

ORIGINAL

OFFICIAL TRANSCRIPT PROCEEDINGS BEFORE

THE SUPREME COURT OF THE UNITED STATES

DKT/CASE NO. 82-206 & 82-229

TITLE FIREFIGHTERS LOCAL UNION NO. 1784, Petitioners v. CARL W.
STOTTS, ET AL.; and MEMPHIS FIRE DEPARTMENT, ET AL., Petitioners
v. CARL W. STOTTS, ETC., ET AL.

PLACE Washington, D. C.

DATE December 6, 1983

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1 IN THE SUPREME COURT OF THE UNITED STATES

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3 FIREFIGHTERS LOCAL UNION NO. 1784, :

4 Petitioners :

5 v. : No. 82-206

6 CARL W. STOTTS, ET AL. :

7 :

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9 MEMPHIS FIRE DEPARTMENT, ET AL., :

10 Petitioners :

11 v. : No. 82-229

12 CARL W. STOTTS, ET AL. :

13 :

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15 Washington, D.C.

16 Tuesday, December 6, 1983

17 The above-entitled matters came on for oral
18 argument before the Supreme Court of the United States
19 at 10:02 p.m.

20 APPEARANCES:

21 ALLEN S. BLAIR, ESQ., Memphis, Tennessee; on behalf of
the Petitioners.

22 REX E. LEE, ESQ., Solicitor General of the United
23 States, Department of Justice, Washington, D. C.; amicus
curiae.

24 RICHARD B. FIELDS, ESQ., Memphis, Tennessee, on behalf
25 of the Respondents.

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1 P R O C E E D I N G S

2 CHIEF JUSTICE BURGER: We will hear arguments
3 first this morning in Firefighters Local Union v.
4 Stotts, and the consolidated case.

5 Mr. Blair, you may proceed whenever you are
6 ready.

7 ORAL ARGUMENT OF ALLEN S. BLAIR, ESQ.

8 ON BEHALF OF PETITIONERS

9 MR. BLAIR: Thank you, Mr. Chief Justice, and
10 may it please the Court:

11 In this case the Court is confronted with a
12 situation where Respondents settled an employment
13 discrimination case for specified relief, waiving any
14 further relief. Later, because Respondents had not
15 foreseen the possibility of events which they should
16 have foreseen, they discovered they wanted additional
17 relief under circumstances which make the granting of
18 such relief inequitable and illegal.

19 The granting of that relief is the subject of
20 the appeal before the Court at this time.

21 This matter arises out of the following
22 background. The case was settled in 1980 with the entry
23 of a consent decree which provided hiring and
24 promotional relief consistent with the complaints which
25 were filed in the cause. The city agreed to a long term

1 goal of raising the percentage of blacks on the fire
2 department in each rank to the percentage of blacks in
3 the work force as a whole.

4 QUESTION: I take it this was a Title 7 case.

5 MR. BLAIR: It was, Your Honor. The complaint
6 was also filed under Section 1981 and Section 1983 of
7 the 1964 Civil Rights Act.

8 The decree also contained what were interim
9 goals for hiring and promotions. No relief was granted
10 with regard to the city's layoff policies or the city's
11 seniority policies, and there was no constructive
12 competitive seniority awarded in the decree, again
13 consistent with the complaints, and the Respondents
14 waived any further relief.

15 In May of 1981, the City of Memphis, facing a
16 fiscal crisis, announced that there would be layoffs in
17 every city department, including the fire department,
18 and those layoffs were to be conducted consistent with
19 the city's longstanding, city-wide seniority policy
20 which was adopted with regard to layoffs in 1975. The
21 Respondents sought injunctive relief in the Federal
22 District Court against the application of the senior
23 policy insofar as it would reduce the percentage of
24 blacks on the fire department.

25 The District Court, after ruling that the

1 issue before the court was not whether the city could
2 lay off, but the manner in which the city would lay off,
3 issued the requested injunctive relief. The court
4 directed the city to come up with a plan consistent with
5 the court's ruling.

6 That court's order caused three innocent,
7 incumbent, white firefighters to be laid off who would
8 not have been laid off had the seniority policy been
9 applied. It also caused seven additional senior,
10 innocent, incumbent, white drivers to be demoted or laid
11 off from their position or, in the parlance of the shop,
12 bumped down. It also caused five additional senior
13 innocent, incumbent, white inspectors to be bumped down
14 and nine additional senior, innocent, incumbent, white
15 lieutenants to be bumped down.

16 The Court of Appeals affirmed in an opinion
17 which addressed several matters really not at issue in
18 the case. While the Respondents and the Court of Appeals
19 attempt to uphold the District Court's ruling as both an
20 interpretation and a modification of the consent decree,
21 we respectfully submit that it is clear the consent
22 decree did not provide the relief requested and that the
23 circumstances necessary to allow for the modification of
24 a consent decree are absent herein. Further --

25 QUESTION: Mr. Blair, in your view, does it

1 make any difference whether this is treated as an
2 interpretation of the decree or a motion to modify it?

3 MR. BLAIR: Justice Rehnquist, in terms of the
4 ultimate result, I don't think it makes any difference.
5 It is our position that it was not an interpretation,
6 that the relief was not provided in the decree at all,
7 and that if the Court then wants to take the next step
8 and analyze whether modification would have been proper
9 under these circumstances, then we respectfully submit
10 that modification was not proper because the proper
11 circumstances were not present in this case.

12 I hope that answers your question.

13 QUESTION: Mr. Blair, may I ask, have any of
14 these white firefighters been reinstated?

15 MR. BLAIR: Justice Brennan, they have.
16 Everyone is back to the position which they held when
17 the layoffs took place.

18 QUESTION: Yes.

19 MR. BLAIR: However, there are continuing
20 effects from this injunction.

21 QUESTION: Well, as to them?

22 MR. BLAIR: Yes, as to them.

23 QUESTION: As to those who have been
24 reinstated?

25 MR. BLAIR: As to them.

1 It is very clear that with regard to those
2 three white firefighters who would not have been laid
3 off had the seniority system been applied, that they are
4 now suffering from the loss of competitive seniority
5 status --

6 QUESTION: What exactly have they lost?

7 MR. BLAIR: They have lost -- they got no
8 seniority credit during the time that they were laid
9 off.

10 QUESTION: And how long was that?

11 MR. BLAIR: That was approximately a month.

12 QUESTION: A month.

13 MR. BLAIR: Yes, sir.

14 QUESTION: And how about back pay?

15 MR. BLAIR: There is back pay due and owing.
16 I represent the union, and we have made the demand upon
17 the city.

18 QUESTION: Is that also a month, Mr. Blair?

19 MR. BLAIR: I beg your pardon?

20 QUESTION: Is the back pay also a month?

21 MR. BLAIR: The back pay with regard to those
22 three firefighters would be a month, but with regard to
23 the seven additional drivers, the five additional
24 inspectors, and the nine additional lieutenants, there
25 would also be back pay due and owing by our contention.

1 Now, I am here arguing on behalf of the
2 city --

3 QUESTION: How, by your contention, how much
4 would they be owing?

5 MR. BLAIR: If Your Honor please, I have never
6 really computed that, but as to those people who were
7 bumped down in classification, they would be due the
8 amount that is the difference between what they would
9 have earned had they been retained on the job and what
10 they earned in a lower-paying classification.

11 QUESTION: Does the city have any authority to
12 make then whole in this respect?

13 MR. BLAIR: It's the union's contention that
14 the city does. Now, the --

15 QUESTION: That it does?

16 MR. BLAIR: Yes, Your Honor.

17 QUESTION: Well, if it does, why isn't this
18 case moot?

19 MR. BLAIR: If Your Honor please, we would
20 respectfully submit that a proposition that the city
21 could, by with the stroke of a pen, as Respondents
22 contend, right the wrong and make this case moot, is
23 tantamount to suggesting that if a case can be settled,
24 a case is moot. Every case can be settled, and under
25 that proposition, every case would be moot.

1 QUESTION: Well, suppose your contention were
2 accepted by the -- you said you are asking the city to
3 make them whole.

4 Suppose the city were to do so. Would you say
5 the case was not moot?

6 MR. BLAIR: Yes, Your Honor, we would say it,
7 the case was not moot.

8 QUESTION: You still say it's not.

9 Why?

10 MR. BLAIR: Because this case is capable of
11 repetition, yet evading review. As spelled out in our
12 Joint Opposition to the Suggestion of Mootness and as
13 spelled out in our reply brief in detail, we clearly
14 feel that this case falls within that doctrine as well.

15 QUESTION: While I have you interrupted, may I
16 ask, did the Tennessee Supreme Court hold that the
17 memorandum of understanding with the union was
18 unenforceable?

19 MR. BLAIR: Yes, Your Honor.

20 QUESTION: Under state law?

21 MR. BLAIR: It did.

22 QUESTION: How does that bear, if it does, on
23 the provision of 703(h) as to bona fide seniority
24 system?

25 MR. BLAIR: If Your Honor please, I don't

1 believe it has any effect whatsoever. It is --

2 QUESTION: Even if it is illegal under state
3 law?

4 MR. BLAIR: That's right.

5 If Your Honor please, this layoff, this
6 senior-based layoff policy that is in question in this
7 case was unilaterally adopted by the city as well in
8 1975, and it is our position that a senior system need
9 not be collectively bargained under 703(h) in order to
10 be protected.

11 QUESTION: You mean, independently of the
12 memorandum with the union, which I gather your state
13 court has said is unenforceable.

14 MR. BLAIR: That's right.

15 QUESTION: Void under state law.

16 MR. BLAIR: Right.

17 QUESTION: There was a unilateral policy
18 which --

19 MR. BLAIR: That's right.

20 QUESTION: -- provided this?

21 MR. BLAIR: Right. And I believe that that is
22 clear from the testimony of Mr. Sabatini in the record
23 in the Joint Appendix, and I believe 703(h) makes no
24 reference whatsoever to the necessity of a seniority
25 system being collectively bargained in order to be

1 protected.

2 QUESTION: I guess most of them are, aren't
3 they?

4 MR. BLAIR: Well, I would say most are, but
5 that doesn't mean that they are exclusively, and we
6 would submit that there are at least some mentions in
7 the legislative history which would support our position
8 as well.

9 QUESTION: Do you know of any that has passed
10 on this question, any decisions?

11 MR. BLAIR: There are a few decisions which
12 have ruled on this question, and they are mentioned in
13 the amicus brief of the International Association of
14 Firefighters on the merits in this case.

15 QUESTION: Mr. Blair, if the District Court's
16 order is invalidated, does back pay and seniority
17 automatically follow?

18 MR. BLAIR: Well, if Your Honor please, it
19 would be our position on behalf of the union that it
20 certainly should

21 QUESTION: Would a separate suit be necessary
22 for that purpose?

23 MR. BLAIR: I don't believe so. I don't see
24 why that would be necessary if this order is reversed.

25 QUESTION: Obviously my questions indicate

1 that I, too, am concerned about mootness.

2 MR. BLAIR: If Your Honor please, there can
3 be --

4 QUESTION: May I ask why it would
5 automatically --

6 MR. BLAIR: Excuse me.

7 QUESTION: Finish your answer to Justice
8 Blackmun. I'm sorry, I thought you had.

9 MR. BLAIR: Well, I was going to address
10 myself to the fact that there are these continuing
11 effects and that this is one of those cases that deals
12 with the doctrine of or is affected by, covered by, if
13 you will, the doctrine capable of repetition yet evading
14 review. So it may be that Your Honor wants to ask the
15 question at this point.

16 QUESTION: Yes, I did want to ask about the
17 specific consequences because I was wondering if, as you
18 answered in response to Justice Brennan, the collective
19 bargaining agreement is not enforceable, what is the
20 source of the city's legal obligation to pay the back
21 pay?

22 MR. BLAIR: Well, if Your Honor please --

23 QUESTION: I understand they have the power to
24 do it, but I think you are also contending on behalf of
25 the union they have an obligation to do it.

1 MR. BLAIR: Under their own rules and
2 regulations --

3 QUESTION: Just the matter of their own rules
4 and regulations.

5 MR. BLAIR: That's right.

6 QUESTION: Don't they have the power to change
7 those rules?

8 MR. BLAIR: Certainly they do, but they
9 haven't.

10 QUESTION: So in all events, isn't it a
11 managerial decision as to whether they will pay the back
12 pay and the seniority, regardless of who wins the
13 lawsuit?

14 MR. BLAIR: Well, if Your Honor please, it
15 certainly would be our contention on behalf of the union
16 that if they have a rule and regulation that is in
17 effect and an obligation arises out of the enforcement
18 of that rule and regulation, that an employer could not
19 at that point at its whim say, well, that's not our rule
20 and regulation anymore, after the fact, and thereby in
21 effect erase the obligation or do away with the
22 obligation.

23 It certainly is true that management has a lot
24 of normal management prerogatives which it can change
25 during the course of the employment relationship, but if

1 there is an obligation that arises out of an area
2 covered by or a rule or regulation which arises out of
3 an area that is covered by normal management
4 prerogative, I don't think management can then erase the
5 obligation by simply saying, well, we are going to
6 change it now. The rule and regulation was in effect
7 then.

8 QUESTION: Sort of a stop.

9 May I also ask, I gather all these employees
10 that are affected by it were hired on the same day,
11 November 5, '79, according to --

12 MR. BLAIR: Well, if Your Honor please, it is
13 true that as to those people who were laid off --

14 QUESTION: Right.

15 MR. BLAIR: When you got down to the bottom of
16 the seniority list, if you will, that the three white
17 firefighters were affected were hired the same day as
18 the three blacks who would have been affected had the
19 seniority policy of the city been applied. That is
20 true.

21 QUESTION: And the policy apparently required
22 they be laid off in reverse alphabetical order, is that
23 right?

24 MR. BLAIR: That's right.

25 QUESTION: What was the source of that

1 decision?

2 MR. BLAIR: Well, if Your Honor please, as I
3 think this court recognized in California Brewers, every
4 seniority system is going to have aspects of that system
5 which are not based on the length of employment.

6 What you have here is a facially neutral,
7 nondiscriminatory, alphabetical tie-breaker designed to
8 apply in just this situation, and the source was that
9 the city was trying to find a fair way to establish or
10 create a tie-breaker.

11 QUESTION: It as the city's decision rather
12 than the collective bargaining agreement. That's really
13 what I was asking.

14 MR. BLAIR: That's right, Justice Stevens.

15 QUESTION: Okay, thank you.

16 QUESTION: Mr. Blair, you mentioned the
17 likelihood of this same problem arising in the future.

18 Do you think that is true with respect to
19 Memphis?

20 QUESTION: I do, Justice Powell. I think it
21 is very definitely true.

22 If I might, I would like to explain with
23 regard to that.

24 The City of Memphis has an extremely limited
25 tax base. Income taxes on the state and local level in

1 Tennessee are unconstitutional. The City of Memphis is
2 already taxing at the maximum level at which it can tax
3 at the present time insofar as sales tax is concerned.
4 We can't raise the sales tax again.

5 As regards our property tax, there was a
6 one-time decrease when the last sales tax increase came
7 into effect, but we are really, from a practical
8 standpoint, at the peak of the property tax at this
9 particular time. We have a rather odd situation where
10 industrial and commercial property in Tennessee is
11 actually taxed at a higher rate than residential
12 property which naturally has the effect of discouraging
13 business and industry to move into our area. Therefore,
14 the local lawmakers are extremely hesitant to raise
15 those taxes.

16 Now, given that situation, you have to
17 superimpose on that the fact that the city is a business
18 like any other business, and it has increasing costs at
19 the present time. It has suffered under extremely high
20 interest rates, continues to suffer under that at the
21 present time. The spiraling cost of health care affects
22 the city because it provides at least in part health
23 care coverage to its employees. And there are other
24 increasing costs. Employee wages continue to increase.

25 QUESTION: Is any of that other than the

1 income tax unique to Memphis as compared to every other
2 large city in this country?

3 MR. BLAIR: Justice Marshall, I can't really
4 speak authoritatively to that except that I would say
5 this, that I don't imagine that there are a great many
6 cities which are in the position of Memphis in that they
7 have reached the maximum sales tax that they can
8 impose.

9 Other than that and the income tax, I would
10 say no, but I would respectfully submit to Your Honor
11 that those are significant differences. You are talking
12 about two of what are the three major sources normally
13 that a municipality has for income.

14 To continue to address your question, Justice
15 Powell, it also seems to me that this is one of those
16 cases that evades review. As this Court has previously
17 recognized, as noted in our reply brief, layoffs are, by
18 their nature, temporary. Now, that is not a hard and
19 fast rule, but this Court has recognized that in its
20 prior decisions, and we would submit that this case
21 clearly falls within the doctrine of capable of
22 repetition, yet evading review.

23 With regard to the interpretation argument,
24 may it please the Court, any claim of the Respondents
25 that is based on an interpretation or effectuation of

1 the consent decree must be settled with reference to the
2 terms of that consent decree, and the terms here are
3 completely unavailing to the Respondents. What we
4 really have here is a situation where they sought new
5 relief barred by the waiver to bail them out.

6 In fact, the situation was clearly
7 foreseeable. We have a situation where the city adopted
8 a seniority-based layoff policy in 1975. It was
9 negotiated into the union's contract in 1975.
10 Therefore, the union and the city foresaw the serious
11 possibility of layoffs in 1975 and codified that
12 concern, if you will, in a public document. Other
13 cities were experiencing a great many financial
14 difficulties at that time. In our own circuit, the city
15 of Cincinnati had to lay off in their fire department
16 and confronted a dispute very much like this one which
17 went to the Sixth Circuit, which resulted in an opinion
18 by the Sixth Circuit in 1978, of which the Respondents
19 should have been aware. And we would submit that any
20 plaintiff in a Title 7 case must analyze the relief
21 that he or she is getting in a consent decree by way of
22 those landmark events in the employment relationship,
23 hiring, promotion, demotion, layoff and recall,
24 termination, and retirement, and look at the relief that
25 they are going to get in the consent decree and say is

1 this all that I am entitled to, is this all that I
2 needS? Clearly they should have foreseen it.

3 QUESTION: Mr. Blair, did the department when
4 it entered into the consent decree waive its right to
5 prove that future beneficiaries of the affirmative
6 action were not actual victims of the discrimination, if
7 it existed?

8 MR. BLAIR: No. I think that, Justice
9 O'Connor, I think what we really had, as is true in any
10 consent decree, is that the parties waive their right to
11 litigate the issues when you enter into a consent
12 decree. That's really what --

13 QUESTION: Well, did the department waive its
14 right to prove that these people who benefitted from the
15 order of the court were not actual victims of
16 discrimination?

17 MR. BLAIR: With regard to the relief granted,
18 yes, but not with regard to additional relief that might
19 be requested later.

20 Really what we think we have here is an arm's
21 length bargained agreement which should have been
22 honored by the court, and given that an interpretation
23 would not avail Respondents of the relief that they are
24 requesting and a modification was not proper, in light
25 of the waiver, then really the court should have stopped

1 there

2 But given the fact that the court went
3 further, if it was proper for the court to go further,
4 then clearly, the court couldn't say that we waived,
5 that is, the city and the union, waived our right to
6 insist that victim status be proved and established.

7 I hope I have answered your question.

8 I notice that my time is running out, and I
9 would like to reserve at least two minutes for
10 rebuttal.

11 I would finally close by saying that if this
12 case is not reversed, it will seriously discourage Title
13 7 settlements in the future.

14 Thank you.

15 CHIEF JUSTICE BURGER: Mr. Solicitor General?

16 ORAL ARGUMENT OF REX E. LEE, ESQ.

17 AS AMICUS CURIAE

18 MR. LEE: Mr. Chief Justice, and may it please
19 the Court:

20 The issue in this case is squarely controlled
21 by this Court's holding in Teamsters v. United States
22 that federal courts lack the power to grant
23 constructive, competitive seniority to nonvictims of
24 employment discrimination, that is, those who have not
25 shown that they individually are persons against whom

1 discrimination was practiced.

2 In Teamsters, the District Court found that
3 the employer had engaged in a pattern and practice of
4 discrimination against blacks and Spanish-surnamed
5 Americans, and in order to remedy this discrimination,
6 the Court of Appeals awarded constructive, retroactive
7 seniority to each member of the class.

8 The previous term, in Franks v. Bowman
9 Transportation Company, the Court had held that proven
10 individual victims were entitled to be slotted into
11 their rightful place in the seniority system, that is,
12 the place that they would have enjoyed but for the
13 discrimination.

14 Under Franks, therefore, both the
15 discriminatees and also their innocent coworkers whose
16 rights are necessarily affected by the grant of
17 constructive competitive seniority, are relegated to the
18 respective positions that they would have enjoyed if the
19 discrimination had never occurred, but for persons not
20 proven to be victims, the Court held in Teamsters that
21 such an award of constructive seniority is outside the
22 remedial authority of a federal court.

23 The defect in this court's order, the order of
24 the district court in this case, is that what the court
25 did here is precisely what this court held in Teamsters

1 that a federal court cannot do, namely, grant
2 constructive competitive seniority to persons who have
3 not proven that they are actual victims. And the only
4 difference is in the timing.

5 Under Teamsters, the district court could not
6 have given enhanced competitive seniority at the time of
7 its original decree against the possibility of layoffs
8 to nonvictims. Certainly it has no power, no greater
9 power once they occur.

10 This Court has observed frequently, and I am
11 quoting now from Hardison, that seniority systems are
12 afforded special treatment under Title 7, and indeed, it
13 is quite apparent from the legislative history of Title
14 7 that the Dirksen-Mansfield compromise which brought
15 703(h) into existence was key to the enactment of Title
16 7.

17 Given the importance of seniority systems to
18 Title 7, it would make no sense at all, we submit, to
19 ignore seniority in the single context where it really
20 matters, particularly when you consider that beginning
21 with Franks in 1976, this Court has been called upon
22 with some frequency and in various contexts to reach an
23 accommodation between the achievement on the one hand of
24 the twin objectives of Title 7, which is to eliminate
25 discrimination and compensate its victims, and on the

1 other hand, the protection of bona fide seniority
2 systems.

3 There are about a half a dozen such cases that
4 deal with that accommodation, and the opinions are
5 characterized by two persistent themes. The first of
6 those themes focuses on who are the beneficiaries of
7 Title 7 remedial orders, and draws a bright line
8 distinction between victims and nonvictims, and that's
9 Franks and Teamsters.

10 The second theme concerns the other half of
11 the remedial calculus, which is who pays the bill, and
12 more specifically, to what extent are the costs for
13 eradicating employment discrimination and compensating
14 its victims, to be borne by those who did the
15 discriminating, namely, the employers, through back pay,
16 front pay, enhanced benefits seniority, if you will, and
17 to what extent by innocent victims -- or excuse me,
18 third-party innocent coworkers, other employees who have
19 done no wrong but whose rights will necessarily be
20 affected if the remedy includes an award of competitive
21 seniority because as this court observed about a year
22 and a half ago in Fort Motor, a competitive seniority
23 award costs the employer nothing and sends the bill to
24 fellow workers.

25 Out of these cases, the law which has emerged

1 is clear, and it is that there is only one circumstance
2 under which federal courts are empowered as part of
3 their remedy for employment discrimination, to award
4 competitive seniority rights, and that is where the
5 beneficiaries of those competitive rights are actual
6 victims. That --

7 QUESTION: Mr. Lee, can the employer entering
8 into a consent decree waive that requirement, in your
9 view?

10 MR. LEE: I suppose that an employer could, as
11 a matter of agreement, at the front end of the decree,
12 could agree to it, and thereby would waive it, but
13 Teamsters is rather careful in spelling out the
14 procedure that is to be followed, and it is a two-step
15 procedure. The first step is the process of proving
16 pattern and practice, and the second step is the
17 practice of proving, or is the process of proving who is
18 a victim.

19 From one perspective, Franks itself, which
20 does grant competitive seniority to actual victims,
21 imposes part of the cost on innocent coworkers, but at
22 least under Franks, the cost distribution among the
23 victims and the innocent coworkers is the same
24 distribution that would have occurred if there had been
25 no discrimination. It simply puts the relative parties

1 back in the same position that they would have enjoyed
2 in the absence of discrimination.

3 To go beyond that and to require that
4 coworkers bear the burdens that they would not have
5 borne even if their employer had never discriminated is
6 to go beyond the limits of federal judicial power, and
7 that's what Teamsters holds.

8 QUESTION: May I ask, Mr. Solicitor General,
9 does it make any difference in your argument that the
10 Tennessee Supreme Court has held that this particular
11 memorandum between the union and the employer is
12 unenforceable under state law?

13 MR. LEE: It does not, Justice Brennan, for
14 this reason. What is before --

15 QUESTION: Just let me ask, that doesn't bear
16 on the question whether this is a bona fide seniority
17 system within 703(h)?

18 MR. LEE: No, it does not because it is very
19 clear from the record in this case, from the testimony
20 of the mayor and others in the joint appendix that
21 absent the court order, the city is within its right as
22 a matter of its own exercise of governmental
23 prerogatives, would have followed this seniority system
24 It was the city's system, so that absent the court
25 order, it is the seniority system that would have

1 prevailed.

2 QUESTION: Mr. Solicitor General, may I just
3 be sure, under your argument, if the parties in advance
4 had agreed on precisely what the district court ordered
5 as a part of the original consent decree, are you
6 contending that would have been beyond the court's power
7 to approve?

8 MR. LEE: No, so long as those innocent third
9 parties were in fact represented, as I think they could
10 have been held to have been represented by the
11 Firefighters Union which did intervene in this case.

12 QUESTION: Well, then, doesn't your argument
13 depend on the court's order being a modification as
14 opposed to an interpretation of the decree? If the
15 judge had in effect said this is what I think everybody
16 really agreed to, then I suppose your argument would
17 fall.

18 He didn't say that, I know, but

19 MR. LEE: It was a kind of a logical sequence,
20 you could make that order, but that is far too much of a
21 distortion of the interests in the facts of this case,
22 of innocent third workers, third parties, to say that
23 they did in fact agree to that, because in fact they
24 simply never got beyond the pattern and practice issue
25 in that case.

1 QUESTION: You certainly wouldn't suggest that
2 the city itself, by agreeing to a consent decree, could
3 waive the rights of nonvictims.

4 MR. LEE: Of course not, and that is exactly
5 the point that I hope that I was making.

6 The assertion by the Respondents and several
7 amici that Title 7 seniority guarantees, 703(h), is
8 substantive and not remedial simply cannot survive this
9 court's decisions in Teamsters and Ford Motor. The
10 issue in Ford Motor, for example, was not whether the
11 provisions of the seniority system substantively
12 amounted to employment discrimination, but rather,
13 whether the proposed remedies permissible, in the
14 language of this court's closing sentence, threaten the
15 interests of other innocent employees by disrupting the
16 established seniority hierarchy.

17 Teamsters and Ford Motor amply demonstrate the
18 obvious, that in crafting equitable remedies under Title
19 7, Federal Courts are not free to ignore the effect that
20 those remedies will have on substantive Title 7
21 policies, and the protection of seniority systems is
22 certainly one of those policies.

23 Finally, it has also been suggested that
24 notwithstanding the defects -- I mean, Teamsters is
25 simply unavoidable. Teamsters does control this case.

1 Teamsters is a Title 7 decision. But the Respondents
2 and their amici nevertheless suggest that Title 7 is not
3 the only source of judicial authority to enter this
4 decree. That argument will notwithstanding analysis
5 because under any circumstance it was an equitable
6 decree, and basic principles of equity teach that
7 federal courts applying equitable principles are to
8 shape those decrees in accord with the substantive
9 policies to be achieved.

10 This is, above all, an employment
11 discrimination decree. The federal policy dealing with
12 employment discrimination is contained in Title 7, and
13 under those circumstances, under any argument, the
14 content of an employment discrimination decree must be
15 shaped by the substantive policies of Title 7, including
16 the protection of seniority systems.

17 Unless the Court has further questions, I have
18 nothing else.

19 CHIEF JUSTICE BURGER: Very well.

20 Mr. Fields?

21 ORAL ARGUMENT OF RICHARD B. FIELDS, ESQ.

22 ON BEHALF OF THE RESPONDENTS

23 MR. FIELDS: Mr. Chief Justice, and may it
24 please the Court:

25 I would like -- I think this case provides us

1 with two issues: first, whether the case was moot
2 because the preliminary injunction issued by Judge McRea
3 has been irrevocably carried out, and the Court's review
4 of that injunction would not affect any of the parties'
5 legal rights in this matter; secondly, if this case is
6 not moot, then was the preliminary injunction a proper
7 exercise of the district court's discretion to enter an
8 order necessary to effectuate the sepcific purpose of
9 the decree, that is, to remedy the hiring and
10 promotional practices of the City of Memphis in their
11 fire department --

12 QUESTION: Mr. Fields, do you, do you contend
13 that the order entered by Judge McRea in this case, the
14 most recent order, is a modification?

15 MR. FIELDS: No, sir, I do not contend it's a
16 modification.

17 QUESTION: You disagree with the Court of
18 Appeals then.

19 MR. FIELDS: No.

20 QUESTION: Well, the Court of Appeals said the
21 principal issue raised on this appeal is where the
22 district court erred in modifying the 1980 decree.

23 MR. FIELDS: Well, Your Honor, first, it's
24 our belief that the district court simply effectuated
25 the purpose of the decree, and did --

1 QUESTION: Then you do think the Court of
2 Appeals was wrong in saying that it was a modification.

3 MR. FIELDS: No, I do not think the Court of
4 Appeals -- no. What the Court of Appeals in the Sixth
5 Circuit opinion in Brown v. Neeb, Judge Brown
6 specifically talks about modification in terms of
7 effectuating the purpose of the decree. That's the
8 terms the Court of Appeals was speaking of about
9 modification.

10 There is no layoff provision in the decree, as
11 we have all -- as admitted, and so there is really no
12 specific provision to modify. Our position is the court
13 was simply enforcing the decree as written.

14 QUESTION: Well, why do you think the Court of
15 Appeals then referred to it as modifying the decree?

16 MR. FIELDS: Your Honor, I don't know. I
17 think if we get to that point, if you were speaking
18 strictly about modification of law, this is not in terms
19 of modifying, for example, in the antitrust cases where
20 defendants want to be released from certain obligations
21 of the decree.

22 First, if it please the Court, this case is
23 moot. All of the people that were laid off by the 1981
24 preliminary injunction have been rehired.

25 QUESTION: What would you suggest we do if we

1 agree with you?

2 MR. FIELDS: I suggest that you vacate the
3 judgment below and remand for a determination of
4 mootness.

5 QUESTION: A determination. You say it's
6 moot. We don't need to determine it, and wouldn't we --
7 wouldn't we vacate the judgment below and remand and
8 direct the Court of Appeals to tell the district court
9 to dismiss the case?

10 MR. FIELDS: Yes, sir, that's correct.

11 QUESTION: Completely, and do away with the
12 consent decree, and --

13 MR. FIELDS: No, sir. This order on appeal
14 does not have anything to do with

15 QUESTION: Well, it's a judgment, isn't it? A
16 consent decree is a judgment, isn't it?

17 MR. FIELDS: The consent decree is, yes,
18 sir, but this --

19 QUESTION: Well, then why -- normally,
20 normally we strip the whole thing down clear through the
21 district court.

22 MR. FIELDS: No, this court has --

23 QUESTION: Well, do you -- I don't know -- you
24 can't -- I don't think you can have it both ways.

25 MR. FIELDS: The only thing on appeal in this

1 case is the preliminary injunction that the district
2 court entered in May of 1981. The consent decree is not
3 before the court. That was presented in Orders v.
4 Stotts which this court denied certiorari review on on
5 November 1, 1982. The consent decree itself has not
6 been attacked by any of the parties.

7 QUESTION: But if that -- unless you say that
8 the case -- unless the mootness necessarily undermines
9 the case --

10 MR. FIELDS: Well, but the mootness doesn't go
11 to the specific -- the provisions of the consent
12 decree. The mootness --

13 QUESTION: Could we ever hold that a
14 particular part of a decree was moot without holding
15 that the whole case was moot?

16 MR. FIELDS: Your Honor, I am -- my position
17 is in this court, and I don't think anyone has said to
18 the contrary, that the decree itself is valid, that --

19 QUESTION: So there is still an underlying
20 case in controversy?

21 MR. FIELDS: No, there's no underlying case in
22 controversy in terms of the court's preliminary
23 injunction as a result of further enforcing the decree.
24 The decree itself is not under attack in this case.

25 QUESTION: Mr. Fields?

1 MR. FIELDS: Yes.

2 QUESTION: If the city was short of money
3 again, could this situation be repeated in the future?

4 MR. FIELDS: It is our position, Your Honor,
5 that that is a different case. In between the time of
6 May 1981 and the present, the city has not only put all
7 of these people back to work, it has hired 63 new
8 firefighters, it has decreased the property taxes, and
9 it is moving forward in its remedial obligation under
10 the decree. A tax --

11 QUESTION: Well, I'm just asking whether it is
12 possible that in the future this city might run short of
13 money and need to implement some kind of a layoff
14 program.

15 MR. FIELDS: Yes, Your Honor, but that layoff
16 would have to be determined as to those circumstances.
17 For example, in this layoff, if there had only been a
18 layoff of 21 firefighters instead of 24, there wouldn't
19 have been any adverse impact upon the minority
20 percentages at that rank. So as the city moves to its
21 obligation to remedy the past discrimination in the fire
22 department, those circumstances would change.

23 It must be emphasized that Judge McRea entered
24 a preliminary injunction only requiring the city to
25 maintain certain percentages in certain

1 classifications. He did not order any specific method
2 of layoff. It was at the city's sole discretion to come
3 forward with what method of layoff it wanted to, and it
4 just so happened the city came forward again with a
5 seniority-based layoff system.

6 The city -- in fact, the union, one of the
7 petitioners in this case, asked the city not to lay off
8 anyone, to provide a system where workers could
9 voluntarily take leaves of absences so other workers
10 could remain on the force.

11 Another union --

12 QUESTION: Well, I suppose the Department was
13 bound by the city's seniority plan.

14 MR. FIELDS: No, Your Honor. The city never
15 adopted any layoff policy.

16 QUESTION: Well, I suppose the department was
17 bound by the city's plan.

18 MR. FIELDS: The fire department?

19 QUESTION: Yes.

20 MR. FIELDS: Yes, it was, but the city is the
21 defendant in this case. It is the Memphis Fire
22 Department and the City of Memphis, and the City never
23 adopted a formal layoff policy until April of 1981, just
24 before these layoffs. There was never any city policy
25 about layoffs. There was the memorandum of

1 understanding which this court has recognized as
2 unenforceable. It was really at the city's sole
3 discretion on how to lay off.

4 If you look into the layoff policy, seniority
5 was not the only factor. The first thing the city was
6 required to do was to measure the various qualifications
7 among the employees, and then they could apply
8 seniority. If there were specific positions in the fire
9 department that the city wished to be exempted from
10 layoff, they could. There were only certain jobs in the
11 fire department that were subject to layoff. It just so
12 happened that these jobs were where most of the gains
13 had been made in the prior year under this consent
14 decree, and that is the reason Judge McRea entered the
15 preliminary injunction, to maintain, for the city to
16 maintain the remedy that had been achieved thus far.

17 QUESTION: Well, may I ask, Mr. Fields, that
18 on page 31 of your brief --

19 MR. FIELDS: Yes, sir.

20 QUESTION: In arguing mootness, you say this:
21 even if the May 18 order were reversed, employees who
22 were laid off in 1981 still would receive no seniority
23 credit for that period unless the city itself chooses to
24 alter its layoff policy.

25 MR. FIELDS: Yes, sir.

1 QUESTION: Is that Tennessee law or is that
2 federal law or what?

3 MR. FIELDS: No, that's the state of -- the
4 state of the situation in the court now. There is no
5 claim in the district court by any employees for
6 seniority or back pay. There is no claim in any forum
7 in Tennessee for those things.

8 QUESTION: Why is there not?

9 MR. FIELDS: Because the union or those
10 employees have never made a claim for that.

11 QUESTION: Well, they are making, they are
12 making, they are litigating the issue here, and unless
13 they have, unless they win on this issue, there is no
14 basis for a claim.

15 MR. FIELDS: If they win or they lose, Your
16 Honor, there is no basis for it.

17 QUESTION: Exactly. Well, if they win, there
18 is a basis for it, an arguable basis for it, so there is
19 no use in making claims until there is some arguable
20 basis for it.

21 MR. FIELDS: Well, Your Honor, there is no
22 basis for it because everything has been achieved by the
23 preliminary injunction. All of these employees are back
24 at work and even if this court affirmed, the district
25 court would not grant seniority to these employees. It

1 is -- you know, also, the court needs to understand, it
2 was not only these employees that were laid off. There
3 were 24 employees laid off. There were three black
4 firefighters laid off. There were also other black
5 employees of the fire department that were laid off
6 because their jobs were abolished. The home fire safety
7 representatives, as mentioned in our appendix, those
8 were mostly black employees, and their jobs were
9 abolished.

10 This was not simply a layoff of white
11 employees to maintain blacks in certain jobs. And those
12 are the circumstances under which Judge McRea entered
13 the preliminary injunction after a hearing on the
14 matter.

15 Also, Your Honors, these three employees have
16 been back for approximately two and a half years. The
17 Petitioners argue that there are continuing effects.
18 First, they argue that these employees missed an
19 opportunity to take promotional exams. In their reply
20 brief they admit error. They also say that these
21 employees would be -- their, their ability to become 30
22 year captains would be delayed by this loss of
23 seniority. They admit that is an error because that
24 provision of the city charter was repealed in 1977, and
25 these employees who were laid off were hired in 1979.

1 Again, I would emphasize that nothing this
2 court would do will change that situation. All the
3 employees are back to work. In fact, some of the
4 employees who were laid off not only are back in their
5 original positions, but they have received promotions.
6 The fire department --

7 QUESTION: Well, are any of them losers of a
8 month's back pay and seniority credit?

9 MR. FIELDS: Excuse me, Your Honor?

10 QUESTION: Are any of those reinstated
11 employees nevertheless out a month's back pay and
12 seniority credit?

13 MR. FIELDS: They are as a result of what the
14 city did, but like we say in our brief, the city could
15 change that unilaterally, just as it adopted this layoff
16 program unilaterally.

17 QUESTION: You mean unilaterally it can pay
18 them a month's back pay?

19 MR. FIELDS: Absolutely, Your Honor. There
20 is --

21 QUESTION: And what -- how do they restore the
22 month's seniority credit?

23 MR. FIELDS: They just grant the seniority,
24 change their seniority days.

25 It is -- the loss of seniority is the city's

1 policy. Even if you look at the memorandum of
2 understanding, that is not in the memorandum of
3 understanding that has any effect at all as delineating
4 what the city's policy is.

5 QUESTION: Is that a matter of grace on the
6 part of the city in your view?

7 MR. FIELDS: Yes, sir, it is.

8 QUESTION: Then there is a way to enforce that
9 by the individuals?

10 MR. FIELDS: No, sir, as far as I can tell
11 there is no way to enforce it. It is not --

12 QUESTION: Then it doesn't carry much water
13 here, does it?

14 MR. FIELDS: In this court?

15 QUESTION: Yes.

16 MR. FIELDS: No, sir, and that's my point.
17 What is done in this court will not affect that one way
18 or the other.

19 QUESTION: Well, are you arguing it that
20 because of this it is not a bona fide seniority system
21 under 703(h)?

22 MR. FIELDS: Your Honor, it is our position we
23 don't have to reach that question, but it was never
24 litigated at the preliminary injunction hearing.

25 QUESTION: You're saying there just isn't any

1 seniority system.

2 MR. FIELDS: No, Your Honor, there isn't. It
3 was something that was adopted by the city just prior to
4 the layoffs, and we are saying that the city had an
5 enforceable duty under the consent decree to remedy past
6 discrimination and could take actions that would abrogate
7 that obligation to maintain that remedy under the
8 consent decree.

9 And that's what Judge McRea did. He told the
10 city that you cannot reduce the proportion of blacks in
11 these ranks pending a hearing on the merits. There was
12 never a hearing on the merits for an injunction in this
13 matter, and we never got into the proof of whether it
14 was a bona fide seniority system or not. This was
15 simply preliminary relief, and that has been irrevocably
16 carried out.

17 In fact, the plan the city submitted was not
18 submitted on May 18. It was submitted in June at the
19 behest of the court. The city at that time could have
20 submitted any plan that met the court's order. It just
21 so happened it chose a seniority plan to submit in June,
22 and that was not appealed from any -- by from any party
23 in this case. The only order that has been appealed
24 from is Judge McRea's May 18 preliminary injunction
25 which just provides that the city maintain certain

1 ratios and certain classifications.

2 The city --

3 QUESTION: Mr. Fields, let me ask you a
4 question on the mootness and all that.

5 MR. FIELDS: Yes.

6 QUESTION: In effect you have argued, well,
7 the city is spending a lot of money which it didn't need
8 to spend because it could just pay these people, if it
9 wanted to, and give them retroactive seniority.

10 Isn't the other side of the coin that you are
11 up here arguing about something your clients really
12 don't care about?

13 Why do you bother arguing the merits if it is
14 moot?

15 MR. FIELDS: Well, Your Honor, basically if it
16 is moot, then my clients have no interest in it. That's
17 true. There's nothing that is going to harm my
18 clients --

19 QUESTION: Even if you lose --

20 MR. FIELDS: Yes, sir.

21 QUESTION: -- on the merits.

22 MR. FIELDS: That's correct

23 QUESTION: So you are kind of giving us an
24 advisory opinion on what we ought to do on the merits.

25 MR. FIELDS: Well, but I think if this court

1 affirms, it is giving an advisory opinion to the city on
2 something that is not in controversy anymore.

3 May I also say in terms of the capable of
4 review but evading -- evading review but capable of
5 repetition argument, the city argues that Memphis is
6 peculiar, for some reason, that this may happen again
7 very soon.

8 It must be understood that this was the first
9 layoff ever in the history of the City of Memphis. Even
10 during the '74-'75 recession there was no layoff of city
11 employees by the City of Memphis, even though layoffs
12 were prevalent throughout the country. And --

13 QUESTION: But so far as this court is
14 concerned, we had a case last year involving a Boston
15 firefighter. I mean, our judgment has to be not so much
16 on the basis of whether it might happen again in
17 Memphis, but whether this kind of a situation is apt to
18 evade review.

19 MR. FIELDS: But in layoffs, Your Honor --
20 but, Your Honor, layoffs are not inherently capable of
21 evading review, or capable of not being reviewed because
22 as one of our amicus briefs shows, in the City of
23 Detroit, approximately 600 black, or 600 police officers
24 were laid off in 1980, and about half of those remain on
25 layoff today. In major industries throughout the

1 country, particularly in the steel industry, employees
2 were permanently laid off when steel companies were shut
3 down.

4 It is the peculiar facts of this situation
5 that this has been carried out, that the people have
6 come back to work and are back in their position --

7 QUESTION: Well, but the same peculiar facts
8 roughly obtained in the Boston situation, I think.

9 MR. FIELDS: Yes, but in that, of course, we
10 don't know how long the layoffs would have happened
11 because in the Boston case the state legislature passed
12 a statute mandating that the workers be put back to
13 work. That's what intervened.

14 Layoffs themselves, though, are not inherently
15 short of duration, and there are facts in other
16 instances to show that

17 Also, in terms of the interest rate argument,
18 in the reply brief, this is the first time we had seen
19 it, I don't know the city could predict interest rates.
20 In our national economy we have the Secretary of
21 Treasury saying the interest rates are going down, the
22 Council of Economic Advisors Chairman saying they are
23 going up. It is our position that really this Court
24 shouldn't decide that issue if major people in the
25 administration can't even decide it.

1 In terms of what Judge McRea did, and in terms
2 of the consent decree, this consent decree does have a
3 specific purpose as stated in paragraph 17. The purpose
4 is to remedy the past hiring and promotional practices
5 of the City of Memphis. It also includes specific
6 promotional goals and hiring goals.

7 What the city proposed to do in this case was
8 to in fact demote and lay off people that were hired
9 specifically and promoted specifically because of that
10 decree. In Exhibit A to the decree there are listed
11 specific promotions that were to be made. One of those
12 promotions was to the particular named plaintiff, Mr.
13 Fred Jones. He was scheduled to be demoted. There is
14 nothing in the consent decree that puts any condition
15 upon these promotions.

16 Judge McRea also looked at the other
17 circumstances surrounding it. In paragraph 6, again it
18 states the purpose, that the purpose was to remedy the
19 past hiring and promotional practices. This preliminary
20 injunction issued by Judge McRea is to be judged on a
21 standard of abuses of discretion. In this case, Judge
22 McRea did not abuse his discretion. Many of the blacks
23 who were scheduled to be laid off were hired or promoted
24 as a result of the 1980 decree. The consent decree at
25 no point authorizes the fire department to reduce black

1 representation until the long term goal has been met.
2 It is a continuing remedial obligation. It is the words
3 of the consent decree and not Title 7 that governs what
4 Judge McRea's authority was to provide this preliminary
5 relief.

6 The limited relief actually afforded by the
7 preliminary injunction therefore did not constitute
8 abuse of discretion. The -- his order of May 18 simply
9 required that specific proportions of blacks be
10 maintained in certain job classifications. Judge McRea
11 not only reviewed these job classifications, he reviewed
12 all of the proposed layoffs that were to be made at
13 least proposed by the fire department.

14 On May 18, no one knew how many people were
15 going to be laid off. No one knew which job
16 classifications were necessarily going to be affected.
17 It was all proposed by the city. What Judge McRea did
18 was propose a standard by which the city could come up
19 with a layoff policy. At the later point when they
20 submitted their plan, the city chose to make the layoffs
21 in such a way that it would affect employees as they
22 stated on a seniority basis. There were other
23 alternatives, but that was not gotten into by Judge
24 McRea. He simply told the city that they had to
25 continue to fulfill their remedial obligation.

1 By issuing this narrowly drawn preliminary
2 injunction prohibiting the city from implementing the
3 proposed layoff policy as it would affect the relief
4 already achieved under the consent decree, Judge McRea
5 did not modify existing provisions of the decree; he did
6 not confer new rights nor impose new obligations on the
7 parties, or take away any contractual or seniority
8 rights allegedly enjoyed by nonparties.

9 Rather, Judge McRea merely prevented the city
10 from abrogating the degree in which it obligated itself
11 to raise the percentage of black employees in each job
12 classification. Judge McRea consciously did not tell
13 the city how to lay off employees. He consciously did
14 not involve himself in the internal operations of city
15 employment practices. He left it up to the city to
16 select a means of meeting its financial obligations
17 without interfering with this remedial obligation in the
18 decree.

19 I would just like to make one other point
20 about the United States position. If the United States
21 is upheld, position is upheld, then of course this
22 would, we believe, and I think the EEOC believes in a
23 footnote to the Justice Department's brief, abrogate any
24 consent decree or any case ever being settled. It would
25 require full litigation of every employment

1 discrimination case.

2 This decree was settled --

3 QUESTION: Well, what is your view about a
4 consent decree, Mr. Fields, that provides provisions for
5 not just hiring preference for minorities but
6 promotional preferences? Do you think the city could
7 enter into a consent decree which would affect the
8 rights of existing nonminority people to promotion?

9 MR. FIELDS: If it is reasonable, yes, Your
10 Honor, and if there is inherent fairness here, and they
11 have participated in the hearing on the decree, yes.

12 QUESTION: You say they have a right to
13 participate, but the decree could adversely affect their
14 seniority expectations.

15 MR. FIELDS: Every Title 7, where there is
16 relief for plaintiffs adversely affects some seniority
17 possibility.

18 QUESTION: Well, certainly not a Title 7
19 decree that simply affects hiring.

20 MR. FIELDS: No, Your Honor, but this decree,
21 the decree we are working with and which this court has
22 denied review on in terms of its provisions has a
23 promotional provision as well.

24 QUESTION: Have we ever upheld one like that
25 that didn't deal only with people who are identifiable

1 victims?

2 MR. FIELDS: Your Honor --

3 QUESTION: Can you answer that?

4 MR. FIELDS: I don't know. You have upheld
5 this decree by denying cert on it.

6 QUESTION: Well, I meant one which we had
7 actually reviewed.

8 MR. FIELDS: Your Honor, I am not aware of any
9 at this time.

10 QUESTION: Neither am I.

11 MR. FIELDS: But in terms of the victim --

12 QUESTION: But you would have to -- your
13 position, I suppose, is that it would have to be some
14 real basis for thinking that the so-called innocent
15 third parties had waived their rights by participating
16 in the negotiations or in the case and agreeing to the
17 consent decree.

18 MR. FIELDS: No, they did not waive their
19 rights --

20 QUESTION: Well, you wouldn't -- would you --
21 you wouldn't suggest that just the city, just the city
22 and your clients could between the two of them agree to
23 a consent decree that would go farther than Teamsters
24 would seemingly permit.

25 MR. FIELDS: The Teamsters doesn't -- I'm

1 sorry, Your Honor.

2 QUESTION: You know what I mean.

3 MR. FIELDS: Yes.

4 No, there has to be a fairness hearing in
5 every consent decree, and if --

6 QUESTION: But doesn't there have to be some
7 basis for thinking that the union represented the people
8 who might possibly be affected by this decree?

9 MR. FIELDS: Yes, sir, I don't disagree with
10 that.

11 QUESTION: So without the union there, or
12 without the individual participation of the nonminority
13 members, there wouldn't -- the city and your clients
14 couldn't enter into a decree that would go farther than
15 Teamsters would permit.

16 MR. FIELDS: No, Your Honor, we could enter
17 into a decree. Whether it would be considered fair or
18 not --

19 QUESTION: Well, it just wouldn't bind, it
20 just wouldn't bind the people who hadn't participated in
21 it.

22 MR. FIELDS: Oh, yes, Your Honor, it would
23 bind those people if they had an opportunity to
24 participate in the hearing to determine whether it's
25 fair or not.

1 QUESTION: Well, I know, but assume they
2 didn't, assume they just didn't participate.

3 MR. FIELDS: Well, if they participate, in our
4 decree -- and that's the only one I know about right
5 now -- there was a hearing, and that people were allowed
6 to participate. As I understand, there has to be a
7 hearing in a consent decree approval.

8 QUESTION: And are you really suggesting that
9 the union here stood by and agreed to this decree
10 knowing and realizing that they were sacrificing rights
11 to competitive seniority?

12 MR. FIELDS: The union did not stand by in the
13 preliminary injunction hearing. We consented to its
14 intervention. At the original decree entry, the union I
15 believe stated in its brief, along with the city in the
16 prior brief, that it considers our consent decree a
17 reasonable consent decree for hiring and promotional
18 purposes.

19 QUESTION: Well, I know, but do you think that
20 they thought they were agreeing that nonvictims could be
21 awarded competitive seniority?

22 MR. FIELDS: Nonvictims could -- Your Honor, I
23 don't know what they thought. I mean, you will have to
24 ask them. I just know the facts --

25 QUESTION: Well, you have to believe that they

1 were agreeing to granting nonvictims competitive
2 seniority, at least with respect to layoffs.

3 MR. FIELDS: Your Honor, obviously they didn't
4 agree at the preliminary hearing, preliminary injunction
5 hearing. Our position is, though, that --

6 QUESTION: Do you think they agreed before
7 that?

8 MR. FIELDS: Your Honor, it never arose before
9 that. Until the layoffs which were the first in the
10 history of Memphis occurred, this issue was never
11 presented. And that is another point that the
12 petitioners present that we should have anticipated this
13 layoff. This layoff was not anticipated by anyone, and
14 in fact, as I stated, in the history of Memphis there
15 had never been a layoff.

16 QUESTION: Well, if this case were reversed,
17 what would the real effect be on parties who are
18 contemplating a consent decree? Would it be likely to
19 encourage them to at least address these issues in the
20 consent decree and not have a decree like this one that
21 didn't address layoffs?

22 MR. FIELDS: If it were affirmed or reversed,
23 that would be the happenstance. I think after the
24 Boston firefighters case, no one would enter a consent
25 decree without addressing those issues. But until

1 layoffs occurred, particularly in the city of Memphis,
2 this was not an issue in this case or in any of -- in
3 the Justice Department's consent decree of 1974 which, I
4 might add, if the Justice Department's position today is
5 upheld, that would abrogate its consent decree that it
6 entered into with the city in 1974 because its decree
7 provides for hiring and promotional goals with the City
8 of Memphis in all departments.

9 QUESTION: Well, if the practical effect is
10 that the parties would be likely in the future to
11 certainly consider and address in the decree of layoffs,
12 then you get back to the question of the extent to which
13 the city and the union, for example, can affect in the
14 terms of the decree the rights of any innocent employees
15 for layoff purposes.

16 MR. FIELDS: Yes, that would, and I think this
17 Court has begun to address that, particularly last term
18 in the W.R. Grace case where an employer enters into a
19 conciliation agreement with the EEOC, they may abrogate
20 an existing collective bargaining agreement. However,
21 you must remember in this case we do not have an
22 enforceable collective bargaining agreement.

23 If there are no further questions, thank you.

24 CHIEF JUSTICE BURGER: Do you have anything
25 further, Mr. Solicitor General or Mr. Blair?

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MR. BLAIR: No, Mr. Chief Justice.

CHIEF JUSTICE BURGER: Very well.

Thank you, gentlemen. The case is submitted.

We will hear arguments next in Justices of
Boston Municipal Court against Lydon.

(Whereupon, at 10:58 a.m., the case in the
above-entitled matter was submitted.)

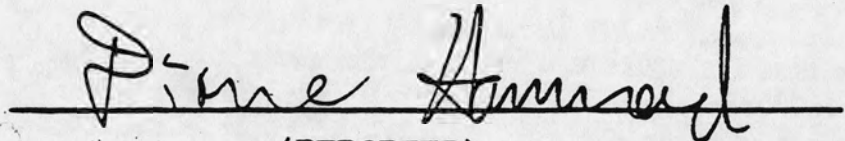
CERTIFICATION

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:

#82-206-FIREFIGHTERS LOCAL UNION NO. 1784, Petitioners v. CARL W. STOTTS, ET AL
~~#82-229-MEMPHIS FIRE DEPARTMENT, ET AL., Petitioners v. CARL W. STOTTS, ETC.,~~
ET AL.

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

BY

A handwritten signature in cursive script, appearing to read "Pine Hunsaid", is written over a horizontal line.

(REPORTER)

83 DEC 13 P1:52

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