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LABOR LAW- Seniority Rules- An Otherwise Bona Fide Seniority System that Perpetuates Effects of Pre-Title VII Discrimination Is Not Unlawful

Marjorie London

LABOR LAW—Seniority Rules—An Otherwise Bona Fide Seniority System That Perpetuates Effects of Pre-Title VII Discrimination Is Not Unlawful. *International Brotherhood of Teamsters v. United States*, 431 U.S. 324 (1977).

The collective bargaining agreement between petitioners T.I.M.E.-D.C., Inc., a common carrier of motor freight, and the International Brotherhood of Teamsters established a seniority system that perpetuated prior discriminatory hiring, transfer and promotion policies of the company.[1] Under the system, certain benefits, such as priority in bidding for particular jobs and order of layoff and recall, were based on the length of service in a particular department rather than on total service in all company jobs.[2] As a result, the seniority system tended to restrict black and Spanish-surnamed employees to "serviceman" and "city driver" jobs by requiring a transferee to the preferred position of "line driver" to forfeit the seniority status earned in his previous department and accumulate line driver seniority as if he were a new employee.[3]

The United States, in an action[4] under Title VII of the Civil Rights Act of 1964 (Act),[5] maintained that a seniority system that

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1. International Bhd. of Teamsters v. United States, 431 U.S. 324, 344 (1977).

2. Seniority for purposes of allocating benefits such as these (benefits that cannot be given equally to any two employees) is called "departmental," "bargaining unit" or "competitive" seniority. For the purpose of calculating benefits such as vacation, pension, or unemployment insurance and other fringe benefits, an employee's seniority runs from the date he joins the company. It takes into account his total service in all jobs and bargaining units and is called "employment," "company" or "benefit" seniority. 431 U.S. at 343.

3. *Id.* at 344. Line drivers, also known as over-the-road (OTR) drivers, engage in long-distance hauling between company terminals. They form a bargaining unit at T.I.M.E.-D.C. as do servicemen (who service trucks) and city operations men (which includes city drivers, who pick up and deliver freight within the immediate vicinity of a terminal). *Id.* at 329-30 n. 3.

4. United States v. T.I.M.E.-D.C., Inc., Civ. No. 5-868 (Oct. 19, 1972) (mem.), 6 Fair Empl. Prac. Cas. 690, 6 Empl. Prac. Dec. ¶ 8979 (N.D. Tex. 1972). This case arose out of two separate suits filed respectively in May, 1968 in Tennessee and in January, 1971 in Texas. The suits were consolidated for trial in April, 1971.

5. 42 U.S.C. §§ 2000e-2000e-17 (Supp. V 1975). The relevant section is 703(a), which provides:

(a) It shall be an unlawful employment practice for an employer—

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any

perpetuates the effects of prior discrimination violates Title VII because it is not "bona fide" as required by section 703(h).[6] The Government contended that, even if such a system could be found to be bona fide, Title VII prohibits applications of a seniority system that perpetuate the effects of prior discriminatory job assignments on persons already employed in the company.[7]

The United States District Court for the Northern District of Texas found that T.I.M.E.-D.C. had engaged in a "pattern or practice"[8] of discrimination in violation of Title VII,[9] and that the seniority system violated Title VII because it impeded the "free transfer of minority groups into and within the company."[10] The Court

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way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

Title VII became effective on July 2, 1965.

6. 431 U.S. at 346. Section 703(h) provides in pertinent part:

Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority . . . system . . . provided that such differences are not the result of an intention to discriminate because of race . . . or national origin. . . .

42 U.S.C. § 2000e -2(h) (1970).

7. 431 U.S. at 346. The Government maintained that even if "constructive" or "fictional" seniority is deemed inappropriate for newly hired employees who had been discriminatorily denied employment, such relief could not, under Title VII, be denied to those who had been hired initially into lower positions solely because of their race and who had accumulated a certain amount of employment seniority in those positions.

The Government sought an injunction against further violation of Title VII by T.I.M.E.-D.C. and the union, as well as remedial relief which would allow individual discriminatees to transfer to line driver jobs with full company seniority for all purposes.

8. The words "pattern or practice" appear in § 707(a) of Title VII, 42 U.S.C. § 2000e - 6(a). Senator Humphrey explained in the course of Senate debates on Title VII that "a pattern or practice would be present only where the denial of rights consists of something more than an isolated, sporadic incident, but is repeated, routine, or of a generalized nature." 110 CONG. REC. 14270 (1964).

9. 6 Fair Empl. Prac. Cas. at 693, 6 Empl. Prac. Dec. ¶ 8979 at 6150. This course of discrimination continued well after the effective date of Title VII.

10. *Id.* at 694, 6 Empl. Prac. Dec. ¶ 8979 at 6150. The district court defined the "affected class" (victims of T.I.M.E.-D.C.'s discriminatory practices) to include all black and Spanish-surnamed employees who had been hired to fill serviceman or city operations jobs at every terminal that also had a line driver operation. *Id.*, 6 Empl. Prac. Dec. ¶ 8979 at 6151. In awarding relief, the lower court divided the affected class into three subclasses. It awarded competitive seniority retroactive to July 2, 1965 (the effective date of Title VII) to those found to have suffered "severe injury"; it awarded competitive seniority retroactive to January 14, 1971 (the date on which the Government filed its lawsuit) to those who were "likely harmed"; and it declined to award seniority relief to those as to whom there was insufficient evidence

of Appeals for the Fifth Circuit agreed with these conclusions,[11] although it rejected the lower court's method for awarding relief. The appellate court held that black and Spanish-surnamed employees in the "affected class" were entitled to bid for future line driver jobs on the basis of company seniority and that once a class member had taken a job, he could continue to use his company seniority for all purposes in the new department.[12] The United States Supreme Court saw no reason to disturb the findings on the basic issue,[13] acknowledging that "racial discrimination was the company's standard operating procedure—the regular rather than the unusual practice."[14] Unlike the lower courts, however, it found the seniority system "entirely bona fide"[15] and held that a seniority system that is otherwise legitimate does not become unlawful when it perpetuates discrimination which occurred before the effective date of the Civil Rights Act.[16]

In *Franks v. Bowman Transportation Co.*,[17] the Supreme Court said that retroactive seniority would be an appropriate remedy for the effects of discrimination occurring after the Act was adopted.[18] Since section 703(h) of the Act sanctions the application of different

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to determine the degree of harm. The court ordered that this third subclass of individuals be considered for line driver positions ahead of applicants from the general public, though behind the other two subclasses. *Id.* at 695, 6 Empl. Prac. Dec. ¶ 8979 at 6151-52.

11. United States v. T.I.M.E.-D.C., Inc., 517 F.2d 299, 317 (5th Cir. 1975).

12. *Id.* at 319. This provision was limited somewhat by a "qualification date" formula, under which seniority could not be awarded for periods prior to the date when (1) a line driver job was vacant, and (2) the class member met, or would have met, the line driver qualifications.

13. 431 U.S. at 343.

14. *Id.* at 336. Shortly after the Government had filed its complaints, T.I.M.E.-D.C. had 6,472 employees of whom 5% were blacks and 4% were Spanish-surnamed Americans. Of the 1828 employees who were line drivers, however, only 0.4% were blacks and only 0.3% were Spanish-surnamed persons. All of the black line drivers had been hired after the commencement of litigation. Eighty-three percent of the black and 78% of the Spanish-surnamed persons working for the company in 1971 held the lower-paying city operations and serviceman jobs while, in the same year, only 39% of white employees held jobs in these categories. In addition to statistical evidence of T.I.M.E.-D.C.'s discriminatory hiring practices, the Government offered individual testimony recounting more than forty specific instances of discrimination. Id. at 337-38.

15. *Id.* at 355. This conclusion was drawn from the fact that the system applied to all races and ethnic groups equally. To the extent that it "locked" black employees into non-line driver jobs, it did so for all.

16. *Id.* at 353-54.

17. 424 U.S. 747 (1976).

18. *Id.* at 771. *See* text accompanying notes 82-95 *infra*.

"privileges of employment" under a bona fide seniority system, section 703(h) "must be the starting point of inquiry."[19]

The Civil Rights Act has been characterized as "singularly uninstructive on seniority rights."[20] Neither the original Title VII provisions nor the House Judiciary Committee Report on the bill[21] mentioned seniority, although a minority report issued by six committee members warned that Title VII would give the President the power to "seriously impair" seniority rights.[22] No Senate report was issued,[23] but Senators Joseph S. Clark and Clifford P. Case[24] placed an interpretative memorandum into the Congressional Record,[25] giving assurances that Title VII would not undermine established seniority rights.[26] During the course of the Senate debates on the

19. Stern, *Retroactive Seniority as a Remedy for Title VII Violations: Relief to Newly Hired and Incumbent Employees in Light of Franks v. Bowman*, 22 Loyola L. Rev. 923, 944 (1976).

20. Local 189, United Paperworkers & Papermakers v. United States, 416 F.2d 980, 987 (5th Cir. 1969), *cert. denied*, 397 U.S. 919 (1970).

21. H.R. REP. No. 914, 88th Cong., 1st Sess. (1963), *reprinted in* United States Equal Employment Opportunity Commission, LEGISLATIVE HISTORY OF TITLES VII AND XI OF CIVIL RIGHTS ACT OF 1964, at 2001 [hereinafter EEOC HISTORY].

22. "Minority Report Upon Proposed Civil Rights Act of 1963, Committee on Judiciary Substitute for H.R. 7152," H.R. REP. No. 914, 88th Cong., 1st Sess. (1963), *reprinted in* EEOC HISTORY at 2062, 2064-65. The report also criticized the "ludicrousness" of a law which mandates that if a firm is not racially balanced, the employer must hire the person of the race which is under-represented, even though he is convinced that another applicant would be a superior employee. *Id.* at 2072.

23. *Id.* at 10. Since supporters of H.R. 7152 considered the Senate Judiciary Committee to be hostile to the measure, and since they wished to avoid a conference between the two houses, they saw to it that the House bill bypassed the Committee and went directly to the Senate floor.

24. Senators Clark and Case were the "bipartisan captains" responsible for Title VII during the Senate debate. (Bipartisan captains, selected for each title of the Civil Rights Act, were responsible for explaining their title in detail, defending it, and leading discussions on it.) *See* 110 CONG. REC. 6528 (1964) (remarks of Sen. Humphrey); Vaas, *Title VII: Legislative History*, 7 B.C. Ind. & Com. L. Rev. 431, 444-45 (1966).

25. 110 CONG. REC. 7212-15 (1964).

26. *Id.* at 7213. Even if, as a result of its discriminatory policies, a business had an all-white work force when Title VII became effective, the employer would not be required, once blacks were hired, to give the latter special seniority rights at the expense of white workers hired earlier. This interpretation was buttressed by a statement prepared by the Justice Department, which emphasized that "Title VII would have no effect on seniority rights existing at the time it takes effect" (110 CONG. REC. 7207, 7207), and by a set of responses to questions submitted by Senator Dirksen, which included the following exchange:

> *Question.* . . . What of dismissals? Normally, labor contracts call for "last hired, first fired". If the last hired are Negroes, is the employer discriminating if his contract requires they be first fired and the remaining employees are white?

controversial bill,[27] a bipartisan group under the leadership of Senators Dirksen, Mansfield, Humphrey and Kuchel met away from the Senate floor and worked out a set of amendments in an effort to ensure the bill's passage.[28] Section 703(h) was added to Title VII as a result of this informal conference.[29]

The Supreme Court, in *International Brotherhood of Teamsters v. United States*[30] (*Teamsters*), declared that "the unmistakable purpose of section 703(h) was to make clear that the routine application of a bona fide seniority system would not be unlawful under Title VII."[31] The Court relied on the Clark-Case memorandum, a statement prepared by the Justice Department, and Senator Clark's response to questions posed by Senator Dirksen as a guide to legislative intent and to the meaning of the term "bona fide seniority system."[32]

The first case to challenge a departmental seniority system such as that used at T.I.M.E.-D.C. was *Quarles v. Philip Morris, Inc.*[33] Plaintiffs, black employees of Philip Morris, Inc. and members of the Tobacco Workers International Union, charged that the company and union had engaged in discriminatory hiring, promotion

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Answer. Seniority rights are in no way affected by the bill. If under a "last hired, first fired" agreement, a Negro happens to be the "last hired", he can still be "first fired" as long as it is done because of his status as "last hired" and not because of his race.

Question. If an employer is directed to abolish his employment list because of discrimination what happens to seniority?

Answer. The bill is not retroactive, and it will not require an employer to change existing seniority lists.

110 CONG. REC. 7216, 7217.

27. The debate on H.R. 7152 was extensive. The bill was read for the first time in the Senate on February 17, 1964. On March 30, after motions and debates, mostly on matters of procedure, the Senate began its consideration of the merits. This debate continued for another 64 days. EEOC HISTORY, *supra* note 21, at 11.

28. Vaas, *Title VII: Legislative History, supra* note 24, at 445. This effort required conferences with House leaders, especially Congressman McCulloch (R., Ohio), with Attorney General Robert F. Kennedy, and with other administration representatives.

29. 42 U.S.C. § 2000e - 2(h) (1970). The text of section 703(h) is quoted at note 6 *supra*.

30. 431 U.S. 324 (1977).

31. *Id.* at 352.

32. *Id.* An important part of the legislative history of any statute is the congressional debate that preceded its adoption. However, due to the unusual circumstances that preceded the adoption of the Civil Rights Act (particularly Title VII) and the resulting absence of the usual congressional materials, the debates on the bill assumed an almost overriding importance.

33. 279 F. Supp. 505 (E.D. Va. 1968).

and transfer policies.[34] The United States District Court for the Eastern District of Virginia found that defendants had discriminated against plaintiff and other black employees who had been hired in one of the two departments where only blacks were employed until 1966.[35] Since promotion within departments was governed by departmental seniority,[36] blacks could not compete successfully within formerly white departments, even after overt discrimination had ceased.[37] The court found that this policy violated Title VII[38] and ordered that black employees hired into formerly segregated departments be allowed to compete for future vacancies in these departments on the basis of their plant seniority.[39]

Judge Butzner, writing for the court, acknowledged that the legislative history of Title VII does not speak of departmental seniority; nearly all references are to employment seniority.[40] He reasoned, however, that nothing in section 703(h) or in its history suggests that a racially discriminatory seniority system established before the Act could be considered a bona fide seniority system under the Act.[41] Since the purpose of the Civil Rights Act was to eliminate racial discrimination, and since section 703(h) requires that seniority systems be bona fide, "one characteristic of a bona fide seniority system must be lack of discrimination."[42] Judge Butzner reasoned that even though Congress did not intend to require reverse discrimination, neither did it intend "to freeze an entire generation of Negro

34. *Id.* at 507.

35. *Id.* at 510.

36. *Id.* at 513.

37. Since blacks had originally been assigned only to the less desirable departments, their departmental seniority after transfer to a newly integrated department (after July 2, 1965) was far less than their plant seniority. The departmental and plant seniority of white workers were approximately equal.

38. 279 F. Supp. at 519.

39. *Id.* at 521. Requiring the use of plant (or employment) seniority despite the existence of a departmental seniority system is a means by which a court can compel an employer to undo, to some extent, the effects of past discrimination. This is the "rightful place" theory of seniority relief, whereby a minority employee is given the first opportunity to move into a vacant position which he would have occupied but for the wrongful discrimination. It has been the remedy of choice in the Supreme Court and in the circuit courts. *See, e.g.*, Franks v. Bowman Transp. Co., 424 U.S. 747 (1976); Robinson v. Lorillard Corp., 444 F.2d 791 (4th Cir. 1971), *cert. dismissed*, 404 U.S. 1006 (1971); Local 189, United Paperworkers & Papermakers v. United States, 416 F.2d 980 (5th Cir. 1969), *cert. denied*, 397 U.S. 919 (1970).

40. 279 F. Supp. at 516.

41. *Id.* at 517.

42. *Id.*

employees into discriminatory patterns that existed before the act."[43]

In *Local 189, Paperworkers & Papermakers v. United States,*[44] the Fifth Circuit Court of Appeals found that the seniority system at Crown Zellerbach's papermill in Bogalusa, Louisiana was unlawful because it perpetuated the discriminatory effects of the company's employment practices[45] which, until 1966, included maintaining separate lines of progression based on race.[46] Following *Quarles,* the Fifth Circuit held that section 703(h) does not protect departmental seniority systems of formerly segregated plants[47] and that "when a Negro applicant has the qualifications to handle a particular job, the Act requires that Negro seniority be equated with white seniority."[48] Only "business necessity,"[49] including factors such as the safe and efficient operation of the mill, would justify the continued exclusion of a racially determined class.[50] Because it was concerned with preventing reverse discrimination, the Fifth Circuit refused to grant "fictional" seniority to blacks hired after discrimination had ceased[51] and held that only incumbent employees would be entitled to retroactive seniority.[52]

In 1971, the Second Circuit considered the departmental seniority issue in *United States v. Bethlehem Steel Corp.*[53] The Government charged that Bethlehem Steel discriminated against blacks in hiring, job assignment, apprenticeship and selection of supervisory personnel at its plant in Lackawanna, New York. It also alleged that the collective bargaining agreement between Bethlehem Steel and the unions perpetuated this discrimination.[54] The facts showed that

43. *Id.* at 516.
44. 416 F.2d 980 (5th Cir. 1969), *cert. denied,* 397 U.S. 919 (1970).
45. *Id.* at 997.
46. *Id.* at 986.
47. *Id.* at 983.
48. *Id.*
49. The "business necessity" doctrine provides an exception to the requirements of Title VII in the case of "overriding legitimate, non-racial business purpose." 416 F.2d at 989. As a result of this doctrine, discriminatory transfer and seniority policies must not only serve legitimate management functions to be exempt, but must be essential to fostering goals of safety and efficiency. *Id.*
50. *Id.* at 997.
51. *Id.* at 994-95.
52. *Id.* at 995.
53. 446 F.2d 652 (2d Cir. 1971).
54. *Id.* at 654.

blacks were treated discriminatorily[55] both before and after passage of the Civil Rights Act, having been forced into less desirable departments solely because of their race.[56] These overt practices were discontinued on October 1, 1967,[57] but both the district and the appellate court found that the seniority and transfer provisions in the contract perpetuated the effects of past discrimination.[58] The court of appeals attempted to correct the "lock-in" effect of the departmental system by allowing qualified black employees one opportunity, within the next two years only, to transfer to a formerly "white" department.[59] Those who transferred would retain the seniority status they had achieved in the segregated department.[60] As a result of the court's order, no employee would have "fictional" seniority rights, as the company had feared,[61] and each transferee would have a chance to attain his "rightful place" in the plant.[62]

Although the circuit courts have been willing to correct the discriminatory effects of departmental seniority systems by using company seniority status to determine entitlement to future benefits, until recently they have not seen fit to remedy the discriminatory effects of a company seniority system which, due to past hiring discrimination, results in unequal distribution of benefits among white and non-white employees.

In *Waters v. Wisconsin Steel Works*,[63] plaintiff, a black who had been discriminatorily denied employment as a bricklayer seven years earlier, was hired by defendant in July, 1964.[64] In September, defendant expected a decrease in its bricklaying needs and plaintiff was laid off. The company had underestimated its manpower requirements, however, and began recalling bricklayers in order of

55. *Id.* at 655. There were no objective standards for hiring. White applicants were sometimes hired without testing and when tested, their scores were sometimes fraudulently raised. Blacks were excluded from the higher paying jobs and more than 80% of them were placed in 11 departments where the dirtiest jobs were done. Whites were given preference also in choosing apprentices and supervisors. These facts were admitted by defendants. *Id.*

56. *Id.* at 658.

57. *Id.*

58. *Id.* at 659.

59. *Id.* at 666.

60. *Id.*

61. *Id.* at 661, 664.

62. *Id.* at 666. The concept of "rightful place" is defined at note 39 *supra.*

63. 502 F.2d 1309 (7th Cir. 1974), *cert. denied*, 425 U.S. 997 (1976).

64. *Id.* at 1313.

their length of prior service. Plaintiff Waters was not recalled until March, 1967. In May, he was laid off again. When offered reinstatement three months later, he refused[65] and brought suit challenging Wisconsin Steel's "last hired, first fired" seniority system[66] as a violation of 42 U.S.C. § 1981[67] and Title VII, because it perpetuated the effects of past discrimination against blacks.[68]

The Seventh Circuit Court of Appeals affirmed the lower court's finding of pre-Act discrimination,[69] but found that Wisconsin Steel's seniority system was not of itself racially discriminatory.[70] The layoff policy was based on a company seniority system which is considered to be racially neutral[71] since it grants equal credit for equal length of service.[72] In support of the claim that a company seniority system is therefore bona fide under the Civil Rights Act, the court looked to the legislative history of Title VII, and cited portions of the Clark-Case interpretative memorandum, Senator Clark's responses to questions posed by Senator Dirksen, and the Justice Department statement.[73]

Two years later, in *Jersey Central Power & Light Co. v. Local 327, IBEW*,[74] the Third Circuit confronted facts similar to those in *Waters*, and reached the opposite conclusion. Plaintiff employer

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65. *Id.*

66. "Last hired, first fired seniority" refers to the generally followed employment practice whereby the last person hired is the first to be laid off when a company is forced, for any number of reasons, to reduce its personnel. Recalls from layoff proceed in inverse order of layoff. This principle is expressed in nearly every current collective bargaining agreement in the manufacturing and transportation industries. S. SLICHTER, J. HEALEY, & E. LIVERNASH, THE IMPACT OF COLLECTIVE BARGAINING ON MANAGEMENT 106 (1960).

67. 42 U.S.C. § 1981 provides in pertinent part: "All persons within the jurisdiction of the United States shall have the same right in every State and Territory . . . to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens. . . ."

68. 502 F.2d at 1317.

69. *Id.* at 1315.

70. *Id.* at 1318.

71. *Id.*

72. *Id.* at 1317-18.

73. *Id.* at 1318-19. The Justice Department statement said: "If, for example, a collective bargaining contract provides that in the event of layoffs, those who were hired last must be laid off first, such a provision would not be affected in the least by Title VII. This would be true even in the case where owing to discrimination prior to the effective date of the title, white workers had more seniority than Negroes." 110 CONG. REC. 7207 (1964). *Accord*, Watkins v. United States Steel Workers Local 2369, 516 F.2d 41 (5th Cir. 1975).

74. 508 F.2d 687 (3d Cir. 1975), *vacated and remanded*, 425 U.S. 987 (1977). *See* 3 Fordham Urb. L.J. 661 (1975).

sought a determination as to which of two allegedly conflicting agreements should govern its reduction of the company's work force.[75] The collective bargaining agreement with defendant union required that layoffs be effected in reverse order of seniority, while a conciliation agreement with the Equal Employment Opportunity Commission required that plaintiff retain a larger proportion of minority and female workers.[76] The United States Supreme Court vacated the appellate court judgment[77] and remanded the case for further consideration in light of *Franks v. Bowman Transportation Co.*[78] On remand,[79] the Third Circuit held that "make whole" seniority relief[80] should, at the discretion of the district court, be awarded to individuals who were denied job tenure in violation of Title VII.[81]

In *Franks*, which is factually similar to *Teamsters*, a class action was brought against a union and an employer trucking firm, alleging racially discriminatory hiring, discharge and transfer policies with respect to over-the-road (OTR) truck drivers.[82] The trial court considered separately the claims of black applicants who were initially denied over-the-road positions and the claims of those who were denied transfer from within the company to OTR positions.[83] It found that Bowman had engaged in discriminatory hiring and transfer policies[84] and granted a permanent injunction against perpetuation of these practices.[85] It also ordered the company to notify within thirty days, both non-employee and transferee black applicants of their right to priority consideration for OTR positions;[86]

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75. *Id.* at 691.

76. *Id.*

77. 425 U.S. 987 (1976). The Third Circuit had held that the provisions of the collective bargaining agreement would control layoffs, stating its belief that "Congress intended a plantwide seniority system, facially neutral but having a disproportionate impact on female and minority group workers, to be a bona fide seniority system within the meaning of § 703(h) of the Act." 508 F.2d at 706.

78. 424 U.S. 747 (1976).

79. Jersey Central Power & Light Co. v. Local 327, IBEW, 542 F.2d 8 (3d Cir. 1976).

80. The "make whole" remedy apparently evolved from the "rightful place" doctrine. *See* Note, *Title VII, Seniority Discrimination and the Incumbent Negro*, 80 Harv. L. Rev. 1260 (1967). In *Franks*, the term "make whole" relief referred to a grant to plaintiffs of the seniority status they would have had absent discrimination. 424 U.S. at 764-66.

81. 542 F.2d at 10.

82. 424 U.S. at 750-51.

83. 495 F.2d 398, 412 (5th Cir. 1974).

84. *Id.* at 413.

85. *Id.* at 412.

86. *Id.* at 413.

however, the lower court declined to grant to unnamed class members the backpay and retroactive seniority they sought.[87] The Fifth Circuit Court of Appeals determined that employees who transferred pursuant to the trial court's decree should be allowed to carry over accumulated company seniority for all purposes in the OTR department.[88] It denied this relief to applicants who, though subsequently hired, had been denied employment initially.[89] The Supreme Court reviewed only the latter part of the judgment[90] and disagreed with the appellate court that an award of retroactive seniority to the applicants who were initially denied jobs was barred by section 703(h).[91] Section 703(h), the Court said in *Franks,* "appears to be only a definitional provision,"[92] not intended to change the meaning of Title VII, but to indicate which employment practices are prohibited (because illegal) and which are not.[93] The Court concluded that section 703(h) does not expressly limit relief which would otherwise be appropriate in a case of illegal discrimination,[94] nor does the legislative history indicate that such restrictions were intended—at least when a discriminatory refusal to hire occurred after the effective date of Title VII.[95]

In contrast to *Franks, Teamsters* dealt with claims of discrimination which had occurred both before and after the effective date of Title VII.[96] The Supreme Court noted that there was nothing illegal about T.I.M.E.-D.C.'s seniority system. It cited *Quarles* and its

87. *Id.*

88. *Id.* at 417.

89. *Id.* The appellate court followed the approach of the Fifth Circuit in *Local 189* and differentiated between the creation of fictional seniority for newly hired black employees which would constitute preferential treatment, and giving equal status to blacks for time actually worked in the company which would be remedial and, therefore, appropriate. 416 F.2d 980, 995.

90. 424 U.S. at 752.

91. *Id.* at 757.

92. *Id.* at 758.

93. *Id. See* Note, *Last Hired, First Fired Seniority, Layoffs and Title VII: Questions of Liability and Remedy,* 11 Col. J. L. & Soc. Prob. 343, 376, 378 (1975).

94. 424 U.S. at 758. Section 706(g), 42 U.S.C. § 2000e - 5(g) is the remedial provision of Title VII.

95. 424 U.S. at 762. Commentators are in accord with this view. *E.g.,* Cooper & Sobol, *Seniority and Testing Under Fair Employment Laws: A General Approach to Objective Criteria of Hiring and Promotion,* 82 Harv. L. Rev. 1598, 1632 (1969); Stacy, *Title VII Seniority Remedies in a Time of Economic Downturn,* 28 Vand. L. Rev. 487, 506 (1975).

96. 431 U.S. at 324, 341 (1977). The Government offered statistical evidence to the effect that the company had discriminated against minority groups since before 1950.

progeny, however, as evidence of judicial support for the position that a seniority system that perpetuates the effects of prior discrimination can never be bona fide.[97] The Court, however, distinguished those decisions because they depended upon findings that the seniority system itself was "racially discriminatory" or had its "genesis in racial discrimination."[98] They stood for the proposition that a seniority system that perpetuates pre-Act discrimination cannot be bona fide if inherent in it is an intent to discriminate.[99] In *Teamsters*, by contrast, the parties conceded that "the seniority system did not have its genesis in racial discrimination, and . . . [was] . . . free from any illegal purpose."[100]

Under certain circumstances even policies or practices that are "free from any illegal purpose" may violate Title VII.[101] The Supreme Court so held in *Griggs v. Duke Power Co.*,[102] stating that "under the [Civil Rights] Act, practices, procedures, or tests neutral on their face, and even neutral in terms of intent, cannot be maintained if they operate to 'freeze' the status quo of prior discriminatory employment practices."[103] The *Teamsters* Court conceded that, absent section 703(h), T.I.M.E.-D.C.'s seniority system would fall within the *Griggs* reasoning.[104] However, it found proof in both the literal terms of section 703(h) and the legislative history of Title VII that Congress considered the effect that seniority systems might have on pre-Act discriminatees and "extended a measure of immunity to [these systems]."[105]

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97. *Id.* at 346 n.28. "Without a single dissent, six Courts of Appeals have so held in over 30 cases, and two other Courts of Appeals have indicated their agreement, also without dissent. In an unbroken line of cases, the EEOC has reached the same conclusion. And the overwhelming weight of scholarly opinion is in accord." *Id.* at 378-79 and accompanying footnotes (Marshall, J. and Brennan, J., concurring in part and dissenting in part).

98. *Id.* at 346 n.28 (quoting Quarles v. Philip Morris, Inc., 279 F. Supp. at 517).

99. *Id.*

100. *Id.* at 356.

101. *Id.* at 349.

102. 401 U.S. 424 (1971).

103. *Id.* at 430. *Griggs* dealt with the discriminatory effect of an employer's requiring a high school diploma or the passing of intelligence tests as criteria for hiring or transfer. These requirements were not intended to measure ability to perform a particular job. Rather, they were instituted because in the company's judgment they would "improve the overall quality of the work force." *Id.* at 431.

104. 431 U.S. at 349.

105. *Id.* at 350. The Court then cited passages from the Clark-Case memorandum and from the Justice Department statement to the effect that seniority rights would be unaffected by Title VII.

Justices Thurgood Marshall and William J. Brennan, Jr., in a dissenting opinion, found "anything but clear support for the court's holding."[106] They noted that the different "privileges of employment" applied to whites and non-whites at T.I.M.E.-D.C. were "the result of an intention to discriminate because of race"[107] and that blacks would not be disadvantaged by the seniority system if it were not for the company's prior discrimination.[108] The dissenting justices attributed little importance to the three documents that Senator Clark had placed in the Congressional Record because they were written weeks before introduction of the Mansfield-Dirksen amendment containing section 703(h)[109] and because none of them addressed the problem of seniority systems that perpetuate discrimination.[110]

Even if Congress intended to immunize seniority systems that perpetuate pre-Act discrimination, the Court has not always deferred to the intent of the legislature. In *Griggs*, for example, the Court disregarded explicit language in the legislative history[111] that would have allowed employers to set qualifications for employment as high as they desired, where the result would have been that fewer blacks than whites could be hired or promoted.[112] One commentator has suggested that the courts should not be overly constrained by statements made during debates on Title VII, but rather should "look to how the congressional goal of non-discrimination can best be accomplished."[113]

The majority's main concern in *Teamsters* was to protect the "vested seniority rights" of white employees who were innocent of

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106. *Id.* at 381.

107. *Id.* at 382.

108. *Id.* The dissenting justices maintained that in order to avoid rendering section 703(h) inapplicable, the majority had to interpret the provision to refer to seniority systems which had their "genesis in racial discrimination" which, it was conceded, T.I.M.E.-D.C.'s did not. *Id.* at 356.

109. *Id.* at 382.

110. *Id.* at 383. The dissent explained that Congress had "not even thought of such subtleties" when it enacted the comprehensive Civil Rights Act of 1964. *Id.* Congress acknowledged its prior naivete when it amended Title VII in 1972. S. REP. No. 9-415, 92d Cong., 1st Sess. 5 (1971).

111. 110 CONG. REC. 7213 (1964).

112. 401 U.S. at 434-35 n. 11.

113. Note, *Last Hired, First Fired Layoffs and Title VII*, 88 Harv. L. Rev. 1544, 1552 (1975).

wrongdoing.[114] But in upholding the seniority system on these grounds, it should be noted that the Court departed from the position it had taken in 1964 in *Humphrey v. Moore*[115] and eleven years earlier in *Ford Motor Co. v. Huffman.*[116]

In *Humphrey,* the Supreme Court examined the relative seniority rights of employees of two carrier companies under almost identical collective bargaining contracts which provided that, in the case of absorption by the employer of another common carrier, the seniority rights of "absorbed" or "affected" employees would be determined by agreement between the employer and the unions involved.[117] When, due to declining business, one company was forced to sell its local operations to the other, a joint grievance committee decided to "dovetail", that is, to integrate the seniority lists of the two companies on the basis of length of service at either company. The complaint alleged that the decision of the joint committee was not binding because the contract clause in question only applied to seniority rights, not to employment and, therefore, only applied if the absorbing company agreed to hire employees of the absorbed company.[118] The Court held that the joint committee had the power to decide initially whether there was an "absorption" and, if so, whether seniority lists were to be integrated.[119] "One group or the other was going to suffer," the majority explained,[120] and the decision to integrate seniority lists based on length of service at either company was fair and not arbitrary.[121] Justice Goldberg, in a concurring opinion, explained that the concept of vested contractual rights should not be used "to hinder the employer and the union in their joint endeavor to adapt the collective bargaining relationship to the exigencies of economic life."[122]

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114. 431 U.S. at 353. Commentators have suggested that the expectations of incumbent white workers may not be legitimate because they result from past discrimination against others. Cooper & Sobol, *supra* note 95, at 1605-06. It has also been pointed out that white workers are not entirely innocent of wrongdoing, as they helped to negotiate the contracts that allowed the exclusion or mistreatment of minorities. N.Y. Times, June 2, 1977, § A, at 1, col. 3 (remarks of Mr. Jack Greenberg, N.A.A.C.P. Legal Defense and Education Fund, Inc.).

115. 375 U.S. 335 (1964).

116. 345 U.S. 330 (1953).

117. 375 U.S. at 337.

118. *Id.* at 341.

119. *Id.* at 350.

120. *Id.*

121. *Id.*

122. *Id.* at 359 (Goldberg, J. joined by Brennan, J., concurring).

In *Ford Motor Co.*, the employer and union entered into a "supplementary agreement" which gave seniority credit to veterans for their pre-employment military service. Employee Huffman sought to invalidate the supplementary provisions and to obtain an injunction against the employer and union.[123] Despite the fact that Huffman and members of his class were injured by the alteration of their seniority rankings, the Court held that the supplementary provisions were within "reasonable bounds of relevancy"[124] and that they conformed with the Government's recommendation and with the statutory requirement which, unless conformed with, would itself result in discrimination. Justice Burton, delivering the opinion of the Court, explained: "Inevitably differences arise in the manner . . . [in] which . . . any negotiated agreement affect[s] individual employees and classes of employees. . . . The complete satisfaction of all who are represented is hardly to be expected."[125]

Subsequent cases have also addressed the issue of vested seniority rights. In *Quarles*, the Virginia district court stated that departmental seniority rights of white employees were not indefeasibly vested, but were only "expectancies" subject to modification.[126] And commentators have contended that seniority should be viewed as a modifiable right or privilege.[127]

Although the Court's desire to protect the seniority acquired by non-minority employees at T.I.M.E.-D.C. is commendable, it is not clear that the rights of these employees should have priority over the rights of victims of illegal discrimination. By its construction of section 703(h), the Supreme Court has carved out an exception to

123. 345 U.S. at 332.

124. *Id.* at 342.

125. *Id.* at 338.

126. 279 F. Supp. 505, 520 (E.D. Va. 1968). *Accord*, Vogler v. McCarty, Inc., 451 F.2d 1236, 1238-39 (5th Cir. 1971) ("Adequate protection of Negro rights under Title VII may necessitate . . . some adjustment of the rights of white employees. The court must be free to deal equitably with conflicting interests of white employees in order to shape remedies that will most effectively protect and redress the rights of the Negro victims of discrimination.")

127. *See, e.g.*, Note, *Title VII, Seniority Discrimination and the Incumbent Negro*, *supra* note 80, at 1263-64, which characterizes seniority rights as "legal rights only in a limited sense," as they are derived from provisions of a collective bargaining agreement which the union and employer may change at any time. Furthermore, since events such as loss of business or market upheaval can also prevent an employee from obtaining a promotion to which he would otherwise be entitled, seniority rights are little more than a hope or expectation. Aaron, *Reflections on the Legal Nature and Enforceability of Seniority Rights*, 75 Harv. L. Rev. 1532, 1540-41 (1962), *cited in* Cooper & Sobol, *supra* note 95, at 1605.

the mandate of the Civil Rights Act that the courts remedy the effects of past employment discrimination[128] and, in the view of some, has produced a result that is "wholly contrary to the general framework and intent" of the Act.[129] A minority group employee supporting a family will not forfeit the seniority rights (including protection against layoff) accumulated over the years in one department in order to take advantage of the company's post-Act offer of transfer. While his co-worker, discriminatorily denied transfer or promotion after 1965, is be able to move to a better position because of the Court's holding in *Franks*, the pre-Act discriminatee is "locked" into a traditional minority department. For such an individual, equal opportunity remains "a distant dream."[130]

Marjorie A. London

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128. The Supreme Court has expressed the congressional objective behind Title VII as follows: "to prohibit all practices in whatever form which create inequality in employment opportunity due to discrimination on the basis of race, religion, sex, or national origin" (Franks v. Bowman Transp. Co., 424 U.S. 747, 763 (1976); *accord,* Alexander v. Gardner-Denver Co., 415 U.S. 36, 44 (1974); McDonnell Douglas Corp. v. Green, 411 U.S. 792, 800 (1973)); "to achieve equality of employment opportunities and remove barriers that have operated in the past to favor . . . white employees over other employees" (Griggs v. Duke Power Co., 401 U.S. 424, 429-30 (1971)), and "to make persons whole for injuries suffered on account of unlawful employment discrimination" (Albemarle Paper Co. v. Moody, 422 U.S. 405, 418 (1975)).

129. *Seniority vs. Fairness,* N.Y. Times, June 6, 1977, at 28, col. 1 (Editorial).

130. 431 U.S. 324, 388 (dissenting opinion).