ORIGINAL

In the

Supreme Court of the United States

CALIFORNIA BREWERS ASSOCIATION, et al.,

Petitioners,

--vs--

ABRAM BRYANT,

Respondent.

No. 78-1548

Washington, D. C.
November 27, 1979

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CALIFORNIA BREWERS ASSOCIATION, ET AL., Petitioners, v. ABRAM BRYANT, Respondent.	No. 78-1548

Washington, D. C.,

Tuesday, November 27, 1979.

The above-entitled matter came on for oral argument at 1:19 o'clock p.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice
WILLIAM H. REHNQUIST, Associate Justice

APPEARANCES:

WILLARD Z. CARR, JR., ESQ., Gibson, Dunn & Crutcher, 515 South Flower Street, Los Angeles, California 90071; on behalf of the Petitioners

ROLAND P. WILDER, JR., ESQ., 25 Louisiana Avenue, N. W., Washington, D. C. 20001; on behalf of Union Respondents supporting Petitioner

JAMES WOLPMAN, ESQ., 105 Churchill Avenue, Palo Alto, California 94301; on behalf of the Respondent

APPEARANCES (continued):

LAWRENCE G. WALLACE, ESQ., Office of the Solicitor General, Department of Justice, Washington, D. C. 20530; on behalf of the United States as amicus curiae

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C O N T E N T S

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P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in 78-1548, California Brewers Association v. Bryant.

Mr. Carr, I think you may proceed whenever you are ready.

ORAL ARGUMENT OF WILLARD Z. CARR, JR., ESQ.,

ON BEHALF OF THE PETITIONERS

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

The question which is before the Court in this case is whether the requirement that there be 45 weeks of work within a calendar year in order to achieve the status of a permanent employee in the California brewing industry, whether this is a seniority system or a part of the seniority system.

The Ninth Circuit found that it was an all or nothing proposition and that it did not meet the fundamental test of a seniority system which they said had to be based upon length of service. It is our position that, from an examination of the system itself, it not only looks like a seniority system, it operates as a seniority system, and it is a seniority system.

The California brewing industry at the time this complaint was filed operated under a multi-employer agreement. There were a number of unions involved under this agreement, too. Within the particular classification of brewer, which is

the classification that Mr. Bryant, the plaintiff in this case, held. There were three tiers of employees: There were new employees, there were temporary employees, and there were permanent employees. A new employee was an employee who worked 60 days within a calendar year in order to become a temporary employee. The temporary emplovee was an employee who worked within 45 weeks within a calendar year in order to become a permanent employee.

Throughout the time from the date of the employee first coming to the industry and starts working in the industry, he starts acquiring seniority. He acquires seniority on two different bases: He acquires seniority on the plant basis, and he also acquires seniority on an industry basis. This seniority has different applications for different purposes, but for each day that the employee works, he is building up seniority credit towards various purposes under the agreement.

For example, after the employee has worked 30 days, he is no longer a probationary employee. After he has worked 30 days he cannot be discharged except for just cause. After he has worked 60 days within a calendar year, then he becomes a temporary employee. Now, when he is a new employee, as he is working along this way, he is building up plant seniority as a new employee. He is also building up industry seniority as a new employee. Among other new employees he has seniority rights within the plant, he would be laid off after other

new employees are laid off who are junior to him, and within the industry he would have also rights as a new employee.

When he becomes a temporary employee, he then has further rights as a temporary employee on the basis of his work within the particular plant and also as a temporary employee based upon his work within the industry. If a temporary employee is going to be laid off, he is going to be laid off based upon his seniority. The junior temporary employee working in that plant will be the first person laid off. The senior temporary employee will be the last laid off. If an employee is going to be recalled to work within that plant and they have need for temporary employees, then the temporary employee with a greater seniority within that plant will be the first recalled, and the temporary employee with the least seniority within that plant will be the last recalled.

The same situation pertains to permanent employees. Within the classification of permanent employees, these are permanent brewers that we are talking about, Your Honors, within the classification of permanent employee, employees are laid off according to their seniority as permanent employees. The most senior permanent employee is laid off last, the most junior employee, permanent employee, is laid off first. On a question of recall, this is again on the basis of plant seniority, the permanent employee with the greatest seniority will be recalled first and the plant employee, or the permanent

employee with the least seniority will be recalled last.

This is the way it works on a plant-by-plant basis. In addition to this, there are industry applications of the seniority principle. For example, the temporary employee, and I might pause here for a second to point out that the term "temporary employee" may be a misnomer. It is a term that is used in the contract. These are not temporary employees in the sense that they are casual employees. These temporary employees may be employees who have worked for a period of years within the industry and have acquired important and significant rights.

The temporary employee, on the basis of his industry service -- he may work for one company, for two companies, for three companies -- will acquire rights and will work towards acquiring the 45 weeks of work within the calendar year which will enable him to become a permanent employee. This is an application of industry seniority.

Also there is another application of industry seniority, as far as temporary employees are concerned. If a temporary employee is out of work, he's been laid off by his own employer, and all the temporary employees with plant seniority at another plant have been recalled and there is still need for additional temporary employees of that plant, the plant employee or the temporary employee with the greatest industry seniority will be the first person recalled to that plant.

So this is another application of the seniority principle working within the system. And the employees also are acquiring other rights in addition to the competitive rights of seniority which I mentioned. They are also acquiring benefit rights. They are acquiring rights as far as health and welfare are concerned. They are acquiring rights as far as pensions are concerned, and they are acquiring rights as far as vacations are concerned.

These rights are building up within this multi-tiered system as the employees progress through the system.

Now, when the system comes to the point where the employee is working, say, less than 45 weeks, the temporary employee is working less than 45 weeks within the calendar year, and so therefore he does not become a permanent employee, the Ninth Circuit suggested or claimed that this was an all-or-nothing proposition, and that he had to start over again on January 1 of the following year and earn the 45 weeks of work within that year. In our opinion this was a failure on the part of the Ninth Circuit to examine the system as a whole. As this Court has said on many occasions, seniority systems are quite varied in their application and the varieties that they have, and that there's no one system, as 41 in Teamsters says, no one system is to be preferred.

QUESTION: Mr. Carr?

MR. CARR: Yes, sir.

QUESTION: Will you point out where in the Ninth Circuit statement it was incorrect?

MR. CARR: Well, in our opinion, Your Honor, they said it was an all-or-nothing proposition. In other words, a person had to start over again the following year, and so --

QUESTION: Well, is that incorrect?

MR. CARR: It is incorrect, Your Honor, in this respect, in our opinion: He does not lose his seniority. He has his seniority that he has accummulated as a temporary employee. If he has worked 40 weeks within 1979 as a temporary employee, he does not lose that seniority on January 1, 1980. He maintains that seniority, and that will give him the first opportunity to be referred out to the company from which he was laid off, assuming he was laid off at the time, and he will be the last person laid off, based upon that seniority; that plant seniority that he has acquired is not lost even though he does not attain permanent status within the year.

QUESTION: Well, I don't think the Ninth Circuit meant it was lost in that respect, but to become a permanent employee he has to start over again, doesn't he?

MR. CARR: He has to earn 45 weeks within the calendar year, but he does not start over again in the sense that his seniority is continuing to push him ahead, his seniority, his plant seniority, his industry seniority, is going to give him the best opportunity to work the 45 weeks of work in 1980 to

become a permanent employee.

QUESTION: Well, is it not true that if one man who worked a year and a half but happened to work 45 weeks in one calendar year is a permanent employee, whereas someone who has worked 35 years, 44 hours a week, still is a temporary employee and junior to the other one?

MR. CARR: That's conceivable, Your Honor, but I think it a very unlikely hypothetical. This case is before this Court without any evidence as to the operation, the maintenance of the system or how it actually operates. It is conceivable under the language of the agreement that this can work. However, I think it is highly unlikely that an employee would find himself in that position. There is only two reasons that an employee, under the situation that you posit, could be disadvantaged to that extent, and that would be, No. 1, if he is working for a company which has economic problems, economic downturns and so therefore they are laying off employees and there are not the job opportunities at that plant. That's one fortuity. The other fortuity would be if the employee himself was not available, if he was on leave of absence, if he was sick, if he was injured. But each day that an employee works under the system within the industry and within the plant, he is acquiring seniority rights which with reasonable certainty will assure him of the best opportunity, the best chance, of becoming a permanent employee the following year.

In Northern California, the brewing industry --

QUESTION: Does the record show how many get across the line between, quote, "temporary," quote, and you admit this is a poor term, into the permanent category?

MR. CARR: No, Your Honor, there is no record. However as we indicated in a footnote in our brief, even though there are allegations that no blacks have made permanent employee within the industry within the period of time involved in the complaint, if this case is remanded by this Court, we are prepared to show that there are some 777 employees who became permanent employees from the temporary ranks, and that of that number some 33 percent were minorities, and we are prepared to show that if this case is remanded by this Court.

Most of these employees, all but 28 of these employees, became permanent employees in Southern California, out of 777. This is in a ten year period from 1968 to 1978, and all but 28 of them became permanent employees in Southern California. This is where the companies were operating and that were the most successful. This is where Anheuser-Busch, Miller's and Schlitz were operating. They were the most successful. They are the only three companies left at the present time.

Mr. Bryant, on the other hand, happened to be working in Northern California. At the present time all those breweries are gone. In fact, they were declining at the time he was working in the industry. For example, he was working

at Falstaff in San Jose. He then transferred, when Falstaff moved to San Francisco to take over Hamm's plant which had closed, he transferred up there. At the present time, and this was indicated in a footnote in our opening brief, there are no Northern California breweries. One of the things which I should also point out on the seniority principle here is that if Mr. Bryant had chosen to and if he could have seen what was going to happen in Northern California with the various companies closing down and no longer operating because of business adversities, he could have sought transfer to Southern California and registered for work in the Southern California area, and been referred out as a temporary employee to one of the Southern California breweries. Then he might at that point of time, because they were in an expanding mode and there was a number of opportunities, job opportunities, he might have been one of the fortunate ones. Presumably he would have been, based upon the seniority principles that I have alluded to, who would have made permanent, one of the 777 employees who have made permanent in the last ten years.

QUESTION: Are there no local Northern California beers any more?

MR. CARR: There are no Northern California breweries operating at the present time, and all the companies that were operating under the California Brewers Association contract have now closed down, including Falstaff, Hamm's, General

Brewing Corporation, and Burgermeister was another one that was operating at one point.

There are only three companies operating in California at the present time, which are Schlitz, Miller's, and Anheuser-Busch. Pabst closed down, which was a Southern California company, earlier this year, which is also --

QUESTION: Pabst was originally Wisconsin, a Wisconsin company.

MR. CARR: Yes, and Anheuser-Busch was originally St. Louis, but these are companies that were operating in California, and Pabst no longer has a plant in California.

QUESTION: Did they drink more beer in Southern California than in Northern?

(Laughter.)

MR. CARR: That may be true, Your Honor. I haven't seen any statistics on that; that might be something that would come to the Court's attention on remand, but I don't know.

In any event, one of the arguments of the Supreme -- of the Ninth Circuit in this particular case was that this system is subject to manipulation. In our opinion it is not subject to manipulation, because it is a seniority system. It is a measure of time worked. An employee advances within the system from temporary to permanent status based upon the time that he works. His layoff and recalls from layoff are based

upon the time that he works. This is an objective standard. This is --

QUESTION: Based on the time he worked in one year?

MR. CARR: Not the time -- his layoff is not determined on the basis of the time he worked in one year, Your Honor.

QUESTION: No, but you said he advanced from temporary to permanent based on the time he worked --

MR. CARR: That's right.

QUESTION: -- amended that to say on the time he worked in one year.

MR. CARR: Yes, but inexorably, the time that he has worked before that particular year will push him up to the front of the ranks of those people who will be -- who will receive the first opportunities for the allocation of the available work in the year in question. His seniority is not lost. His seniority continues, and he will be the first recalled and he will be the last laid off, based upon his seniority as a temporary employee, so he will then become a permanent employee that much more certainly, based upon the service that he has already accummulated as a temporary employee.

QUESTION: Is this a common pattern in the area?

MR. CARR: Yes, sir, it's common. There are also some other cases that have been cited in the brief and in the AFL-CIO brief included in their appendix an example in the Seafarers'

Union where this type of program exists, where the case is cited in our brief, the New Jersey Brewing Company, involved a situation where employees had to work on a similar basis. Gerber Foods involved a situation where the War Labor Board directed that the provision be that there be 600 hours within a six-month period, which is quite similar to what we have here.

So there is a considerable precedent for this type of system and this operation of a system along this line.

As the Chief Justice said in a case decided a few years ago, when he was a judge in Outland, that very seldom is length of service being considered the dominant factor, and that is contrary to experience and also to judicial attitude to say that it is the dominant factor. In this case we do have a measure of time worked, and whether it be within a discrete period of time, as in 45 weeks within a calendar year, it is still a period of time worked. It is not run into any of the vises that might be considered in other types of cases, if you are dealing with a supervisor's evaluation or an educational test or something like that. This is an objective seniority standard. It is a measure of time worked, and it operates just on that basis.

Our position, as far as the disposition of this case, the disposition that this Court should make of this case, is first, that it should be remanded to the District Court for

Mr. Bryant to have the opportunity to prove any allegations of intentional or differential treatment that he may be able to establish.

Secondly, if there is some question in the Court's mind or in the party's mind as to whether this is a bona fide system which was specifically not addressed by the Ninth Circuit, then it should be remanded to have a determination made and evidence taken.

One of the problems with this case is that this case is before you without a record as to the actual operation or without any evidence as to whether there is any question of the bona fides of this particular case, particular provision.

Finally, we think that this court can and should decide that this provision, this particular provision, based upon an examination of the totality of the seniority system within the California brewing system, how it works on a plant basis, how it works on an individual company basis, that it must be held to be a seniority system, and therefore within the exemption 703(H) of Title 7 of the Civil Rights Act of 1964.

QUESTION: And if the Court accepts your argument, what action should we take in this case, to remand it --

MR. CARR: Yes, sir.

QUESTION: -- to see if, A, first of all, it was bona fide?

MR. CARR: If there is any question raised and it has not been decided yet, yes, it should be remanded to determine if it is bona fide.

QUESTION: And then also for consideration of the plaintiff's Title 7 claims --

MR. CARR: Intentional discrimination.

QUESTION: No, I meant this is a seniority system, the issues would be if it's bona fide and secondly, even if it is bona fide, was there discrimination quite apart from this seniority.

MR. CARR: That's right. And under the principles of Franks v. Bowman, the Court can grant relief if they find differential treatment without disturbing the seniority system.

QUESTION: Right, right.

QUESTION: Mr. Carr, I suppose there isn't any possibility of the unions and management working out something different. This is an old type of thing, surely as a lawyer, in the face of 703(H), you wouldn't be drafting this kind of a system today?

MR. CARR: I might not, Your Honor. It's been around for 25 years and it has worked satisfactorily, as far as the parties are concerned, for over the last 25 years. In addition, you may also notice that there is another category of employees within the agreement. That's the permanent bottler and the temperory bottler. You progress from a

temporary bottler to a permanent bottler based on 1,600 hours of work, and that, of course, gives credit for overtime work that you may perform, and that was a change from an earlier provision where they required 45 weeks of work within the calendar year. They changed it to 1,600.

It may be that through the process of collective bargaining, which is where we think it belongs rather than before this Court, through the process of collective bargaining there may be a change in the way that the contract reads, and how you move from temporary to permanent. We believe it is up to the parties, rather than to the courts.

QUESTION: Well, I suppose the argument is that it is the collective bargaining that is the barrier, and it's not too dissimilar from the case we had this morning.

MR. CARR: Yes, Your Honor, but this is, in our opinion, within a specific exemption granted by Congress in Section 703(H), and to give Congress its due, this should be held to be exempt from the reach of Title 7 otherwise.

MR. CHIEF JUSTICE BURGER: Mr. Wilder.

ORAL ARGUMENT OF ROLAND P. WILDER, JR., ESQ.,
ON BEHALF OF UNION RESPONDENTS SUPPORTING
PETITIONER

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

There are a number of facts in this record, some of

which have been touched on by Mr. Carr on behalf of petitioners that cannot be disputed and that are, in our view, determinative of this case. One of these facts is that the 45 week rule is based on time served. It is based on service. In determining whether that rule reflects the seniority principle therefore, it becomes necessary to determine, to find out under the system how a temporary employee's chances of working 45 weeks in a calendar year are allocated.

As Mr. Carr has indicated, the competition for work opportunities among temporary employees is determined by plant and industry seniority that accrues from year to year. It is this accrued interaction of seniority that affords the employee the opportunity to work 45 weeks in a calendar year and therefore satisfy the requirement.

So viewed against the context of the total seniority system, it seems apparent that the 45 week rule and the acquisition of permanent status reflect seniority principles to the fullest possible degree.

One of the functions of the 45 week rule is to regulate competition between so-called permanent employees and temporary employees. It is the way, in other words, that industry service is given partial seniority credit at the plant, or as the government says at page 24 of its brief, "It is a measure of time worked." And like other measures of seniority, the 45 week rule is to a great extent determinative of where

an employee appears on the seniority list.

Mr. Bryant has always agreed that the brewery system should extend recognition to length of industry service. That appears at page 306 and 307 of the record. But neither he nor the government likes the 45-week rule because it does not give controlling effect to what they describe as cumulative length of service. We submit that in seeking to restrict Section 703(H) to cumulative length of service systems, our opponents apparently confuse simple longevity with seniority. Longevity is only one of the values that are reflected in seniority arrangements.

If it were the only value, if it were the only value, all seniority systems would allocate opportunities across the broadest possible basis. There would be no collective bargaining agreements establishing separate units of seniority, as appeared in the system considered by this Court in Teamsters. There would be no agreements having rules providing for breaks in seniority or for lots of accrued seniority all together, as can be found in virtually every collective bargaining agreement.

But the point is --

QUESTION: In effect, if that's all seniority means, all you would need to do is have a one or two sentence definition of it, the number of days you've worked for the plant?

MR. WILDER: I am not sure I follow that question.

QUESTION: Well, you are saying that if seniority is as simple as the Ninth Circuit said it was, then all you would need in defining a seniority system is a one or two sentence paragraph.

MR. WILDER: Simply a sentence in the collective bargaining agreement saying that plant seniority shall govern for all purposes. That would be the end of the seniority clause. It would not --

QUESTION: It would still have to be, I suppose, defined in terms of interruptions and so on.

MR. WILDER: Well, I think that there is one other factor that would have to be there other than the measure of seniority. There would have to be a definition of the field of eligible --

QUESTION: Certainly, there has to be all sorts of ground rules.

MR. WILDER: Otherwise you -- compete, using their plant seniority.

But the point that I wish to make, and I think it is an important one, that the qualifications on absolute accummulation of seniority exist today. They existed in 1964 when Title 7 was passed and they existed from the beginning of seniority arrangements in the 1880's in the railroad industry.

Congress in 1964 acted to protect vested seniority rights, those rights that had accrued under seniority systems

of whatever form and description. We think it plain that Congress did not seek to restrict Section 703(h)'s protections to so-called cumulative length of service systems, if indeed such systems exist at all.

Thank you. I would like to reserve the rest of my time for rebuttal.

MR. CHIEF JUSTICE BURGER: Mr. Wolpman.

ORAL ARGUMENT OF JAMES WOLPMAN, ESQ.,

ON BEHALF OF THE RESPONDENT

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

I must add to the facts, shortly, anyway. Firstly, there is still a brewery in Northern California; Anheuser-Busch operates a very large brewery in Fairfield. During much of the time that this dispute was going on, there were likewise other breweries in Northern California where Mr. Bryant could have worked.

Mr. Bryant seems to fall into the category of an inconceivable situation, as Mr. Carr has phrased it, in view of the fact that he worked for seven years in the Northern California brewery industry and never was able to pass the barrier into permanent employment.

QUESTION: Well, he obviously didn't work for seven years in the common meaning of that term. He worked for parts of seven years.

MR. WOLPMAN: Right. A major part, his major source of income during that period was --

QUESTION: We don't know what his income was. I mean, even if he had worked a week in one year.

MR. WOLPMAN: There is in the record, there are some interrogatories that indicate that the periods of time that he worked during those years, that it was his major life endeavor--

QUESTION: He didn't work for seven years.

MR. WOLPMAN: That's correct.

QUESTION: Did this case go off on summary judgment, or was it after a trial?

MR. WOLPMAN: It was even before summary judgments on motions to dismiss filed by the defendant breweries, Your Honor.

QUESTION: And the motions for summary judgment granted by the breweries were granted and those judgments were reversed by the Ninth Circuit?

MR. WOLPMAN: That is correct, Your Honor.

QUESTION: And remanded?

MR. WOLPMAN: That's correct.

There are two other important facts. One is that there is no difference in the actual day to day work carried on by a permanent brewer and by a temporary brewer. Yet there is a tremendous difference in the pay and benefits which accrue to those two categories.

In our brief we have indicated with citations to appropriate parts of the collective bargaining agreement no less than 16 areas where the permanent brewer is advantaged over the temporary.

QUESTION: Well, that's true of someone who has worked five years on an assembly line and someone who has worked 25 years on an assembly line, too, isn't it?

MR. WOLPMAN: I doubt that it would be that extreme. This is certainly an extreme situation. I want to point that out, because the Ninth Circuit took that, I think, into account in sort of a litmus paper test, if you want, as to whether this was a seniority provision.

QUESTION: What do you mean, a litmus paper test?

MR. WOLPMAN: Any -- there are so many differences, the system operates so harshly on the temporary as compared to other people down the seniority lines in other kinds of operations, and the cut-off, this all-or-nothing thing, is so unique that I think that that possibility led the court to go on from that and begin to analyze what was behind that possibility as revealing that what was really going on here was something other than seniority considerations, and I will try to draw that out a little more in my argument, Your Honors, as we proceed.

QUESTION: But if the case went off on summary judgment or motion to dismiss, how can the Ninth Circuit have any

peculiar knowledge as to what was, quote, "behind," close quote, the agreement?

MR. WOLPMAN: The agreement itself will tell us a lot, Your Honor. It will tell us that there is a tremendous financial advantage to the employer if he utilizes temporaries who do the same work as permanents, that that's the purpose for this provision. It's not a seniority provision.

QUESTION: But it was collectively bargained for by the union, which simply has the employee in mind.

MR. WOLPMAN: Right, and the union did have some employees in mind. That's the other part of the purpose. The old time employees definitely were taken into account. In fact, essentially a finite wage and benefit package has been divided up by those few permanents to the disadvantage of the temporaries.

QUESTION: Well, isn't that a complaint that temporaries may have against the union, rather than the possible permanent employee has against the employer?

MR. WOLPMAN: I think it raises really no -- the question that, is this really a seniority provision or is it a thing that allows the employer low-paid labor and the old timers the right to divide up a package among themselves, a smaller number: Now, that's -- I'm not saying those reasons are necessarily illegitimate or illegal. I am saying those are not the reasons that lie at the root of the seniority

principle. The root of the seniority principle is to reward the accummulation of service, to reward the person as he works for years and years. Not to, what it does for the employer, make it cheaper, or for the unions, allow a few people to share all of the benefits.

QUESTION: But to the extent that it makes it more expensive for the employer to keep on employees who have worked for a number of years and the employer has a finite amount of money that he can devote to labor costs, it necessarily makes it cheaper for the employer with respect to new employees.

MR. WOLPMAN: It certainly does, Your Honor, but that is not seniority; that is our point. That is something else, and that's something that would have to be justified as a business necessity. Remember, we're not saying that the 45 week provision is automatically invalid. We're saying if we go back to the district court, we will have to establish that it indeed does perpetuate the discrimination of the past and the employer will have the opportunity to establish that indeed he has to have it that way because it's a business necessity.

QUESTION: But any bona fide seniority system is necessarily going to be top heavy with labor costs at the upper end of the age scale of the workers, and if there's a finite amount of wages, of money available to the employer, it's going to be conversely lower in the lower wage scales.

MR. WOLPMAN: I think we have to get at the -- to get to the answer to that question, you have to begin to see what kind of industry we are talking about here, Mr. Justice Rehnquist. You have to see that we are talking about a seasonal industry and a seasonal industry -- what is unique about a seasonal industry is that it is tied to the calendar year. It is a calendar year notion, and the biggest thing about jobs in that kind of industry is whether or not you are a year-rounder or whether you are just seasonal. That is ingrained in the job structure of the seasonal industry. And what the 45-week provision is about is about the classification structures that exist in seasonal industries. It is not about seniority. Seniority comes into play in the first half of the sentence, 45 weeks in a calendar year. Forty-five weeks, as the government indicates, is a seniority measure. In a calendar year is something that comes from somewhere else, that comes from the principles that I have indicated to you, the advantages that accrue to the employer and to the old-time union members that have nothing to do with seniority. So you put those two together and you get the 45-week rule.

QUESTION: Well, you say that a rule where 45 weeks out of 52 does not count as seniority, or say 44 does not advance one towards seniority, is a seasonal industry?

MR. WOLPMAN: That's right, Your Honor. The typical way that you will find in the packing industry, for example,

you will find these same kinds of structures which are being attacked, too. They have to do with the job structure and of the industry, not with seniority.

QUESTION: What is the vacation period, the maximum, for a very senior employee in this industry?

MR. WOLPMAN: I don't know off the top of my head, Your Honor. I suspect that it is --

QUESTION: It must be at least two or three weeks, isn't it?

MR. WOLPMAN: That's right.

QUESTION: More likely three than two.

MR. WOLPMAN: That's right. It is --

QUESTION: Possibly four?

MR. WOLPMAN: Possibly. It can get very difficult to pass --

QUESTION: Then you don't have many -- you don't have much range between five weeks -- between four weeks and seven weeks.

MR. WOLPMAN: It is a very, very difficult hurdle and it is a hurdle that again the Ninth Circuit observed that it is a hurdle that you have to be very mistrustful of because in any large industry there is enough free play in the scheduling of the start-up of production and in the timing of layoffs to very easily allow an employer the economies that come with maintaining a large low-paid labor pool.

I think that the best way I can portray what I am trying to get at here is to put it in the context of collective bargaining. In collective bargaining, the union comes in with proposals and the management comes in with counter proposals that seek to limit or to alter the proposals. That is exactly the way it is with seniority. Unions will generally propose seniority provisions. Management will answer with countervailing limitations on the seniority provisions, limitations such as testing, ability, supervisor's recommendations or what not. Those are non-seniority principles, and what you may come up with is some kind of compromise between those two.

QUESTION: Since this was decided rather summarily, as it was, I suppose there is nothing in this case in the record to show the history of the collective bargaining of this particular provision, is there?

MR. WOLPMAN: No, Your Honor. Of course, we would --

QUESTION: One can assume that if it followed the pattern that you are describing, give and take.

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

Now, given that give and take, I think that -- and this is the real danger of the position that the employers are taking -- given that give and take, what they want to say is that any system that combines those two elements, the seniority principle plus the conflicting countervailing considerations

which have been interjected in the course of bargaining by the employer, that that entire system is protected. In other words, you have not only the seniority principle but you have the concerns that are coming from the opposite direction.

Now, I think that that -- and that is why they say a mixed system is protected, such that -- well, they are willing to acknowledge that a test, for example, as a grounds for promotion would be invalid. They would claim 703(h) protection for a test combined with a seniority provision.

Now, besides these countervailing non-seniority considerations that do come from management, there are again the seniority principle and the aspects of it have to be worked out. There have to be rules of how seniority is obtained in a unit, there have to be rules for loss of seniority, there have to be rules for breaks in service.

These rules have to do with the elaboration of the seniority principle. They are a part of seniority. They do not concern the countervailing considerations that the employers generally have introduced to erode the notion of seniority. They could be said to compliment or elaborate rather than override, supersede or restrict.

So the real issue here becomes is the 45-week provision in a calendar year one of these housekeeping ground rules or is it something that is coming from another direction, from the countervailing limitations on seniority. And that

I think requires an analysis of the purpose behind the 45 weeks in a calendar year.

So I think that ultimately you have to get at the purpose behind this, and this is nothing new. The Court has done this in the veterans cases, in Accardi and in Alabama Power. It didn't take what management and labor agreed to as seniority or non-seniority in those cases at face value. It said we have to look at it, we have to enter the --

QUESTION: Didn't the Ninth Circuit send this back for trial or did it simply say this is not a seniority system?

MR. WOLPMAN: Well, it sent it back for trial but it also said that this is not a seniority system, therefore we would go to trial on the issue of whether it does perpetuate discrimination and whether it can be justified as a business necessity. It eliminated 703(h), Your Honor.

QUESTION: Well, if you are right and you have to kind of look at the purpose of the thing and get behind it, I would think that was a factual issue if there ever was one.

MR. WOLPMAN: I would say that except that the facts are so completely clear from the nature of the collective bargaining agreement. The obvious economic advantage which accrues to the employer by maintaining a few permanents and as many temporaries as possible, the obvious advantage which has been pointed out by Law Professor Slichter in his book which is cited in all the briefs as to the old-timers getting

what they want. There is nothing wrong with the old-timers getting what they want. There is nothing wrong with the employer trying to save money. But that is not seniority. That is not what section 703(h) was about.

QUESTION: But it certainly was collective bargaining.

MR. WOLPMAN: It certainly was collective bargaining, but not everything, as we well know from the history of title VII litigation, in collective bargaining is to be protected. I think there is a real danger that if we took this mixed notion of seniority, that is the rules for working out seniority principle and these countervailing considerations, that the expansion that would occur in 703(h) would wind its way into just about every part of the collective bargaining agreement. We point out 16 areas in this collective bargaining agreement where the seniority principle plays some role. Now, if every area that is touched by that principle is automatically protected by 703(h), I question whether Congress did not enact the Seniority Protection Act of 1964 rather than the Civil Rights Act of 1964.

QUESTION: On the other hand, if this is not a seniority system there is going to be quite a swarth cut through collective bargaining agreements, isn't there?

MR. WOLPMAN: No greater swarth, Your Honor --

QUESTION: Well, how do you appraise the position of

the AFL-CIO?

MR. WOLPMAN: Well --

QUESTION: They say this is a seniority system.

MR. WOLPMAN: They say that it is a seniority -- they actually adopt our reasoning. They say that anything that overrides seniority is not a seniority system, but then they adopt a definition of the people who can compete in a system that sort of brings in --

QUESTION: In any event, this is a seniority system in their view.

MR. WOLPMAN: In their view, yes.

QUESTION: I suppose they wouldn't be so interested if this would only affect maybe one or two stray collective bargaining agreements.

MR. WOLPMAN: It certainly affects any collective bargaining agreement or many collective bargaining agreements in seasonal industry, and I think that in analyzing this problem the Court is going to have to inevitably meet the question of just how broad 703(h) could be -- that is, could it include these countervailing considerations, and that is important.

QUESTION: I suppose somebody besides permanent employees belong to these unions.

MR. WOLPMAN: I'm sorry, Your Honor, I didn't hear you.

QUESTION: I suppose someone besides permanent employees belong to these unions.

MR. WOLPMAN: Yes, Your Honor. The difficulties, however, of the temporary employee in asserting his powers within the union is something that I can only point to. There is certainly nothing in the record. I can only say that this Court in the veterans cases has not turned its back on what is and what is not a seniority and left it entirely to whatever the union and the management happen to say.

I think it is an old and very sad story. When people can't clean their own houses, the government sometimes has to clean it for them, and the history of the intrusion of the government in the area of discrimination into employment relationships is one that has showed a great deal of patience and reluctance on the part of the government.

Up until 1944, when the steel case, Steel v. Louisville and National Railway case was decided, the government had stayed out of this area. Then in 1944 it entered the fray because of what was -- I can only characterize it as dismal discrimination. But that --

QUESTION: Your argument about whether this is a seniority system or not would be the same whether there was any racial aspects to this case at all.

MR. WOLPMAN: Yes, Your Honor, I think we have to decide what is a seniority system. It only becomes critical

in the racial case in a racial situation because of the way the legislation is drawn, of course. I think we have to work towards an analysis of --

QUESTION: It won't be just race, it will be any kind of what could be called invidious discrimination that could be gotten at --

MR. WOLPMAN: Well, that would have to be gotten at only through the duty of fair representation, Your Honor. And as I pointed out, probably under the duty of fair representation which we had for twenty years and did not accomplish the purpose that it was supposed to, it may be impossible to get at this kind of situation.

Under title VII which, again, after twenty years Congress decided that it could not countenance what was going on in the work place and it came in with another stronger test. It wasn't the duty of fair representation test, it was the business necessity.

And so I think that the Court sees a tremendous amount of patience and it is time --

QUESTION: Well, certainly a good deal of that patience ended with the Landrum-Griffin Act of '59, where the Congress finally got into the internal affairs of unions to a certain extent.

MR. WOLPMAN: I do not know the internal affairs of these unions. I can only point to my years of experience in

the difficulties that younger people have in asserting powers in some sorts of unions. That is all I can say about that. We could develop that as we develop the record.

QUESTION: But how do you develop a record except by trial?

MR. WOLPMAN: Well, we have to decide first of all is this a seniority system. I think there is a record to do that. Whether this is --

QUESTION: A record of witnesses?

MR. WOLPMAN: No, I don't think that is necessary. The seniority system is a creature of contract. We can look at the contract which is before this Court and say is there a mechanism in there which protects the accumulation of service as a way of advancing, and I think we can see from the 45-week provision that it does not.

Thank you.

MR. CHIEF JUSTICE BURGER: Thank you.

Mr. Wallace.

ORAL ARGUMENT OF LAWRENCE G. WALLACE, ESQ.,

ON BEHALF OF THE UNITED STATES AS AMICUS CURIAE

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

As the United States views the governing legal principles in this case, the broader propositions urged by the employers and the unions here prove too much. Seniority

in the sense of length of service is ordinarily a substantial ingredient in transfers, promotions, layoffs, rehirings, and in measuring compensation and fringe benefits. This cannot mean, we submit, that all additional criteria considered along with seniority for such purposes thereby become part of a seniority system within the meaning of section 703(h) and thereby become immunized from examination under the ordinary standards of title VII. Otherwise, the limited purpose exception of 703(h) would largely swallow up title VII's guarantee of nondiscrimination in transfers, promotions, layoffs, rehirings, and in compensation and fringe benefits.

So our major premise in this case is that a rule such as the 45-week rule that is at issue here must be separately scrutinized for purposes of section 703(h) to determine whether it embodies the seniority principle.

Another way of stating the same proposition is that we don't believe the use of the word "system" in section 703(h) is meant to be a grabbag for non-seniority considerations that can be tied in with seniority considerations and thereby immunized from the basic nondiscrimination principle of title VII.

If anything, we would submit that it would be more plausible to read the word "system" in 703(h) as indicating the way in which seniority can be used to override the nondiscrimination principle. It is only systematic use rather than ad hoc use of seniority which is being authorized to

override the basic purpose of the statute, the nondiscrimination principle so that there will be a guarantee that to the extent seniority will override the basic principle of the statute, it will be systematic seniority available to all classes of persons rather than ad hoc use of seniority that might prejudice the protected classes.

Now, our minor premise in this case -- that is the fundamentally important question before the Court -- our minor premise is that the 45-week rule at issue here does not embody the seniority principle as we understand it because it does not provide reasonable certainty of progression based principally on cumulative length of satisfactory and reasonably continuous service. This does not mean that the rule is invalid but only in our submission that it is not immunized by section 703(h) from challenge under title VII. And the legal standard I have stated is a rather complex one, involving cumulative length of satisfactory and reasonably continuous service and reasonable certainty of progression.

QUESTION: Is the Ninth Circuit standard?

MR. WALLACE: Well, I don't think they were that specific, Mr. Justice, although they said nothing inconsistent with this, as I read their opinion. It seems to me the complexities of seniority rules largely go to determining these various elements that I am stating, rather than to incorporate in other considerations and other values that don't

go to effectuating the basic principle of seniority, which is what Congress meant to protect. Their discussion was largely in terms of last hired-first fired kind of relatively simple considerations.

It seems to us that this is the approach to 703(h) that is faithful to the basic purpose of title VII which was to assure that there would be a nondiscrimination principle applicable to work rules affecting all these valuable rights in the employment relationship. And our view of what constitutes seniority for these purposes is supported as well by this Court's decisions by analogy considering what constitutes seniority for purpose of veterans' reemployment rights under the Military Selective Service Act.

As we explain in some detail in our brief on pages 8 and 9 and in Footnote 7, one of the reasons we think this 45-week rule does not meet the legal standard for purposes of 703(h) is because of the fortuities that it permits to displace cumulative length of service as determinative of achieving the permanent status that is involved here. But even if in our view it produced results that more closely approximated cumulative length of service, it still seems to us would not be a rule that is part of a seniority system because of the lack of reasonable certainty of progression which was the basic reason why in the McCart case cited and discussed in our brief this Court held that a veteran was not

entitled to a promotion, that he could not be reasonably certain of having received during the period of his military service. That, after all, is an act in which seniority being an ameliorative principle should be broadly interpreted where here is an exception that should be narrowly interpreted.

Instead, what we have is a classification system which, as Mr. Wolpman has explained, has something of an us and then syndrome in which there is no reasonably certain progression from the class of them to the class of us that can be earned through stages of seniority through which there is some kind of systematic progression.

Now, it may be that in this industry these classifications are justified by the business needs of the particular industry, and we don't say that in determining whether the business justification has been met under title VII. There is no room for flexibility in the collective bargaining process.

QUESTION: But if the business justification has been met, wouldn't it be also a business justification for that kind of a seniority system?

MR. WALLACE: Well, the seniority aspects of this contract don't need justification, in our view, Mr. Justice, because they are protected by 703(h) and some of those were recited by Mr. Carr. But the 45-week rule, for the reasons I have just stated, is not part of the seniority provisions.

QUESTION: Well, you say then that the plaintiff

can pick and choose as among the seniority provisions and say some are protected by 703(h) and some aren't?

MR. WALLACE: Well, that question presupposes that the 45-week rule is a seniority provision, but I have devoted my entire argument to the reasons why we think it is not a seniority provision. So I can only say that it is not a matter of picking and choosing the seniority provisions that are protected by 703(h), but this is not a seniority system both because it is not based principally on cumulative length of service and because there is no reasonable certainty of progression from one class to another here.

But we do believe that there is in meeting the business necessity test considerable room for flexibility in the bargaining process for reasonable accommodations to meet the substantial needs of the industry, but the inquiry still must be as a justification of these classifications whether this does meet a substantial need of the industry.

There is room for flexibility in determining how to meet the substantial needs, but the question if a prima facie showing of discriminatory impact is made would be whether a classification system of this type is necessary to meet substantial needs in this industry. All of this has not been explored, although some justifications have been recited in the briefs.

QUESTION: Mr. Wallace, I take it that if the

employer and the union had a contract and they agreed that one classification of employees was permanent employees, then in this company there would be a hundred permanent employees, and that as a permanent employee retired he would be replaced and he would be replaced by the fellow who had worked the longest time in the last two years. Now, I take it that you would have the same problem with that.

MR. WALLACE: Well, there might be --

QUESTION: Well, it would be the same thing.

MR. WALLACE: It is very similar, although there would be some additional certainty of progression in your hypothetical, Mr. Justice.

QUESTION: Why? What, for example?

MR. WALLACE: Because here --

QUESTION: The difference between two years and one.

MR. WALLACE: Here the indications are that automation is reducing the number of permanent employees and that people are not progressing into that rank, but this is nothing that has not been explored in detail. It is an allegation and the Court of Appeals, although I can't say what it is based on, stated that no one in Northern California is advancing from one class to the other.

QUESTION: But in this case the question of seniority has been finally disposed of by the Ninth Circuit, it is no longer an issue in the case.

MR. WALLACE: That is correct, Mr. Justice, based on their interpretation of the terms of the agreement.

QUESTION: And you agree with that?

MR. WALLACE: We agree with that, but what is a principal concern to us are the governing legal principles which I attempted to state.

Thank you.

MR. CHIEF JUSTICE: Thank you.

Mr. Wilder, you have about six minutes.

ORAL ARGUMENT OF ROLAND P. WILDER, JR., ESQ.,
ON BEHALF OF THE UNION RESPONDENTS SUPPORTING
PETITIONER -- REBUTTAL

MR. WILDER: Thank you, Mr. Chief Justice.

Let me start first by referring to one or two factual matters. I am advised that the Fairfield plant never had been covered by the agreement in issue, that the industry seniority provisions would not be applicable to that agreement.

Although, Mr. Chief Justice, the maximum amount of vacation a senior employee in the industry can obtain is six weeks per year.

QUESTION: But that would be a permanent employee.

MR. WILDER: Yes, it would be. It would be normally through the accrual of an industry vacation by accumulating time at different plants.

QUESTION: So even this fellow would work only 46 weeks in the year then if he qualified --

MR. WILDER: If he took the vacation or if he qualified for it. You earn your vacation on the basis of time worked according to a particular formula. You don't get six weeks automatically.

QUESTION: I suspect there aren't all that many six weeks people, are there?

MR. WILDER: I do not know, Your Honor. I suspect not, however.

I should point out that with respect to the allegation that the purpose of the agreement is creating a pool of cheap labor, the temporary employees earn vacations, too. In fact, Mr. Bryant earned a vacation by working 45 weeks in two calendar years at Falstaff.

The point is that the benefits under the agreement, the very expensive benefits -- pension, health and welfare -- are held by temporary employees. This is not a depressed pool of labor.

Now, building on that theme, I should like to suggest the analysis suggested by the Ninth Circuit and urged by the government and respondent here will affect every collective bargaining agreement because their arguments go not so much to the classifications but they go to the appropriateness of this seniority system. Under the guide of determining whether

or not it is a seniority system, they are questioning the appropriateness.

Let me refer to at least some of the adjectives that I have heard them use just before this Court. It is harsh. It is unfair. It is unjustified. We can't see the business necessity. It is unnecessary. People don't like it. It sets up divisiveness between permanent and temporary employees in the union.

These are questions that go to the appropriateness of the choice that was made by management and labor.

QUESTION: But the government says more than that. The government says that -- it proposes two criteria by which to judge whether something is a seniority system or not.

MR. WILDER: The government proposes a cumulative length of service criterion which is a criterion and hence forth has been unknown in the real world of collective bargaining. They propose absolute cumulative length of service. Any provision that does not measure up --

QUESTION: Isn't it triggered by that -- any advantage that isn't triggered by cumulative services not a part of a seniority system?

MR. WILDER: That's correct. Now, there has been a suggestion that if this Court holds that this particular provision is a seniority system within the meaning of section 703(h), it will be open to yawn and gap. The title VII

protection will be inevitably wounded. I can't see how this will happen.

What the Ninth Circuit and what the government are concerned about is privileging classification devices, privileging just educational requirements and other obvious non-seniority criteria. These are the overriding factors that all parties, the employers, the unions and the AFL have indicated would not be covered by section 703(h) protection. The 45-week rule measure of time worked. It deals with service. And because it is itself based on service, there is no possibility whatever that there could be any confusion between an obvious seniority provision like this rule and the classification devices that our opponents have so artfully enmeshed in this case.

One quick word if I might on the need to construe 703(h) narrowly. This is a theme that has run through all the briefs. We suggest that analytically it is ill-founded. Section 703(h) was a definitional provision put in the act by Congress to determine what actions were discriminatory and unlawful and what were not. It was designed to confirm Congress' understanding stated many times in the legislative history that bona fide seniority systems were not intended to be condemned by the general prohibition of title VII. It is not an exemption to title VII's remedial purpose.

QUESTION: Mr. Wilder, could I ask you, what if the

only semblance of a seniority system in this case was a collective bargaining provision providing for how people enter the permanent employee class? That is all, there is nothing -- you don't accumulate any other kind of time by being a temporary employee, there are no advantages whatsoever from length of service except if you work 45 weeks in a year or whatever the week is, you are a permanent employee, that is the only provisions.

MR. WILDER: I will answer the question. I do suggest, Mr. Justice White, that that was how the Ninth Circuit got in trouble below. But that --

QUESTION: I know, but would that be a seniority system or not?

MR. WILDER: I think it would be because it is based on time worked. It is a criterion of advancement based on actual service as opposed to some other non-seniority criterion.

QUESTION: You are glad you don't have that case.

MR. WILDER: Yes, I am glad I don't have that case. I have a case in which that is one provision in a --

QUESTION: You say the Ninth Circuit oversimplified the case to be just that.

MR. WILDER: That's correct. As Professor Slichter said, there is a positive danger in --

QUESTION: Would you say it is wrong even on its

simplistic assumptions it was wrong?

MR. WILDER: I think that that would make it an easier case analytically and that is all the Court has to decide in this case.

Thank you.

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

(Whereupon, at 2:24 o'clock p.m., the case in the above-entitled matter was submitted)

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