In the

Supreme Court of the United States

NORTHWEST AIRLINES, INC.,	)	
	)	
PETITIONER,	)	
	)	
V.	)	No. 79-1056
	)	
TRANSPORT WORKERS UNION OF AMERICA, AFL-CIO, ET AL.,	)	
	)	
RESPONDENTS.	)	

Washington, D. C.
December 2, 1980

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ORIGINAL

IN THE SUPREME COURT OF THE UNITED STATES

NORTHWEST AIRLINES, INC.,

Petitioner,

v. : No. 79-1056

TRANSPORT WORKERS UNION OF AMERICA, AFL-CIO, ET AL.,

Respondents.

Washington, D. C.

Tuesday, December 2, 1980

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 2:04 o'clock p.m.

APPEARANCES:

PHILIP A LACOVARA, ESQ., Hughes, Hubbard & Reed, 1660 L Street, N.W., Washington D.C. 20036; on behalf of the Petitioner.

STEPHEN B. MOLDOF, ESQ., Cohen, Weiss & Simon, 605 Third Avenue, New York, New York 10158; on behalf of the Respondents.

LAWRENCE G. WALLACE, ESQ., Deputy Solicitor General, United States Department of Justice, Washington, D.C. 20530; on behalf of the United States as amicus curiae.

C O N T E N T S

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P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We'll hear arguments next in Northwest Airlines v. Transport Workers.

Mr. Lacovara, I think you may proceed when you are ready.

MR. LACOVARA: Thank you.

ORAL ARGUMENT OF PHILIP A. LACOVARA, ESQ.,

ON BEHALF OF THE PETITIONER

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

The issue in this case is whether an employer that has been held responsible for paying back pay under the employment discrimination statutes because of the wage differential among various categories of employees may serve a claim for contribution against the labor unions that, according to the complaint in the case, regularly bargained for and indeed demanded the preservation of that differential.

There are a number of issues that are briefed extensively by the parties and by the various amici curiae who have supported one side or the other. In my argument this afternoon I would like to touch upon three major themes. They are, in sum, first, that this is not an implied right of action case and that the discussion about the extent to which the Court should be implying rights of action where there is congressional silence is not an apt controversy here.

This is a question of developing a remedy to allocate liability that already exists under developed legal doctrines.

Secondly --

QUESTION: I'm not so clear I see the distinction for what you're saying. I mean, to say that it's a way of developing a remedy for allocating liability, I mean, you could pretty much describe implied cause of action that way, couldn't you?

MR. LACOVARA: I think there are two fundamental aspects of the implied right of action cases, as this Court has been debating them over the past few terms that distinguish them from this case. As Justice Powell's dissenting opinion in Cannon, for example, makes clear, the implied right of action cases involve an effort to invite the courts to create statutory liability, monetary liability, where Congress has not explicitly fastened liability on the defendant. Secondly, those cases, as Justice Powell points out, necessarily involve assertion of federal question jurisdiction over disputes that would not otherwise be assigned by Congress to the jurisdiction of the federal courts.

As I'll explain in this case, Justice Rehnquist, what we have here is a claim that turns upon a premise that Congress has already created the financial liability for unions, that Northwest is seeking to share. So far it has been ordered to pay the exclusive portion of the liability.

So this is not a case in which new liability is being created.

Secondly, this kind of allocation --

QUESTION: I wonder if that's a valid distinction, because it has not expressly created liability on the part of the union to the company.

MR. LACOVARA: But it has created liability to the employees, and that's the --

QUESTION: Then, isn't it like Cannon and the other cases that the question was whether the particular plaintiff could get recovery, not whether the defendant might be liable to somebody else?

MR. LACOVARA: But, Your Honor, as I will explain --

QUESTION: And most of those cases assume that there's some legal duty owed by the defendant to somebody.

MR. LACOVARA: Yes; what we have here, though, is a situation in which, if both defendants had been sued together -- that is, if the employer and the union had been joined in a suit, or if the employer had been sued alone and had impleaded the unions, there seems to be little question that under case law that this Court has developed as well as cases in the lower federal courts, that there would have been a right of allocation of that liability. That's what the lower courts have held rather consistently, and in this Court in somewhat similar settings. This obviously is the first time this Court has been called upon to decide this --

QUESTION: You mean there would have been the right of contribution? You say right of allocation. There would have been a right of contribution in that situation?

MR. LACOVARA: Yes. And the predicate for that argument, Justice Stevens --

QUESTION: What is the case that holds that?

MR. LACOVARA: I am thinking, for example, of Justice White's opinions in Czosek v. O'Mara, and Vaca v. Sipes.

QUESTION: Court opinions.

MR. LACOVARA: Justice White's opinions for the Court.

QUESTION: Heinz v. Anchor Motor Freight --

MR. LACAVARA: I'm sorry?

QUESTION: Heinz v. Anchor Motor Freight Lines.

MR. LACOVARA: Yes. These are cases in which the Court has already said --

QUESTION: One of the more popular decisions.

MR. LACOVARA: I think it's an excellent decision. These are decisions, though, in which the Court has already said that where one or both concurrent tortfeasors are sued, the courts have a federal common law responsibility to develop remedies that will fairly allocate the liability according to the relative degrees of fault. That assumes that there is existing liability under some doctrine of law. I shall attempt

to demonstrate that in this kind of case liability for unions for the conduct alleged here is clear under Title VII. No one disputes that the unions have that Title VII liability. I can also attempt to demonstrate and, I hope, persuade the Court, that unions also have liability for conduct that violates the Equal Protection Act. Their own duties --

QUESTION: Equal Pay Act?

MR. LACOVARA: Excuse me, the Equal Pay Act, for conduct that violates their own independent duties under the Equal Pay Act.

So, that's the first point. Conceptually, I think that Cort v. Ash and its progeny in the debate over implied rights of actions does not really focus the Court on the proper set of cases.

QUESTION: Well, the Equal Pay Act specifically makes employers liable and says nothing about unions' liability, does it not?

MR. LACOVARA: That's correct.

QUESTION: And whereas Title VII makes both liable?

MR. LACOVARA: Yes. It's explicit. I shall attempt to explain as we lay out in our briefs, in some detail, why we think, as correctly understood, that Congress did intend under the Equal Pay Act to permit direct suits by employees from union violations. But in any event, that is not relevant to Northwest's contribution claim, because any union conduct that

violates the Equal Pay Act's bar on unions causing employers to discriminate by paying unequal wages, constitutes also a violation of Title VII and a violation of the union's duty of fair representation. And under either of those two duties, unions would have financial liability for that misconduct. And it is a settled principle of contribution that the Government itself acknowledges in its amicus brief that contribution may be asserted by one wrongdoer against another even when the source of their misconduct and financial liability is different: one, for example, arising under statute; another arising -- and this is, again, to repair to Justice White's opinions for the Courts in those two cases -- the situation in which the Union's breach is a breach of its federal common law duty of fair representation.

QUESTION: Is the contribution action a separate lawsuit which you may bring, say, two or three years after you paid the judgment? Or is it one in which you must implead a party before the case goes to trial?

MR. LACOVARA: Well, that was one of the issues that was mooted in the Court of Appeals. Our position is, in accordance with traditional law, that a contribution suit is a wholly separate plan, and indeed, this is the orthodox principle, that a contribution claim is an equitable right that normally is asserted only after one wrongdoer has paid more than his fair share of the judgment. The Federal Rules

of Civil Procedure --

QUESTION: Now, when you say "wrongdoer," a wrong arising from what? From a violation of a statute or from what?

MR. LACOVARA: Violation in any sort of tortious duty, including a statute. What we have here alleged is a statutory violation engaged in by Northwest, violation of both the Equal Pay Act and Title VII. We have contended that the union's conduct as alleged in paragraph 6 of the complaint also constituted a violation of its independent responsibilities under Title VII, under the Equal Pay Act, and necessarily under its common law duty of fair representations. Any of those three, but at least two of those three, without question, created financial liability to the union for, as the complaint alleges, regularly demanding the preservation of this differential.

QUESTION: This violation stems from the contract between the union and Northwest Airlines, is it not so?

MR. LACOVARA: Yes, sir. In fact, that's an essential ingredient in the facts of the case here. We have alleged that at all times from the late 1940s up through the Laffey lawsuit, the underlying class action that was brought only against Northwest, each of these two unions in turn represented all of the cabin attendants employed by Northwest, the higher paid five percent who were pursers and were

virtually all male, and the lower paid categories, the female stewardesses, the male stewards, and flight service attendants. And we allege that at each round of bargaining the union came to the table and demanded the perpetuation, and indeed, the enlargement of that differential.

QUESTION: Well, the Equal Pay Act is applicable only if one gender is paid otherwise from another gender for doing the same job, isn't it?

MR. LACOVARA: That's correct.

QUESTION: It doesn't have anything to do with differentials between two different jobs?

MR. LACOVARA: There has to be a determination that one job is occupied by people of one sex and the other is occupied by people of another; that's correct.

QUESTION: That the union had nothing to do with?

MR. LACOVARA: Well, that is an issue in the case.

QUESTION: That would be on the merits?

MR. LACOVARA: That's on the merits. And the lower court cases under Title VII dealing with analogous situations are fairly clear and their cite is Blanton in our brief, Justice Stewart. They establish that a union is responsible for the consequences of a discriminatory contract if the results of the contract in operation are discrimination, regardless of whether or not the terms are themselves facially discriminatory.

QUESTION: As I read these briefs, the unions at least urge that they tried hard to get you to hire females as stewards.

MR. LACOVARA: As pursers?

QUESTION: As pursers.

MR. LACOVARA: That was the higher-paid; correct.

QUESTION: As pursers.

MR. LACOVARA: That will be an issue for the --

QUESTION: But that would be -- it would be premature, you submit, for us to consider any such matter at this time?

MR. LACOVARA: Yes, as we point out in our brief, that kind of factor may be relevant to the determination of relative fault in the allocation of liability. We on remand, if the Court permits this case to go back for trial, will have to prove that the unions' conduct vis-a-vis Northwest Airlines and vis-a-vis the Laffey plaintiffs, the class in that underlying suit, constituted a violation of Title VII and the Equal Pay Act, or the duty of fair representation. If we're not able to demonstrate that, then, of course, the contribution -- comes out.

QUESTION: The Title VII violation was also premised, in the Laffey case, was premised upon discrimination based upon sex.

MR. LACOVARA: Yes, that's correct. Only sex discrimination is involved in this case.

QUESTION: And that's all that's covered by the Equal Pay Act, isn't it?

MR. LACOVARA: Yes, that's right. But as you know the Bennett Amendment to Title VII was intended to make the two statutes congruent so that any conduct that violates the Equal Pay Act necessarily violates Title VII.

QUESTION: The employer, however, is the one who pays the wages or the salaries and do you only have to prove that the union violated one of these statutes to prove some kind of loss by the employee because of the union conduct?

MR. LACOVARA: The case law is fairly uniform on that, Justice White, and it is to the effect that Title VII expressly imposes an independent duty on the unions to root out --

QUESTION: Right. All right, so let's assume both of them, both employer and union, have violated Title VII.

MR. LACOVARA: Yes, sir. And what the lower courts have done in cases like that, either where the union --

QUESTION: You automatically say then that the union has caused part of the loss of the employee, or all of it, or what?

MR. LACOVARA: Generally, what the lower courts have done is to look to the dynamics of bargaining. In some cases they have said the union was principally or primarily or exclusively responsible for that discriminatory --

QUESTION: So you not only have to prove a violation but you also have to prove that the union really was responsible for the employer's violation?

MR. LACOVARA: To some degree.

QUESTION: To some or -- but the union can be made to contribute only to the extent that it did cause the employer to --

MR. LACOVARA: Well, cause is one of the two statutory provisions that may give rise to union liability. Under 703(c)(3) it's illegal for a union --

QUESTION: Yes but my question is, when you go back, if you are entitled to contribution, what must you prove to get any contribution? You must prove a violation and then what?

MR. LACOVARA: We must prove a violation by the union.

QUESTION: By the union, and then what?

MR. LACOVARA: And the federal court exercising equity will determine what the relative fault --

QUESTION: It isn't just going to sit there, and operate in the blue. It's going to require some proof by you.

MR. LACOVARA: That's right.

QUESTION: As to the relative contribution?

MR. LACOVARA: This is what federal courts have done. This is not a novel issue. This has been litigated

many times, and what the courts look to is, for example, the origin of the disputed provision, the incentive for it, for its retention, the efforts that may have been made by one or the other of the parties to eliminate it. And I should note that it is undisputed that in 1966 Northwest proposed to eliminate the differential in this case and the union refused to go along with that.

QUESTION: So what would happen, what have courts done, if the person asking the contribution proves the violation and then just rests? Will the court just say automatically, we divide? Or --

MR. LACOVARA: There is still some discussion in the lower courts about whether or not there is to be pro rata contribution. That has not been what the federal courts have done in employment discrimination cases. They have looked to relative fault, which is, as you know from the opinions we have discussed, what this Court has suggested is the proper federal common law rule of allocation.

QUESTION: Well, Mr. Lacovara, I gather, since this is a collective bargaining agreement and the provision is the one that creates the discrimination, is it not, in violation of the statute? A collectively bargained provision, isn't it?

MR. LACOVARA: Yes, sir.

QUESTION: And are you suggesting that it would be your duty on either trial to canvass the whole procedure in

collective bargaining which led to the adoption agreement upon the provisions?

MR. LACOVARA: Well, this is pretty straightforward. It's only a single provision, but --

QUESTION: Even so, you said that you had somehow to bring home to the employer some kind of contribution of the responsibility for the provision, didn't you?

MR. LACOVARA: To the union. We must demonstrate, first, that the union signed the contract.

QUESTION: Well, actually, there is. You have the agreement.

MR. LACOVARA: Secondly, that it operated in a way that would discriminate. And thirdly, that the union bears responsibility for that discrimination.

QUESTION: All right. Well, on that last inquiry, don't you have to go through the whole process of collective bargaining, what happened, what brought about the agreement, who proposed it.

MR. LACOVARA: That is one of the issues that would have to be litigated. That is not a terribly complicated issue. These negotiations dealt with a number of different terms, naturally, but the focus of a trial under the Federal Rules will be confined to what are the material issues.

QUESTION: You'll have a swap-off of this provision for giving up another one, and all that sort of thing?

MR. LACOVARA: I have no idea what the union's defense will be on the merits, but again, that's an issue that I can only speculate on at this point.

QUESTION: In the 3rd Circuit Court of Appeals, Judge Higginbotham wrote an opinion for the court --

MR. LACOVARA: Yes. On which we rely very heavily.

QUESTION: On which you rely greatly. And understandably; agreeing with you. And at what stage was that written? Just at the equivalent stage of this case?

MR. LACOVARA: No, that was after trial. What happened in the Glus case, which is the opinion to which he is referring, Justice Stewart, is that a suit was brought there against the employer and some unions who had been charged before the EEOC as well as some unions that had not been charged by the EEOC. The employer and the unions asserted crossclaims, in effect, for contribution. The employer then settled, and the question was whether or not the employer could then go forward against the unions to perfect its crossclaims which then became contribution claims for a portion of the amounts for which the employer had settled with the aggrieved employees. And that was what Judge Higginbotham's opinion for the 3rd Circuit sustained, that there is such a right of contribution and that essentially it had been properly tried and resolved in that case.

That is just one illustration of a number of cases

that we cite in our briefs in which the federal courts have found this question of allocation of relative liability a fairly straightforward problem dealing with --

QUESTION: I remain troubled by one of your answers to Mr. Justice Brennan's question, that it's quite simple and all we have to focus on is this one provision in the contract. But how that one provision came to be in the contract may involve a very complicated history of negotiations and that sort of thing. So that what is a simple issue in the lawsuit involves very complex testimony and history of bargaining within the industry.

MR. LACOVARA: It may involve that. We don't know.

QUESTION: In which event you may not sue.

MR. LACOVARA: Pardon me?

QUESTION: In which event, if it's too tough, you may not sue.

MR. LACOVARA: There's no doubt that the contribution claimant has the burden of proof on that, and if it's too complicated and the stakes are not sufficiently high, an employer may not assert a contribution claim. All we're trying to demonstrate is that we have the right to get through the courthouse door. My answer to Justice Brennan and you, Justice Rehnquist, is that this case is not necessarily, this type of case is not necessarily any more complicated than an underlying employment discrimination case or many of the other

kinds of cases.

QUESTION: Well, but there is a difference. There is a difference, is there not? Here your starting point is that you have a contract entered into, presumably, at arm's length; we must assume that whether it's true or not.

The arm's length contract entered into and now you propose that the courts should be open to go back and go through this really very difficult process of who was responsible, which of the two contracting parties was the more responsible or -- assumed division of responsibility?

MR. LACOVARA: That is an undertaking that the courts have found answerable in some cases.

QUESTION: Isn't there something about the old maxim of in pari delicto that gets into the act here?

MR. LACOVARA: I think not, Mr. Chief Justice. The premise of contribution, which as we emphasize is now the prevailing American rule, is that the plaintiff making the contribution claim is a wrongdoer. The pari delicto doctrine has not been thought to be lingeringly sufficient to insist upon the old common law rule.

QUESTION: That's why I said, something like the in pari delicto rule.

MR. LACOVARA: However it's characterized, the courts, including this Court, and on every occasion on which it's addressed contribution, having knowledge that

contribution among concurrent tortfeasors is the fairer modern rule. The only cases in which the Court has refused to apply it are cases in which it is found that there would be some conflict between a specific federal statutory policy and what is now recognized to be the fairer American rule. The lower courts in this context, the employment discrimination contribution context, are virtually uniform. We cite, I think, more than a dozen cases in which district judges all over the country, the people who have to try these cases, have sustained the legal validity of contribution claims, recognizing that it involves an undertaking on their part as the tryers of fact to determine whether the contract was discriminatory and to what extent the union had some complicity.

QUESTION: Well, but maybe their dockets would be a lot less congested if they didn't undertake this kind of inquiry. In the '30s when they repealed "heartbalm" authorizations, there were a lot less lawsuits filed.

MR. LACOVARA: I think that's correct. If this were simply a question of whether or not the federal courts should have a larger or smaller workload, of course we would have abandoned this case long since. What you find, though, Justice Rehnquist, is that the widespread criticism of the heartbalm statutes on policy grounds is exactly the converse of what we have here, where all, I'd say, with the exception of the Government's latest position before this Court, all of the

informed commentary by the judges, by the EEOC and the court below, just -- at least two of the EEOC commissioners today -- is that contribution ought to be sustained in general, as the fairer principle. And that in particular, contribution ought to be extended to the employment discrimination statutes, as the courts for the last 12 years have regularly done so.

QUESTION: But, Mr. Lacovara, there's something here more than just crowded dockets of courts. It's what brings certain types of cases to the courts that could have been avoided, that is, could have been avoided if two parties hadn't been engaged in some kind of mutual and reciprocal wrongdoing. And the courts are not quite as hospitable, shouldn't be as hospitable to trying to remedy the relative justice as between those two as they would with other types of claims.

MR. LACOVARA: Well, Mr. Chief Justice, might I suggest in response to that point that you may very well find that if you implement a contribution remedy as the lower courts have been willing to do, you will find that the congressional plan, as this Court itself identified it in Albemarle Paper Company v. Moody, will reduce rather than increase the number of employment discrimination suits. This Court --

QUESTION: In other words, you think unions will stop high-pressuring lawyers to do these things, is that what you mean?

MR. LACOVARA: Or at least will have the independent

incentive to complain when the employers attempt to do them. Either way, this Court in Albemarle said -- and this is the Court's own phrase, "It is the reasonably certain prospect of a back pay award that Congress intended to be the spur or catalyst to cause employers and unions to root out discriminatory employment practices."

What the lower courts have said, and Justice Stewart referred to Judge Higginbotham's recent opinion, that opinion finds, as did the district court in this case, and the EEOC two years ago and two commissioners today, that making this back pay prospect a realistic one, something that will be achieved through contribution, and it will be undermined through a no contribution rule, will achieve the congressional goal of eliminating employment discrimination at the bargaining table, so that there won't be the need to come into court so often to bring back pay suits on behalf of employees. I think that's a fair, reasonable prediction.

QUESTION: No, there's another way to eliminate that discrimination, and that's for the employer to say, no, to the union, when the union presses them to discriminate, or vice versa.

MR. LACOVARA: We're not suggesting that the full responsibility for this practice lies at the feet of the union, Mr. Chief Justice. What Title VII, and indeed, the Equal Pay Act recognize, what other courts have recognized, is that this

is a collaborative venture. Sometimes the initiative comes from one side, sometimes from the other. But the best way to root out discrimination in employment is for both sides to have an incentive through the certain or reasonably certain prospect of a back pay award. To say, I won't propose a discriminatory arrangement, and if you propose it, I will resist it, because I will have responsibility if I go along with it. That's the congressional plan. That's what we think a contribution remedy would enforce, that's why the lower courts two years ago, the EEOC forcefully in the Court of Appeals, and today two commissioners still insisting this is the best way to achieve that congressional design.

QUESTION: May I ask a question just about the mechanics of the case? In the early part of your brief you point out the liability was fixed somewhere around $37 million back in 1974. Was that judgment ever affirmed, and has the judgment been satisfied?

MR. LACOVARA: Justice Stevens, $37 million is the figure today. The judgment was affirmed in part and vacated in part by the Court of Appeals in 1976, and was remanded for certain further proceedings. The Court of Appeals ruled two months ago on a related appeal in the Laffey case that that 1974 judgment was not a final judgment, because of the things that remain to be done about other aspects of the case. So the judgment has not yet been paid. $37 million is our

estimate of the liability today with interest.

QUESTION: Is it settled in that litigation that the purser's job was equal to the stewardess's job, the cabin attendant's job?

MR. LACOVARA: It has been so found by the district court after a three-week trial and the Court of Appeals affirmed that. We intend -- and I should alert the Court to this -- to bring the case back up here on the questions of liability if we have an opportunity to do so.

QUESTION: My second question is, whether the prolonged period of disposing of that litigation has been affected at all by the pendency of this claim for contributions?

MR. LACOVARA: I think the answer to that is no, sir.

QUESTION: It was not.

MR. LACOVARA: I should like to reserve the rest of my time for rebuttal.

MR. CHIEF JUSTICE BURGER: Very well. Mr. Moldof.

ORAL ARGUMENT OF STEPHEN B. MOLDOF, ESQ.,

ON BEHALF OF THE RESPONDENTS

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

By this action Northwest is asking for contribution for its liability in Laffey v. Northwest Airlines, a liability that arose not under the common law but under two specific federal statutes, Title VII and the Equal Pay Act.

Neither of those statutes provide a right of contribution, and the issue is whether despite the absence of a provision for contribution in those statutes this Court can nevertheless recognize Northwest's claim. I think that's the point where we part company with Northwest.

Northwest is telling this Court that all it is asking for is a remedy. Contribution is simply a remedy, and this Court has broad remedial powers to remedy violations of Title VII and the Equal Pay Act. I think this goes back to the question that the Chief Justice asked of Mr. Lacovara, what is the recognized legal right which Northwest possesses, which it claims has been violated, and for which it is asking this Court to impose a remedy?

To use the terminology employed this last year by the Court is Davis v. Passman, does Northwest have a cause of action? Is it among the class of litigants who is empowered to establish liabilities for violations of these statutes?

The answers to these questions do not turn simply on the label that Northwest has chosen to apply to its claim. It calls this a common law claim. But as Mr. Lacovara has acknowledged this afternoon, it is a claim which has as its principal component the establishment of the union's liabilities under Title VII and the Equal Pay Act. That liability has never been determined.

I have heard again this afternoon, as I've heard in

the briefs, that the unions are clearly equally liable with Northwest for the violations here. No court has ever concluded that either of these unions violated either of these statutes.

QUESTION: Well, neither one has ever been sued.

MR. MOLDOF: That's correct, Your Honor.

QUESTION: Although, certainly, the union could have been sued, clearly, under Title VII, I would say, at the plaintiff's option.

MR. MOLDOF: Your Honor, there is no question that unions can be sued under Title VII. There is also no question that unions can be liable for back pay under Title VII.

QUESTION: And certainly no court's going to hold them liable if they're not sued.

MR. MOLDOF: That's right, Your Honor.

QUESTION: And if both the employer and the union had been sued in this case, it's possible that a judgment would have been entered against both of them.

MR. MOLDOF: Well, without getting into the facts --

QUESTION: I said it's possible; it's possible.

MR. MOLDOF: It is possible, Your Honor; yes.

QUESTION: Well, under the 46th change in the Rules where the defendant could no longer implead someone whom he said was equally liable and could only implead someone who he said was liable over to him, the plaintiff has its choice of defendant, in effect, does it not?

MR. MOLDOF: The plaintiff has a choice of defendants here. And Title VII provides the plaintiff with a choice of defendant. And I think the critical focus should be on the statute. As I said before, unions can be liable for violations of Title VII. But Congress didn't simply stop there. Congress provided in this statute in Title VII precisely how a party's liability is to be established, and at whose instance. It didn't have to do that, but it did do that. And it provided that a title VII lawsuit can be brought by aggrieved employees or by the EEOC. And it provided precisely what rules would have to be followed to establish another party's liability.

Now, an absolute critical feature of that statute is that a party cannot be hauled into court, into federal court, with the claim that it has violated Title VII unless the claim against that party has first been submitted to a nonjudicial administrative process. That procedure is invoked by filing a charge before the EEOC.

QUESTION: Which is to say, Northwest could not have brought the unions into the Laffey suit?

MR. MOLDOF: We don't know; under our reading of the statute Northwest is not among the class of litigants who is entitled to establish another party's Title VII violations.

QUESTION: Well, that's what I said. Your view is that they could not have brought the unions in anyway.

MR. MOLDOF: That's right, Your Honor.

QUESTION: And couldn't have submitted a claim to the EEOC.

MR. MOLDOF: Well, they certainly could have asked the EEOC to bring the unions in. If Northwest has any rights over against the unions for violations of Title VII, then presumably they might have the power to file a charge. If they are a party that can establish the union's liability, then there is no justification within the statute why they should be allowed to establish that liability by wholly extra-statutory means.

QUESTION: If they have a right to file a charge, do they get a right to sue letter from the EEOC?

MR. MOLDOF: If they have a right to file a charge, Your Honor, it would work just like any other plaintiff filing a charge. They would file the charge at some point in time and they either could request the right to sue letter or one would be given to them, if the EEOC determines --

QUESTION: They file a charge that the union has been discriminating against the employees?

MR. MOLDOF: We would take the position they could not.

QUESTION: Well, I know, but that's what's the kind of a charge you're suggesting they must file.

QUESTION: Well, is that right? Isn't there a

subsection that says it's an unlawful employment practice for a labor organization to cause or attempt to cause an employer to discriminate against anyone?

MR. MOLDOF: That's right, Your Honor. There would be a question. Our reading of the statute would be that that is a right which goes over to the aggrieved employees. It's not a right of the employer. But if that were a right that resides in the employer, then that right would have to be processed just like any other claim of an unfair, unlawful employment practice. The charge would have to be filed, the matter would have to be submitted to the EEOC, the party would get a right to sue letter.

QUESTION: And what would the suit then be, if they get the right to sue? What would it take the form of -- intervention in the Laffey suit?

MR. MOLDOF: No, this is all predicated -- unless I misunderstand the hypothetical -- this is all predicated on the fact that a violation of (c)(3) can somehow be asserted by the employer.

QUESTION: Well, assume he can.

MR. MOLDOF: Okay. Assuming he can, then I would assume the employer would be claiming that the union has caused it to violate the statute and accordingly has violated the statute.

QUESTION: So the right to sue would be authority

to sue, of Northwest, directly to sue the unions, is that it?

MR. MOLDOF: If this is all predicated --

QUESTION: For contribution, for contribution.

MR. MOLDOF: Well, this is all predicated under the assumption that the right provided in (c)(3) resides in the employer. I don't think the statute supports this.

QUESTION: The general way that contribution works in the ordinary law -- let's take two joint tortfeasors. And the plaintiff sues only one of them. He's the one and he's held liable. And then he sues his joint tortfeasor for a contribution. He's not claiming that the joint tortfeasor wronged him but only that the joint tortfeasor should share the liability to the plaintiff.

MR. MOLDOF: The difference here, Your Honor, is that Northwest is seeking contribution -- this is not a regular tort case. Northwest is seeking --

QUESTION: Well, it is a contribution case.

MR. MOLDOF: It is a contribution case.

QUESTION: That's what contribution is.

MR. MOLDOF: Right, Your Honor.

QUESTION: It's not a claim by a defendant that the codefendant wronged him in any independent way, but only that the codefendant should share the liability to the plaintiff.

MR. MOLDOF: Well, what I'm suggesting is that we have to look at what the substance of that contribution

claim is. The critical aspect of that claim, what is essential for the establishment of that claim, is the establishment of the union's liability for violating Title VII. That has never been determined before. And Congress has set forth an express procedure by which that is to be established.

QUESTION: Well, that's a matter of defense, isn't it, on the merits?

MR. MOLDOF: I don't think so, Your Honor.

QUESTION: Well, it certainly is. But your point is that --

MR. MOLDOF: Well, it's a defense -- oh, I'm sorry; of course, it's a defense on the merits, but it's not a question that has to turn on the merits of the particular controversy.

QUESTION: Controversy.

QUESTION: Itn't it the complaint of the airline that they were willing to do right in 1966 and the union stopped them from that?

MR. MOLDOF: No, Your Honor. First of all, there's nothing about the '66 negotiations in the complaint.

QUESTION: I know, but if they get a chance that's what they claim they want to prove.

MR. MOLDOF: The findings in Laffey -- that's the underlying case -- which, by the way -- Mr. Lacovara neglected to mention that this Court denied certiorari to the underlying Laffey decision.

QUESTION: Could I ask you -- I'm sorry, you didn't finish your answer. Go ahead.

MR. MOLDOF: The findings in Laffey point out that in 1966 what Northwest proposed was for the unions to equalize downing, to lower the wages of the pursers down to the level of the female employees. And that's precisely what is now permitted by the Equal Pay Act.

QUESTION: Well, my point is that if two people, two joint statute violators get together and take it out on an individual worker, that the individual worker has a right to decide who he's going to sue.

MR. MOLDOF: That is our position, Your Honor.

QUESTION: And that there's no remedy against --

MR. MOLDOF: There is a remedy. A remedy -- if the employer has remedies. So that -- is that the thrust of the question, Your Honor?

QUESTION: I don't care; is there a remedy? That's what I asked.

MR. MOLDOF: The remedies -- if you're asking whether the aggrieved employee who chooses one has a remedy --

QUESTION: No, I mean, how does -- if he only chooses one --

MR. MOLDOF: Right.

QUESTION: How does one have a chance to get a remedy?

MR. MOLDOF: Okay. The procedure that Congress placed into Title VII was to allow charges and lawsuits to be filed by the EEOC. And the legislative history reflects that one of the reasons that that was put into the statute was to overcome just this type of situation where a union member might be reluctant to come after his union, and there would be another procedure whereby some outside party could come after the union.

Now, I would suggest that it's far more likely that an individual --

QUESTION: What statute, rule, or regulation gives this remedy to the employer?

MR. MOLDOF: The remedy that I'm suggesting, the procedure that I'm suggesting is provided by Title VII, that the EEOC can file a charge. There is no specific remedy in Title VII resting in the employer.

QUESTION: So he's -- to use the vernacular of the street, he's stuck?

MR. MOLDOF: Well, he may be stuck --

QUESTION: Is that right?

MR. MOLDOF: He may be stuck under --

QUESTION: So he's stucj solely at the will of the employee. The employee decides, who I like, I'll sue that one.

MR. MOLDIF: Your Honor, when an employee sues for violations of Title VII, he's not solely bringing a private

lawsuit, there are public interests involved here. And we want to encourage these people to file lawsuits. At least that's what Congress said it wanted to do. Now, certainly if an employee is forced to bring in a union, the practical effect is that the employee winds up [illegible] part of his own back pay liability. The back pay that the union has to pay comes out of union dues which the aggrieved employee himself funds. And that's something that the employee can do if he chooses to.

But to allow a discriminating employer to override the plaintiff's choice not to sue the union and to force him to accept that consequence seems to have no basis.

QUESTION: That wouldn't be true in a right-to-work state, would it, where the employee might not be a member of the union?

MR. MOLDOF: Well, that might not be true for that situation, but what generally happens in these type of cases -- for example, this is an example of the type of situation I have in mind: many of these Title VII cases are class actions and the plaintiff may be suing not only on its own behalf but on behalf of a large class many of whom may be union workers; union members. So the practical result of that type of a situation is that the union members who are members of the plaintiff class are going to wind up paying for their own back pay.

QUESTION: Could I -- I take it your submission is

that at least before the employer should be able to get into court he should make his complaint before the EEOC?

MR. MOLDOF: Yes, that's quite --

QUESTION: And if the EEOC then gives him a right to sue letter, I suppose you would say he could get into court?

MR. MOLDOF: Assuming that the employer has the right to invoke the mechanisms under Title VII. What I'm suggesting, Justice White --

QUESTION: Well, it seems that -- do you say he isn't?

MR. MOLDOF: Well, I have grave doubts that he is. And what I'm suggesting is that if a --

QUESTION: Well, if he's -- if he's got grave doubts about that, you wouldn't say, then, that the thing that bars this particular suit is his failure to file with the EEOC? You can't have it both ways.

MR. MOLDOF: What I would say, under that circumstance, what bars this suit is the fact that nobody has been able to establish the union's liability under Title VII by the explicit procedures that Congress placed in the statute for establishing such liabilities.

QUESTION: You mean, exclusive in the sense that the only person who is permitted to claim that the union violated the Act is the emplcyee?

MR. MOLDOF: That's one half of the equation.

QUESTION: Well, what's the other one?

MR. MOLDOF: The other half is, how a party's liability is to be established, first by filing a charge, first by submitting a claim through administrative process.

QUESTION: I know, but you say that an employer can't do that.

MR. MOLDOF: Well, whoever can do it, a party should not be subjected to the potential for liability for violating this statute by means outside of the scheme that Congress decided to put into this statute.

QUESTION: Well, if he can't file, it isn't outside the scheme. Congress hasn't provided any scheme for the employer.

MR. MOLDOF: Well, then, if that is the --

QUESTION: If you're right. If it has, all he has to do is to file and get his right to sue letter.

MR. MOLDOF: Right. And if he can't do that, then his inability to proceed against the union is a consequence of the scheme that Congress saw fit to adopt. If the scheme is unfair, if a different scheme could have been devised -- and certainly a different scheme could have been devised.

QUESTION: Well, I would think then that you -- I don't see how you can then conceive that the employee could choose them both and sue them, and get judgment against both of them in one suit.

MR. MOLDOF: The employee certainly has the right to go after whichever party it wants to, or both of them, if that's its desire.

QUESTION: And suppose -- do you think it would be -- suppose there's a judgment entered against both the union and the employer, in a suit by the employee, after he's gone through the EEOC and got his right to sue letter, and there's a judgment entered against them both, and the judge says, each one of you is liable for the total amount, but I am going to order you two defendants to share the liability. Would that be inappropriate under the Act?

MR. MOLDOF: In your scenario, if I understand it, in the hypothetical, both parties have been charged, both parties have been sued, both parties have been found liable.

QUESTION: And can, then -- each one of them is totally liable for the entire amount, but the judge then says to the two defendants, I am going to order you to share the payment?

MR. MOLDOF: The federal courts have the authority at that point -- in fact, Congress provided a procedure for the federal courts which is entirely consistent with the charging requirement. The court's power to fashion remedies which is created by 706(g) of the statute provides that once a court finds that a respondent has intentionally violated the statute, the court can order appropriate remedies. And the

example you've provided, Justice White, is one of the types of remedies that can be provided.

QUESTION: Well, both defendants say, neither one of us wants to have to pay this entire judgment and so they both, the judge orders them to share it. Is that an appropriate order?

MR. MOLDOF: That would be an appropriate order because the scheme had been consistently followed. And if either of the defendants felt that that order was inappropriate because it was not responsible to the same extent as the other party, the aggrieved party, whether it's the employer or union, could appeal.

QUESTION: And they could litigate it, they could litigate their respective responsibilities.

MR. MOLDOF: That's correct. But I'm --

QUESTION: Short of appeal, in Justice White's hypothetical case, each party had been found completely liable.

MR. MOLDOF: That's right. And through the procedures explicitly provided by Congress.

QUESTION: But what's the authority that a judge could do that, namely, say, you divide it? I thought that took a statute?

MR. MOLDOF: Well, Section 706(g) provides that the court can fashion remedies. It specifies certain types of remedies, the possibility for injunctions, back pay, attorneys'

fees. Once it is found that a respondent -- which is, by the way, is defined as a party that's been named in a charge -- has intentionally violated the statute, at that point there is nothing in the statute that says the court can allocate. And on the basis of congressional intent, which would be the court's role at that point, the court could construe Title VII as empowering --

QUESTION: Well, but you are conceding that it does take a statutory authorization for a court to do that, and you're arguing, I gather, that 706(e), is it, some such statutory authority, gives such tests for it?

MR. MOLDOF: Yes. Without statutory authorization -- the courts' powers in the remedial area of Title VII are expressly provided by statute.

QUESTION: Well, no, I was thinking as a general proposition. I had supposed if they're joint tortfeasors, there can't be compelled contribution without statutory authorization. Isn't that right?

MR. MOLDOF: You certainly have to have the statutory -- know the statutory rulings.

QUESTION: I'm talking generally about the law of contribution.

QUESTION: How about in ordinary negligence cases?

MR. MOLDOF: If you're talking about whether or why a contribution can be recognized as a matter of federal law,

and you're talking about a totally -- first of all, there has never been a ruling by this Court that there is a right of contribution as a matter of federal law.

QUESTION: Do youthink it takes a statute to have a contribution in federal courts, at all, in any kind of a case?

MR. MOLDOF: If the controversy is between solely private --

QUESTION: That the courts aren't entitled to enforce contribution as a matter of federal common law, so-called?

MR. MOLDOF: If the litigation is solely between private litigants and there's no overriding impact on some kind of federal interest, then we would take the position that the Court would not have the authority at that point to fashion a federal common law of contribution, and it would have to await litigation.

QUESTION: What would you do under Erie if they were from nonresidents? The Erie v. Tompkins case, a negligence case based on an automobile accident in New York, sued in California.

MR. MOLDOF: And the sole basis for federal jurisdiction is diversity?

QUESTION: To order mutual help, could you say that we can order you to share the costs or expenses as joint tortfeasors?

MR. MOLDOF: If we're talking about an Erie type of situation, okay, the --

QUESTION: That doesn't quite -- what worries me -- and I realize your time's up; just one point -- what worries me is, I don't see why this case is completely controlled by either the Equal Pay Act or Title VII.

MR. MOLDOF: The reason, Your Honor, why we feel it is --

QUESTION: I said, completely. You understand -- completely.

MR. MOLDOF: The reason why we feel it is, Your Honor, is because we're talking about contribution for liabilities under those two statutes and under nothing else. That's not to suggest that within the statutes the Court doesn't have certain powers, but the powers that the Court has within the statutes are to be discerned through congressional intent, and it's the guidelines announced in the --

QUESTION: Suppose a shipowner sues a stevedore company because they were found guilty and it wasn't maybe them, it was the stevedore company. Would they be bound by maritime law or general federal law?

MR. MOLDOF: The way this Court has construed those kind of situations in the past is that it has applied maritime law, admiralty law, where the court's legislative powers of common law --

QUESTION: -- think you did something wrong, when you conspired --

MR. MOLDOF: I'm sorry, Your Honor. I didn't catch the question.

QUESTION: What if by putting on perjured testimony I was found guilty instead of you, can I sue?

MR. MOLDOF: If you're asking as a matter of federal law, I suppose --

QUESTION: Does it matter what kind of case it was?

MR. MOLDOF: Yes, it very definitely does turn on the kind of case.

QUESTION: If I say that your perjury caused me to lose a case?

MR. MOLDOF: Well, certainly it would be an open question whether you had a federal remedy or whether you had a state remedy.

QUESTION: That's right. I think that's -- I just don't see why we have to look solely to those two. And I emphasize solely, underscored.

MR. MOLDOF: Because the jurisdiction of the Court to entertain this controversy, the only basis of a federal interest in this particular controvery is the fact that we're talking about rights and obligations under these two statutes. And the right to contribution either exists within these statutes or it doesn't exist.

QUESTION: At this time don't you agree that Northwest has no interest in these statutes at all, they're interested in $32 million bucks?

MR. MOLDOF: That certainly is their practical interest, Your Honor.

QUESTION: That's right.

MR. MOLDOF: But our interest is the fact that we've never been adjudicated liable for violation of these statutes, and that's what has to be determined in this case.

MR. CHIEF JUSTICE BURGER: Your time has expired now.

MR. MOLDOF: Thank you.

MR. CHIEF JUSTICE BURGER: Mr. Wallace.

ORAL ARGUMENT OF LAWRENCE G. WALLACE, ESQ.,
ON BEHALF OF THE UNITED STATES AS AMICUS CURIAE

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

In 1942 this Court in Solo Electric Company v. Jefferson Electric Company, in a unanimous opinion by Chief Justice Stone observed, and I'm quoting now from page 173 of Volume 317:

"When a federal statute condemns an act as unlawful, the extent and nature of the legal consequences of the condemnation, though left by the statute to judicial determination, are nevertheless federal questions, the answers to which are to be derived from the statute

and the federal policy which it has adopted."

This observation serves as a reminder that in many fields there would be no federal law and no federal rights if Congress had not legislated in the exercise of its commerce power. In the absence of such legislation no federal common law would govern labor relations or the field of fair employment practices in the private sector.

The legal consequences of the congressional entry into this field must therefore flow from the pertinent federal statutes themselves, expressly or by implication.

QUESTION: Before you get further into your interesting argument, Mr. Wallace, could you tell me why the Commission has completely reversed its position between the time that this case was in the Court of Appeals and the time it's here?

MR. WALLACE: It has thought better of the position that it took. It's not a complete reversal, because the Commission opposed the contribution claim in this case in the Court of Appeals, but on grounds that would have permitted contribution claims in some other circumstances as compatible with Title VII. Upon further consideration of the question, in consultation with counsel, the Commission has thought better of its position.

QUESTION: It did so, the Court did so in a proceeding that was closed to the public despite demands of the

representatives of the public to be there, by a 3-2 vote, didn't it?

MR. WALLACE: Well, that is correct. But this is not an unusual proceeding. It was a proceeding in which --

QUESTION: I just wondered if you were free to tell me why?

MR. WALLACE: -- they were deliberating litigation policies, the position to be taken in litigation, this very case. And that is ordinarily closed to the public.

QUESTION: But -- and so you are not at liberty to say why except you just think this is a better position?

MR. WALLACE: Well, it's the position that the Commission is now taking on having reexamined the question. It's also the position that the United States is taking, and never having taken a contrary position, filing --

QUESTION: They didn't take any position. The Commission appeared.

MR. WALLACE: The Commission appeared in the Court of Appeals on its own. It has its own litigative authority in all courts but this Court.

QUESTION: And you weren't there when the Commission made up its mind?

MR. WALLACE: We were not, at that time. The Commission did consult with the Department of Justice with respect to the position to be taken in this brief, and --

QUESTION: It seemed to me very -- I read the excerpts from your brief and the Commission's brief in the Court of Appeals, which appear in the petitioner's reply brief in this court. It seems to me, if it's not a reversal of position, it's certainly a completely different position.

MR. WALLACE: The Commission's position before this Court is the position set forth in our brief.

QUESTION: And it's quite different from the one that was taken in the Court of Appeals.

MR. WALLACE: It's quite different with respect to Title VII. The Commission took no position with respect to the Equal Pay Act in the Court of Appeals.

QUESTION: No.

MR. WALLACE: It filed a brief -- Title VII.

QUESTION: Mr. Wallace, has the United States taken a position with respect to whether or not the employer could file a complaint against a union in a case like this with the EEOC?

MR. WALLACE: It has not.

QUESTION: Do you have one now, or -- ?

MR. WALLACE: Well, I can say that since there is now provision for commissioner complaints to be issued, any member of the public including an employer can bring to the attention of the Commission or of a commissioner an alleged violation of the statute.

QUESTION: You don't think the provision in the Act that -- you don't think the employer on his own -- could complain that he's been forced to violate the Act?

MR. WALLACE: Only in that manner. The employer was not --

QUESTION: All right, let's -- well, you say, yes, he could file a complaint. And the EEOC is supposed to act on it? It may, in the normal way complaints are acted on?

MR. WALLACE: It's not a charge, when somebody brings to the attention of a commissioner. It enables the commissioner, if he sees fit to do so to file a commissioner charge; it would be comparable to bringing a charge before the National Labor Relations Board.

QUESTION: But the person, or including the employer who files the complaint or files whatever he files hasn't any right himself to invoke the Commission's action, like an employee?

MR. WALLACE: Not so far as I'm aware.

QUESTION: So you do take a position, you do take the position that the employer has no right to file a charge with a commissioner?

QUESTION: It's not a law, it's just --

MR. WALLACE: So far as I'm aware. I don't know if the Commission has ruled on this question, and I hesitate to commit it.

QUESTION: Isn't the question whether the employer would be a person aggrieved if he alleged during some negotiations that the union was trying to cause him to enter into a discriminatory contract?

QUESTION: Say an employer, while bargaining with a union, alleged a violation of 703(c) and said it was a person aggrieved. Why couldn't it file the charge?

MR. WALLACE: Perhaps it could.

QUESTION: The statutory issue is whether it's a person aggrieved.

MR. WALLACE: Whether it's a person aggrieved. Unions do file charges regularly and have brought suits regularly, but this is on behalf of their members. They're essentially class suits alleging that their members are victims of discrimination.

QUESTION: Yes, but the employer, as Mr. Justice Stevens is saying, is claiming that he's being forced to discriminate.

QUESTION: Against his own employees, then, if he sticks to them.

MR. WALLACE: I don't really know how the Commission would rule on this. I don't know if this case --

QUESTION: Well, how it could it rule any other way than that it's a proper --

MR. WALLACE: Well, I hesitate to commit the Commission on something that it may not have decided.

QUESTION: Well, suppose it decided that it could not file at all, the employer could not file at all. Do you think the employer then has no remedy whatsoever against the union? Apparently that's your position, I gather as I read your brief.

MR. WALLACE: It has no remedies for damages. That isn't --

QUESTION: Well, Mr. Moldof's position was precisely that, that if this statute doesn't give the employer a right to sue for contribution, then there simply isn't any right in the employer. I thought that's what his argument was.

MR. WALLACE: Well, our argument is --
Any right to contribution has to be derived from the statute.

QUESTION: From this very statute?

MR. WALLACE: The hypothetical Mr. Justice White poses might be the basis for an employer charge to the National Labor Relations Board, that the Union is insisting in bargaining or in striking on an unfair labor practice. I'm informed that the EEOC has voted that an employer can file a charge. I don't have the citation to the case.

QUESTION: Making that sort of claim?

MR. WALLACE: I don't have the citation to the case.

I don't know the case. It --

QUESTION: In which event, sooner or later, the employer should be able to get a right to sue under.

MR. WALLACE: I don't know whether the Commission's interpretation has been --

QUESTION: In which event, you may not call it contribution but you'd have a statutory action against the union.

QUESTION: Well, in any event, Mr. Wallace, do I understand that your position today is that the statute provides no authority for a suit for contribution by the employer against the union and that's the end of the case. Is that it?

MR. WALLACE: That is our position, that neither statute expressly or by implication applying the proper standards to whether there's an implied remedy for contribution, would support a remedy for contribution, that it wouldn't be compatible with the remedial scheme, or the remedial theory, of either statute for reasons that we've set out in our brief, and that I won't have time to elaborate on. But we do think --

QUESTION: Then the result, Mr. Wallace, depends on the fortuity of whether the plaintiffs bring some suit against both the union and the employer, or whether the employer doesn't ever get around to bringing the union into the case.

MR. WALLACE: Well, we don't think the employer has a right to bring the union into the case at an earlier stage either, if the union has not been charged.

QUESTION: We don't know that, though.

MR. WALLACE: Unless the employer who's filing a charge can bring about to itself a right to sue the union.

QUESTION: But there is no traditional decision holding that the union could not have been joined with the employer here?

MR. WALLACE: By the complainants.

QUESTION: So it could have been, under the statute?

MR. WALLACE: It could have been, under Title VII. Perhaps not under the Equal Pay Act. That's an open question, whether there's a private remedy against unions under the Equal Pay Act. That's a question that the Commission has not yet resolved.

For the reasons stated in our brief, we submit that the case should be dismissed.

MR. CHIEF JUSTICE BURGER: Mr. Lacovara, you have three minutes left.

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

ORAL ARGUMENT OF PHILIP A. LACOVARA, ESQ.,

ON BEHALF OF THE PETITIONER -- REBUTTAL

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

The Commission, in response to this colloquy about whether an employer may conceivably be an aggrieved party entitled to file a charge, did adopt the position that Mr. Wallace acknowledged. This is printed on page 12A of

our reply brief. This is from the Commission's brief in the Court of Appeals. The Commission said that for the first time it faced that question when it was asked by the Court of Appeals what its position was on contribution. And it said that the Commission believes that in certain circumstances an employer might be able to file a charge as an aggrieved party. That is eight years after the charges were filed against Northwest, and I submit it would be highly inequitable to the Court to block a contribution claim on the basis of a still unsettled and unadjudicated --

QUESTION: If during your bargaining negotiations, and this is in substance what you allege, you were being forced by the union to enter into a discriminatory bargain, couldn't you then have invoked the provisions of 703(c)(3) -- whatever it is, and then filed your charge that, don't let the union put this kind of pressure on us?

MR. LACOVARA: The answer, Mr. Justice Stevens, is I don't know. Not until eight years after all these events took place did the Commission ever indicate that an employer could file a charge. As far as --

QUESTION: But the statute has been there all the time, and one can read it, and it says that a person aggrieved can file a charge. And if you were aggrieved under that section, I don't know why you couldn't file a charge.

MR. LACOVARA: As far as we've been able to

ascertain, the Commission in the 16 years since that statute has been in effect has never entertained a charge from an employer.

QUESTION: Well, maybe an employer has never tried.

MR. LACOVARA: That's entirely possible.

QUESTION: So that you you just -- but you recited it, the Commission said for the first time we've been asked about it in the Court of Appeals.

MR. LACOVARA: That's right. And I concede --

QUESTION: As soon as they're asked about it, they say yes.

QUESTION: The Commission said a lot of things in the Court of Appeals that it's now changed its tune on.

MR. LACOVARA: Yes, sir. My principal point, though, may it please the Court, is that this discussion about whether Northwest could have filed the charge is irrelevant, as the 3rd Circuit held in the Glus case, and as the other federal courts have held in sustaining claims --

QUESTION: It's not irrelevant if we consider it a jurisdictional prerequisite to litigating under Title VII.

MR. LACOVARA: Yes. My submission, Justice Stevens, is that it is not a jurisdictional prerequisite, and that's why it's irrelevant, that's what the lower courts have held when they've said that a contribution claim really is a federal common law claim, not a Title VII claim. And it doesn't make any difference.

QUESTION: Except the Court of Appeals, in this case.

MR. LACOVARA: Except the Court of Appeals in this case, which didn't reach the Title VII issue. It stopped short of reaching it.

QUESTION: Mr. Lacovara, may I just ask you, does your brief cite any cases in this Court, or other federal cases for that matter, which have held that there may be a suit for contribution unless there is statutory authority for it?

MR. LACOVARA: Yes --

QUESTION: Even without statutory authority?

MR. LACOVARA: Oh, yes, absolutely. For example, Cooper Stevedoring --

QUESTION: All right.

MR. LACOVARA: Cooper Stevedoring.

QUESTION: This is in the maritime?

MR. LACOVARA: It's in the maritime field. We do cite other cases in 417. -- 417 U.S. --

QUESTION: Well, maritime's a little unique, isn't it? Well, anyway --

MR. LACOVARA: Thank you.

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

(Whereupon, at 3:07 o'clock p.m., the case in the above-entitled matter was submitted.)

CERTIFICATE

North American Reporting hereby certifies that the attached pages represent an accurate transcript of electronic sound recording of the oral argument before the Supreme Court of the United States in the matter of:

No. 79-1056

NORTHWEST AIRLINES, INC.

V.

TRANSPORT WORKERS UNION OF AMERICA, AFL-CIO, ET AL.

and that these pages constitute the original transcript of the proceedings for the records of the Court.

BY: