In the

ORIGINAL

# Supreme Court of the United States

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| ANNE B. ZIPES, ET AL., | ) | |
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| Petitioners, | ) | |
| v. | ) | NO. 78-1545 |
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| TRANS WORLD AIRLINES, INC.: and | ) | |
| | ) | |
| INDEPENDENT FEDERATION OF FLIGHT ATTENDANTS, | ) | |
| | ) | |
| Petitioners | ) | |
| v. | ) | NO. 80-951 |
| | ) | |
| TRANS WORLD AIRLINES, INC., ET AL. | ) | |

Washington, D. C.

December 2, 1981

Pages 1 thru 41

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ANNE B. ZIPES, ET AL., :

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v. : No. 78-1545

TRANS WORLD AIRLINES, INC.; and :

INDEPENDENT FEDERATION OF FLIGHT :

ATTENDANTS, :

Petitioner, :

v. : No. 80-951

TRANS WORLD AIRLINES, INC., ET AL. :

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Washington, D. C.

Wednesday, December 2, 1981

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:09 o'clock a.m.

APPEARANCES:

WILLIAM A. JOLLEY, ESQ., Kansas City, Missouri; on behalf of the Petitioners in No. 80-951.

A. RAYMOND RANDOLPH, JR., ESQ., Washington, D. C.; on behalf of Petitioners in No. 78-1545.

LAURENCE A. CARTON, ESQ., Chicago, Illinois; on behalf of the Respondents.

C O N T E N T S

P R O C E E D I N G S

CHIEF JUSTICE BURGER: We will hear arguments first this morning in Zipes against Trans World Airlines.

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

ORAL ARGUMENT OF WILLIAM A. JOLLEY, ESQ.,

ON BEHALF OF THE PETITIONERS IN NO. 80-951

MR. JOLLEY: Mr. Chief Justice, and may it please the Court, the decision of the Seventh Circuit at issue in 80-951 affirms a district court order approving a settlement agreement between defendant, TWA, and plaintiffs who were former TWA employees.

Pursuant to that settlement, plaintiffs were granted full union or competitive seniority, despite the fact that the Seventh Circuit had previously decided that plaintiffs had failed to establish a violation of Title 7, despite the fact that TWA objected -- excuse me, despite the fact that IFFA, the incumbent union, objected to that settlement, and despite the fact that the settlement overrides the seniority provisions of IFFA's collective bargaining agreement with TWA.

From at least the effective date of the Civil Rights Act of 1964, and up until October of 1970, TWA maintained a policy of terminating all flight attendants who became mothers. On May 30th, 1970, the first charge was filed with the EEOC challenging this practice. In August of

1970, this litigation was brought against TWA as a class action purportedly on behalf of all flight attendants terminated under that policy since July 2, 1965.

In 1976, the district court granted partial summary judgment againts TWA, holding that its policy was indeed a violation of Title 7, and also that all claims were timely because TWA had engaged in a continuing violation. In 1978, however, the Seventh Circuit vacated that order in a decision known as the consolidated opinion. The Seventh Circuit held that TWA's policy was indeed unlawful, but that there was no continuing violation, and that the claims of 92 percent of the plaintiff class were therefore untimely pursuant to former Section 706(d), the 90-day time filing requirement.

Plaintiffs contended before the Seventh Circuit at that time that TWA had nevertheless waived any timeliness defenses. The Seventh Circuit in its opinion expressed doubt as to any waiver by TWA, but ruled that the time filing limit is a jurisdictional prerequisite which in any event is not subject to waiver by TWA.

Plaintiffs and TWA thereupon filed petitions for certiorari in Cases Number 78-1545 and 78-1549. It is important to note that plaintiffs in seeking -- in filing their petition for certiorari did not seek review of the Seventh Circuit holding that there was no continuing

violation, and it should be remembered that this was the basis for the district court's order granting summary judgment.

In June, 1979, while those petitions for certiorari were pending, TWA and the plaintiffs entered into a settlement agreement.

QUESTION: Counsel, what do you think the Seventh Circuit's definition of a "continuing violation" is?

MR. JOLLEY: Your Honor, the Seventh Circuit in its opinion considered this Court's decision in Evans, and relying in part upon the decision in Evans concluded that where there is a termination of employment, a permanent severing of the employment relationship, it is that act that starts the statute running, as opposed to a layoff situation where employees maintain a continued link to their job or to their employment, and TWA's refusal in the succeeding years after the terminations beginning in 1965 to rehire is not in the Seventh Circuit's opinion a continuing violation. The violation was the act of termination.

The settlement agreement entered into by TWA and the plaintiffs in this case divided the plaintiffs into two subclasses, Subclass A consisting of the 8 percent, approximately 30 in number, who according to the Seventh Circuit had valid timely claims; Subclass B consisting exclusively of the 92 percent, exceeding 400 plaintiffs in

number, whose claims are time barred according to the Seventh Circuit.

Under the agreement, TWA agrees to pay each subclass $1.5 million to be apportioned among the respective subclasses. The settlement also contains a non-admission clause regarding TWA's liability and a provision stating that the settlement supersedes past, present, and future collective bargaining agreements.

Most importantly, the settlement provided that all class members would be offered re-employment and may obtain full competitive seniority to be awarded by the district court "in its discretion pursuant to the provisions of Section 706(g) and all other applicable provisions of law without contest or objection by TWA."

IFFA, the incumbent union, intervened, and its objections to the district court's jurisdiction, to the approval of the settlement agreement, and to an award granting seniority were all overruled by the district court. On appeal, the Seventh Circuit affirmed the seniority grant on the basis of this Court's decision in Franks versus Bowman, and rejected IFFA's jurisdictional challenge on the rationale that the policy favoring voluntary settlements outweighs its lack of jurisdiction, even though the Seventh Circuit left undisturbed its previous holding that the time limit is jurisdictional.

IFFA stands before the Court today because valuable contract rights, indeed, its most cherished and important contract rights, previously bargained away to IFFA by TWA through the collective bargaining process, and therefore belonging to IFFA, have been taken from IFFA and given to the plaintiffs.

Under the Railway Labor Act, not only is IFFA entitled to determine for itself the collective bargaining process, what changes to make in the collective bargaining agreement, what provisions to try to include or to include in a collective bargaining agreement, it is also entitled to compliance by TWA with its Railway Labor Act obligation to deal exclusively with IFFA, and with no other, not only in setting but in changing the terms and conditions of employment, which includes seniority.

This Court has previously acknowledged the overriding importance in today's economic system of seniority systems.

QUESTION: Are you going to -- you are going to get to the jurisdictional matter, the time matter? Or are you arguing that?

MR. JOLLEY: Your Honor, we certainly are not waiving the jurisdictional question. We want to address primarily the grant of seniority, because we believe there is absolutely no foundation for a grant of seniority in the

circumstances of this case.

QUESTION: Well, what if we affirm the court of appeals' holding that it was a jurisdictional requirement, and then held also that the district court could not enter a settlement with respect to 92 percent of the plaintiffs?

MR. JOLLEY: Your Honor, we would be very happy.

QUESTION: Well, I know. It seems to me that it is a jurisdictional question, isn't it?

MR. JOLLEY: Yes, Your Honor, it is.

QUESTION: Well, you don't even get to your issue if the jurisdictional issue is decided in your favor.

MR. JOLLEY: Your Honor, ordinarily I know that the Court first addresses jurisdictional questions to determine the --

QUESTION: You go your own way, but you are just going to leave us on our own?

MR. JOLLEY: Well, that is the issue that is raised in Number 1545, which is the other case consolidated. That precise issue is before the Court. We do not believe --

QUESTION: Yes, but you --

MR. JOLLEY: Your Honor, we do not believe, first of all, that a district court whose own court of appeals has stated that there is no jurisdiction, has the jurisdiction even to approve a settlement agreement.

QUESTION: All right. Well, you go ahead and argue your case the way you want to.

MR. JOLLEY: As this Court has previously indicated, competitive seniority rights determine the allocation between competing employees to scarce employment benefits, and indeed determine who gets and who keeps an available job. In our brief, I think we have detailed that these remarks are even more appropriate to flight attendants by the nature of their job. The nature of the rights that have been taken from IFFA in this case are highlighted by the fact that since 1979, when IFFA intervened in the settlement of this action, hundreds of flight attendants have been furloughed, have not been recalled, and since the collective bargaining agreement would be superseded by the settlement agreement between plaintiffs and TWA, their contractual right to recall within a period of three years, which is a part of the current collective bargaining seniority system, will be deprived by the grant of greater seniority to the plaintiffs in this case.

QUESTION: Mr. Jolley, will you agree that the agreement as to Subclass A also overrode the bargaining agreement?

MR. JOLLEY: No question about it, Justice O'Connor. It did override.

QUESTION: Well, then, why is the union failing to

object to the portion of the agreement which applies to Subclass A?

MR. JOLLEY: Your Honor, the union has chosen, as is its right to do, in a sense to agree by not objecting because plaintiffs in Subclass A have come close to carrying their burden required by Franks in order to demonstrate even the possibility of an entitlement to rightful place. IFFA has made a judgment, as in fact courts have done, that those who file timely claims are in a different position than those who have not, and even though the question of TWA's violation as to Subclass A is pending before this Court, the jurisdictional infirmity does not exist as to Subclass A, and for that reason we have chosen, as is our right, to not base our objections on the competitive seniority grant to Subclass A members.

QUESTION: Would you also agree that the seniority system itself really was not affected by the settlement agreement? It was a question of who was plugged in where, but it didn't change the seniority system itself.

MR. JOLLEY: No, Your Honor. The settlement agreement itself states that the seniority agreement is superseded. Moreover, the provision of the agreement which states that flight attendants who are terminated or who resign forfeit all their seniority, that is an integral part of the seniority system, because it is that provision which

allows incumbent employees once they have a job to move up and become more entitled to the scarce employment benefits, and that provision has been superseded, and that is integral to the functioning of the entire seniority system.

QUESTION: Let me ask you one more question while I have you responding right now, and that is whether IFFA is not bound by the actions of the union which did represent the plaintiffs when the action was filed.

MR. JOLLEY: I don't believe --

QUESTION: And if not, why not?

MR. JOLLEY: Well, Number One, that question has never been raised, and I believe that before there can be a granting of seniority that belongs to IFFA, that IFFA has a right under due process to litigate that issue, and Number Two, there has -- we are not bound. That would require us to be a legal successor, which we denied, and again, that has not been litigated, and the actions of the early union in 1971, they entered into a settlement agreement which in fact was based upon the jurisdictional infirmities of 92 percent of the plaintiff class. And our position is consistent with the position of the union at that time in that regard.

I am running out of time, and I would like to conclude by indicating that under our system of laws, there are only two ways in which property which belongs to one

party can be granted to another. It is a simple proposition. Property that belongs to me can be given away by my consent, or it can be taken from me after a litigation which results in a finding of a legal wrong which entitles someone to my property after I have had the opportunity to defend myself and to attempt to prove that there has been no such legal wrong. There has been no voluntary settlement in this case. IFFA has not agreed to the grant of its seniority. TWA and the plaintiffs have entered into a settlement, and to the extent that TWA offered what was TWA's to give, and that the plaintiffs offered what was the plaintiff's to give, that is a settlement. That has mutuality of consideration. That is voluntary. That is not a settlement as to IFFA. It is not a settlement as to the seniority rights.

QUESTION: You don't claim that IFFA isn't bound by Title 7, do you?

MR. JOLLEY: Oh, absolutely not. Title 7 has -- a remedial scheme which binds -- binds IFFA. It has affirmative provisions which bind IFFA. But it also has Section 706(g), which states in clear terms that upon a finding of the commission of an unlawful employment practice, upon a finding of a violation of Title 7, the Court may enjoin that practice and may award affirmative relief. And there has been no such required finding. This

Court in Franks said that such a finding is required before you get to the --

QUESTION: Well, what about Class A? Was there a finding of violation with respect to them?

MR. JOLLEY: Your Honor, there was a finding in the 1976 order of summary judgment. That judgment was reversed as to Subclass B because of the -- violation.

QUESTION: I understand, but how about A?

MR. JOLLEY: There is a finding, but that is up before the Court at this time on certiorari in 1549.

QUESTION: Well, I know, but that wasn't granted, was it?

MR. JOLLEY: It was granted as not being heard.

QUESTION: It was what?

MR. JOLLEY: I do not believe that the grant of certiorari -- the grant of certiorari --

QUESTION: Oh, it was deferred. That's right.

MR. JOLLEY: -- in 1549 is deferred. It is still before the court.

QUESTION: That's right. But if that were -- if that finding of -- where do you stand if that finding of violation is left standing?

MR. JOLLEY: As to Subclass A, we haven't objected at this point.

QUESTION: Well, I know, but there is a finding of

violation.

MR. JOLLEY: But only as to Subclass A, and Subclass A cannot bootstrap otherwise invalid claims. The class action procedures are only a device for consolidating claims which are otherwise properly before the Court.

QUESTION: What did the district court find?

MR. JOLLEY: In which action, Your Honor?

QUESTION: With respect to Subclass B. Did the district court find a violation?

MR. JOLLEY: The district -- the only order of a violation was the 1976 summary judgment granted --

QUESTION: Right.

MR. JOLLEY: -- summary judgment grant, which was based on the continuing violation --

QUESTION: Yes, with respect to the entire class.

MR. JOLLEY: -- which was -- to the Seventh Circuit.

QUESTION: With respect to the entire class.

MR. JOLLEY: At least by inference to Subclass B. There is a finding of a violation that the policy was discriminatory, and that Subclass A members were the subject of a timely claim, and I believe that ruling has been left intact, subject to the writ of certiorari that has been granted in this case or held in abeyance by the court in 1549.

QUESTION: Mr. Jolley, to what extent did IFFA take part in the proceedings with respect to the settlement?

MR. JOLLEY: After the settlement was entered into, IFFA intervened, objected --

QUESTION: After the settlement?

MR. JOLLEY: Pardon me?

QUESTION: This was after the settlement?

MR. JOLLEY: After the settlement was an accomplished fact.

QUESTION: Yes.

MR. JOLLEY: IFFA intervened for purposes of objecting to the district court's jurisdiction, and objecting to the settlement, and objecting to the grant of seniority.

QUESTION: You made the same arguments then that you are making here today.

MR. JOLLEY: We did, Your Honor, and the right to be heard in that proceeding is not the right that is guaranteed to us under the due process clause to litigate in the first place whether there has been a finding of a violation to litigate the merits. There has been no determination on the merits that TWA has violated the law under Title 7, and therefore there is no basis for exerting 706(g) remedial powers, and there has been no settlement.

I would like to reserve my remaining time for

argument -- for rebuttal if there are no further questions.

QUESTION: Mr. Jolley, may I ask you one more question before you do? Is there a necessary conflict between employees currently represented in an employment situation and others such as the ones who were formerly discharged who want rightful place relief?

MR. JOLLEY: First of all, Justice O'Connor, yes, there is a conflict. There are conflicts often times in collective bargaining even between one group of present employees and another covered by the same collective bargaining agreement, and as this Court has held on numerous occasions going back to Steel versus Louisville, et cetera, the collective bargaining representative has the authority so long as it acts in good faith as a part of its collective bargaining rule to resolve those conflicts, but yes, there is a conflict.

However, this is not a rightful place case. Rightful place is a term under Franks which arises only after there is a finding of a violation. This Court in both Evans and Hardison made that point crystal clear. This is not a rightful place case, certainly not as to Subclass B. There has been no determination of a right to that place. It is a settlement agreement which the holder of the right did not enter into, and on that basis it cannot stand.

Thank you.

CHIEF JUSTICE BURGER: Mr. Randolph.

ORAL ARGUMENT OF A. RAYMOND RANDOLPH, JR., ESQ.,

ON BEHALF OF THE PETITIONERS IN NO. 78-1545

MR. RANDOLPH: Mr. Chief Justice, and may it please the Court, I represent the plaintiff class in this case, and I would like to first address myself to a number of the arguments that Mr. Jolley has just made on behalf of the union and also in his reply brief, and then address the question that Mr. Justice White raised with respect to jurisdiction.

There was and has been no absence of union participation in this litigation in the eleven-year history of the case. As Justice O'Connor pointed out, this case was begun by the union. There was a complaint filed by the union after the union brought a charge before the EEOC in 1970. There came a time, three years after the litigation was under way, that the court of appeals decided that the union could no longer represent the class that I now represent because of a conflict of interest, but the union was not ousted from the litigation. The original union remained in this case until 1976 as a party, participated in the pleadings, filed motions in opposition to summary judgment, and so on and so fort.

In 1976, the district court entered an order that the original union had become defunct. That was Local 550

of the Transport Workers Union, AF of L-CIO. The Court, however, allowed without prejudice the new union, Local 551, to intervene. That order was entered in April of 1976, and a few days later Local 551 intervened, and so, again, from 1976 on, the union was participating in the litigation.

In April of 1977, this union came into being. They did not, however, file to intervene into this case. And they did not come into the case until July of 1979, before the settlement agreement was approved by the district court. One might speculate about why during an eleven-year history of this case there were two years when this union was in existence when a union was not a party to the litigation. But there is no need to speculate, because the union explained why it stayed out of the case to the district judge, and we think that explanation contradicts a good many of the things not only that Mr. Jolley has just said to this Court, but also that the union has said in its reply brief.

There is a document entitled Supplemental Suggestions of Intervenor IFFA in Support of Motion to Intervene, and I have lodged copies of this document with the Clerk of the Court, and they are available, and I would like to just read to the Court what the union told the district court.

"In this case" -- and this was filed in July of

'79 -- "In this case the union certainly had no reason to intervene prior to this time. The union was not in existence for the first seven years of this litigation. Shortly after the union came into existence, counsel for the union spoke with counsel for the defendant regarding this litigation, and it was mutually agreed that no purpose would be served by the union intervening at that time, but that intervention by the union might be appropriate if and when the case ever reached the remedy stage."

So, the union came into this case purposely only at the time of the remedy, and the union's intervention petition was aimed at two arguments. One, that the district court should not exercise jurisdiction because the court of appeals had ruled otherwise, and Number Two, that the seniority award would have an adverse impact, an unusual adverse impact.

Mr. Jolley in his argument throughout the brief has referred to the settlement agreement depriving his clients of their rights. The settlement agreement did not do that. There was a separate seniority award entered by the district judge, not simply after the union made objections, but after a three-month hearing on the matter in which depositions were taken, exhibits were introduced, cross examination was engaged in, and arguments were made.

After that litigation was over, with TWA standing

aside, is the point at which the seniority award was made by the district court, pursuant to Section 706(g) of the Act, which provides that if a violation is found the district court has jurisdiction to enter a remedy. Mr. Jolley said there was no finding of violation with respect to Subclass B.

To borrow from the Solicitor General's brief, I think that argument is syntactically complex. What he means by that is not that the district court never found that Subclass B people were not victims of a Title 7 violation, because the district court did so find. He cannot mean that the district court found no jurisdiction. The district court did so find. What he means is that because the court of appeals reversed the district court, therefore we can ignore the fact that there was a violation found, and to make it plain, and now I would like to address the jurisdictional argument, but in doing so, I want to --

QUESTION: Mr. Randolph, ordinarily when the court of appeals reverses the district court, the district court's findings are overturned, are they not?

MR. RANDOLPH: That's right. But in this case, the case reached the court of appeals on a Section 1292(b) appeal, an interlocutory appeal. No final judgment had been entered. There was no stay of the district court's proceedings. When the court of appeals issued its judgment,

there was a stay of the mandate of the court of appeals judgment. So when the district court had the case before it in 1979, while petitions were pending here, the case was the same as if the court of appeals had not ruled, and we made the point in our brief that what petitioners are really arguing is that the district judge should have been persuaded by the court of appeals' opinion.

A mandate compells compliance. It does not compell agreement, and the court of appeals mandate had been stayed. The district court -- if the district court was not persuaded by it, and the district court was not, the district court was free, in fact, even without the settlement agreement in this case, the posture of the case in the district court was that the only question remaining was remedy. There was a summary judgment for all members of the class. There was a finding of jurisdiction. The district court could have proceeded to the remedy stage without a settlement, and ordered retroactive seniority relief as the court ultimately did.

QUESTION: Well, you wouldn't go so far as to say that if the district court dismisses the complaint, the court of appeals orders it reinstated, that the district court may simply refuse to continue litigation on that complaint because the mandate has been stayed of the court of appeals, would you?

MR. RANDOLPH: If the district court has dismissed the complaint, and the court of appeals has reversed, and no mandate has come down yet, I think the district court is not -- can be guided by the opinion, but is not bound to reinstate the complaint until the mandate issues.

The question that I am about to address is, we think, the heart of the union's argument in this case, which is jurisdictional. Although the union talks about lack of violation, they mean jurisdiction. Although they talk about lack of jurisdiction, what they really mean is whether the court of appeals was correct, and I would like to quote Mr. Jolley's statement to the court of appeals -- or to the district court. It is not in the appendix. It should be at Volume 2, Page 19. It is the sentence that begins after the sentence ending at the top.

He said, "If it" -- the Supreme Court -- "does grant cert and reverses the Seventh Circuit, as we are going to ask you to do, then I think our position is basically," and this is the union's position, "to be heard on the basis of seniority alone, and to try to show the Court there would be a serious adverse impact which would be within the Court's discretion."

Now, the Court, of course, has granted certiorari. The question about whether the particular remedy in this case is appropriate is not an issue in the

case, because the Court denied certiorari with respect to the union's last question presented in its petition which dealt with that, and the question that remains, we submit, is the question that we have addressed in our brief and that the Solicitor General has addressed in its brief with respect to jurisdiction, and that question arises because, as Mr. Jolley correctly states, with respect to some, and what the percentage is, I believe, is probably about 90 percent of the plaintiffs in this case, their complaint was not filed within -- their charge with the EEOC was not filed within 90 days of the time that they were terminated for becoming mothers.

The complaint in this case was filed, as I said, by the union, and after the union filed the complaint, TWA answered. The answer is contained in the joint appendix, at Page 8A. TWA's answer admitted jurisdiction, raised two affirmative defenses, neither of which were statute of limitations. Two years later, and this is contained in the joint appendix at Page 54A, the district court entered an order at TWA's behest.

That order, which is contained in the appendix on 54A, found that the court had jurisdiction over all members of the plaintiff class. That order was pursuant to a settlement that TWA had worked out with the prior union, which was ultimately set aside, as I mentioned before.

The case wound its way on, and four years after the filing of the complaint, TWA made a motion to amend their answer. They claim now that the plaintiff's complaint can be defended on the basis that there was -- that they failed to comply with the "statute of limitations". The district court granted TWA leave to amend, but cautioned that TWA was going to be required to show that its delay and failure to raise this defense for four years was excusable, and that the plaintiff suffered no prejudice as a result of that.

Five years after the lawsuit began, TWA appeared in district court in 1975, and for the first time in this case raised the question whether this was jurisdictional. Former Section 706(d). TWA argued that the failure to comply with the charge filing provisions of Title 7 was a jurisdictional defect, and since it is jurisdictional, TWA wanted to take advantage of the ancient maxim that any party at any time in the litigation can raise a jurisdictional problem. The district court asked how in the world a motion like this can be filed five years after the lawsuit began, but I guess I have no choice, because you are raising a jurisdictional question.

It was at that point that the district court rejected TWA's argument about jurisdiction, found a continuing violation, entered summary judgment for Subclass

B. Those two findings, summary judgment and continuing violation, were the subject of 1292(b) interlocutory appeals to the court of appeals, and the court of appeals ruled in 1978 that in fact the time limits were jurisdictional, and we petitioned for certiorari, and the court has granted our petition.

QUESTION: Did the district court ever find there had been a waiver?

MR. RANDOLPH: The district court --

QUESTION: And assuming it was not jurisdictional, they hadn't complied with the time limit. Did the district court ever rule on that, or did the court of appeals just say it is doubtful if there was a waiver?

MR. RANDOLPH: I don't believe the court of appeals said it was doubtful that it was a waiver. I think the --

QUESTION: Well, I thought I understood your colleague to say that.

MR. RANDOLPH: Yes. I don't believe that is accurate, Justice White.

QUESTION: Did the district court make any finding that the settlement agreement itself constituted a waiver? That the time deficiencies were not jurisdictional, but merely statute of limitations?

MR. RANDOLPH: No, because the district court did

not have to so find. Once having found a continuing violation, Justice Brennan, there was no need to consider whether there was a waiver of the statute of limitations, so there was no finding in that respect. The district court's --

QUESTION: Did you make any argument that if this is statute of limitations, that the settlement did constitute a waiver?

MR. RANDOLPH: We think that that is the only thing that TWA in fact waived in this case, is their right to further litigate the question whether they waived the statute of limitations. That is what they gave up through the settlement, from our point of view.

QUESTION: Do I understand the adversary petitioner who just argued to take the position that even if this was a statute of limitations and not jurisdictional, that nevertheless the settlement is invalid?

MR. RANDOLPH: Yes, they say -- for the first time, I think, in this litigation, the union has said that we should be allowed to raise the statute of limitations defense, even if TWA has waived it, and our answer to that is, Number One, their petition for intervention under Rule 24(c) of the Federal Rules of Civil Procedure is supposed to state all of their claims or their defenses, and if the Court reviews that -- it is in the appendix -- you will find

no statute of limitations.

QUESTION: Do you understand that in saying that the settlement is invalid, they are really arguing that it is only because it is time barred. Is that it? Even if it is statute of limitations and not jurisdictional?

MR. RANDOLPH: Well, I think that their claim is entirely jurisdictional, Justice Brennan. They cannot say that there was no violation, no finding of violation, unless they make a jurisdictional argument. The Court has said on a number of occasions that the failure to comply with the statute of limitations doesn't extinguish the claim. They are saying that failure to comply with a jurisdictional defect does extinguish the claim. It is the only way they can make that argument.

QUESTION: You still have to argue the jurisdictional --

MR. RANDOLPH: Yes. I have a few minutes left. I think we are in good company in making this argument. The EEOC and the United States have filed an amicus brief that basically support or we support their construction, one way or the other. Twenty-five judges of the Fifth Circuit in a case we relied upon -- it is an opinion by Judge Anderson and I commend it to the Court -- in Coke joined in holding that this particular provision, the 90-day charge, was not jurisdictional. I guess we can call -- take credit also for

the Eleventh Circuit now, because that was rendered before those two circuits split, and every judge sitting in those circuits has agreed.

In fact, every circuit -- our review and the Solicitor General's review indicates that every circuit court that has considered this question agrees that the 9-day charge filing provision with the EEOC is not jurisdictional except the Seventh, and this is the only case representing a position of a court of appeals now that takes that position.

We argue on the basis of statutory interpretation. This is in essence a question of what Congress intended. And folllowing the usual course, one looks first at what the statute says. The section dealing with jurisdiction of the federal courts simply says, each U. S. district court shall have jurisdictions of actions brought under this subchapter. There is no qualification in that section, the section 706. There are no conditions. There is no cross-reference to any other provision.

The charge filing provision that is at issue here deals with the time for filing a charge with the EEOC, not the time for filing a charge with the court. It is a separate provision.

One thing that is clear, and the Court's prior opinions have so said -- Franks has been mentioned,

Albermarle Paper Company versus Moody, and a number of other cases -- that the remedial provisions of Title 7 were modeled after the National Labor Relations Act, and the close provision in the National Labor Relations Act, former Section 706(d) of Title 7, that we are dealing with now, has language similar to what we are talking about here. It provides that complaints have to be filed within six months with the NLRB, and the courts have uniformly, without exception, construed that provision to be an ordinary statute of limitations, subject to equitable modification.

There are statements of Members of Congress on the floor in 1964 to the effect that what they were designing by this provision is a period of limitations.

QUESTION: I thought the statute of limitations governed actions at law, and that equitable modification would deal with the latches.

MR. RANDOLPH: Well, this is a -- this, I think -- this suit is analogous to a suit under the National Labor Relations Act for a make whole remedy, and I think Congress so considered that as the proper analogy, Justice Rehnquist, and whether it should be called a statute of limitations or some other term subject to equitable modification I don't think is the significant point. I would point out, however, that the committee reports, when this section was amended in

1972, and extended to 180 days, in fact called it a statute of limitations.

QUESTION: Which is the term you ordinarily use for an action at law.

MR. RANDOLPH: I suppose. But I notice that TWA has taken us to task because they said that the NLRA is not a good analogy. Our only point here is, we are dealing with a question of statutory interpretation, and the important thing is what Congress's analogy was, and if you look at Page 27 of our brief, you will see that, for example, the House -- the minority view of the House Labor Committee called the filing period a statute of limitations, and said it was identical to the statute of limitations under the National Labor Relations Act, and the Senate Labor Committee section by section analysis basically said the same thing.

The opinions of this Court, we think --

QUESTION: May I ask, Mr. Randolph --

MR. RANDOLPH: Yes.

QUESTION: -- are you getting any comfort out of the 180-day limitation and the Age Discrimination Act?

MR. RANDOLPH: Yes. That was amended in 1978. The Court in Coke mentioned that. There was a case in this Court, I believe, called Dart, where the Court evenly split, and whether it was over that issue I don't know, but that Act is modeled after Title 7, and in Coke, the court of

appeals mentioned that Congress made clear in amendments to the Age Act in 1978 that they did not want this time filing provision to be construed as a jurisdictional matter, but rather as a statute of limitations. There are other --

QUESTION: It said that explicitly, I gather, did it?

MR. RANDOLPH: Pardon me.

QUESTION: Didn't one of the reports so state explicitly?

MR. RANDOLPH: It so stated explicitly. Explicitly.

QUESTION: All right.

MR. RANDOLPH: And the reasons for that, I think, are fairly certain. There is no reason for construing this as a jurisdictional matter. I think there was no policy reason. A statute of limitations provides a defense if it is invoked, and would defeat a claim if it were invoked by an employer. Our point here is, Number One, it is not invoked as an affirmative defense. For five years this case went on and it was not invoked. TWA was given leave to amend, but only on condition that they justify their failure, and then the case was settled, and I might say, since my time is up --

QUESTION: Could I ask you, do we judge this case on the basis that there was no continuing violation?

MR. RANDOLPH: Yes, we have not raised that as an issue.

QUESTION: Yes, so we say that the statute of limitations matter then is of critical importance?

MR. RANDOLPH: Yes. I have to qualify my statement. In fact, the court of appeals did find a continuing violation with respect to some members of the class, the ones that became mothers between July 2nd, 1965, and March of 1970, but then got rehired.

QUESTION: To the extent the court of appeals disagreed with the district court, you have not -- that issue is not here.

MR. RANDOLPH: We have not raised that issue.

QUESTION: All right.

MR. RANDOLPH: We rest on the statute of limitations.

QUESTION: Yes.

CHIEF JUSTICE BURGER: Mr. Carton?

ORAL ARGUMENT OF LAURENCE A. CARTON, ESQ.,

ON BEHALF OF THE RESPONDENTS

MR. CARTON: Mr. Chief Justice, may it please the Court, just two matters that I wanted to dispose of on this question of jurisdiction. One was Mr. Rehnquist's point, and I just wanted to read from our brief, "The NLRA does not contain any preliminary requirements like the state and EEOC

proceedings, without which Title 7 could not have been enacted."

Secondly, as far as the 1972 amendment, the 1972 amendments which brought in the 180 days were applicable only to charges pending with the commission on the date of enactment, and all charges filed thereafter.

The two previous speakers really have not touched upon the matter that is most important as far as TWA is concerned. TWA is interested in the settlement that will end this litigation. It is not involved in the seniority dispute between reinstated employees and current employees. TWA --

QUESTION: You can't avoid being involved in it, can you?

MR. CARTON: I am not sure, Justice White. I feel that the settlement agreement can be approved --

QUESTION: I know, but what if -- if we say the district court didn't have jurisdiction to approve the settlement with respect to 90 percent of the class, you can't avoid being affected.

MR. CARTON: That is right.

QUESTION: That is all I meant.

MR. CARTON: That is right. TWA stopped the practice two months after the complaint was filed. One year later, it entered into a settlement agreement under Rule

23(e). A similar settlement was entered into with American Airlines and the union, and both of these settlements were turned down by the court of appeals, primarily on the issue of the failure to grant retroactive seniority.

So, then we go back to the district court, and we have two years of discovery, and the district court, as has been discussed, hands down a judgment that there has been a violation of the Act, and so first American Airlines, we have a settlement agreement negotiated. The settlement agreement is approved by the court of appeals, certiorari is denied by this Court.

So, TWA is beginning to feel that we are getting somewhere. So, we go ahead and negotiate basically the same agreement as the American agreement two years later. The union intervenes, just the way they did in the American case. We have the hearings before the district court. This time we want to be even more careful, so we don't just have one order involving both seniority and the settlement agreement, we have two orders, a settlement agreement order and a second order in which the court grants retroactive seniority as he was authorized to do under the settlement agreement.

And as you all know, the matter goes on, and is approved by the court of appeals, and we feel we are home free.

QUESTION: You sound very innocent in the whole thing --

(General laughter.)

QUESTION: -- but you are the ones who brought the jurisdictional issue up in the court of appeals.

MR. CARTON: That is correct.

QUESTION: And the court of appeals ruled in your favor.

MR. CARTON: That's correct.

QUESTION: Well, that's the fly in the ointment -- that got the case here.

MR. CARTON: But even -- even in the proceeding, Justice White, in the American case, the question of jurisdiction was brought up, and the court of appeals approved this settlement regardless of the question and cert was denied.

Now, if the settlement order is approved here, the --

QUESTION: Well, may I ask, Mr. Carton, what is your position now on jurisdiction?

MR. CARTON: Our position on the jurisdiction case, Justice Brennan, is, as was said earlier, 92 percent of these class members didn't, as the testimony indicated, lift a finger. What brought this into the courts was a charge filed in June of 1970 by the union. They didn't do

anything, and our feeling is that there has been a violation of the requirements of Title 7, whether you label those requirements as statute of limitations or as jurisdictional prerequisites or even subject matter jurisdiction.

QUESTION: But as to the effectiveness of the settlement agreement, it does make a difference, doesn't it, whether this is merely time -- these are merely time barred claims or whether they are jurisdictionally barred.

MR. CARTON: That's correct.

QUESTION: Doesn't it make a difference?

MR. CARTON: But as far as the -- as far as the settlement is concerned, our feeling is that there is -- there is some advantage to the condition precedent idea which we have suggested, which was, incidentally, the term used in the Coke case. We feel that if there was a violation on the part of all of these 92 percent by not filing their charges, that these people are in a situation where the settlement is fair as far as they are concerned.

We also feel, getting back to this jurisdiction question, that there was not a final order on the part of the courts with respect to jurisdiction back in --

QUESTION: I guess what I am really trying to get at, Mr. Carton, do you want us to hold that the failure to file within the 180 days was a jurisdictional defect? Is that your position?

MR. CARTON: We are somewhat relaxed about the thing, Judge, Justice, because it isn't necessary --

QUESTION: You want the settlement to stand.

MR. CARTON: We want the --

QUESTION: Either way, whether you hold it jurisdictional or not, you think the district court was entitled to approve the settlement.

MR. CARTON: That is right, Justice White.

QUESTION: No matter what you say about jurisdiction.

MR. CARTON: That is exactly the way we feel, and we feel that --

QUESTION: You don't think your chances are better of having the settlement stand if our holding is that it is merely a statute of limitations rather than a jurisdictional defect?

MR. CARTON: Our feeling doesn't really, I think, matter.

QUESTION: You are just embarrassed by your prior position in the court of appeals in that respect.

(General laughter.)

MR. CARTON: We have tried all along to do what is best for TWA.

QUESTION: Yes, right.

MR. CARTON: But the point still is that we made

this settlement because we didn't know what was going to happen at a proceeding such as we are having now, and we felt -- we felt that we should go ahead and make the settlement. We were not very much concerned about the powers of the district court, because we felt that, as I said before, the case was not final, and so here we are. Now, I would like, if I could, to get into one area which we think is very important to our case, and that is the question of the power of the district court.

The district court is in a situation here, we think, where it can under the ancient rules of equity come down and handle this retroactive seniority issue. It can handle it under 706(g). It can handle it under its broad powers of equity.

I noticed a case that I am sure that you are familiar with, the Swann case on busing, where they had a quotation, "The essence of equity jurisdiction has been the power of the chancellor to do equity and to mold each decree to the necessities of the particular case. Flexibility rather than rigidity has distinguished it. The qualities of mercy and practicality have made equity the instrument for nice adjustment and reconciliation between the public interest and private needs as well as between competing private claims."

QUESTION: Mr. Carton, is it possible to state in

one or two sentences what is being disputed and by whom in this case?

MR. CARTON: I think that the question of the settlement agreement, Justice Rehnquist, and the seniority order have been confused. I think that the relationship -- they are intermingled, and I don't think they should be. I think there are two separate orders, and what I am trying to say by quoting regarding the powers of a court of equity is that a court of equity in a situation like this has the power to come in here and finalize in a comprehensive way all of these complications that have grown up over eleven years of litigation so that these women can go back to work.

QUESTION: Mr. Carton, do you want us to do that?

MR. CARTON: Yes, sir.

QUESTION: What did we do to bring that on ourselves? You want us to take this whole eleven years of litigation and work out a plan.

MR. CARTON: No, we have a plan for you.

QUESTION: Oh, you want us to take your plan.

(General laughter.)

QUESTION: Oh, that is different.

QUESTION: Well, certainly courts of equity are not notorious for the speed with which they move. Take Jarndeis against Jarndeis.

(General laughter.)

MR. CARTON: Well, I hope this case doesn't turn into Jarndeis versus Jarndeis. It has only gone on for eleven years. But the idea that we still have is that the court is now in a position here to, by approving the settlement agreement, this will then, under the Court's usual practice, make moot the other two cases, and that is the end of it. And that is what we would like.

CHIEF JUSTICE BURGER: Do you have anything further, Mr. Jolley?

MR. JOLLEY: Very briefly.

CHIEF JUSTICE BURGER: You have a minute and a half.

ORAL ARGUMENT OF WILLIAM A. JOLLEY, ESQ.,
ON BEHALF OF THE PETITIONER IN 80-951 - REBUTTAL

MR. JOLLEY: Thank you, sir.

Mr. Chief Justice, and may it please the Court, four points remain to be countered. Plaintiffs particularly argue thatt there has been a finding of a violation on the basis of the district court's summary judgment order in 1976. The first thing I want to point out is that the district court order approving the settlement agreement, the district court order granting the seniority, and the Seventh Circuit opinion affirming that exercise by the district court did not in any way refer to the finding of a violation on the part of TWA or the commission of an unlawful

employment practice by TWA as a basis for approving what TWA and the plaintiffs did. It was based instead entirely on and laced throughout referenced to the settlement agreement between TWA and the plaintiffs, and the policy encouraging voluntary settlements even in the lack of jurisdiction.

Secondly, the plaintiff maintains that there really was a violation found as to Subclass B because the act -- because the practice by TWA was found to be discriminatory. That is not so, and moreover it cannot be so by virtue of this Court's decision in Evans, where you very clearly held that the timely filing of a charge is a part of the violation, and that a discriminatory act not made the basis of a timely charge must be treated as lawful.

In that case, the no marriage rule of the airline was unlawful, but it had to be treated as lawful because it was not subjected to a timely filing of a charge.

CHIEF JUSTICE BURGER: Your time is up, Mr. Jolley.

MR. JOLLEY: Thank you, Your Honor.

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

(Whereupon, at 11:06 o'clock a.m., the case in the above-entitled matter was submitted.)

# CERTIFICATION

Alderson Reporting Company, Inc. hereby certifies that the attached pages represent an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of the United States in the matter of:

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

BY Dione Hammond