OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE

THE SUPREME COURT OF THE UNITED STATES

DKT/CASE NO. 83-1545

TITLE WESTERN AIR LINES, INC., Petitioner v. CHARLES G. CRISWELL, ET AL.

PLACE Washington, D. C.

DATE January 14, 1985

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IN THE SUPREME COURT OF THE UNITED STATES

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WESTERN AIR LINES, INC., : No. 83-1545

Petitioner :

v. :

CHARLES G. CRISWELL, ET AL. :

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Washington, D.C.

Monday, January 14, 1985

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 11:24 o'clock a.m.

APPEARANCES:

GORDON DEAN BOOTH, JR., ESQ., Atlanta, Ga.;
on behalf of Petitioner.

RAYMOND C. FAY, ESQ., Chicago, Ill.;
on behalf of Respondent.

LAWRENCE G. WALLACE, ESQ., Washington, D.C.;
on behalf of the United States and the EEOC
as amici curiae supporting Respondents.

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C O N T E N T S

P R O C E E D I N G S

CHIEF JUSTICE BURGER: Mr. Booth, I think you may proceed whenever you're ready.

ORAL ARGUMENT OF GORDON DEAN BOOTH, JR., ESQ.

ON BEHALF OF THE PETITIONER

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

According to the order granting certiorari in this case, this matter is before the Court for you to decide the proper burden of proof in connection with a defense of reasonable factors other than age arising under the Age Discrimination in Employment Act, as well as the appropriate standard for establishing a bona fide occupational qualification, a BFOQ, under the same Act in a situation where the safety of third parties is involved.

Petitioner will limit its comments to those legal issues. Petitioner understands that this case is not before the Court on any issue involving the sufficiency of the evidence below or the nature, quality or quantity of such evidence, and therefore will not comment on the evidence except where necessary to clarify its positions or concepts. Of course, Petitioner relies on the record and the briefs, and does not concede any evidentiary questions

The Federal Aviation Administration sets minimum safety standards for air carriers. It does not in any way attempt to set safety standards as such, but leaves to the carriers the methods, approaches, procedures and techniques that allow them in each of their own judgments to maximize safety.

The carriers do in fact operate with substantially different approaches and philosophies. The flight engineer's job, for example, is different from carrier to carrier, particularly in the training aspects and emergency procedures and in the airlines' approach to the management of flight, whether the carrier utilizes a coordinated crew approach to flying.

Some carriers treat their flight engineer's job as a lifetime position. Others, among them Western, hire only pilots and do not hire those only qualified to be flight engineers, and treat the flight engineer or second officer slot as an entry level job on a line of progression leading to pilot.

Of course, all common carriers own their passengers a duty of extraordinary care. This is not a new concept, but rather has been the standard for many, if not hundreds, of years. It is viewed as fair and reasonable. The carrier is in control of the situation. The carrier has superior knowledge and

experience by virtue of being in the business, and therefore is in the best position to know and to assess the risk involved.

The carrier delivers this care through hundreds, if not thousands, of small decisions, decisions regarding the manner of operation, the type of equipment to be used, the manner of repair, maintenance and replacement of equipment, schedules and the speeds required to be utilized to meet those schedules, as well as decisions regarding the competence level required of employees, the training required, the proficiency required, and other personnel decisions, all involving human skills, human weaknesses, and human abilities -- decisions which, taken together, allow the carrier to predict a safe operation.

All of these decisions are made subject to the requirement that the carrier operate to an extraordinary level of care. The airline common carriers are charged by statute with the duty to make their decisions so as to maximize safety, to operate in the highest degree of safety in the public interest.

In practice, all common carriers probably strive to meet that standard. All try to make decisions in such a way that a safe operation is predictable.

It is also a federal law that employment and

other personnel decisions shall not be made in such a way as to arbitrarily discriminate among people based on their age. And it is also the common experience of mankind that certain abilities and capacities diminish with age. The difficulty is with adequately measuring or predicting such diminution in an appropriate way. And this case involves those questions.

There are two sets of Plaintiffs. Some were captains who sought to become second officers as they approached age 60. The second officer is the most junior person in the cockpit. He occupies the flight engineer position. It is the entry level job.

Some of the Plaintiffs were part of a group of ten second officers who in 1962 were permitted to remain as second officers as an exception to the company's up-or-out policy normally applied to the second officer, first officer, captain line of progression. These second officers wanted to continue as second officers after reaching age 60.

As to the captain group of Plaintiffs, the Defendant asserted that such bids would invert the normal seniority in the cockpit by allowing the most senior person in the cockpit to become the most junior in the chain of command. The company has a firmly established up-or-out policy for safety reasons, and the

inversion would be inconsistent with that policy.

The company asserted that the Plaintiff captains had no right to make such bids, as they were not allowed under the colective bargaining agreement. No captains were allowed to make such bids under the collective bargaining agreement.

The company advanced this as a reasonable factor other than age under the ADEA.

QUESTION: Well, what precisely did the company mean by reversing the seniority or inverting the seniority? No one was contending that because the flight engineer had been around longer he could tell the captain what to do?

MR. BOOTH: This is only captain Plaintiffs. These Plaintiffs had been captains and they had been around longer than anybody in the cockpit. The people who were career flight engineers didn't know how to fly the airplane. They wouldn't have any --

QUESTION: Yes, but as to the captains, you say the company advances a reasonable factor other than age, the fact it would invert the seniority, if I understand. What does that mean?

MR. BOOTH: Well, Your Honor, a lot of carriers, not all of them but a lot of carriers, feel very strongly that the most senior person in the cockpit

should be the captain, the next most senior person should be the copilot, and the most junior person should be the flight engineer.

About half of the carriers treat the flight engineer's job as a training seat leading to the job of copilot, and then from copilot to captain. So if a captain were to go down and become a flight engineer, you would have a situation where the most senior person in the cockpit would be the most junior person in the chain of command.

QUESTION: Well, what is so bad about that?

MR. BOOTH: Well, there's a strong feeling among a lot of carriers that having someone who has been a captain become in a subordinate position is bad for command. A coordinated crew command concept presupposes that the crew will react like the fingers on your hand do to a single stimulus, and the crew is trained to handle emergencies and routine flight in that way.

There is a powerful feeling in the industry, which -- I'm giving now the reason the company gave, which I'm not sure a reasonable factor has to meet the standard of BFOQ. But in any event, the reason is they feel that it's like a backseat driver or somebody's grandmother.

QUESTION: Someone who has previously been a

captain is more apt to second-guess or backseat drive?

MR. BOOTH: That's right, to interfere with the operation of the cockpit.

QUESTION: Of course, that is not true for all airlines, is it?

MR. BOOTH: That is not the view of all airlines. Not all airlines, Your Honor, have a line of progression. Some airlines allow people to stay flight engineers their whole careers, so they would never move up. And some airlines, a minority but a substantial minority, have allowed captains to go back and occupy that seat.

But all the training procedures are different among the carriers, too. Their approach to emergency management and the approach to flight are also different. So you really have to investigate the way they treat their circularity or the seniority list with the way they approach flying airplanes in toto.

QUESTION: But if the captain flying as a flight engineer gets out of line, he's very easily dealt with.

MR. BOOTH: Your Honor, he would be --

QUESTION: He's grounded, right?

MR. BOOTH: Your Honor, he would be dealt with -- I'm not sure that's true, first. Everybody has a

tendency to accommodate to some other human being's views if you sense that somebody doesn't appreciate what you're doing. Nobody likes to have somebody read over their shoulder. I'm not sure that that's true.

But even if it were true, Your Honor, the question is, if it were a critical time, if it were an emergency situation, which the evidence in other cases has been is the time that it's most likely to occur, you might not have an opportunity to punish him later.

QUESTION: The other airlines have no trouble with it.

MR. BOOTH: Your Honor, the other airlines have not experienced any known difficulty with it, those who have tried it. But the simple fact that a risk has been successfully endured doesn't mean it's not been endured. I don't know how much time we need to know --

QUESTION: Well, I hope you're not relying on that only.

MR. BOOTH: No, Your Honor. The point of this is that, as to the ex-captain Plaintiffs, the company advanced this as a reasonable factor other than age. The point in this case is the judge then ordered the company that it had the burden of proof on that point. That's I think all that's before this Court today, is whether or not the burden of proof should have been on

the company or on the Plaintiffs.

The Defendants asserted to the other group -- that is, the people who had stayed second officers -- that age 60 was a BFOQ for the position of second officer, because the risk of subtle and sudden incapacitation increases substantially after age 60, and that there was at present an inability to distinguish those who as a consequence of their aging constituted a threat to safety.

Thus, the reasonable factor other than age defense only applies to those Plaintiffs who were captains, and the BFOQ defense at that time only applied to second officers.

Addressing the BFOQ issue, all parties to this case agree that the leading case at this time which has considered the BFOQ question before the Court today is Usery versus Tamiami, decided by the Fifth Circuit in 1976. The court considered the exception contained in the ADEA, which allows an employer to consider age where it is a BFOQ, in the light of the carrier's obligation and duty to operate as safely as possible. Its opinion taken as a whole, it is submitted, properly and fairly balanced the interplay of these concurrent obligations at the point where they may and from time to time do conflict.

Petitioner believes that Tamiami, taken as a whole, directs what the policy ought to be. Indeed, the decision has been cited with approval or followed or claimed to have been followed by all of the courts of appeal.

QUESTION: Mr. Booth, can I ask you kind of a basic question that puzzles me a little. I've had a little trouble focusing on the issues in this case. It seems to me there's some tension between arguing on the one hand that the discrimination was based on a factor other than age, your first basic argument, and secondly arguing that it was based on age, but it was a BFOQ.

MR. BOOTH: There are two different sets of Plaintiffs. Under the reasonable factors other than age --

QUESTION: I see, one applies to one set of Plaintiffs and the other applies to the other.

MR. BOOTH: Right, Your Honor. No captains, regardless of age, were allowed to bid -- to invert the seniority list in the cockpit by bidding down to flight engineer. That's the defense the company asserted. It didn't make any difference how old you were. If you were a captain you couldn't do that. So it didn't have anything to do with age.

Whether it was reasonable or not, Justice

Marshall was addressing, but we just want an opportunity to prove that under the proper standard.

QUESTION: Your objection there is to the form of the instruction which placed the burden of proof on you?

MR. BOOTH: Exactly, Your Honor.

QUESTION: You say that, even though it's an affirmative defense, you apply the McDonnell Douglas approach. That's your basic argument.

MR. BOOTH: Well, I'll address that in a moment, Your Honor. We don't think it's an affirmative defense. It has none of the characteristics historically at common law of an affirmative defense.

QUESTION: On the instruction point concerning reasonable factor other than age, where in the instruction did the court tell the jury that it was an affirmative defense?

MR. BOOTH: Your Honor, I thought somebody might ask that. If you read charge paragraphs 17, 23 and 30, taken together, what the judge --

QUESTION: Where is that?

MR. BOOTH: Sorry, Your Honor. It's in the appendix. I don't have the citation to the appendix. It's the judge's charge to the jury.

He said what the defenses were and then he

said what defenses were affirmative defenses and the burden of proof, and then he said that this was --

QUESTION: I just didn't find anyplace where the trial judge said the reasonable factor other than age was an affirmative defense and that the burden was on Western Airlines. And I wondered where you could point out.

MR. BOOTH: You're quite right, Your Honor, it is nowhere in there stated as that. What you have to do is to put -- to dovetail the three paragraphs.

QUESTION: So that argument may fail simply because that isn't what the judge instructed.

MR. BOOTH: It's conceivably possible that that's true.

QUESTION: Then you made this argument that the court had to apply that McDonnell Douglas approach on reasonable factors other than age. Do you think that this Court's opinion a few days ago in TWA versus Thurston now forecloses that argument?

MR. BOOTH: No, Your Honor. In that case as I understand it, TWA had a policy which allowed people of a certain classification to do things, but it didn't allow everyone in that classification to do things. This reasonable factor other than age applied to every captain who would have sought to do what these captains

did.

QUESTION: Well, isn't that direct evidence of age discrimination, so that you have to face it head-on rather than in a McDonnell Douglas approach?

MR. BOOTH: I'm sorry, Your Honor. Not all the captains are even 40. They're not even in the protected group. This rule applied to all captains. It didn't make any difference how old you were. I don't see how you would get a head-on kind of discrimination by having a rule that applied to all captains, period. I mean, in the case no one was allowed to bid.

QUESTION: Well, I guess all we had here were captains who had reached the age that precluded them from being captains.

MR. BOOTH: In this case?

QUESTION: Yes.

MR. BOOTH: No, Your Honor. When these people bid they were not 60. They were approaching 60, but they weren't 60. And they sought to bid down, as any other captain would have done in the population pool of captains at that time.

All of the courts of appeal which have considered the Tamiami case, as I was saying, have cited it with approval since 1976. All of the parties before the Court today urge it or parts of it on this Court as

helpful in aiding this Court in reaching a resolution of the BFOQ issue.

The court in Tamiami did not purport to be drafting a jury charge, but instead was setting forth the methodology to be utilized and the requirements to be met in connection with an employer's proof of a BFOQ defense in a case involving safety. It reviewed two requirements it had established earlier in BFOQ cases not involving safety of third parties.

QUESTION: Mr. Booth, can I interrupt again. I don't know why, I had a little difficulty getting focused on the issues in this case. But if you are right about your reasonable factors other than age and they had a right -- or assume they had a right, you had a right to refuse to let them bid down, but you would have discharged them at age 60 anyway, because I presume your age 60 rule would have applied.

How is there any damage at stake on the reasonable factor other than age issue? I don't quite understand how that could affect the ultimate outcome anyway, because if you lose on the BFOQ isn't that the end of the ballgame?

MR. BOOTH: Your Honor, as to this population of Plaintiffs I don't know, but I would assume that all of them are 60 by now.

QUESTION: But I don't see how a captain could possibly have suffered injury by being forbidden to bid down if he was going to get fired when he was 60 anyway.

MR. BOOTH: Well, I think, Your Honor --

QUESTION: Because he would presumably earn more money as a captain.

MR. BOOTH: They earn -- the flight engineer earns 60 percent of what a captain earns.

What they sought was to position themselves as a flight engineer --

QUESTION: Right.

MR. BOOTH: -- because if they had the right to bid down under the seniority provisions of the collective bargaining agreement, the company has to train them. So that most of these captains may never have been flight engineers or they might not have a current --

QUESTION: But they would have been fired when they reached their sixtieth birthday anyway.

MR. BOOTH: Well, of course they were trying to position themselves to argue that that was --

QUESTION: That's right. But it wouldn't have done them any good if you win on the BFOQ.

MR. BOOTH: Well, of course, Your Honor --

QUESTION: I just don't understand how the reasonable factor other than age can possibly determine anybody's rights, that issue in this case. Maybe I missed something.

MR. BOOTH: Well, maybe only two or three years' rights, Your Honor.

QUESTION: Pardon me?

MR. BOOTH: It may be only two or three years' rights, but the Plaintiffs --

QUESTION: But it would be two or three years at a lower salary.

MR. BOOTH: Of course. Your Honor, I want to focus on the fact that all we seek here is to have the case tried under a proper burden of proof charge to the jury. I don't think that we're here before this Court today trying to convince you --

QUESTION: But you don't want to try it on that issue if you're going to lose anyway on the BFOQ issue. I'm not saying you do lose, but I just frankly don't quite understand.

Well, anyway, go ahead.

MR. BOOTH: Well, actually I viewed this as the introduction to the facts, Your Honor.

As I was saying, the Fifth Circuit said that the employer must demonstrate that the qualification be

reasonably related to the employer's business and that the employer prove that he had a factual basis for believing that all or substantially all persons excluded would be unable to perform safely and efficiently the duties of the job involved, or demonstrate that it is impossible or highly impractical to deal with the excluded persons on an individualized basis.

The court then discussed refinements to be considered in a case where safety was involved. The court observed: "The greater the safety factor, measured by the likelihood of harm and the probable severity of that harm in case of an accident, the more stringent may be the job qualifications designed to ensure in that case safe driving. We believe that courts must afford employers substantial, though not absolute, discretion in selecting specific safety standards and in judging their reasonableness."

The court concluded by saying that: "In the safety area, the employer must be afforded substantial discretion in selecting specific standards which, if they err at all, should err on the side of preservation of life and limb. The employer must, of course, show a reasonable basis for its assessment of risk of injury or death. We think the safety factor should be evaluated in terms of the possibility or lack of it of injury or

death."

We suggest to you that in cases involving considerations of public safety an appropriate standard would be to require the employer to show: first, that the duties of the job in question are related to the essence of the business; and secondly, that the qualifications selected by the employer for that job are reasonable in light of the safety risk; and that there is a reasonable cause to believe -- that is, a factual basis for believing -- either that most persons excluded by the challenged age limitation do not possess the selected qualifications or that it is impossible or impractical to deal with such persons on an individual basis, thereby justifying a reasonable general rule; and further, that where the purpose of a challenged employment policy is to promote safety and minimize risk of injury to third parties, the employer should be afforded flexibility and discretion in selecting specific safety standards and in judging their reasonableness.

Petitioner submits that these requirements are totally consistent with the opinion in Tamiami and with the better reasoned decisions following Tamiami. This Court, of course, is not bound by Tamiami nor its progeny.

Petitioner submits that, whatever test this Court devises for use in cases involving safety consideration, that this Court should accord the employer flexibility and properly restrained discretion in selecting job qualifications stringent enough to ensure safety.

The charge given by the trial court in this case did not afford Western any flexibility or discretion in selecting job qualifications for the position of second officer. Moreover, it did not permit Western to make a conservative management decision when faced with substantial conflicting medical evidence concerning the efficacy of medical individual tests.

Every court which has considered the issue of safety and the BFOQ claim has concluded that some leeway, some margin for error, is to be afforded the employer, except the lower courts in this case.

QUESTION: Mr. Booth, may I ask one other question. Does the record before us contain your objections to the trial court's instructions on BFOQ?

MR. BOOTH: Your Honor, there were numerous discussions between the court and the parties as to the different BFOQ's that were given -- I mean, strike that -- that were proposed for charges. And this charge was not anybody's charge, so I think the objection --

QUESTION: Well, my question is did you, after it was made or after you knew what it was going to be, make objections to it?

MR. BOOTH: Your Honor, I think the objections were continually made. I honestly don't know what specific objections --

QUESTION: Can I find them in the record. Could you help me find them in the record if I were to look for them?

MR. BOOTH: Your Honor, I don't know.

QUESTION: And did you propose a different instruction and is that in the record?

MR. BOOTH: Different instructions that were proposed were in the record. I didn't try the case, but by the trial lawyers.

QUESTION: But somebody representing your client.

MR. BOOTH: Yes, Your Honor.

QUESTION: And where are the instructions that your client proposed on BFOQ?

MR. BOOTH: Where are they shown in the record?

QUESTION: Yes.

MR. BOOTH: Your Honor, I don't have the citations for the record. I can furnish it to the

Court, but I don't have it here with me.

The charge given --

QUESTION: On page 79 of the joint appendix there are some responses to requests. Those are requests for admissions, I think. Those are just requests for admissions, aren't they?

I don't see any -- I guess it must be in the full record that's filed here.

MR. BOOTH: In the full record, Your Honor. Most of the actual discussions involving the charge and the arguments took place in chambers. So what's in the record --

QUESTION: Were they recorded or not?

MR. BOOTH: Your Honor, a lot of that was not recorded. What is recorded is the different proposals and the results and the kind of distillation. I don't think the charge the judge gave was requested by anybody.

QUESTION: Well, is the instruction to which you address your challenge embraced within the instruction that begins on page 51 of the appendix?

MR. BOOTH: Yes, Your Honor. We have the complete jury instructions in the appendix.

QUESTION: Well, Mr. Booth, to try to clarify your point, if I can, the trial judge instructed that,

in 1978 when these Plaintiffs were retired, the jury had to find it was highly impractical for Western to deal with each second officer over 60 on an individualized basis to determine his ability.

Now, you made objection to that instruction, is that right, or trial counsel for Western made objection to that, is that correct?

MR. BOOTH: Your Honor, I don't believe there was that instruction to the subsets of that instruction. That particular language was included in a request made by Western, but after that language there were two or three paragraphs involving how that was to be interpreted in the light of the safety obligation of the carrier and its duties, and those paragraphs were not given.

QUESTION: And did the clarifying paragraphs make it clearer that it was enough for the jury to find that the employer simply had a reasonable basis in fact to think it was highly impractical?

MR. BOOTH: Your Honor, the clarifying language approached the problem by saying that the jury could adjust the impracticality factor by considering the safety obligations and the safety responsibilities. That's what the following paragraphs did. They didn't approach it by saying per se that Western had to prove

that it had a reasonable basis in fact.

QUESTION: But that's what you're urging today.

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

QUESTION: You urge that the trial judge should have said the employer had a reasonable basis in fact to believe it was impractical.

MR. BOOTH: Well, Your Honor, we also say that the trial judge should have charged the jury on Western's standard of care and allowed the jury to consider its safety obligations in light of the other requirements it had.

QUESTION: Well, that seems like a separate point, and of course the trial judge did instruct that safety was a factor.

MR. BOOTH: Well, it's true, we are now proposing to the Court what we think would be a perfect charge and we are complaining about the charge below on the ground that it had several errors that we thought --

QUESTION: Although you did not propose the "perfect charge" at the time?

MR. BOOTH: No, Your Honor, but the charge we proposed was not given and the charge that was given was an inaccurate statement of the law.

QUESTION: Mr. Booth, did the Court of Appeals review that charge?

MR. BOOTH: Your Honor, it reviewed the charge, yes. The charge, as I just told Justice O'Connor, failed to explain to the jury Western's duty, its standard of care to operate with the highest possible degree of safety.

The Petitioner doesn't advocate a subjective test. Petitioner submits that the employer must demonstrate by objective evidence at trial that the selected job qualifications are reasonable in light of the safety risk.

It suggests that where there is a legitimate bona fide dispute among experts in the field, not just a dispute among witnesses at trial, the jury should not decide which expert view is correct. If there is a dispute among experts in the field and there exists on both sides of the question legitimate, credible evidence, an employer ought to be allowed to reach the most conservative decision.

An employer ought to be able to make safety decisions -- ought not to be required to make safety decisions based on what he can prove. He should be allowed to take a more prudent approach. Slight evidence ought to cause an employer concern and perhaps

cause action before the issue is ultimately resolved by experts. Successful risk management involves the elimination of potential impediments to safety.

Thank you.

CHIEF JUSTICE BURGER: Mr. Fay.

ORAL ARGUMENT OF RAYMOND C. FAY, ESQ.

ON BEHALF OF RESPONDENTS

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

I think it would be helpful if I initially explain to the Court what really went on in the district court with regard to the instructions and the various defenses that Western raised, and also provide just a little bit of clarifying background about how the instruction that Judge Tashima gave was constructed.

QUESTION: Did you try the case?

MR. FAY: Yes, I did.

QUESTION: Well, is what you're going to tell us in the record or is it just your memory?

MR. FAY: I'm going to tell you everything that's in the record.

QUESTION: You mean everything you say is going to be in the record?

MR. FAY: That's correct.

QUESTION: All right.

(Laughter.)

MR. FAY: First of all, with regard to the backseat driver defense, that was not raised in this case at all, either as a reasonable factor other than age or as a BFOQ. The record will reflect that one of the chief management officials was asked about this on cross-examination and he explicitly said that Western was making no contention about that.

It has not been raised in one brief in the Court of Appeals or in the Supreme Court, and the first time I've heard of it in this case is today's oral argument.

Secondly, the reasonable factors other than age defense in this case as it was pleaded, as it was briefed, and as it was tried related only to the contractual restriction on down-bidding. In fact, the reasonable factors defense was almost exclusively based on the arbitration decision, which said that the down-bids were improper under a particular provision of the pilot agreement, not because the literal language of the pilot agreement wouldn't allow it, but because to grant the bids to Criswell and Starley would violate the company's policy against mandatory retirement.

There was no argument in this case about the inversion of seniority in the cockpit. There was no

evidence presented by Western to show that that would be a safety factor under either reasonable factors or BFOQ.

Now, with regard to the instructions, Western initially tendered about ten BFOQ instructions, which are identified in our brief. The correct citation tc the record is number 164 of the clerk's record, which is not reproduced in the joint appendix.

In all of those instructions, the drift of the instruction was that Western could prove a BFOQ by articulating a rational basis for its safety belief that a life would be endangered by abandoning its policy of mandatory retirement. It relied exclusively on the district court opinion in the Tuohy case, which was reversed by the Sixth Circuit, and it relied upon the Seventh Circuit's decision in Greyhound, which was clarified later by the Seventh Circuit in Orzel to fall in line with Tamiami and the test which almost every court has adopted.

Now, after the judge --

QUESTION: Well, counsel --

MR. FAY: Yes.

QUESTION: -- what about that portion of the instruction dealing with the instruction that the jury had to find it was in fact highly impractical for

individualized testing?

MR. FAY: After the judge made his ruling that he was not going to abide by the Tuohy district court ruling, because he said that would take it away from the jury, Western tendered an instruction called 19 alternate. That is contained in the clerk's record, number 184. And they state up at the top: "This instruction is submitted only if the court rejects the instruction based on the rational basis in fact doctrine of Greyhound-Tuohy."

Now, what Jude Tashima did is he took the first page of the instruction and gave most of it. This unfortunately is my scratched copy from when we sat in the instruction conference. And Western tendered the language that Your Honor is referring to, the "highly impractical" language.

The only change Judge Tashima made in that part of the instruction was to insert words directly from the Tamiami opinion. In other words, Western had said: "in 1978, when these Plaintiffs were retired, it was not practical for Western to deal with each second officer over age 60 on an individualized basis," et cetera. And Judge Tashima inserted the words "highly impractical" in the place of "not practical." In other words --

QUESTION: And in the first proposed instruction they had asked for the rational basis in fact language?

MR. FAY: That's correct. They also did it in this one. On the second page of these lengthy instructions, I believe Mr. Booth referred to this as the clarifying language. Well, the clarifying language would have, in Judge Tashima's ruling, essentially directed the matter for Western, because it says, "If you find that second officers perform duties on a DC-10 such that their incapacitation would to any extent whatever decrease the safety of or increase the risk to passengers in Western aircraft, then I instruct you that you may find that the existence of the FAA rule by itself constitutes a sufficient basis for you to find that a BFOQ existed," et cetera.

So in other words, they had inserted on the second page a rational basis test again. Judge Tashima struck that out, but he did give them the state of the art back in 1978. Western had said, well, we shouldn't be held to what medical science can now do; we should only be held to what was practical back in 1978. He did allow them to do that.

CHIEF JUSTICE BURGER: We will resume there at 1:00 o'clock, counsel.

(Whereupon, at 12:00 noon, the argument in the above-entitled matter was recessed, to reconvene at 1:00 p.m. the same day.)

AFTERNOON SESSION

(1:00 p.m.)

CHIEF JUSTICE BURGER: You may continue.

RESUMED ORAL ARGUMENT OF

RAYMOND C. FAY, ESQ.,

ON BEHALF OF RESPONDENTS

MR. FAY: One more item of clarification regarding the state of the record. Perhaps Mr. Booth inadvertently stated that the BFOQ defense did not apply to the captains. The BFOQ defense was asserted against all the Plaintiffs in the case.

On the down-bidding issue, the refusal to allow the captains to transfer, that was defended by various defenses -- reasonable factors other than age, bona fide seniority system, business necessity -- at various stages of the case, and all of that applied only to the captain plaintiffs, Criswell and Starley, who sought to down bid.

The BFOQ instruction in this case should be upheld for two key reasons. First, the Tamiami BFOQ test, without the adulteration proposed by Western in its brief, satisfies the statutory requirement of a reasonably necessary BFOQ. First, it requires reasonableness in the selection of the job qualifications which are related to the essence of the

business, here safety; and second, it requires necessity in the application of the age limit, in the sense that it would be impossible or highly impractical for the employer to conduct the business without the limit. That was contained in the instruction.

The Tamiami test has worked well in literally dozens of BFOQ cases and has been embraced by every circuit to consider the issue. Now, the Tamiami test was applied by Judge Tashima in this case with two modifications which lightened Western's Tamiami burden.

First, instead of having to prove that the flight engineer job qualifications and duties were reasonably related to safety, Western received a direction to the jury that this prong, called the Diaz prong of the Tamiami test, was met.

QUESTION: What page of the instructions is that on, Mr. Fay?

MR. FAY: In the joint appendix?

QUESTION: Yes.

MR. FAY: It's instruction number 28, on page 61 of the joint appendix, where it states: "The BFOQ defense is available only if it is reasonably necessary to the normal operation essence of Defendant's business. In this regard, I instruct you that the normal operation essence of Western's business is the

safe transportation of air passengers."

So Western did not have to put on any evidence. As a matter of fact, it objected to the court giving any such instruction on the Diaz prong. Contrary to its argument here that it wasn't allowed to make an argument in this regard, it objected tc the court stating this part of the statutory requirement.

There was an additional modification in the classic Tamiami test which Judge Tashima gave in the instruction which also lightened Western's burden, and that is he omitted the part of the Tamiami test which would have required Western to prove that it had a factual basis to believe that all or substantially all flight engineers over age 60 could not perform the job.

So those two elements were omitted, and that's really the only reason why the instruction looks at all different from the Tamiami decision. In both instances it lightened Western's burden.

Well, Western advocated the rational basis BFOQ test based on the -- principally on the age 60 rule of the FAA, which applies to pilots, not flight engineers, with the gloss that it had a duty under the statute to perform its duties in the highest degree of safety.

Well, reliance on the FAA's age 60 rule for a

position to which the age 60 rule doesn't apply is insufficient as a matter of law. It is clear from this Court's recent opinion in TWA versus Thurston that the BFOQ must apply to a particular position. So even assuming that the FAA's age 60 rule is a BFOQ for the captain or the copilot, the employer can't make its BFOQ for a different position solely dependent upon that.

Moreover, there is an abundance of evidence in this record related to the FAA's regulatory scheme and the manner in which Western operated under that scheme. There was absolutely no limitation on the manner in which Western was allowed to argue its business as a regulated carrier.

In fact, all of the evidence was given to the jury in that context. In final argument, Western told the jury, we have to operate in the highest degree of safety. The FAA's minimum standards and other standards came into play, and the ability of Western to exceed those standards in areas where it thought it might have a safety problem also came into play.

But the jury was also shown that there were over 200 flight engineers at the time -- now there are over 500 -- who are beyond age 60. There was a suggestion in oral argument this morning that the jobs are different from carrier to carrier. Not true. There

was an expert witness in this case who testified that the job is essentially the same, the flight engineer job is essentially the same from carrier to carrier.

QUESTION: Could I ask you --

MR. FAY: Yes.

QUESTION: -- did Western take the position in the trial court that the reason they're insisting on a BFOQ for the flight engineer was that it's the training ground for the captain's position?

MR. FAY: Not as such. There was --

QUESTION: Because we haven't -- I don't know that we have any cases that say that a carrier can't adopt a scheme for training pilots that means, we're going to take everybody in as a flight engineer, nobody can be a pilot who hasn't been a flight engineer, and the flight engineering job is a training ground for pilots.

MR. FAY: That had nothing to do with the BFOQ argument that Western made.

QUESTION: Why not?

MR. FAY: Why not?

QUESTION: Yes.

MR. FAY: Because it simply didn't assert it. It made a pass --

QUESTION: That's what I asked you.

MR. FAY: It did not.

QUESTION: It did not assert it?

MR. FAY: It did make a pass at saying that it had a progression line, but that was in support of the restriction on down-bidding.

QUESTION: Well, would you say that it could have a progression line like that and say, therefore all flight engineers that we hire must meet the requirements of a pilot?

MR. FAY: Well, in fact that was the contractual requirement here. The flight engineers did not have to be qualified to fly that airplane.

QUESTION: Well, would you say that -- no, no.

MR. FAY: But they had to have a pilot's certificate.

QUESTION: Well, and they also couldn't be over 60, just like a pilot couldn't be.

MR. FAY: Well, that's just another -- that's another way of saying that there's a flat-out ban on age. It's making the age 60 rule for pilots a proxy for the age limitation for flight engineers.

QUESTION: So your answer is that they can't have --

MR. FAY: They cannot.

QUESTION: -- a flat rule against a progression?

MR. FAY: Well, here, Your Honor, in this record there was no flat rule.

QUESTION: Could they say, could they have a rule that, because the flight engineer is a training seat for pilots, we'll never hire a flight engineer over 60?

MR. FAY: That argument --

QUESTION: What about your position on that?

MR. FAY: Could that argument be made?

QUESTION: Well, no.

MR. FAY: I'm sorry.

QUESTION: Would it be sustainable?

MR. FAY: I'm boxed in by this record, where there were so many exceptions to the progression.

QUESTION: In the abstract?

MR. FAY: In the abstract?

QUESTION: Could TWA say, lock, we're training pilots by making them flight engineers, so we refuse to hire anybody as a flight engineer who's over 60?

MR. FAY: Oh, age 60 hiring.

QUESTION: Because of this progression.

MR. FAY: It would still have to be shown that it was related to safety. That fact alone would not

establish a BFOQ.

QUESTION: Well, it's related to safety in the sense that this is where we get all our pilots, and therefore, if the pilot BFOQ is related to safety, so is this one.

MR. FAY: Well, that would establish perhaps the first prong. They would still have to prove the second prong, and that is that there would not be a basis to assess the individualized performance of a new age 60 flight engineer on an individualized basis.

QUESTION: But supposing they just don't want to hire someone at 60 when the position is a line promotion to something else that he can never fill. What's wrong with that?

MR. FAY: I'm scratching my head because I don't think it exists in this industry.

QUESTION: No, but I just want to know your answer to the question in the abstract.

MR. FAY: The question in the abstract is I don't think it would meet both prongs of the Tamiami test. It might meet the first prong, but I don't think it would meet the second one.

QUESTION: But Mr. Booth, it's not farfetched. Back in the railroad days you couldn't be an engineer unless you'd been a fireman, right?

MR. FAY: That's true.

QUESTION: I mean, it was an absolute rule.

MR. FAY: That's true, Your Honor.

QUESTION: So I mean, it's not too farfetched, from saying that you have to be an engineer -- I mean, that you have to be a flight engineer before you can be a pilot.

MR. FAY: The normal progression rule is the one that Western asserted in this case. They said you did have to progress, but once you progress to captain you've satisfied that rule and you were allowed to go backwards as many times as you needed or wanted to under the existing rules.

Western had that progression argument, but only -- not as a safety argument, only as an argument that restricted the down-bidding. But since there were hundreds of exceptions and people were allowed to go backwards if they had a medical disqualification, for example --

QUESTION: Well, they also had up-or-out, too.

MR. FAY: Well, the up-or-out was a very limited one here, and once you made captain, as Criswell and Starley did, they were allowed to go backwards as many times as they wanted.

QUESTION: Even if you concede what Justice White and Justice Rehnquist were asking you, how does that affect your case?

MR. FAY: I don't believe it affects the case at all, Your Honor.

QUESTION: Well, it might affect whether an overage pilot can go take a seat as a flight engineer that would keep it away from some younger man who would be training for a pilot.

MR. FAY: Which is not this case. I would agree with the Chief Justice that it would not affect this case.

QUESTION: Does the record tell us what happens to a flight engineer who has a medical certificate good enough to be a flight engineer, but is not physically qualified to be a pilot? Does he lose his job?

MR. FAY: He does not. Under Section 24(d) of the pilot agreement, he goes immediately to flight engineer. On this record there was a 56-year-old DC-10 captain who had had a heart problem and came back as a flight engineer and was flying at the time of trial.

QUESTION: Of course, he couldn't be training, obviously, for the pilot job.

MR. FAY: He was not qualified to fly as a

captain any more because of the medical requirements.

Similar to what there was in TWA, there were also bumpbacks here. There were bumpbacks recounted in the record and they're printed in the joint appendix. There were disciplinary downgrades, which weren't even addressed in the contract. If the company wanted to punish someone, they made him down-bid or downgrade for a while.

So the factual situation on that score was markedly similar to TWA. If anything, the facts were stronger here because Starley actually had his down-bid under the contracts and the company cancelled the bid, and the chief pilot at the trial admitted that they singled him out and discriminated on the basis of age. And then when he went to arbitration, the arbitrator found that, yes, the literal language of the contract would allow you to down-bid, but we're not going to allow you to do it to get around the mandatory retirement rule.

So that is just another reason why the reasonable factors other than age scheme that we have here is -- the argument that they make here is foreclosed by TWA, because, as in TWA, we have a facially discriminatory policy -- age 60 captains were the only ones who were not allowed to down-bid in any

circumstances -- and secondly, that there was a -- and secondly, that the bona fide seniority system would not have been a defense.

By the way, in this case the reasonable factors other than age defense was just one of a number of defenses Western asserted to stop the down-bidding, and on all the other ones -- for example, bona fide seniority system and business necessity -- there was no question that Western had the burden of proving that, because behind it was this age-bases selection policy, that once you were 60 you could not down-bid.

(Pause.)

MR. FAY: If there are no further questions.

CHIEF JUSTICE BURGER: Mr. Wallace.

ORAL ARGUMENT OF LAWRENCE G. WALLACE, ESQ.,
ON BEHALF OF THE UNITED STATES AND THE EEOC
AS AMICI CURIAE SUPPORTING RESPONDENTS

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

Just to clarify what this case is about factually, on page A-42 of the appendix to the petition for certiorari, in the district court's factual findings the court mentions that Western has permitted down-bids or downgrades by more than 400 pilots. This is not a case in which pilots younger than age 60 have not been

allowed to downgrade.

Many of these occurred during cutbacks of operations, but others were for medical reasons, several pilots who no longer qualified to get a medical certificate that enabled them to be pilots.

So factually the case is very similar to the TWA case decided last week with respect to this disparity. In fact, the court found that the only circumstance in which Western has consistently denied down-bids is by captains nearing age 60, and there was no --

QUESTION: So is it your position, Mr. Wallace, then that there is direct evidence of discrimination on the basis of age, and therefore the RFOA defense doesn't apply?

MR. WALLACE: That is correct, just as there was in the TWA case. In this case it was admitted that all second officers had to retire at age 60. That's obviously direct evidence of an age-based involuntary retirement requirement. And there was no instance in the record in which anyone disqualified to continue as a pilot was not allowed to down-bid or downgrade except those who were nearing age 60, who would be affected by the mandatory retirement requirement.

So I think the suggestion that has been made

by Justice Stevens, that the case basically turns on the BFOQ question, is correct. And with respect to that, the legal question of some significance in the case has to do with interpretation of the BFOQ requirement, a now familiar phrase in the law, but one that originated with Title VII of the 1964 Act and was carried forward into the Age Discrimination Act in substantially identical language.

This Court in Dothard against Rawlinson referred to the BFOQ as a "extremely narrow exception," because in both statutes it permits the very conduct that the Act generally prohibits.

On its face -- and we have quoted the relevant provision from the ADA on page 22 of our brief -- the BFOQ on its face strongly suggests that an objective standard is to be applied. It says that action otherwise prohibited may be taken where age is a bona fide occupational qualification reasonably necessary, where it is reasonably necessary to the normal operation of the particular business.

QUESTION: Mr. Wallace, if you're running an airline and you simply leave that question up to the jury in every case, it doesn't help much in making decisions as to what you can do.

MR. WALLACE: Well, the Congress did choose to

bring juries into the enforcement of the Age Discrimination Act.

QUESTION: Or if you leave it up to a judge in every case, it doesn't help much.

MR. WALLACE: It is a factual inquiry, and obviously if someone is going to decide that he comes within an extremely narrow exception to the Act, he better do so with assurance that he has evidence that will stand up in court.

QUESTION: Well, on the second prong of that Tamiami test requirement for a BFOQ, what is an airline supposed to do if two medical reports come to it, one that says the tests to screen out unqualified people over 60 are valid and will properly identify the people who should be eliminated, and the other medical report says, no, those tests won't tell you who's safe and who isn't safe?

Now, is the employer supposed to risk public safety and hire the person over 60, or not hire the people over 60 and be hauled into court for the violation of ADEA? I mean, that's a pretty tough position.

MR. WALLACE: I recognize that, and safety considerations are definitely relevant. They're part of the evidence in one of these cases. Congress did not

preclude them from being taken into account. They were argued in this case. The instructions to the jury accommodated them.

But Congress did not set up a separate standard when safety was involved. Safety --

QUESTION: Well, would it be appropriate to at least instruct the jury that, if the employer has a rational basis in fact to think the tests won't screen out individually the people who are at risk, that the employer is not liable under ADEA?

MR. WALLACE: We do not think that is the statutory standard, Justice O'Connor. The formulation of the legislative history that we quote on pages 8 and 9 of our brief can be read consistently with the face of the statute, which proposes an objective standard.

In the words of Senator Javits, who is explaining it, it's that when it can be proved that the employer can demonstrate that there is an objective factual basis for believing. Now, there is a possible ambiguity, whether you'd read that that he had a basis, an objective factual basis for believing, or whether you read it that the finder of fact, it's demonstrated to the finder of fact that there is an objective factual basis for believing.

And the more reasonable reading, in light of

the plain language of the statute, is that an objective standard is to apply, since the words of the statute present an objective standard and the whole idea that Congress had in both Title VII and the Age Discrimination Act was that persons were being excluded from employment without an adequate basis in fact and that this discrimination should be ended, and the affirmative defense should not be read to defeat the statutory purpose.

In this case there never were safety considerations introduced as a reason at the outset for terminating these people. It was argued as a basis for establishing a BFOQ once the case came to trial, but it wasn't the reason given to these people for their termination.

And it's quite possible, in looking at this record, to think that safety considerations might be better served if the employer were to apply more medical tests to all of the flight engineers. When one notices the number of cases involving cockpit crews that have been litigated and the fact that the Airline Pilots Association, unlike other unions, has been more resistant to the application of this statute in its particular industry in comparison with its application elsewhere, at first my reaction was that, well, perhaps

they're really trying to support opportunities for the younger pilots to make bids for more desirable jobs sooner.

But what this record suggests and some others is another possibility, and I can't say that there is direct evidence on it. But the provisions of the agreement reproduced in the joint appendix starting at page 76 show that the collective bargaining agreement restricts the medical tests that can be given to those required by the FAA, and there are other concerns shown by the employer here that it would be difficult to get the union to agree to additional medical tests being given.

And what is suggested by this is a concern that perhaps some of the younger employees who are not yet eligible for pension benefits would not pass additional medical tests if the need to employ the older persons who don't want to retire were to result in the need to give additional medical tests to all of the flight engineers.

QUESTION: Well, is the union a party to this case?

MR. WALLACE: The union was not a party in this case and no one from the union testified. But the collective agreement is in evidence and there is

testimony concerning the difficulty that the airline might have in getting additional medical tests.

So it's quite possible to read this record as suggesting that safety concerns would be better served if additional tests were given to all of these flight engineers, those over age 60 and the others, and that the concern for safety may not cut in just one direction.

My time has expired.

CHIEF JUSTICE BURGER: Thank you, gentlemen.

The case is submitted.

(Whereupon, at 1:21 p.m., argument in the above-entitled matter was submitted.)

* * *

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BY Paul A. Richardson

(REPORTER)