In the ORIGINAL

# Supreme Court of the United States

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| PULLMAN-STANDARD, A DIVISON OF PULLMAN, INCORPORATED, | : | |
| Petitioner, | : | |
| | : | No. 80-1190 |
| v. | : | |
| LOUIS SWINT AND WILLIE JOHNSON, ETC., and | : | |
| UNITED STEELWORKERS OF AMERICA, AFL-CIO. ET AL., | : | |
| Petitioners, | : | |
| | : | No. 80-1193 |
| v. | : | |
| LOUIS SWINT AND WILLIE JAMES JOHNSON | : | |

Washington, D. C.

January 19, 1982

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LOUIS SWINT AND WILLIE JAMES JOHNSON

Washington, D. C.

Tuesday, January 19, 1982

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 2:10 o'clock p.m.

APPEARANCES:

MICHAEL H. GOTTESMAN, ESQ., Washington, D. C.; on behalf of the Petitioners.

ELAINE R. JONES, ESQ., Washington, D. C.; on behalf of the Respondents

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P R O C E E D I N G S

CHIEF JUSTICE BURGER: We will hear arguments next in Pullman-Standard against Swint.

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

ORAL ARGUMENT OF MICHAEL H. GOTTESMAN, ESQ.,

ON BEHALF OF THE PETITIONERS

MR. GOTTESMAN: Thank you, Mr. Chief Justice, and may it please the Court, this case, like the last one, involves the question whether a seniority system is protected by Section 703(h), but the issues that are before this Court are entirely different. This is a pre-Act system. No one disputes that it is a seniority system. And indeed, no one disputes that the ultimate outcome of this case turns on the resolution of a single dispositive question of fact, that is, whether this system was negotiated or maintained with a discriminatory purpose.

The issues that are before this Court relate not to the meaning of 703(h) as such. That is something which is common ground in both lower courts and with all the parties in amici, but rather, with the -- the respective roles of district courts and courts of appeals in making the factual determination of discriminatory purpose, and with a methodology that the Fifth Circuit has sought to impose, both on the district courts and on itself, for treating with

the evidence that bears on the resolution of that factual question.

Now, this case was before the district court in successive trials that amounted to 19 days, in which his focus throughout was principally on the seniority system, and he had in addition to 19 days of testimony, a mass, literally a mass of documentary evidence, and on the basis of that the district court found as fact that the seniority system in this case, a system which provided that departmental seniority would be the measure of seniority for layoffs, recalls, and promotions, had not been adopted with a discriminatory purpose, and had not been maintained with a discriminatory purpose, and he cited a number of subsidiary findings, if you will, that led him to that ultimate conclusion.

First, this system was neutral on its face, made no distinction on the basis of race, and was in fact applied equally to blacks and whites throughout its existence. Second, he found the system was essentially the product of the union's aims and policies at that plant, not the company's. He found that at each stage in its development it was the union that was making the demands for particular seniority features, and that the features that emanated from bargaining were those that the union had sought.

He therefore thought it particularly important to

look at the attitudes of that union on questions of race and the roles that blacks and whites respectively played within that union in determining its policy. He found that this was a union rather unique in Alabama in the early 1940s that pursued colorblind objections -- objectives, excuse me. He found that the work force at this particular plant was roughly half black at all times, that blacks had been a major force, indeed the major force in organizing the union, that blacks had at all times been actively involved in the leadership of the union, holding officer positions, holding a majority of the shop steward positions, that blacks at all times had been on the union's negotiating committee, had participated in negotiating the very seniority system in question, indeed, had proposed many of the very elements of the system that were under question in the negotiation, that each element of the system when negotiated was brought back to the membership for approval at membership meetings in which blacks and whites participated equally, both in speaking about the system and in voting on it, that the votes on the seniority system had never divided along racial lines, and he made two ultimate conclusions about the role of this union that had negotiated this system.

One, this was not a local dominated by whites in any sense --

QUESTION: Well, how come it was divided into two

separate units on racial lines?

MR. GOTTESMAN: By two units, do you mean the plant was divided into two bargaining units?

QUESTION: Yes.

MR. GOTTESMAN: Is that Your Honor's question? The union was not divided into two units. The Steelworkers Union was one union. It came and sought to organize that entire plant.

QUESTION: Was the plant divided into two sections?

MR. GOTTESMAN: What happened was, another rival union -- this was the CIO, the Steelworkers union. They came and said, we are an industrial union, we want to organize the entire plant.

QUESTION: That wasn't my question. Were there two separate units, one white and one black, in this plant?

MR. GOTTESMAN: No.

QUESTION: Well, were blacks and whites in the same jobs?

MR. GOTTESMAN: They were in the same departments. They were historically not in the same jobs.

QUESTION: My point was, were they in the same jobs?

MR. GOTTESMAN: No, the company assigned blacks to some jobs and whites to others, and it was this seniority system that --

QUESTION: And the union permitted it?

MR. GOTTESMAN: Permit it? No, the union did not permit it.

QUESTION: Well, did the union represent it?

MR. GOTTESMAN: The union negotiated a seniority system that enabled blacks to exercise seniority to get to the white jobs.

QUESTION: And the union allowed them to have separation on the basis of race.

MR. GOTTESMAN: No, it did not, Your Honor. The evidence is quite --

QUESTION: Well, did they stop it?

MR. GOTTESMAN: Pardon me?

QUESTION: Did they stop it?

MR. GOTTESMAN: They stopped it before the effective date of Title 7, and they stopped it with this very seniority system. Those were the findings.

QUESTION: Yes, and it is still based on the same thing.

MR. GOTTESMAN: I am sorry?

QUESTION: I still don't understand how the union agreed to this all along.

MR. GOTTESMAN: Well, Your Honor, the union walked into a plant in which the company had discriminatorily assigned people to jobs on the basis of race. It had not by virtue of that put all blacks in this department and all

blacks in that department. Departments were set up for operational purposes, long before there was a union, long before there was a seniority --

QUESTION: And just accidentally --

MR. GOTTESMAN: It wasn't accidental at all, Your Honor. The company for racial motivations found by the district court discriminatorily assigned people to jobs. When the union came on the scene, there was a department. That department had jobs with black people on them and it had jobs with white people on them, and the union said, we want a departmental seniority system, and that system, when they got it and when they finally got promotion rights under it, meant that blacks on a job where the company had put them because they were black could now exercise their seniority to promote to the jobs that had previously been assigned to the whites.

QUESTION: But they started off on an unequal footing.

MR. GOTTESMAN: Absolutely. Started off, because the company assigned them different jobs.

QUESTION: They ended up on an unequal footing.

MR. GOTTESMAN: No, they ended up on an equal footing, Your Honor. That is the important thing, because since departmental seniority was the measure, the time that a black had spent on that black job that the company

assigned him to counted just as much as the time that a white spent on a white job.

QUESTION: So if I started off in the plant solely because of race the same day you did, and I started eight steps below you on the seniority level, solely because of my race --

MR. GOTTESMAN: No seniority ladder, Your Honor. A very important fact here.

QUESTION: I'll bet you you don't know what my hypothetical is.

MR. GOTTESMAN: I am sorry. Excuse me, Your Honor. You are entirely --

(General laughter.)

QUESTION: I'll bet you you don't.

MR. GOTTESMAN: Okay.

QUESTION: And I start off eight steps behind you, solely because of my race, and I am told I can't advance, and then 85 years later they tell me I can advance to the same extent that you advance, you say I am not discriminated against?

MR. GOTTESMAN: There is no question you were discriminated against before the passage of Title 7.

QUESTION: Well, what difference is it except the 85 years?

MR. GOTTESMAN: Your Honor, there is no doubt that

but for the Section 703(h) and the decision in Teamsters, there is an injury suffered by people by reason of pre-Act discrimination. It happens to be much less here than in most cases, because here the hypothetical Your Honor gave, that you were eight steps below, doesn't exist. Here there were no lines of progression. That was one of the very important things the district court pointed out as evidence of innocent motivation.

Here, everyone was told, promotions from now on within this department will be on the basis of departmental seniority, without any lines of progression, so that a black who had been in that plant longer, even though he had been assigned to the bottom job, or the lowest paying job -- there was no bottom job as such in the department -- would be free to use that seniority to claim any job in that department that he wished the minute a vacancy arose.

In other words, this -- the design of this system was found by the district court to be positive evidence of innocent motivation, because although many people for non-discriminatory reasons, in all-white plants, for example, where race couldn't be a factor, do in fact develop lines of progression. There is nothing inherently vicious about lines of progression. In fact, this system didn't contain those. This system contained a much quicker route of access to repair the damage that had been wrought by the

company's initial acts of discrimination.

Now, beyond these features, the company cited two others. The company looked at -- I am sorry, the district court looked at the two components of this system about which complaints had been made. The first of those was, this is a departmental seniority system. The measure of seniority is how much time have you been in the department, and the plaintiffs allege that the court should find that the parties' choice of that measure of seniority was badly motivated.

And the court said, I have nothing to support such an inference. On the contrary, every plant in America of this size and with this disparity of jobs is either a departmental seniority system or a narrower one. The only kind of seniority system you can create that doesn't have the effect of disparate impact when a company has previously discriminated in assignments, is one that says, from now on, whenever any job in this plant opens up, no matter where it is, it will go to the most senior person in the plant who bids for it. Now, that is the only kind of system that doesn't create disparate impact.

But that kind of system didn't exist anywhere in America in a large plant. It didn't exist because employers couldn't operate a plant that way. They would be playing musical chairs every day, moving everybody around. And it

didn't exist because employees didn't want a seniority system like that. There would be no stability whatever in your job. You wouldn't know from day to day where you were going to work in the plant.

So that there was no such thing as the only kind of seniority system that would not have disparate impact, and what that meant was, and this was the point the district court found absolutely most important in his analysis, what that meant was, when a union organized a plant, a large plant where the employer had historically discriminated, and that discrimination was still manifested in the placement of people in the plant, it was not conceivable that innocently motivated parties would have negotiated a system that would not have disparate impact.

To choose to have a seniority system meant that you were going to have a system that had disparate impact. Now, I suppose one could say, well, the fact that these parties chose to have a seniority system of any kind is evidence of bad motives. If they hadn't been badly motivated, they wouldn't have chosen to have a seniority system. But we know that can't be the case. This Court has said seniority systems are universal in American industry. Every union upon negotiating every plant, the first thing it wants, even before a wage increase, is a seniority system, because that is the most important things that employees want for job

equity. And it is not possible in the face of a history of discriminatory assignments to negotiate however innocently a seniority system that doesn't have a disparate impact.

Now, it happens that among the choices that innocently motivated people in plants make, if you look at all-white plants where race couldn't be a factor, in the north, there are a number of kinds of systems people could adopt. They could adopt a job seniority system with a line of progression. They could adopt line of progression seniority. The widest kind of seniority anybody ever adopted anywhere was departmental seniority without lines of progression, the very thing which these parties negotiated here, right in 1941. So these parties adopted the broadest system of seniority that had the least disparate impact of any conceivable system they might reasonably have been expected to choose, and the district court said, how can I find bad motive when I find these parties adopting what is in fact the broadest possible system anybody could have been expected to adopt.

Now, that, I think, indicates what is the danger of placing undue emphasis on evidence of disparate impact in measuring seniority systems, and this would be true of a post-Act system as well, if the union came along tomorrow and organized a plant that still had the effects of an employer's historical discrimination. Simply to choose to

have a seniority system is to create something that will have disparate impact.

QUESTION: Mr. Gottesman, what test did the district court employ for determining the intent in setting up the system?

MR. GOTTESMAN: When you say what test, he said the question before me is, were the parties motivated by a racial purpose. That was his test. He derived that test from Teamsters, and foreseeability, Teamsters eliminated as an element in the inquiry foreseeability. Now, it is always true if a union comes on a plant that has had disparate assignments, to choose to have a seniority system will foreseeably have a disparate impact, but what Teamsters said is, that the is the very thing Congress wanted to protect in 703(h). It knew that it was foreseeable that any seniority system would have those effects, and it wanted to say, because it wanted to protect seniority systems, that notwithstanding that it was inevitable that those systems would have that effect, we want to protect those systems, and we will not invalidate them, as this Court also said in Feeney, in the Fourteenth Amendment context, and it said it again in Teamsters in the Title 7 context, we will only allow the invalidation of those systems that were set up because of, not in spite of their disparate impact.

So that if you find that these parties designed the

system for the purpose of hurting blacks, or fencing them out, or whatever, that system will not be protected, but if these parties with innocent purpose set up the same seniority system they would have set up if everybody were white, or everybody were black, that is to say, a system which was not shaped by racial purpose, then the mere fact that that system has a continuing effect because of the company's independent discrimination will not invalidate that system.

QUESTION: So what do you tell the Negroes, you are sorry?

MR. GOTTESMAN: We have told them that, Your Honor. In some places, as this Court knows, we have done a lot more. We have negotiated quotas and the like. But the law certainly did not require us to do that, and in this plant that was not done. We don't tell them we're sorry, Your Honor, but when you say we tell them we're sorry, this seniority system as the district court found, "has been negotiated by blacks no less than whites," and that is a finding which the court of appeals did not dispute. Blacks had an absolutely equal voice in this system, and for whatever reason, in more recent years, when the company proposed merging lots of departments, an event which would in fact have created the opportunity to use seniority more broadly, the record evidence is undisputed, and the district

court found that was unanimously rejected by the employees with the efforts to reject it led by the minority employees, who said, sure, there are some advantages, and increased mobility, but there are also disadvantages, in that others are going to have increased mobility vis-a-vis us.

That was a choice made by all the employees, not for racial reasons. It was made by blacks and whites together, because this is the seniority system they thought would work best in their plant.

Now, the court of appeals reversed. And it reversed saying, we find that there was a discriminatory purpose here. And there are three features of that reversal that I think are important to focus on. First, while all the parties had assumed that what the court of appeals said is this entire system that the Steelworkers negotiated is invalid, the choice of departmental seniority, departmental structure. That is certainly what they said. They said, the system is invalid. The government has come along in an amicus brief and said, oh, no, that -- it is true that literally that is what it seems to say. That can't be what the court of appeals meant to say, because the reasoning of the court couldn't possibly get you that far. All it meant to say is that that tiny component of the system which was impacted by this other union, the Machinists, racial motivation in giving 24 jobs to the Steelworkers, was

invalid. Nothing else is invalid.

Now, whichever of those is the correct interpretation of the court of appeals opinion, the court of appeals committed the two errors that we have brought before this Court for consideration. First, it is the rule of the Fifth Circuit, not just in seniority cases, but applied in Title 7 cases wherever discriminatory purpose is the issue, it is the rule of the Fifth Circuit that Rule 52A does not apply to our review of a district court finding on discriminatory purpose. Oh, it applies to the subsidiary claims. If this Court found, for example, that blacks participated in the vote, we have got to accept those findings unless they are clearly erroneous. But what they call the ultimate fact, and what I would say when discriminatory purpose is the dispositive fact, we will make an independent factfinding on that issue free of the clearly erroneous rule.

Now, the first issue we have brought before the Court is -- and this Court granted cert on this last year in Berdeen and then didn't reach it, and has granted cert on it again this year -- the first thing we bring before this Court is that the Fifth Circuit is usurping powers that it does not have in reviewing factfinding. Nobody is here to defend the Fifth Circuit. Neither the plaintiffs nor the government defends their assertion that Rule 52(a) doesn't

apply, and that is not surprising, because this is not an open issue in this Court. This Court has four times held that when motive is the dispositive factual question in a case, the court of appeals must review that finding on the basis of Rule 52(a). Two of those were Fourteenth --

QUESTION: Where in the court of appeals opinion do you identify an erroneous standard of review?

MR. GOTTESMAN: Well, we identify it in the statement which appears in Footnote 6 on Page 15(a), in which they are quoting from another of their cases.

QUESTION: 15(a) of what?

MR. GOTTESMAN: I am sorry. This is the union's -- there are two appendices, and they look alike. I think Your Honor has the company's. And this is the one that says United Steelworkers, and this is the one to which all of the parties have cited in their briefs. It is, in any event, Footnote 6 of the court of appeals decision, and I think it is going to be easier to follow since all the parties have the United Steelworkers appendix.

In Footnote 6, on Page 15(a), the court first says, we have a definite conviction here that a mistake has been made.

QUESTION: That isn't so far off, is it?

MR. GOTTESMAN: No. Those are the words of the clearly erroneous rule.

QUESTION: Yes.

MR. GOTTESMAN: But then they say, Footnote. The footnote says, findings of fact by a district court in Title 7 are not to be set aside unless clearly erroneous. They are still cooking. They are still saying the right thing, as far as we are concerned. But then it begins to break down, because they proceed to say, in the last paragraph, quoting East v. Romine, they proceed to recite their own standard, which is, while we are bound by findings of fact under the clearly erroneous rule, if there are subsidiary issues as to a finding of discrimination or non-discrimination, that is a finding of ultimate fact in reviewing the district court's findings. Therefore, we will proceed to make an independent determination of appellant's allegations of discrimination, though bound by findings of subsidiary fact which are not themselves not clearly erroneous.

Now, they said it here. They have done it in every single Title 7 case involving discriminatory purpose. Between the filing of our opening brief and our reply brief, there were 12 more Fifth Circuit cases saying that where discriminatory purpose is the ultimate question of fact, we do not apply clearly erroneous, we make an independent determination.

And it is clear from the methodology of the opinion

that is what they did. They recite what the district court did as though it were sort of interesting history.

QUESTION: Well, they would have to do that even if they were trying to find out if a mistake was really made.

MR. GOTTESMAN: Well, they would, to be sure.

QUESTION: But you say that --

MR. GOTTESMAN: But they would at some point say, here is --

QUESTION: -- they acknowledge the clearly erroneous rule for findings to which it applies, but there is one to which it doesn't apply.

MR. GOTTESMAN: It does not apply to the ultimate finding as they call it of discriminatory purpose.

QUESTION: Do they limit this to Title 7 cases?

MR. GOTTESMAN: No, they have applied it under 1983, wherever -- at least wherever discrimination is the ultimate fact. In theory, the principle goes broader. It is wherever there is an ultimate fact which you find from subsidiary fact.

In any event, as I have said, this Court has four times said the contrary, and two of them the issue was racial motivation, Wright versus Rockefeller and the Dayton School --

QUESTION: Were those cases cited to the Fifth Circuit?

MR. GOTTESMAN: In the Fifth Circuit or to the Fifth Circuit?

QUESTION: Were they cited to the Fifth Circuit?

MR. GOTTESMAN: I am not sure that I know the answer to that, Your Honor, and I apologize for that. Certainly the parties said the test here is clearly erroneous.

QUESTION: Well, if there had been a dozen or so cases --

MR. GOTTESMAN: Well, there hadn't been --

QUESTION: -- like this, somebody must have cited something to them.

MR. GOTTESMAN: There had not been a dozen. This came early in the game. The dozen came in after.

QUESTION: I know, but since. Since. They haven't given it up since, have they?

MR. GOTTESMAN: They have not given it up. Oh, I am sorry. If the question is, has anybody cited them, I am sure they have. But they have not given it up, and indeed they are playing it, as I say, a dozen cases between opening brief and reply brief. Every Title 7 discriminatory purpose case is being found this way.

Now, nor is it an answer that, well, some cases are documentary. This one isn't. This was as case with 19 days of trial testimony. But even in documentary cases, this

Court has said that where all the evidence is undisputed, the inference to be drawn when it is the dispositive fact is to be drawn by the district court and is to be reviewed under Rule 52(a). There is not to be de novo review. This Court has repeatedly said that, and we have cited those cases in our brief.

So that I won't go through -- we have done it in our brief -- the reasons why this limited scope of review has been provided, but there is no question, this Court has definitively decided enumerable times that the standard of review the Fifth Circuit is now applying is wrong.

Now, the other issue that comes here is that the Fifth Circuit, after having assumed this responsibility of independent factfinder, proceeded to apply the so-called James factors as its methodology for resolving that fact. Now, the James factors carry with them two kinds of problems. The first problem is, they list four factors that are relevant, and Number Four happens to be whether the system has a -- was negotiated or maintained with a discriminatory purpose. Well, since we know that that is the only question under Teamsters, the fact that there are three up there before it has an intrinsic potential for creating three additional tests that a seniority system must meet, and indeed, that is the way it effectively works in the Fifth Circuit.

Our position is that there ought not to be any elevation of particular items of evidence as the most important items to find discriminatory purpose. As this Court in a quite different context held in Commissioner versus Duberstein, cited in our brief, when there is a factfinding to be made, the district court should make it from all the evidence in the record. This Court should not declare certain facts shibboleths which are automatically to be touchstones of a ruling one way or the other, and that is in essence what the Fifth Circuit is doing.

It would be wrong to do that even if the three touchstones they cited were particularly probative, but in fact they are not. The first is impact, and as I have already talked, and I won't go through that again, impact is a very unreliable indicator of the motive of a seniority system, where the company has historically discriminated, because if the parties chose any system at all, it was going to have bad impact, and that doesn't mean the parties were badly motivated. The degree of impact is going to be a product of how badly the employer discriminated in assignments, not how meanly the parties designed their seniority system.

We have talked in our brief, in our reply brief, rather, about the other two, and shown why they likewise are not reliable indicators. So there ought not to be a

hierarchy of evidentiary points at all, but if there were one, it should certainly not include the three that the Fifth Circuit has made dispositive.

And what they did here, they reversed the district court, ignoring this mountain of evidence that he had that it seems to us convincingly showed this system was innocently motivated, because that evidence in their scheme wasn't to be looked at. They had their three little touchstones, impact, the employer was engaging in other discrimination at that time, and there were some differences between this system and the system at the company's northern plant, all of which the district court explained, it seems to us, quite convincingly.

So, we suggest that for both of these reasons, the Fifth Circuit's decision should be reversed, and I would like to reserve the remainder of my time.

CHIEF JUSTICE BURGER: Miss Jones, you may proceed.

ORAL ARGUMENT OF ELAINE R. JONES, ESQ.,

ON BEHALF OF THE RESPONDENTS

MISS JONES: Chief Justice Burger, and may it please the Court, some 15 years ago, less than two years after the passage and the effective date of Title 7, black employees at the Pullman-Standard Company filed charges of discrimination with the EEOC, seeking their rightful place in the employment picture of the company. Last year, it

became painfully clear that the rightful place would never be achieved, as the company permanently closed the doors of its Bessemer, Alabama, plant.

Today, this Court must decide whether all relief is barred for the affected class of black employees, as it gropes with the question of whether the seniority system at Pullman-Standard adopted at a time when racial discrimination was pervasive, and it pervaded every aspect of the life of the company, and was maintained from its genesis in 1941 until the plant closed in 1981. All during this period, racial discrimination at the company was still the order of the day. And this Court must decide whether that system is nonetheless protected by the narrow immunity afforded to good faith seniority systems under Section 703(h).

QUESTION: I think your friend has no argument with you on that.

MISS JONES: Okay.

QUESTION: He conceded that this discrimination had existed for a long time.

MISS JONES: Thank you, Chief Justice Burger. I just wanted to emphasize that pervasive, intentional racial discrimination was the order of the day at the time this system was adopted.

All right. Now, let's move to the seniority

system. The seniority system in this case is the system which was negotiated by the company, Pullman-Standard. That system involves seniority rules and two bargaining units, the Machinists and the Steelworkers. It is not the Steelworkers negotiated system or the Machinists negotiated system that plaintiffs are -- that respondents are challenging. We are saying that the seniority system negotiated by Pullman-Standard, by the company, the system the employee faces when he walks into the door, is the system that we challenge.

Now, that system has these two component parts, and the component parts of this system are interrelated in their genesis and adoption, and in their cumulative impact on black employees at Pullman-Standard. The company simultaneously negotiated both parts. During the genesis of the system in 1941 and '42, the bargaining units, the Machinists and the Steelworkers, negotiated with each other as well as with the company. Three actors, the company, the Steelworkers, and the Machinists, adopted, designed, and maintained the seniority system.

Now, what respondents complain of is their inability to make interdepartmental transfers within the Steelworkers unit, and the loss of seniority, and their inability to transfer into the Machinists unit without carryover seniority.

Now, the district court committed three principal legal errors which flawed its analysis of bona fideness. First, at the heart of our claim that this particular departmental system is not bona fide lies the racial manipulation and jerrymandering of the departments. Each time departmental seniority was adopted, the number of one race departments increased, and the racially stratified departmental structure upon which the seniority system was grafted.

Much of this racial maneuvering along department lines and along bargaining unit lines occurred during the NLRB certification process just prior to the adoption of seniority at the company. The district court erred in determining as a matter of law that certification of the bargaining units by the NLRB was insulated from 703(h) review.

Second, the district court deemed irrelevant as a matter of law the motives of one of the principal architects of the system, the Machinists. Also, as a matter of law, the district court determined that evidence of adverse economic impact of the seniority system on blacks was irrelevant to a determination of bona fideness.

Now, there are other areas in which the district court made legal error which I won't go into at this point, but one is, the court also determined that NLRB

certification of the bargaining units insulated the transparent facial irrationality of the system, because what we have is a Machinist, an all-white Machinist bargaining unit which excluded blacks by reason of race, with its seniority system, and it was able to get the all-black bargaining unit through entering into an agreement with the Machinists, and the IAM system has two departments, the Machinists, the IAM system, the Machinist system, has two departments; the Steelworkers system has 26 departments. The two IAM departments are all white departments culled from departments which were in -- which were previously racially mixed departments before unionization.

The court of appeals was absolutely correct in its conclusion that the seniority system was not bona fide. Now, it is important to review for purposes of our argument the context in which the court of appeals reached its conclusion.

All right. Arlington Heights tells us to look at the historical background in which a decision was made. The company negotiated seniority rules at Pullman-Standard. It was the only actor who negotiated every seniority rule in this litigation. From the time it opened its doors to do business in Bessemer, Alabama, in 1929, it racially stratified the plant. There were black jobs, white jobs. It had some all-white departments, some all-black

departments. It had racially disproportionate departments. Special badge numbers for blacks. All memos and records indicated the race, "col" beside the names of blacks. It had segregated facilities at this plant until 1967, the same year EEOC charges were filed.

All right. Now, we have in 1941 the Steelworkers and the Machinists together coming to the plant. The Machinists as part of their ritual excluded blacks as a matter of both policy and practice. With regard to the petitioner Steelworkers, the history of its International Union is not at issue in this case. What is at issue here are the policies and practices of Local 1466 of the Steelworkers unit, which was a certified bargaining agent at this particular plant in Bessemer, Alabama.

The local practiced extensive segregation of the races. The local had segregated seating at the union hall until the first trial of this case in 1974. Segregated facilities until the EEOC charge was filed in this case, 1967. Blacks were told to stay in the black jobs and sit on the black side of the union hall.

Now, true, blacks were not excluded from Local 1466, as they were from the Machinists local, but blacks certainly had their place in the Steelworkers local, and that was stamped with a badge of inferiority.

All right. Now, also, the practices of the local

Steelworkers was a matter of choice, not a matter of custom and practice, because in another case before this Court, Terrell versus U.S. Pipe, which is here on other issues, there was a Steelworkers local also in Bessemer, Alabama, during the same period in which the Fifth Circuit absolved the liability because of their exemplary racial practices.

Now, Arlington Heights indicates a sequence of events may provide some evidence of discriminatory intent. There are two periods critical to development of this seniority system. First is the period 1941-42. The second critical period is the period 1952 through '54. We detail in our brief the record evidence and by the way, it was not a 19-day trial on the issue of bona fides. There was a three-hour hearing in which the evidence was documentary. This case was remanded in light of Teamsters, and it was a documentary case put on before the trial judge. The only witnesses at the hearing were two witnesses called by respondents where credibility was not at issue, but the seniority documentation in this case and the record is all documents, and anything that was referred to in an earlier trial is still documentary. There is no testimony that goes to the question of bona fides.

Also, I invite the Court to look at the memorandum opinion of the district court judge at Appendix 46-47 when he granted a hearing in light of Teamsters on bona fides,

and he made it clear that the theory during the trial was perpetuation, and now submit evidence on the question of bona fides.

Now, we detail in our brief the record evidence that leads to the virtually inescapable inference of intent regarding the IAM's exclusion of blacks from its bargaining unit, how at the representational hearing in 1941-42, how it maneuvered jobs based on race and not job function, how it hop-skipped over jobs based on the race of the job incumbent, how the IAM selected a patchwork quilt of production and craft jobs, and excluded any blacks that were in production jobs but included whites that were in related production jobs.

Now, the Machinists also represented both craft and production jobs until the close of the plant. Now, at the hearing, the Machinists attempted to exclude all blacks but was not completely successful because the Machinists bargaining unit was certified and included some blacks. When NLRB certified the union it included some blacks. But the Machinist was able to rid itself of all of the blacks in its bargaining unit when it entered into an agreement with the Steelworkers where they swapped employees based on the race of the employee, and then went back to the NLRB for another certification one month later.

Now, these racial maneuverings during certification

created five new one-race departments. Then, during the same period of time, contemporaneously, the company and the USW sat down and immediately drafted a departmental seniority system onto these racially stratified departments. Again, the intent of the parties, especially the company, to keep blacks in these lower-paying jobs and departments is manifested in 1954, when the Steelworkers readopted a departmental seniority system. Just two months prior to the adoption of that departmental system in 1954, six new one-race departments appeared on the seniority list. All of these one-race departments were culled from previously racially mixed departments.

Now, in contemplation of a return to the departmental seniority system, the company created without a whimper of protest from the union, the Steelworkers, these six departments. There is no explanation in the record why. What these departments do is further segregate the plant.

Now, these -- an example of how this -- the system was maintained to continue this discriminatory intent may be determined by looking at one particular department, the dye and tool department at this company. It was a racially mixed pre-unionization department. That department, when the IAM and the company and the Machinists came in there, was split along racial lines. The IAM took all of the jobs

in which there were whites. The dye and tool Steelworkers department had all the jobs in which there were blacks.

That department, those departments were all black and all white until at least 1970. The company maintained the discriminatory -- the assignment of these employees and maintained the seniority system by assigning employees in that manner. The company could have assigned whites to the Steelworkers unit, but it didn't. And so what we have is blacks and whites working together in the dye and tool department, but the blacks cannot use their seniority to get into the better jobs right there in dye and tool.

Maintenance is purposeful perpetuation. The company maintained the segregative purpose of the seniority system, not only in dye and tool, but in every racially disproportionate department at the company.

Now, the discriminatory departmental assignments in this case, which is the law of the case before, during, and after the adoption of the departmental seniority system, is very strong evidence of an intent to discriminate entering the adoption and maintenance of the system. Departmental assignments in this case are not perpetuation, because perpetuation indicates inadvertence. This is deliberately using the system to keep blacks from accruing competitive seniority so that they might move into historically white jobs.

Mr. Gottesman said, oh, well, blacks can use their seniority to move up into other white jobs, other jobs in the department. Not so. The departments are heavily racially disproportionate. They are either disproportionately white or disproportionately black, and you either have a disproportionately white department with whites in the better jobs, and a few blacks in that department clustered at the bottom.

QUESTION: Ms. Jones, are you arguing that the district court was clearly erroneous?

MISS JONES: What I am arguing is that because of the errors of law of the district court, the court of appeals was free to look at this case and the clearly erroneous rule did not apply.

QUESTION: Well, that isn't the reason the coiurt of appeals gave for not applying the clearly erroneous rule.

MISS JONES: Well, the court of appeals did indicate that there has been legal error. He indicated that the NLRB certification should --

QUESTION: Well, you agree, you agree then that the court of appeals did not apply the clearly erroneous rule with respect to the ultimate finding of motive.

MISS JONES: With respect to the finding of motive --

QUESTION: Of purpose, racial discriminatory

purpose.

MISS JONES: Any rule that the district court -- if it applied any rule, it was only the clearly erroneous rule.

QUESTION: You mean the court of appeals.

MISS JONES: The court of appeals. If -- because the --

QUESTION: Well, it applied some rule. I thought -- you disagree with your colleague on the other side then that the court of appeals didn't apply the clearly erroneous rule?

MISS JONES: I was saying, in this case, the court of appeals, because of the errors of the district court, was free of the clearly erroneous rule, and that was so --

QUESTION: And it didn't apply it. Did it or didn't it apply the rule?

MISS JONES: Well, I guess I am making an alternative argument to you, Justice White.

QUESTION: Yes.

MISS JONES: The court of appeals does say in its opinion that it is of the firm conviction that a mistake had been made, and --

QUESTION: Well, in some respects, yes.

MISS JONES: Yes, it said that, but the court of appeals on the question of intent did look at the question, and did not feel that it was bound by the clearly erroneous

rule because of the legal posture of this particular case.

QUESTION: When a reviewing court finds that the initial tryer has applied erroneous rules of law to guide the factfinding process, is the correct solution for the reviewing court to make its own findings, or to send it back for making findings under the corrected rule of law?

MISS JONES: Well, in this case, Chief Justice Burger, the record is documentary. There is no dispute as to the facts. The argument is over the inferences to be drawn from those facts. The Fifth Circuit -- this was the second time the Fifth Circuit had reviewed this case, and it remanded it the first time. This time, when it saw the legal errors of the court of appeals, it was in the same posture to make the inferences as the court of appeals -- as the district court. The district court had failed to look at huge chunks of its evidence, because of its erroneous application of legal principles. It had ruled out the NLRB -- decided that the NLRB, what had happened was irrelevant. It had decided that the motives of one of the architects of the seniority system was irrelevant. The court of appeals had told it before to look at the IAM departments.

And so, in this instance, the rationale behind Rule 52, which is demeanor of witnesses and credibility findings of trial courts, it didn't apply, but --

QUESTION: Well, I take it then you do seem to

agree that for whatever reason it was, either for legal error or for some other reason, the court of appeals did not apply the clearly erroneous rule to the purpose.

MISS JONES: No, I do not agree that the court of appeals did not apply the clearly erroneous rule to findings of purpose. The court of appeals looked at the evidence, and saw the erroneous applications of legal principles, but also the court of appeals in looking at it gave -- applied the clearly erroneous rule to whatever subsidiary facts of the district court judge, but the district court --

QUESTION: But not to the ultimate finding?

MISS JONES: Well, you know, the --

QUESTION: Do you agree that the Fifth Circuit has in a good many cases or at least more cases than this indicated that it did not apply the clearly erroneous rulings to ultimate findings such as purpose? Are you familiar with those cases?

MISS JONES: I have looked at those cases, Justice White, and the district court -- the court of appeals Fifth Circuit has not treated these cases any different from any other. It has looked at these cases as --

QUESTION: Well, do you defend those cases, or do you think they are inconsistent with --

MISS JONES: Well, I mean --

QUESTION: They are certainly inconsistent with

other courts of appeals, I gather. How about with cases of this Court?

MISS JONES: Justice White, if you take the position of petitioners, it is that any finding -- that the finding of intent is a question of fact for the lower court. If you take that position, in these cases, that overbroad reading would mean that you have different cases, cases with the same facts being decided different ways. I mean, like cases must be decided in a like manner. There must be a role for the court of appeals in looking at these cases, and the court of appeals in the Fifth Circuit, as in every other circuit, has applied the clearly erroneous rule to subsidiary factfindings of the district court judges.

QUESTION: But not to the ultimate finding of discrimination.

MISS JONES: Well, that -- this is a question of law. It is a question of law, or mixed question of law and fact. We intend to think there is a role for the court of appeals in looking at intent cases, and --

QUESTION: You mean a role -- an independent role, independent of the -- it should make its own assessment of the facts --

MISS JONES: No.

QUESTION: -- in terms of the ultimate --

MISS JONES: In terms of the ultimate question, but

in terms of the subsidiary --

QUESTION: The ultimate question of purpose.

MISS JONES: -- it is bound by the clearly erroneous findings of the lower court. If there is no role in these cases for the courts of appeals, then I think of this Court's decision in Feeney and in Dayton, in which there was a role for --

QUESTION: Well, there is a role for the court of appeals, the one the rules give them, to determine whether the findings are clearly erroneous.

MISS JONES: That is right.

QUESTION: That is a role, isn't it?

MISS JONES: That is right, Justice White, but in this particular case, with the documentary evidence before it, the district court had not made findings of fact on some of these questions. It had just failed to look at certain of the evidence. So therefore the findings that the court made had never been -- that the district court had determined that he was not reversing the -- overruling the district court or reversing it in any way, but -- and there was no conflict between the courts as to what the factfindings were, because the district court had not -- had not looked at the issue because of its erroneous application of legal principles.

The district court has applied no different rule

from that used by any other circuit in discrimination cases.

QUESTION: What rule? I am still -- What rule do you say the court of appeals applied on the ultimate issue?

MISS JONES: I say the court of appeals in this case was not -- the clearly erroneous rule and 52(a) had no force in this case because of the erroneous errors, the legal errors of the district court. The Fifth Circuit was free of the clearly erroneous rule, because of these legal errors.

QUESTION: And those were the three errors you described earlier.

MISS JONES: And because of those errors, the district court's view of the evidence completely changed, would change in terms of motive. The impact of the IAM on the Steelworkers unit, the division of the departments, the manipulation between the unions, that evidence was simply -- the district court just didn't look at that, and had not looked at it, and so therefore any of the findings that it did make, the court of appeals respected the subsidiary findings and applied the clearly erroneous rule to that, because it uses the language in the opinion, and I assume when it looked at the facts of the district court, the subsidiary facts, those that could stand, stood.

But the question as to whether intent, you know, is

a question of law or an ultimate fact or a mixed question of law and fact is -- it has to be in these cases, intent has to be a question of law in which the court of appeals is bound by the factfinding of the lower court, which this Court -- it used no other standard but the clearly erroneous standard, if it used a standard.

The adverse impact of this seniority system is clear. The disproportionate white and disproportionate black departments, the way the system had been maintained through the assignment of blacks and through discriminatory departmental assignments, the legal errors of the district court and the fact that the record was documentary, the Fifth Circuit was in a position to look at the evidence that the district court had not entertained.

There are no disputed facts in this case. The argument is the inference to be drawn from those facts, and in these cases, there should not be a hard and fast rule that the court must decide the case or that it must send the case back. The official administration of justice in these cases requires that the court of appeals be able to look at these cases, and especially if they are documentary, the 52(a) does not have the force that it has if the case were based on credibility of witnesses.

The bona fides means good faith, and Section 703 offers this particular departmental system no protection,

almost by definition. Acts taken over the course of the 14-year development of the system all move to further, further segregate the system. There is the creation of these one-race departments just before the adoption, on the eve of the adoption of the seniority system, and the grafting of this seniority system onto a racially stratified company and departmental system which both the union and the company had to know would have those foreseeable consequences.

QUESTION: Miss Jones, your opponent argues that that was inevitable, that when you have a history of discrimination, which was lawful no matter how unfortunate it may have been, was it possible to draft a seniority system that would not have had that impact?

MISS JONES: The issue in this case is -- we are not challenging the departmental systems per se. We are challenging the racial manipulations and jerrymandering of these departments prior to the imposition of the departmental system.

QUESTION: But at that time there was no statute that prohibited it.

MISS JONES: Yes, but --

QUESTION: You are talking about 1952.

MISS JONES: But 70(h) says, if an intent to discriminate enters into the adoption or maintenance of the

system, then the system is not bona fide.

QUESTION: But it seems to me under your argument no system could be bona fide.

MISS JONES: Oh, yes. If these departments had not been -- if they had not intentionally manipulated the departments, or --

QUESTION: Well, they did that, and they in effect admit it. And they say, but it was lawful at the time we did it. They don't admit all the manipulation, but they admit that there was a pattern of discrimination here.

MISS JONES: Well, under 703(h), if that pervasive intentional discrimination entered into the adoption of the seniority system, then that system does not keep the protections of 703(h).

QUESTION: Would that be true if the primary intentional discrimination was by the other union that you have chosen not to -- that isn't before us now?

MISS JONES: Well, the --

QUESTION: I mean, there is stronger evidence --

MISS JONES: Where the IAM is relevant to the Machinists, we take the position, the company negotiated all aspects of the system with the Steelworkers and the Machinists. The question of the allocation of responsibility is a question of remedy, but the question of liability for purposes of 703(h) is whether or not an intent

to discriminate entered the system. And if that intent is there, well, then, that -- for 703(h) liability purposes, that ends the inquiry, we contend.

We believe that the court of appeals should be affirmed.

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

ORAL ARGUMENT OF MICHAEL H. GOTTESMAN, ESQ.,
ON BEHALF OF THE PETITIONERS - REBUTTAL

MR. GOTTESMAN: May I have one or two moments, Your Honor?

CHIEF JUSTICE BURGER: Yes, you have three minutes remaining.

MR. GOTTESMAN: Three minutes. Thank you.

Just a few very brief things. It is not our job here or anybody's, and certainly not the Court's, to retry the facts of this case. It makes me somewhat reluctant to have to be up here defending ourselves on them, but there has been an effort to lay a glove on the Steelworkers' union, and they are quite sensitive about that, because back then there was a period when they had whites and blacks sitting on opposite sides of the meeting hall. That is said to tarnish their colorblind objectives. As I am sure the Court realizes, that was something required by the laws of Bessemer. Indeed, it was a crime for a union or anybody

else, for that matter, not to have people sitting on opposite sides, and the Court certainly can take judicial notice of what was the Bessemer City Code then, Chapter 34, Article 2, and the district court and the court of appeals, neither one of them thought that that impugned the district court's finding that this was a union that pursued colorblind objectives, sought to eliminate wage discrimination on the basis of race, and everything else.

This business about manipulating departments is something the district court spent a lot of time on. Ninety-five percent of the people, black and white, were in departments that never changed. They were set up long before there was a union. They were the operational departments. And for every one of the few changes that were made, there was a reason, and the court gave it, and it was a perfectly valid non-racial reason.

And what is more, to think that the parties wanted to separate the races because they manipulated 5 percent of the departments when 95 percent of the people were in racially mixed departments just doesn't make any sense.

QUESTION: Mr. Gottesman, on your clearly erroneous argument, do you say that the clearly erroneous standard should have applied or should have been applied because the clearly erroneous rule applies to all questions of ultimate fact, or because purpose and motive is not an ultimate fact?

MR. GOTTESMAN: I am not sure I know what an ultimate fact is. The clearly erroneous rule applies to all facts, including the fact that an action was taken with or without a discriminatory purpose.

QUESTION: Or whether you had a bona fide factor generally.

MR. GOTTESMAN: Well, it is a question or law what bona fide means. In Teamsters this Court held what it meant. What it meant was, you had to have acted without a discriminatory purpose. That was a legal question. That legal question having been answered, there is now left a question of fact: in this case, did these parties negotiate this seniority system with a discriminatory purpose.

QUESTION: Of course, if it is concluded on these facts there is a purpose, you are saying what purpose means.

MR. GOTTESMAN: If there were a dispute about what purpose means, that would be a question of law, but there doesn't seem to have been one here. There is ultimately a factual question to be asked. And that factual question which in this case was encapsulated by the --

QUESTION: Your view is, there are no so-called ultimate facts to which the rule does not apply.

MR. GOTTESMAN: That's right. There are mixed questions of fact and law, and it is the court of appeals' job to separate them out and answer the legal questions, and

then to review the factual components under the clearly erroneous rule. That is correct, Your Honor.

Just one last thing. The notion that you are freed of clearly erroneous if the district court made a legal error is certainly not the law. In our reply brief we have cited cases. The district court made a legal error. You send it back and tell them to find the facts under the right legal standards. You don't suddenly get freed as a court of appeals to become the factfinder, and the relative decisions here are the clearest. If ever you wanted a paradigm of why courts of appeals shouldn't be factfinders, it is this case, as our opening brief shows.

CHIEF JUSTICE BURGER: Thank you, counsel.

The case is submitted.

(Whereupon, at 3:10 o'clock p.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:

PULLMAN-STANDARD, A DIVISION OF PULLMAN, INC., vs. LOUIS SWINT AND WILLI JOHNSON, ETC., AND UNITED STEELWORKERS OF AMERICA, AFL-CIO, ET AL. v. LOUIS SWINT AND WILLIE JAMES JOHNSON # 80-1190 & 80-1193

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

BY Sharon Ryan Connelly