841 to 894, that show the additional qualifications that a road driver must have before he can go on the road.

I would also point out to you that at the trial we showed, through the experience at our Memphis Terminal, that when we did transfer city drivers to the road, that we had much more extensive damage and accidents attributable on a percentage basis to the city drivers than to those road drivers who had been initially hired on the basis of their prior road experience.

So it is not safe to say, to conclude that city drivers automatically give you a good pool of road drivers.

QUESTION: Why do you take white city drivers?

MR. SCHULER: I beg your pardon?

QUESTION: Why do you take white city drivers? I assume they are no more or no less inefficient than the Negro.

MR. SCHULER: Your Honor, the --

QUESTION: Am I right?

MR. SCHULER: There have been some white city drivers who have transferred to the road. But the experience we had at Memphis involved as many, if not more, white drivers than

minority drivers. The experience of both of them --

QUESTION: Well, why --

MR. SCHULER: -- was bad.

QUESTION: Why, then, penalize the Negro driver in California? For what the white driver in Memphis did.

MR. SCHULER: Well, I bring up the Memphis experience simply to say that it is not safe to assume that city drivers make good road drivers.

And in Memphis, both white and minority city drivers were transferred to the road, and both the white and the minority city drivers were not good road drivers. They had, percentagewise, a far higher accident ratio than whits and minority road drivers, who came in with prior road training.

So I'm simply commenting on an assumption that we think is not valid here.

In addition, there was a statement that a minority could not transfer from the city to the road, even if he wanted to give up his competitive-status seniority. That is not so. At any time a minority or a non-minority employee in the city can, if he wants to, transfer from the city to the road, for competitive-seniority status he will have to go to the bottom of the road board. He keeps his benefit seniority when he goes to the road. But it is not true to say that there is a no transfer policy.

I believe it's been pointed out here that T.I.M.E.-DC

is maybe one of the few of the larger trucking companies that does not have a no transfer policy. And the record shows uniformly that, with one or two exceptions, transfers were allowed from city to road.

The government also assumes that fewer than half of the people involved here will transfer. There was no evidence to support that. This should have been put in at the trial, and we believe the Justice Department attempted to put in as much evidence as it could, as to who the people were that had suffered discrimination. We've already tried that issue, and we should not have to go back and try that issue, and to try remedy all over again.

QUESTION: Is there, in the record, any figures about how many vacancies there were from 1965 to date, or from the date the Act went into effect up to date, in terms of various terminals, or not?

MR. SCHULER: Your Honor, we argue that the government had not proven that, and we thought that they should have put that into the record.

There may have been some scattered, limited evidence to that effect. I do not believe that they came forward and said: Here is your list of employees in 1971; here is the number of openings you had from '65 to '71; and here is the racial identification of the people you put in those openings.

We say they failed in not putting in that type of

evidence.

The government has not --

QUESTION: Well, then, your answer to my question is no?

MR. SCHULER: Yes. It is a qualified no, Your Honor, because, with a record as long as this one was, I am sure that there were -- maybe at one or two terminals there was some information as to that type put in. I do not recall specifically that there was.

QUESTION: Well, do you think it makes -- I take it, you think it makes some difference whether there is or not, that kind of proof?

MR. SCHULER: Yes, I do think it makes a difference.

We believe that the government has not addressed several critical issues. We have argued that we believe McDonnell Douglas should apply in determining liability and remedy, and the scope of those proofs, in individual, class, and pattern of practice cases. And there has been nothing suggested in the brief of the government or in the oral argument today why McDonnell Douglas should not so apply.

As I mentioned before, there has been nothing stated here in response to our statement that all the proofs were put in for liability and remedy at the trial stage.

There has been no response by the government to our argument that the discretion granted to a district court in

matters like this has to be very broad to exercise proper equitable discretion. Franks and the Thornton cases tell us that.

We believe, in the circumstances, that it was a reasonable decision by the district court, even if we assume there was discrimination, to award the relief that the district court did for Categories A, B and C, particularly in light of the fact that there was a partial consent decree that not only settled back pay awards for this same class, but also affirmatively offered future hiring on what is a very substantial ratio, a one-to-one basis.

Also, the government has not addressed the conflict between the Circuits as to qualification date, and what that means. And we believe that the failure to address these things should result, at the very least, in affirmation of the order of the district court or a finding that the company is not guilty of discrimination.

Thank you.

MR. CHIEF JUSTICE BURGER: Mr. Wells.

REBUTTAL ARGUMENT OF L. N. D. WELLS, JR., ESQ.,
ON BEHALF OF THE PETITIONER UNION

MR. WELLS: Mr. Chief Justice, and if the Court please:

Counsel has addressed himself to a Quarles line of cases. Quarles holds, 279 F Supp at 517, a department seniority

system that has its genesis in racial discrimination is not a bona fide seniority system.

This system does not have its genesis there. The whole Quarles line is based on findings of union connivance with an employer or with separate black and white unions or with line of progress seniorities, none of which apply here.

Now, Mr. Justice Stevens inquired as to what the Court of Appeals had done. I'm at page 6 of the Appendix to the Petitioner for Certiorari -- just a moment, that's the wrong page.

I'm at page 34 of that document.

"All those on App. A, App. B and App. C" -- that's the entire list of minorities -- "are entitled to be given an opportunity to bid on future vacancies in the specified job classifications to which they are allowed to transfer by the District Court's order on the basis of their seniority and, if they qualify for those jobs, to be permitted to exercise their full seniority in such jobs for all purposes, including bidding and layoff."

Now, I'm happy to hear counsel abandon that position today and tell us that when we get back downstairs and re-try that which we have already tried, that he's going to let us try other issues.

But he's not the Court of Appeals. This is what the Court of Appeals did.

One other matter ought to be indicated. That is, that our contract does not prohibit an employee from transferring. I am now on page 7 of that same document. And this is the Court of Appeals. The second paragraph on page 7:

"Nothing in the union contracts prohibits an employee from transferring between separate bargaining units at a given terminal, but he loses his pre-transfer accumulated seniority for bid and layoff."

Now, if I understood what Mr. Wallace had to say, it was that the distinguishing feature between white and black city drivers is that blacks could not transfer.

Now, if that's right, it's this man, it's the employer that says they can't transfer. We don't stop them from transfer.

That shows that it is the discrimination in transfer by the employer that perpetuates the wrong, not the seniority system.

Any black that is discriminated against with respect to that transfer by -- or refusal to transfer by the employer has his right, under the statute, to -- and under your Franks decision -- to be made whole. Actually he has more than that, he has a contract right under Article 38 of the contract, if he wants to follow that.

QUESTION: Does this record show, Mr. Wells, individual complaints by Negro drivers, city drivers, that they

had applied for transfer and were met by this block?

MR. WELLS: There are some who say that they opted to go on the road, who testified that these options were indicated pre-1965, at a point when it was not unlawful under this statute.

QUESTION: Mr. Wells, let's be realistic. If one of the Negro city drivers is hired by this company and put on the line drive, and given the seniority that this opinion says, do you assure me that the union will not object to that?

MR. WELLS: I do, Your Honor, and --

QUESTION: Well, what are you going -- are you going back on your own contract?

MR. WELLS: -- long prior to the --

QUESTION: Are you going back -- your contract says seniority, doesn't it?

MR. WELLS: I misunderstood your question, Your Honor.

QUESTION: Your union contract says seniority on the line.

MR. WELLS: Our union contract, Mr. Justice Marshall, says that seniority begins from the date of coming into the bargaining unit.

QUESTION: Right.

MR. WELLS: The bargaining agent for the road drivers has no right to bargain under the NLRA for somebody who is

outside the bargaining unit.

QUESTION: I didn't say that.

MR. WELLS: So the seniority starts -- white, black, brown, or whatever -- when he comes in that unit.

QUESTION: I said if he comes in with seniority back to when he first applied, would the white man that is thereby interfered with comes to his union, which is your union, what woul you say, "too bad"?

MR. WELLS: I would say that this black man coming and showing that he was discriminated against because of his race in entry into that unit should --- unlawfully discriminated against. The union will support him, he will get --

QUESTION: Which union?

MR. WELLS: Any Teamster union. Any Teamster union.

QUESTION: Well, he's in one, he's in the Local, isn't he?

MR. WELLS: Pardon?

QUESTION: Isn't he in the city Local?

MR. WELLS: In some places --- in Los Angeles, they are separate Locals; in Dallas, it's the same Local. It varies. But any Teamster union will support white or black in getting his seniority from the date he comes to work in that unit.

QUESTION: over the white man.

MR. WELLS: He will come and he will get his seniority on X date, as to when he applied or when a job was open for him,

and when he was discriminated against, and until there comes a time --

QUESTION: And that seniority --

MR. WELLS: If I may answer, if Your Honor please. Until there comes a time of a posting at the next six-month or twelve-month interval, he won't displace -- neither will displace the other.

But at the next posting, under the contract, whoever has the higher seniority at that point will be the fellow that getst the option on the job.

QUESTION: So the Negro won't get it.

MR. WELLS: It depends on when he was discriminated against. If he was discriminated against before the white came to work, he will. If he was not, he will not.

QUESTION: Well, that's not in your contract.

MR. WELLS: Yes, sir. That's exactly the contract.

QUESTION: Where is that in the contract?

MR. WELLS: Article 38 of the contract, --

QUESTION: But, wait a minute, you don't understand my question.

MR. WELLS: I'm sorry, sir.

QUESTION: Where in the contract does it say about somebody was discriminated against because of race?

MR. WELLS: In Article 38. May I find it? I believe it's in the third volume --

QUESTION: I didn't see it.

MR. WELLS: Mr. Previant is looking for it now. But there is a specific --

QUESTION: Oh, we'll find it. Yes. Go ahead. We'll find it.

MR. WELLS: Here we are, it's page 816:

"The Employer and the Union agree not to discriminate against any individual with respect to hiring, compensation, terms or conditions", et cetera.

Now, you have to read that ---

QUESTION: But I don't see anything there about the seniority is waived.

MR. WELLS: You have to read that, if Your Honor please, in connection with the seniority provision, --

QUESTION: Oh, oh.

MR. WELLS: -- and in connection with the grievance procedure provision.

QUESTION: Oh.

MR. WELLS: And you have to look at Ralph Dixon's testimony in this record with respect to what happened, when any employee claims that his seniority has been denied him, and the contract remedy that is available to him there. I assure you it's there.

QUESTION: All right, I'd rather take your word for it.

MR. WELLS: Thank you, Your Honor.

QUESTION: Mr. Wells, before you sit down, may I ask you a question that was suggested to me by a question of my brother White:

Do you suppose that even if the courts were wrong here in holding that the union had in any way violated the Title VII of the '64 Act, and that you're correct, that there was no violation on the part of your client, that, nonetheless, the court, as a court of equity, might have power to amend the collective bargaining agreement to the extent necessary to make it possible to remedy the violation on the part of the employer and to give those entitled to it their rightful place?

MR. WELLS: We don't say that a collective bargaining contract is written in stone. We do say that it is basic, it follows from a basic national policy under the Labor Act. Unions give up some wages and other conditions sometimes to get seniority.

QUESTION: Yes.

MR. WELLS: And certainly a chancellor can weigh equities.

But you're not even close to that in this case. Where we are here, as Mr. Justice White's question may have suggested, that we are kind of like -- or should be like a Rule 19 defendant, in for, to help the Court --

QUESTION: Perhaps another remedy.

MR. WELLS: -- to figure out what is a proper remedy under the contract --

QUESTION: Perhaps as a remedy.

MR. WELLS: Yes, sir.

QUESTION: And might it not be true that even though you are wholly guiltless of any violation of Title VII or any other federal law in this respect, that an equity court might not be warranted in varying the collective bargaining agreement to the extent necessary to give relief against the violation by the employer?

MR. WELLS: I will concede there may be such cases. I will not concede that this is such a case.

QUESTION: Well, let's assume that -- I take it, you prefer the district court's resolution of this case?

MR. WELLS: Well, I think the district court -- well, I certainly prefer it, yes, sir.

QUESTION: Well, let's assume that there is no question but what there has been a continued pattern of discrimination by the employer, and that there's a question of working out a suitable remedy, such as giving some person some retroactive seniority when he transfers to the road.

Now, to the extent that that requires some modification of the seniority provisions in the contract, if any, you wouldn't say that the court couldn't do that, even though the

union didn't violate the contract?

MR. WELLS: I would not. However, I hasten to say here that Your Honors' decision in Franks make very clear that that is wholly unnecessary. That within the four corners of the contract, and within the --

QUESTION: Well, no one would blow a hole in the side of the contract unnecessarily, I take it.

MR. WELLS: Well, the --

QUESTION: If you don't need to tinker with the contract, you wouldn't. But what if you did have to?

MR. WELLS: If you have to, obviously a chancellor has powers.

Thank you, Your Honors.

MR. CHIEF JUSTICE BURGER: Thank you.

Did you have a --

SURREBUTTAL ARGUMENT OF LAWRENCE G. WALLACE, ESQ.,
ON BEHALF OF THE RESPONDENTS

MR. WALLACE: May I make a brief comment with respect to that?

As a matter of fact, these contracts have been reformed in many instances through consent decrees and through agreements with the Office of Federal Contract Compliance of the Department of Labor, and literally tens of thousands and probably hundreds of thousands of employees have been covered by final decrees, litigated and consent, as well as by

these agreements with the Office of Federal Contract Compliance, that are all premised on the theory of the Quarles line of cases that I have been talking about. The most prominent of them covering 50,000 workers in the nine largest steel producers was entered as a consent decree in Allegheny-Ludlom Steel case, United States v. Allegheny-Ludlom Steel, in which the United Steelworkers Union was one of the parties defendant that entered into the consent decree.

QUESTION: Mr. Wallace, now that you've gotten on your feet, do you agree you misread the Court of Appeals opinion, having in mind the language your opponent quoted from?

MR. WALLACE: Not at all. We specified in our brief exactly what we think the relief contemplated by the court --

QUESTION: You don't think full seniority means full seniority, in other words, as the Court said?

MR. WALLACE: Well, there are ambiguities in that opinion. We have stated what we consider to be the proper interpretation of it.

Looking at the section called "Qualification data" as referring back to and modifying the rest of it.

It seems to me they have spelled it out very carefully in a subsequent decision of the Fifth Circuit, which is referred to in our brief, specifies that in even greater detail. As does the Rodriguez decision, which this Court cross-

references to.

And then there is a subsequent decision which we refer to in our brief that specifies it in even more detail, where we discuss qualification date in our brief.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Wallace.

Thank you, gentlemen.

The case is submitted.

[Whereupon, at 1:52 o'clock, p.m., the case in the above-entitled matter was submitted.]

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