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Title VII Seniority Remedies in a Time of Economic Downturn*

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The current economic downturn in the United States, characterized by a deceleration in economic growth and, more recently, a recession,[1] has occasioned or exposed problems of employment discrimination in seniority systems that prior court decisions do not resolve. Rules laid down by the federal courts or by the federal government's two administrative guardians against discrimination in employment—the Equal Employment Opportunity Commission (E.E.O.C.)[2] and the Office of Federal Contract Compliance (O.F.C.C.)[3]—are not the general solutions that they had earlier appeared to be. Instead, in an economic downturn the rules have served to exacerbate discriminatory practices or to delay remedies.

The riddle of how to comply with equal-opportunity requirements in imposing a layoff has prompted a flurry of lawsuits,[4] lead articles in the *New York Times*[5] and the *Wall Street Journal*,[6] and an increasingly visible divergence in policy between the E.E.O.C. and the O.F.C.C.[7] Indicative of the present confusion is a suit brought by an employer in New Jersey against the E.E.O.C. and the

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1. U.S. DEP'T OF COMMERCE, SURVEY OF CURRENT BUSINESS, Table 1.2-Gross National Product in Constant Dollars, at 12 (Nov. 1974).

2. Established under the authority of 42 U.S.C. § 2000e-4 (1970).

3. Established under the authority of Exec. Order No. 11,246 (1965), 3 C.F.R. 169 (1974).

4. Bales v. General Motors Corp., 9 F.E.P. Cas. 234 (N.D. Cal. 1975); Jersey Cent. Power & Light Co. v. Local 327, Electrical Workers, 8 F.E.P. Cas. 690 (D.N.J. 1974), *rev'd*, 508 F.2d 687 (3d Cir. 1975); Cox v. Allied Chem. Corp., 382 F. Supp. 309 (M.D. La. 1974); Loy v. City of Cleveland, 8 F.E.P. Cas. 614, *dismissed as moot*, 8 F.E.P. Cas. 617 (N.D. Ohio 1974); Watkins v. Local 2639, Steelworkers, 369 F. Supp. 1221 (E.D. La. 1974), *appeal docketed*, No. 74-2604, 5th Cir., June 17, 1974; Cates v. TWA, Inc., 8 E.P.D. ¶ 9755 (S.D.N.Y. 1974); United Affirmative Action Comm. v. Gleason, 10 F.E.P. Cas. 64 (D. Ore. 1974); Roman v. ESB, Inc., 368 F. Supp. 47 (D.S.C. 1973); Waters v. Wisconsin Steel Works, 8 F.E.P. Cas. 235 (N.D. Ill. 1973), *rev'd*, 502 F.2d 1309 (7th Cir. 1974), *petition for cert. filed*, 43 U.S.L.W. 3476 (U.S. Feb. 24, 1975).

5. N.Y. Times, Nov. 10, 1974, § 3, at 1, col. 1.

6. Wall Street J., Nov. 5, 1974, at 1, col. 6.

7. *See* textual discussion accompanying notes 173-75 *infra*.

O.F.C.C. to determine its legal obligations in imposing a layoff.[8] In addition, cases dealing with seniority and layoffs have been decided by the Seventh[9] and Third[10] Circuits and another is pending in the Fifth Circuit,[11] all of which will likely require ultimate resolution by the Supreme Court.

This article will attempt to clarify the application of rules against employment discrimination in a period of rising unemployment by first examining the nature of the seniority system and then explaining the theory and mechanism of the conventional remedy. Next a review of recent problems that have tested that remedy will be undertaken, with special attention devoted to the peculiar problems incident to layoffs. Lastly, the article will consider the means by which an employer can minimize the liability that may result from the discriminatory impact of seniority systems.

I. The Nature of the Seniority System

With unemployment at a thirty-four-year high,[12] it is relevant to recall that organized labor's commitment to the seniority principle arose from anxiety about job tenure.[13] In periods of fuller employment, workers came to regard the seniority principle as a useful device limiting management's power to control job movements, thereby enabling employees better to assess their prospects for retention and advancement.[14] In addition, union leaders saw that the seniority principle would deliver them from the turmoil implicit in

8. Jersey Cent. Power & Light Co. v. Local 327, Electrical Workers, 8 F.E.P. Cas. 690 (D.N.J. 1974), *vacated*, 508 F.2d 687 (3d Cir. 1975).

9. Waters v. Wisconsin Steel Works, 502 F.2d 1309 (7th Cir. 1974).

10. Jersey Cent. Power & Light Co. v. Local 327, Electrical Workers, 508 F.2d 687 (3d Cir. 1975).

11. Watkins v. Local 2639, Steelworkers, *appeal docketed* No. 74-2604 (5th Cir. June 17, 1974).

12. Wall Street J., Feh. 10, 1975, at 3, col. 1.

13. "Seniority first emerged in the railroad industry of the '80's, in an atmosphere of stratified opportunity and precarious tenure. The growth of vast and complex railroad organizations and of absentee ownership militated against recognition of merit. And several factors combined to make employment insecure. Not only were nepotism and job-selling rife, but also it was the customary practice for superintendents, in their frequent shifts from road to road, to transfer employees who ousted the incumbents of the lower positions." Comment, *Seniority Rights in Labor Relations*, 47 Yale L.J. 73,74 (1937) (footnotes omitted). Somewhat similar apprehension prompted federal and municipal legislation adopting seniority as the basis for retention when reductions in the civil service are made. *E.g.*, 5 U.S.C. § 3502 (1970). *See also* Loy v. City of Cleveland, 8 F.E.P. Cas. 614, 615 (N.D. Ohio 1974).

14. Cooper & Sobol, *Seniority and Testing Under Fair Employment Laws*, 82 Harv. L. Rev. 1598, 1605 (1969); Note, *Title VII, Seniority Discrimination, and the Incumbent Negro*, 80 Harv. L. Rev. 1260, 1263 (1967).

having to choose among individual workers' competing claims on the basis of merit.[15]

Management sees the seniority principle as counterproductive when applied to either job assignment or workforce retrenchment. In management's view the assignment of employees should be based upon merit and ability rather than seniority, except when the qualifications of the employees are relatively equal. Promotions or transfers based only upon seniority may stifle individual employee initiative and impair both the efficiency of operations and the competitive position of the company. Managerial discretion in such actions ensures the matching of employees with the tasks for which they are best suited and facilitates the hiring and retention of skilled workers, who often refuse to start at the bottom of the wage ladder.[16] In layoff situations management would prefer to minimize the retraining, transfers and "bumping" of junior employees implicit in a seniority system by dispensing first with those least qualified to perform the remaining work.[17]

Whatever values it may serve or disserve, however, the seniority principle is now embodied in virtually every collective bargaining agreement.[18] The magnitude of this principle is demonstrated by the latest published figures, an estimated 26,000,000 employees are covered by collective bargaining agreements.[19]

Analytically, it is useful to dichotomize the concept of seniority in order better to understand the functions that it performs. "Competitive status seniority"[20] is the type of seniority with which this article is more concerned, and applies in those situations in which the granting of a certain benefit to one aspiring employee necessitates the denial of it to all other contending employees. For example, although changes in technology or scope of operations might enable all aspirants to be promoted to foreman in the long run, in the short run awarding the job to one aspirant means denying it to all others. This type of seniority is to be distinguished from "fringe

15. Gould, *Black Workers Inside the House of Labor*, 407 ANNALS 78, 82-83 (1973).

16. U.S. DEP'T OF LABOR, BUREAU OF LABOR STATISTICS, MAJOR COLLECTIVE BARGAINING AGREEMENTS: SENIORITY IN PROMOTION AND TRANSFER PROVISIONS 1 (1970) [hereinafter cited as PROMOTION AND TRANSFER].

17. U.S. DEP'T OF LABOR, BUREAU OF LABOR STATISTICS, MAJOR COLLECTIVE BARGAINING AGREEMENTS: LAYOFF, RECALL AND WORKSHARING PROCEDURES 1 (1972) [hereinafter cited as LAYOFF, RECALL].

18. Aaron, *Reflections on the Legal Nature and Enforceability of Seniority Rights*, 75 HARV. L. REV. 1532, 1534 (1962).

19. U.S. DEP'T OF LABOR, BUREAU OF LABOR STATISTICS, DIRECTORY OF NATIONAL UNIONS AND EMPLOYEE ASSOCIATIONS, 1973, at 88 (1974).

20. S. SLICHTER, J. HEALY & E. LIVERNASH, THE IMPACT OF COLLECTIVE BARGAINING ON MANAGEMENT 106 (1960) [hereinafter cited as IMPACT].

benefit seniority," which governs the enjoyment of noncompetitive entitlements such as pension benefits and increments in vacation time.[21]

Included among the benefits, options, and safeguards affected by competitive status seniority, are not only promotion[22] and layoff,[23] but also transfer,[24] demotion,[25] rest days,[26] shift assignments,[27] prerogative in scheduling vacation,[28] order of layoff,[29] possibilities of lateral transfer to avoid layoff,[30] "bumping" possibilities in the face of layoff,[31] order of recall,[32] training opportunities,[33] working conditions,[34] length of layoff endured without reducing seniority,[35] length of layoff recall rights will withstand,[36] overtime opportunities,[37] parking privileges,[38] and, in one plant, a preferred place in the punch-out line.[39] The impact of seniority varies in each of the competive situations listed above. While management may be wholly content, indeed relieved, to assign parking spaces on the basis of seniority, countervailing considerations of skill and ability seem extremely significant in promotions.

A thorough, recent study of some 1,851 major[40] collective bargaining agreements found promotion-on-seniority-only clauses in only three percent of the agreements having seniority provisions.[41] A mere textual examination of collective bargaining agreements,

21. Note, *Title VII, supra* note 14, at 1263 n.23.

22. U.S. DEP'T OF LABOR, BUREAU OF LABOR STATISTICS, MAJOR COLLECTIVE BARGAINING AGREEMENTS: ADMINISTRATION OF SENIORITY 2 (1970) [hereinafter cited as ADMINISTRATION OF SENIORITY].

23. Fluker v. Locals 265 & 940, Papermakers, 6 E.P.D. ¶ 8807 (S.D. Ala. 1972).

24. ADMINISTRATION OF SENIORITY, *supra* note 22, at 2 (1970).

25. Hicks v. Crown Zellerbach Corp., 321 F. Supp. 1241, 1242 (E.D. La. 1971).

26. IMPACT, *supra* note 20, at 108.

27. *Id.* at 107-08.

28. United States v. N.L. Indus., Inc., 479 F.2d 354, 359 (8th Cir. 1973).

29. *Id.* BNA's newly revised *Basic Patterns in Union Contracts* reveals that, in a sample of 400 contracts in effect in 1973, seniority was a factor in selecting employees for layoff in 85% of the contracts. BNA, Daily Labor Report, Jan. 23, 1975, B-1.

30. LAYOFF, RECALL, *supra* note 17, at 37.

31. *Id.* at 39.

32. United States v. N.L. Indus., Inc., 479 F.2d 354, 359 (8th Cir. 1973).

33. Hicks v. Crown Zellerbach Corp., 321 F. Supp. 1241, 1242-43 (E.D. La. 1971).

34. IMPACT, *supra* note 20, at 107.

35. Buckner v. Goodyear Tire & Rubber Co., 339 F. Supp. 1108, 1120 (N.D. Ala. 1972), *aff'd. mem.*, 476 F.2d 1287 (5th Cir. 1973).

36. Watkins v. Local 2369, Steelworkers, 8 F.E.P. Cas. 729, 731 (E.D. La. 1974).

37. ADMINISTRATION OF SENIORITY, *supra* note 22, at 2.

38. IMPACT, *supra* note 20, at 109.

39. *Id.* at 109 n.1.

40. As here employed, major collective bargaining agreements are defined as those covering 1000 or more workers. PROMOTION AND TRANSFER, *supra* note 16, at *iii*.

41. *Id.* at 5.

however, may leave one overly impressed by the skill or ability requirements that appear in unweighted juxtaposition with the seniority element. Unwritten employee expectations often impose a potent interpretive gloss. For example, in a strongly unionized industry a junior employee cannot be promoted over a senior worker unless he is "head and shoulders" better than his competitor.[42]

A further, severely restrictive impediment to mobility is the accrual of seniority on a less than plant-wide basis. "Job," "gang," "unit," "progression line," or "department" seniority is frequently a basis for determining promotion.[43] Although these subdivided seniority systems may reflect the efficiencies of specialization, foster professionalism, and avoid the personnel costs involved in a plant-wide canvass, they foreclose the lateral entry of long-time employees from elsewhere in the plant by denying credit to their seniority, thus relegating veteran employees to entry-level pay and perquisites. This barrier to transfer is objectionable to both the employees in a department where specialized output is in declining demand and to the ambitious employee who finds those with greater departmental seniority to be uncommonly settled.

If these employees have been relegated to a less desirable department on the basis of their sex,[44] race,[45] or nationality,[46] then what ordinarily would be merely vexatious becomes invidious, and the employees feel compelled to seek a remedy. Furthermore, the option of collectively organizing on the basis of sex, race, or nationality to negotiate for lateral mobility is foreclosed when a union already serves as collective bargaining agent.[47] A certified union enjoys a monopoly within the bargaining unit since the employer is

42. Gould, *Black Workers Inside the House of Labor*, 407 ANNALS 78, 83 (1973). *See also* Taylor v. Armco Steel Corp., 373 F. Supp. 885 (S.D. Tex. 1973): "Under the contract seniority is only one of three criteria. Ability and physical fitness are the others. . . . However, the evidence from all parties was clear that the men and the Union regarded seniority as the controlling factor and required Armco to go to great lengths to show that a man was unable or unfit." 373 F. Supp. at 906, n.7.

43. Irvin v. Mohawk Ruhher Co., 308 F. Supp. 152, 161 (E.D. Ark. 1970); United States v. Local 189, Papermakers, 282 F. Supp. 39, 42 (E.D. La. 1968); Quarles v. Philip Morris, Inc., 279 F. Supp. 505, 512 (E.D. Va. 1968).

44. Weeks v. Southern Bell Tel. & Tel., 408 F.2d 228 (5th Cir. 1969); Laffey v. Northwest Airlines, Inc., 366 F. Supp. 763 (D.D.C. 1973); Rosenfeld v. Southern Pac. Co., 293 F. Supp. 1219 (C.D. Cal. 1968).

45. United States v. Navajo Freight Lines, Inc., 6 F.E.P. Cas. 274 (C.D. Cal. 1973); United States v. Pilot Freight Carriers, Inc., 6 F.E.P. Cas. 280 (M.D.N.C. 1973); United States v. Central Motor Lines, Inc., 338 F. Supp. 532 (W.D.N.C. 1971).

46. Guerra v. Manchester Terminal Corp., 498 F.2d 641 (5th Cir. 1974); United States v. Inspiration Consol. Copper Co., 6 F.E.P. Cas. 939 (D. Ariz. 1973); United States v. Navajo Freight Lines, Inc., 6 F.E.P. Cas. 274 (C.D. Cal. 1973).

47. Emporium Catwell Co. v. Western Addition Community Organization, 95 S. Ct. 977 (1975). *See generally* R. MARSHALL, THE NEGRO AND ORGANIZED LABOR 242, 244 (1965).

prohibited by statute from negotiating with anyone but the union representative concerning terms and conditions of employment.[48] Nevertheless, the same status of statutory monopoly that occasions this exclusivity also raises the possibility that the actions of the monopoly are amenable to legal regulation.

II. Theory and Mechanism of the Conventional Remedy

A. *Legislative and Decisional Attempts to Deal with Seniority and Discrimination*

Only nine months after the Supreme Court first articulated the basic rule of exclusive representation,[49] now a cornerstone of our national labor policy, the Court was constrained, to spell out the correlative obligation of the union not to discriminate in its representation of those within the bargaining unit. In *Steele v. Louisville & Nashville R.R.*,[50] an all-white union with a substantial number of blacks in its bargaining unit negotiated a collective bargaining agreement providing that: "not more than 50% of the firemen in each class of service in each seniority district of a carrier should be negroes . . . ."[51] The Court voided the agreement, holding that the union was required "to represent non-union or minority union members of the craft without hostile discrimination . . . ."[52]

The *Steele* doctrine of "fair representation" forbids unions from entering into agreements that invidiously discriminate against minorities. Although its prohibitory impact is clear, there is doubt, however, whether the doctrine implicitly contains an affirmative duty to rectify the competitive disadvantage that is brought to a seniority system by prior discrimination.[53] The most significant litigative effort to impose this implicit obligation was undertaken in *Whitfield v. Steelworkers Local 2708*[54] in the Fifth Circuit in the late fifties. From 1942 until a 1956 collective bargaining agreement, black employees at a Houston steel mill had been foreclosed from entering the more remunerative, skilled line of progression. The collective bargaining agreement offered only a partial remedy: blacks were no longer barred from entering the skilled line of pro-

48. 29 U.S.C. § 159 (1970); 45 U.S.C. § 152 (1970).

49. J.I. Case Co. v. NLRB, 321 U.S. 332 (1944).

50. 323 U.S. 192 (1944).

51. *Id.* at 195.

52. *Id.* at 204.

53. Archibald Cox, for example, has argued that the duty of fair representation does not impose upon unions "the affirmative obligation of making reasonable efforts to abolish racial discrimination." Cox, *The Duty of Fair Representation*, 2 Vill. L. Rev. 151, 156-57 (1957).

54. 263 F.2d 546 (5th Cir.), *cert. denied*, 360 U.S. 902 (1959).

gression, but those who entered did so like all other transferees across department lines—bereft of any recognition of their seniority and with a pay cut to entry-grade level.[55] Five black employees sued the union, as their exclusive bargaining agent, for failing in the performance of its concomitant duty of "fair representation." The trial court held against plaintiffs[56] and the appellate court affirmed, noting: "We might not agree with every provision, but they have a contract that *from now on* is free from any discrimination based on race. Angels could do no more."[57]

The *Whitfield* decision was considered to be the conventional wisdom by the forces who in the early sixties successfully pressed for the passage of the 1964 Civil Rights Act. Perhaps to insulate the workings of the seniority principle from attack in the name of anti-discrimination, Congress tempered the thrust of Title VII, the employment discrimination title, by adopting section 703(h) of the Dirksen-Mansfield substitute, which, in relevant part, exempted from the Title's prohibitions "different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority . . . system . . . ."[58]

Some fifty days before the Senate received the Dirksen-Mansfield substitute bill that it subsequently adopted, Senate floor leaders Clark and Case sought to allay apprehensions for seniority systems under Title VII in language to which the courts have repeatedly turned:

> Title VII would have no effect on established seniority rights. Its effect is prospective and not retrospective. Thus, for example, if a business has been discriminating in the past and as a result has an all white working force, when the Title comes into effect the employer's obligation would be simply to fill future vacancies on a nondiscriminatory basis. He would not be obliged—or indeed, permitted—to fire whites in order to hire for future vacancies, or, once Negroes are hired, to give them special seniority rights at the expense of the white worker hired earlier.[59]

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55. 263 F.2d at 549.

56. Whitfield v. Local 2708, Steelworkers, 156 F. Supp. 430 (S.D. Tex. 1957).

57. 263 F.2d at 551.

58. 42 U.S.C. § 2000e-2(h). Ruefully, the term "bona fide" is not defined in the statute. The concept does not include all seniority systems that are the product of strenuous but uncoerced bargaining. For example, such a departmental seniority system that favored a junior white over a senior black employee was found not to be bona fide in Quarles v. Philip Morris, Inc., 279 F. Supp. 505 (E.D. Va. 1968). Plant-wide seniority systems may be immune from similar scrutiny as to their effect. The view of the Third and Seventh Circuit Courts of Appeals is that a plant-wide seniority system qualifying for the statutory exemption of § 703(h) as bona fide can produce racially or sexually disproportionate layoffs which respondent employer or union does not have to justify in terms of business necessity. *Contrast* Jersey Cent. Power & Light Co. v. Local 327, IBEW, 9 F.E.P. Cas. 117 (3d Cir. 1975) *with* Griggs v. Duke Power Co., 401 U.S. 424 (1971).

59. 110 CONG. REC. 7213 (Apr. 8, 1964).

Hypothesizing about layoffs, the Senate floor leaders explained:

> 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. Title VII is directed at discrimination based on race, color, religion, sex or national origin. It is perfectly clear that when a worker is laid off or denied a chance for promotion because under established seniority rules he is low man on the totem pole he is not being discriminated against because of his race.[60]

Sections 703(h) and 703(j)[61] and the quoted analysis offered by Senate floor leaders Clark and Case are the determinants with which courts have dealt in weighing seniority systems under Title VII. Soon after the legislation's enactment the courts were asked to consider whether, under Title VII, it was sufficient for a company with a formerly discriminatory seniority system (i.e., one in which race, sex, or national origin determined departmental or progression-line assignment) simply to desist from actively discriminating "from now on," in the words of *Whitfield*.

The Fifth Circuit provided the landmark treatment of this question in *United States v. Papermakers Local 189*,[62] which dealt with the historically segregated progression lines of a southern Louisiana paper mill. The court held that the facially neutral re-

60. *Id.* at 7207.

61. The Dirksen-Mansfield substitute, which was the source of § 703(h), was also the source of the more problematically worded anti-preference provision, § 703(j), set out below and more fully discussed in the text accompanying note 194 *infra*.

> Nothing contained in this subchapter shall be interpreted to require any employer, employment agency, labor organization, or joint labor-management committee subject to this subchapter to grant preferential treatment to any individual or to any group because of the race, color, religion, sex, or national origin of such individual or group on account of an imbalance which may exist with respect to the total number or percentage of persons of any race, color, religion, sex, or national origin employed by any employer, referred or classified for employment by any employment agency or labor organization, admitted to membership or classified by any labor organization, or admitted to, or employed in, any apprenticeship or other training program, in comparison with the total number or percentage of persons of such race, color, religion, sex, or national origin in any community, State, section, or other area, or in the available work force in any community, State, section, or other area.

42 U.S.C. § 2000e-2(j) (1970). *See generally* Note, *Employment Discrimination: Statistics and Preferences Under Title VII*, 59 VA. L. REV. 463 (1973). Compare the position taken by the Solicitor General at page 7 of the amicus brief filed by the Justice Department and the E.E.O.C. in support of the granting of certiorari in Franks v. Bowman Transp. Co., No. 74-728, *cert. granted*, 43 U.S.L.W. 3515 (U.S. Mar. 24, 1975): "Section 703(j) of the Act . . . is not a bar to an award of seniority credit. That Section addresses only what constitutes an unlawful employment practice; it does not limit the court's remedial power to prescribe effective relief once a violation is established."

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

quirement of forfeiture of competitive-status seniority upon transfer between progression lines revived past wrongs and violated Title VII. The practical result had been that long-employed blacks could enter the more remunerative, and formerly all-white, line of progression only at the bottom, possibly at a reduced salary and certainly without any recognition of competitive-status seniority.[63]

The court's opinion also contains a lengthy and oft-cited weighing of the competing theories for bringing seniority systems into compliance with Title VII.[64] The court examined three theories:

> (1) the "freedom now" theory, essentially a complete purge of the "but-for" effects of previous bias, that would require that blacks displace white incumbents who hold jobs that, but for discrimination, the blacks' greater plant seniority would entitle them to hold;
> (2) the "rightful place" theory which construed Title VII to prohibit the *future* awarding of vacant jobs on the basis of a seniority system that "locks in" prior racial classification; and,
> (3) the "status quo" theory, reminiscent of *Whitfield*, under which the employer could satisfy the requirements of Title VII merely by ending existing discrimination.[65]

The court found the "rightful place" theory best to comport with the legislative history and affirmed the judgment of the district court.

The *Local 189* court directed that workers in the black progression line be allowed to carry over their competitive-status seniority upon transfer to the previously all-white progression line and use it in bidding on future vacancies in that line.[66] In dictum, the court stated further that it was simply requiring that time actually worked in black jobs be given equal status with time worked in

63. 416 F.2d at 990. An even more severe variant of departmental seniority obtained throughout the trucking industry. Minority employees were hired only as city drivers, usually a separate bargaining unit from that for the more remunerative over-the-road drivers. The facially neutral requirement of the collective bargaining agreement was that a city driver had first to resign and then to apply as a new employee. Against such a background the ostensibly neutral practice was found to perpetuate discrimination. As a remedial measure city drivers were allowed to transfer to over-the-road jobs with all seniority exceeding the minimum experience requirement. Bing v. Roadway Express, Inc., 485 F.2d 441 (5th Cir. 1973); Sabala v. Western Gillette, Inc., 371 F. Supp. 385 (S.D. Tex. 1974); United States v. Navajo Freight Lines, Inc., 6 F.E.P. Cas. 274 (C.D. Cal. 1973). *See generally*, J. NELSON, EQUAL OPPORTUNITY IN TRUCKING: AN INDUSTRY AT THE CROSSROADS (1971).

64. The court borrowed on the analysis of a seminal law review note entitled *Title VII, Seniority Discrimination and the Incumbent Negro*, 80 HARV. L. REV. 1260 (1967).

65. 416 F.2d at 988.

66. *Id.* at 992-94.

white jobs. It deprecated the creation of fictional seniority for blacks not previously hired, declaring this practice to be "preferential treatment on the basis of race" forbidden by section 703(j).[67]

The E:E.O.C. has made note of its disagreement with the *Local 189* denial of a remedy to blacks not previously hired. Commission Decision 71-1447 states that those who were refused employment or dissuaded from applying by a company's segregationist reputation have suffered complete discrimination, in contrast to the only partial discrimination suffered by those employed in the segregated departments. Therefore, the Commission declared, the remedial purposes of Title VII are poorly "effectuated by basing a difference in legal consequence upon the thoroughness of the discrimination."[68]

The type of order affirmed in *Local 189* causes little, if any, disruption of industry. It preserves the basic values of a seniority system while enabling those formerly excluded to move more quickly into higher level positions by virtue of carried-over seniority.[69] Although, as discussed in the next section of this article, *Local 189* is now controverted in a half dozen of its implications, it remains the beginning case for many Title VII string citations.

Though the transfer of seniority remedy decreed in *Local 189*, has been successively endorsed by every appellate court that has considered the question,[70] the administration of the remedy has been bedeviled by problems. It is to those problems that the article next turns.

B. The Search for the Dysfunction-free Remedial Order

The carry-over of antecedent seniority need not be granted to every employee; it is compelled only for victims of prior discrimination, dubbed by the courts to be members of the "affected class."

67. 416 F.2d at 995.

68. EEOC Decision No. 71-1447, CCH EEOC Decisions ¶ 6217, at 4375-76 & n.10 (1971).

69. *See* Cooper, *Introduction: Equal Employment Law Today*, 5 COLUM. HUM. RIGHTS L. REV. 263, 269 (1973). Labor unions have seized upon efforts to remedy departmental seniority's potential for perpetuating discrimination as an opportunity to press for plant-wide seniority for all. This is doubly attractive to union officials since it broadens the promotion and transfer options for all workers and avoids the disgruntlement felt by white male workers when plant-wide seniority comes into play only at the intervention of a member of the affected class. The courts have not held so sweeping a change to be required, *e.g.*, Bragg v. Robertshaw Controls Co., 355 F. Supp. 345 (E.D. Tenn. 1972), though it was successfully negotiated for in the consent decree entered in the steel industry litigation. *See* 8 BNA 1974 LAB. REL. REP., F.E.P. MANUAL § 431 at 125, 133 (1974).

70. *See* Bowe v. Colgate, Palmolive Co., 489 F.2d 896 (7th Cir. 1973); United States v. N.L. Indus. Inc., 479 F.2d 354 (8th Cir. 1973); Robinson v. Lorillard Corp., 444 F.2d 791 (4th Cir.), *petition for cert. dismissed*, 404 U.S. 1006 (1971); United States v. Bethlehem Steel Corp., 446 F.2d 652 (2nd Cir. 1971).

Although the gravamen of an attack on the seniority forfeiture provision may be its inhibition of minority transfer, the affected class clearly includes those who already have transferred, incurring the loss, as well as those inhibited from transfer.[71] On the other hand, the affected class is not necessarily that described by plaintiffs in the class action paragraph of their complaint,[72] nor does it extend to those hired after discrimination has ceased.[73]

Once those deserving antecedent seniority are identified, the inquiry ought to move to how they should be informed of the opportunities for its use. The most prevalent method is the posting of vacancies.[74] If the jobs in a more desirable department from which women or minorities were heretofore excluded are dictated by the technology of the industry to be vertically linked so that the experience prerequisite for a higher position can only be met by incumbency in the next lower position, then only entry-level vacancies are open to the affected class.[75] If, however, the vertical linkage is ascribable to custom and not to technological necessity, then prospects for advanced entry are open, and the remedy requires that the affected class members have notice of these vacancies as well.[76] The minimal requirement is that relevant notices of vacancy must be communicated to the affected class contemporaneously with notice to others.[77] Courts have, in their discretion, ordered orientation or familiarization tours, so as to provide members of the affected class with actual knowledge of the nature of the vacant position.[78]

71. *See* United States v. St. Louis-S.F. Ry., 464 F.2d 301, 311 (8th Cir. 1972), *cert. denied*, 409 U.S. 1107, 1116 (1973); Sabala v. Western Gillette, Inc., 371 F. Supp. 385, 390 (S.D. Tex. 1974); Irvin v. Mohawk Rubber Co., 308 F. Supp. 152, 161 (E.D. Ark. 1970).

72. *See, e.g.*, Dennis v. Norwich Pharmacal Co., 5 E.P.D. ¶ 8599 (D.S.C. 1973); McAdory v. Scientific Instruments, Inc., 355 F. Supp. 468 (D. Md. 1973); O'Brien v. Shimp, 356 F. Supp. 1259 (N.D. Ill. 1973).

73. *See, e.g.*, United States v. Florida East Coast Ry., 7 F.E.P. Cas. 540, 555-56 (M.D. Fla. 1974). Though this rule seems simple, it has been misapplied to foreclose class membership to blacks hired after the assignment of just one white to a previously all-black department. *E.g.*, Johnson v. Goodyear Tire & Rubber Co., 349 F. Supp. 3, 16 (S.D. Tex. 1972), *modified*, 491 F.2d 1364, 1374 (5th Cir. 1974). The entry of whites or males into a department does not cure the discrimination where minority or female workers are still assigned only to that department. In Jones v. Lee Way Motor Freight, Inc., 431 F.2d 245 (10th Cir. 1970), *cert. denied*, 401 U.S. 954 (1971), the job of city driver was still, under this analysis, a black job though 80% of the incumbents were white.

74. *See* PROMOTION AND TRANSFER, *supra* note 16, at 15-18.

75. *See* Pettway v. American Cast Iron Pipe Co., 494 F.2d 211 (5th Cir. 1974); Long v. Georgia Kraft Co., 450 F.2d 557 (5th Cir. 1971).

76. Bush v. Lone Star Steel Co., 373 F. Supp. 526 (E.D. Tex. 1974).

77. *See* Pettway v. American Cast Iron Pipe Co., 494 F.2d 211, 248 (5th Cir. 1974); Griggs v. Duke Power Co., 5 E.P.D. ¶ 8017, at 6745-46 (M.D.N.C. 1972); United States v. Central Motor Lines, Inc., 338 F. Supp. 532, 562 (W.D.N.C. 1971).

78. *E.g.*, Bowe v. Colgate, Palmolive Co., 489 F.2d 896, 900 (7th Cir. 1973). *But see* Barth v. Bayou Candy Co., 379 F. Supp. 1201, 1202 (E.D. La. 1974).

Since only a relatively small percentage of employers automatically consider all eligible employees in filling a vacancy,[79] in most instances bidding is called for as an indication of employee interest either before or after the vacancy occurs. Remedial decrees providing for contemporaneous rather than prospective bidding have resulted in far greater transfers by members of the affected class.[80] Other decrees have stated that the practice of letting a job for bids first in the department in which the vacancy occurs, then more broadly only if it remains unfilled, perpetuates past discrimination and thus violates Title VII.[81]

The part of the typical remedial order that addresses bidding between the minority or female transferee and those resident to the department has the potential for upsetting legitimate expectations and increasing inter-group polarity. Although departmental seniority is the coinage in which bids for promotion normally are made,[82] when a transferee belonging to the affected class is among the contenders, seniority for all bidders will be computed on the basis of plant rather than departmental seniority.[83] Thus, the potential exists for white employees, who during their employment have switched departments, so that their total plant seniority exceeds their available departmental seniority, to snatch promotions from the hands of other white employees with greater departmental seniority by prompting a junior, black transferee to enter the competition. Once the black transferee's bid is received, the basis for calculation is changed, and the employee with the most plant seniority gets the promotion.

As troublesome as this phenomenon is, the safeguarding of traditional expectations by intra-group primaries and inter-group runoffs appears in only one reported case.[84] On the other hand, the

79. *See* PROMOTION AND TRANSFER, *supra* note 16, at 15-16.

80. Interview with Robert Moore, Deputy Chief, Employment Section of the Justice Department's Civil Rights Division, BNA Daily Labor Report, May 29, 1974, at C-4. Transfers by members of the affected class have been sharply restricted, however, when the decree ordered that bids, multiple if desired, were to be filed with defendant employer within a time certain, and subsequent declension of an offered transfer by a member of the affected class worked a waiver of his other bids on file. *Id.* at C-3 & C-4.

81. *E.g.*, Pettway v. American Cast Iron Pipe Co., 494 F.2d 211, 224 (5th Cir. 1974); Head v. Timken Roller Bearing Co., 486 F.2d 870, 878-79 (6th Cir. 1973); Irvin v. Mohawk Rubber Co., 308 F. Supp. 152, 157 (E.D. Ark. 1970).

82. *See, e.g.*, United States v. N.L. Indus., Inc., 479 F.2d 354, 359 (8th Cir. 1973); United States v. Bethlehem Steel Corp. 446 F.2d 652, 655 (2d Cir. 1971); *In re* Bethlehem Steel Corp., 2 CCH EMPL. PRAC. GUIDE ¶ 5128, at 3253 (1973).

83. *See, e.g.*, United States v. N.L. Indus., Inc., 479 F.2d 354, 375 (8th Cir. 1973); United States v. Bethlehem Steel Corp., 446 F.2d 652, 666 (2d Cir. 1971); *In re* Bethlehem Steel Corp., 2 CCH EMPL. PRAC. GUIDE ¶ 5128, at 3253 (1973).

84. Watkins v. Scott Paper Co., 6 E.P.D. ¶ 8912, at 5869-70 (S.D. Ala. 1973).

Steelworkers Union was sufficiently alert to the possibility of this subterfuge to insist that all competitions under the steel industry decree[85] be settled on the basis of plant seniority, thus obviating the possibility of switching the rules of the game.

When the bidding starts, the calculation of an employee's antecedent seniority is of signal importance. Some district courts have mistakenly assumed that once female or minority hirees cease being relegated to a less desirable department, the accrual of antecedent seniority, like the prospect of membership in the class, ceases.[86] Their logic is that once barriers to the newly hired employees' assignment to the more desirable departments are removed, those who do not transfer into these departments—even at forfeiture of seniority or rate of pay—must attribute subsequent injury to their own dalliance. Such reasoning has not survived appeal.[87] As an appellate court recently pointed out, it is the duty of the district court to dissolve the barrier to transfers completely, not merely to reduce the penalty.[88] Additionally, save for one aberrational appellate exception,[89] the antecedent seniority is available *in toto*, not fractionally.

Many of the seniority situations that have come before the courts have involved not a transfer into a parallel progression line running through the same department, as in *Local 189*, but transfers between spatially remote departments that utilized different skills. In cases like these, courts have allowed a probationary period, reflecting the employer's legitimate interests in safe and efficient operation, to be imposed upon transferees with lengthy service but little related experience.[90] During this probationary period antecedent seniority cannot be used to bid on higher positions in the new department.[91] Antecedent seniority, however, may be used under court decrees to resist layoff even during these probationary periods.[92] This availability of antecedent seniority is a partial response

85. Steel Industry Consent Decree in United States v. Allegheny-Ludlum Indus., Inc., Civil No. 74-P-339 (N.D. Ala., Apr. 15, 1974), 8 BNA 1974 LAB. REL. REP., F.E.P. MANUAL § 431 at 125, 133.

86. *See, e.g.* Franks v. Bowman Transp. Co., 5 F.E.P. Cas. 421, 424, 430 (N.D. Ga. 1972), *rev'd*, 495 F.2d 398 (5th Cir.), *cert. granted*, 43 U.S.L.W. 3515 (U.S. Mar. 24, 1975).

87. *E.g.*, Franks v. Bowman Transp. Co., 495 F.2d 398, 416 (5th Cir.), *cert. granted*, 43 U.S.L.W. 3515 (U.S. Mar. 24, 1975.

88. *Id.* at 416.

89. United States v. St. Louis-S.F. Ry., 464 F.2d 301, 311 (8th Cir. 1972), *cert. denied*, 409 U.S. 1107, 1116 (1973).

90. Newman v. Avco Corp., 8 F.E.P. Cas. 714, 717 (M.D. Tenn. 1974); United States v. H.K. Porter Co., 7 F.E.P. Cas. 1021, 1023 (N.D. Ala. 1974); United States v. Florida E. Coast Ry., 7 F.E.P. Cas. 540, 557 (M.D. Fla. 1974).

91. United States v. H.K. Porter Co., 7 F.E.P. Cas. 1021, 1024 (N.D. Ala. 1974); United States v. United States Steel Corp., 371 F. Supp. 1045, 1056 n.25 (N.D. Ala. 1973).

92. *E.g.*, Bragg v. Robertshaw Controls Co., 355 F. Supp. 345 (E.D. Tenn. 1973).

to genuine apprehensions about the greater vulnerability of tenure that restrain many longer-term employees from transferring. Earlier decrees often proved ineffectual by failing to allay apprehension caused by two other possibilities: the inability to pass the probationary test, and the desire to return to the more familiar ways of the former department. Assurance of retreat rights in these situations makes the option of transfer appear less treacherous. The more thorough decrees are now providing for these two latter contingencies.[93]

The disincentive of a cut in pay upon transfer has been obviated by the use of "red circling," a wage rate retention device long familiar in labor arbitration.[94] This device continues the transferee's wage rate from his prior department until he attains a higher rate in the department into which he transferred.[95] If, however, the jobs in the departments from which women or minorities have heretofore been excluded are not vertically linked, then advanced positions admit of lateral entry, in which case wage-rate retention may not be necessary.[96]

A recurrent problem in the drafting of transfer decrees involves the number of times a previously excluded employee is entitled to transfer into another department with antecedent seniority. Although the steel industry consent decree allows two exercises of this transfer,[97] decisions since *Local 189* range from only a single good

93. United States v. Allegheny-Ludlum Indus., Inc., 8 LAB. REL. REP. 431:125, 135 (N.D. Ala. 1974) (consent decree); United States v. H.K. Porter Co., 7 F.E.P. Cas. 1021, 1023 (N.D. Ala. 1974); EEOC v. Frito-Lay, Inc., Civil No. 18281 (N.D. Ga., entered Apr. 15, 1974).

94. *See* Big Jack Mfg. Co., 27 Lab. Arb. 858 (1957); Dayton Steel Foundry Co., 29 Lah. Arb. 260 (1957); Erie Forge & Steel Corp., 22 Lab. Arb. 551 (1954).

95. Pettway v. American Cast Iron Pipe Co., 494 F.2d 211, 248 n.99 (5th Cir. 1974); *see* United States v. Bethlehem Steel Corp., 446 F.2d 652, 661 (2d Cir. 1971).

Occasionally one encounters a transferee who subsequently fails to show the desire or ability to advance to that remunerative a rate in his new department. In the more tightly drafted decrees employer's counsel imposes safeguards against the remedy's becoming an open ended benefaction. *Cf.* the following provisions from Hicks v. Crown Zellerbach Corp., 321 F. Supp. 1241, 1243 (E.D. La. 1971).

Such Red Circle Rate shall continue until such employee:

(a) Progresses to a permanent job in the new line with a RJR [regular job rate] higher than his Red Circle Rate, or

(b) Refuses promotion, temporary or permanent, to a higher job, or

(c) Is disqualified for promotion, temporary or permanent, to a higher job into wbich he would otherwise move, or

(d) Chooses a branch of the progression line which will not lead to a job with a RJR higher than his Red Circle Rate . . . .

96. *See* Pettway v. American Cast Iron Pipe Co., 494 F.2d 211, 248 n.100 (5th Cir. 1974); Long v. Georgia Kraft Co., 450 F.2d 557 (5th Cir. 1971); United States v. H.K. Porter Co., 7 F.E.P. Cas. 1021, 1024 (N.D. Ala. 1974).

97. United States v. Allegheny-Ludlum Indus., Inc., 8 LAB. REL. REP. 431:125, 137 (N.D. Ala. 1974).

faith opportunity[98] to multiple tries at a single successful exercise.[99] If, after the allowed number of transfers, prospects appear brighter in yet another department, the employee who no longer suffers from discriminatory placement incurs upon further transfer whatever disincentives the collective bargaining agreement provides.[100]

In those instances when the courts have found that segregated assignment or recall rosters were maintained by employers, they have ordered them merged.[101] This must be done by dovetailing, that is, by redrawing the rosters, without segregation, on the basis of seniority. Endtailing or topping and bottoming of rosters have been held unsatisfactory to meet the merger requirement.[102]

Although there is a tradition in labor relations of deferring to private ordering of competing demands,[103] discriminatory seniority systems have not been saved by virtue of being embodied in a collective bargaining agreement.[104] In addition, many of the boundaries traditionally hallowed by organized labor have fallen before court decrees that have allowed victims of discrimination to transfer across collective bargaining units,[105] crafts,[106] union locals,[107] and even internationals.[108]

In decreeing that members of the affected class must be allowed to transfer, the courts have attacked three distinct practices ostensibly designed to foster efficiency or enhance morale through the wider sharing of promotional opportunities. First, the courts' ap-

98. *E.g.*, United States v. Hayes Int'l Corp., 456 F.2d 112, 119 (5th Cir. 1972).

99. *E.g.*, United States v. Florida E. Coast Ry., 7 F.E.P. Cas. 540, 557 (M.D. Fla. 1974).

100. *See, e.g.*, United States v. N.L. Indus., Inc., 479 F.2d 354, 375 (8th Cir. 1973).

101. Rock v. Norfolk & W. Ry., 473 F.2d 1344, 1349-50 (4th Cir. 1973); Guthrie v. Colonial Bakery Co., 6 F.E.P. Cas. 662, 666 (N.D. Ga. 1973); *cf.* EEOC Decision No. 71-1938, CCH 1973 EEOC Decisions ¶ 6273 (Apr. 29, 1971).

102. *E.g.*, Rock v. Norfolk & W. Ry., 473 F.2d 1344, 1348-49 (4th Cir. 1973). The requirement is that the rosters be combined in order of descending seniority and that the black roster not simply be stapled to the end of the white roster.

103. Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593 (1960); Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574 (1960); Steelworkers v. American Mfg. Co., 363 U.S. 564 (1960).

104. Vogler v. McCarty, Inc., 451 F.2d 1236 (5th Cir. 1971); United States v. Jacksonville Terminal Co., 451 F.2d 418 (5th Cir. 1971), *cert. denied*, 406 U.S. 906 (1972); Local 53, Heat & Frost Insulators v. Vogler, 407 F.2d 1047 (5th Cir. 1969).

105. Bing v. Roadway Express, Inc., 444 F.2d 687, 691 (5th Cir. 1971); Jones v. Lee Way Motor Freigbt, Inc., 431 F.2d 245, 249 (10th Cir. 1970); United States v. Central Motor Lines, Inc., 338 F. Supp. 532, 558 (W.D.N.C. 1971).

106. United States v. Chesapeake & O. Ry., 471 F.2d 582, 588-89 (4th Cir. 1972), *cert. denied*, 411 U.S. 939 (1973); United States v. Jacksonville Terminal Co., 451 F.2d 418, 458 (5th Cir. 1971), *cert. denied*, 406 U.S. 906 (1972); United States v. Florida E. Coast Ry., 7 F.E.P. Cas. 540, 557 (M.D. Fla. 1974).

107. *E.g.*, Carey v. Greyhound Bus Co., Inc., 500 F.2d 1372 (5th Cir. 1974).

108. *Id.*

proach under Title VII to the requirement of residency within a position for further promotion has markedly changed in recent years. A typical district court remedy from 1972 provided that "no member of the class involved herein to which the remedy applies shall be subjected to any unduly burdensome residency requirement in a new department prior to moving up through the various lines of job progression which was not previously required of similarly situated employees, white or black, as a condition to the exercise of this remedial seniority in any new department."[109] More recently the courts' concern has been directed not toward guarding against the increase of invidious residency requirements, but toward recognizing that residency requirements can perpetuate past discrimination by imposing a greater delay upon the progress of the affected class than can be justified by demands of business necessity.[110]

Secondly, judicial suspicion has focused on the limitation of bids on file in the plant's personnel office.[111] What formerly may have been considered an unobjectionable cost/benefit balancing when only white males had bids on file recently has been held to violate Title VII if unsupported by business necessity[112]—a less cost-sensitive standard[113] than the former balancing. This system operated as a restriction on the possible promotion of members of the affected class.

Thirdly, a limitation on the number of promotions an employee could enjoy during the life of the collective bargaining agreement was overturned by a federal district court as a barrier to the catch-up efforts of the affected class that was unsupported by business necessity.[114]

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109. Johnson v. Goodyear Tire & Rubber Co., 349 F. Supp. 3, 17 (S.D. Tex. 1972), *modified*, 491 F.2d 1364 (5th Cir. 1974).

110. Afro American Patrolmen's League v. Duck, 503 F.2d 294 (6th Cir. 1974); Pettway v. American Cast Iron Pipe Co., 494 F.2d 211, 238 n.66 (5th Cir. 1974); Harper v. Kloster, 486 F.2d 1134, 1137 (4th Cir. 1973); Bridgeport Guardians, Inc. v. Bridgeport Civil Serv. Comm'n, 482 F.2d 1333, 1341 (2d Cir. 1973); Russell v. American Tobacco Co., 374 F. Supp. 286 (M.D.N.C. 1973); EEOC Decision No. 70-522, Feb. 19, 1970, CCH EEOC Decision ¶ 6139 (1973).

111. Newman v. Avco Corp., 8 F.E.P. Cas. 714, 716 (M.D. Tenn. 1974).

112. *Id.* (*semble*).

113. United States v. N.L. Indus., Inc., 479 F.2d 354, 366 (8th Cir. 1973); Robinson v. Lorillard Corp., 444 F.2d 791, 799 n.8 (4th Cir. 1971); Diaz v. Pan Am World Airways, Inc., 442 F.2d 385, 388 (5th Cir. 1971). Although the cost of compliance has clearly been rejected as a defense in the foregoing cases, the dimensions of a backpay remedy for uncritical reliance on the "last hired/first fired" principle in imposing layoffs may now be so sizeable as to give courts pause in the future application of this rule. Ford Motor Company, for example, has temporarily laid off 55% of its hourly paid work force. N.Y. Times, Jan. 11, 1975, at 1, col. 7.

114. United States v. Central Motor Lines, Inc., 338 F. Supp. 532, 558 (W.D.N.C. 1971).

III. Recently Emergent Problems Testing the Doctrines of *United States v. Local 189*

As mentioned earlier, the appellate decision in *Local 189* is now controverted in six of its doctrines.

First, the *Local 189* court held that the perpetuation of past discrimination through the application of facially neutral principles is an evil that departmental seniority systems possibly may impose on minorities but that plant-wide systems do not impose. The question now being raised is whether the appellate court, speaking in a time of economic expansion—when the transfer but not the layoff problem would have surfaced—spoke exhaustively or merely illustratively of the perpetuation of past discrimination. Differences concerning that premise are at the crux of the dispute over whether a plant-wide layoff can violate Title VII and will be treated more fully later in this article.

A second *Local 189* doctrine, that relief should be determined by a "but for" test and granted only to those identifiably wronged, has faded perceptibly in subsequent court decisions. The longevity bonus point cases[115] illustrate this trend. In the Mobile, Baltimore, Cleveland, and Toledo police departments, longevity in grade earned extra points toward promotion. Recently hired black officers challenged the practice as perpetuating past discrimination because white officers averaged more points than black officers. None of the courts thought it necessary to find that any of the black officers ought to have been hired earlier than he was. Rather, the courts proceeded from the belated entry of blacks into the department and faulted the longevity bonus point system as an impediment to others of that race.

The third *Local 189* doctrine, that relief does not countenance the displacement of incumbents, but operates instead in terms of future vacancies, has encountered low visibility modification and high visibility challenge. The low visibility modification has come in cases in which rights of recall were denied, increasing the number of slots considered vacant.[116] In one case the preemptive recall rights of furloughed workers laid off for more than sixty days were pruned by judicial fiat.[117] The high visibility challenge came in two cases,

115. Shield Club v. City of Cleveland, 370 F. Supp. 251 (N.D. Ohio 1974); Afro American Patrolmen's League v. Duck, 366 F. Supp. 1095 (N.D. Ohio 1973), *modified*, 503 F.2d 294 (6th Cir. 1974); Harper v. Mayor & City Council, 359 F. Supp. 1187 (D. Md.), *aff'd sub nom.*, Harper v. Kloster, 486 F. 2d 1134 (4th Cir. 1973); Allen v. City of Mobile, 331 F. Supp. 1134 (S.D. Ala. 1971), *aff'd*, 466 F.2d 122 (5th Cir. 1972), *cert. denied*, 412 U.S. 909 (1973).

116. United States v. Florida E. Coast Ry., 7 F.E.P. Cas. 540, 544 (M.D. Fla. 1974); United States v. United States Steel Corp., 371 F. Supp. 1045, 1056-57 (N.D. Ala. 1973).

117. United States v. Florida E. Coast Ry. Co., 7 F.E.P. Cas. 540 (M.D. Fla. 1974).

Guthrie v. Colonial Bakery[118] and *Patterson v. American Tobacco Co.*[119]

In *Guthrie* the restriction of female bakery workers to a cake department meant that when the department was subsequently closed, the female employees were laid off, while more junior, male employees remained at work in the bread department. The court ordered that women with greater seniority be offered the positions held by the junior men. Since the deprivation in *Guthrie* was drastically more severe than that in *Local 189*, the court actions do not really seem irreconcilable, despite *Guthrie*'s displacement of incumbents.

In *Patterson*, a Virginia tobacco facility that discriminated against blacks and females was required, with limited exceptions, to put every non-supervisory job up for bids on the basis of seniority and willingness to learn the job. Displaced incumbents bumped to lower job classifications were to have their wages red-circled so that they would suffer no loss in salary. This order has been criticized because it seems akin to the ouster of whites to make room for blacks that the floor leaders of Title VII specifically disavowed in Senate debate.[120] Moreover, the rejoinder that the whites ousted from more desirable nonsupervisory positions were not discharged is supported only by a one-dimensional view of what a worker derives from his job; although the wages remained, the displaced worker was deprived of the significant psychological benefits derived from his status and craft. The significance of that dimension cannot be disregarded lightly.[121]

The subsidy paid the "bumped-but-retained" workers cannot be considered a remedy for past discrimination that they might have suffered. It should be viewed as one of the rare equitable awards under Title VII other than backpay rather than an award of punitive damages, for which Title VII has been construed not to provide.[122] Beyond the narrow statutory question, there remains in the minds of many a further question about the propriety of increasing a company's on-going costs in a highly competitive industry.

The *laissez-faire* thrust of the fourth doctrine of the *Local 189*

118. 6 F.E.P. Cas. 662 (N.D. Ga. 1973).

119. 8 F.E.P. Cas. 778 (E.D. Va. 1974).

120. *See* note 59, *supra*.

121. G. FRIEDMANN, THE ANATOMY OF WORK 122-28 (1961). *See generally* F. HERZBERG, B. MAUSNER & B. BLOCK, THE MOTIVATION TO WORK (2d ed. 1959); A. LEVENSTEIN, WHY PEOPLE WORK (1962).

122. Loo v. Gerarge, 374 F. Supp. 1338 (D. Hawaii 1974); Howard v. Lockheed-Georgia Co., 372 F. Supp. 854 (N.D. Ga. 1974); Van Hoomissen v. Xerox Corp., 368 F. Supp. 829 (N.D. Cal. 1973).

decision, that an acceptable promotion of personnel can be had with a minimum of adjustment to the existing promotional mechanism, by folding in the affected class on the basis of their plant seniority, is encountering doubters. In nine recent district court actions promotion figures have been fixed, by consent of decree in four cases,[123] and by rendition of judgment in the other five.[124] The courts of appeal are divided over the propriety of promotion quotas. In the Second Circuit it is an abuse of discretion, but not so in the Sixth Circuit.[125]

The fifth *Local 189* doctrine, that the conferral of "fictional seniority" is inconsistent with Title VII, subsumes two and possibly three distinct reservations. The disapproval reflects an apprehension that those hired may not be those earlier discriminated against, a lack of guidance on how much remedial seniority to confer, and perhaps an unarticulated, ex post facto reservation. It has been pointed out that a black discriminated against in connection with hiring *after* Title VII became effective could enjoy, consistent with *Local 189*, fictional seniority.[126] Indeed, at least five courts have awarded seniority that was fictional in that it did not reflect hours worked.[127] This "date of application" seniority was given to plaintiffs who had suffered dateable, and in most cases, explicitly post-Act discrimination. These five cases were characterized by identifiable parties, precisely calculable injuries, and no compelling ex post facto anxieties.

123. Bolden v. Pennsylvania State Police, Civil No. 73-2604 (E.D. Pa., June 24, 1974); Corley v. Jackson (Miss.) Police Dep't, Civil No. 73 J-4(C) (S.D. Miss., entered March 25, 1974); United States v. Allegheny-Ludlum Indus., Inc., 8 LAB. REL. REP., 431:125, 137 (N.D. Ala. 1974); EEOC v. Frito-Lay, Inc., Civil No. 18281 (N.D. Ga., entered Apr. 15, 1974).

124. Kirkland v. New York State Dep't of Corrections, 8 E.P.D. ¶ 9675 (S.D.N.Y. 1974); Pennsylvania v. Rizzo, 8 E.P.D. ¶ 9681 (1974) (preliminary injunction), 9 E.P.D. ¶ 9891 (E.D. Pa. 1975) (final judgment); Schaefer v. Tannian, 8 E.P.D. ¶ 9605 (E.D. Mich. 1974); Bridgeport Guardians, Inc., v. Bridgeport Civil Serv. Comm'n, 354 F. Supp. 778 (D. Conn.), *rev'd*, 482 F.2d 1333 (2d Cir. 1973); Stamps v. Detroit Edison Co., 365 F. Supp. 87 (E.D. Mich. 1973).

125. *Compare* Bridgeport Guardians, Inc. v. Bridgeport Civil Serv. Comm'n, 482 F.2d 1333, 1341 (2d Cir. 1973) *with* E.E.O.C. v. Detroit Edison Co., 10 F.E.P. Cas. 239 (6th Cir. 1975).

126. Gould, *Black Workers Inside the House of Labor*, 407 ANNALS 78, 84-85 (1973).

127. Bowe v. Colgate Palmolive Corp., 489 F.2d 896 (7th Cir. 1973); Jurinko v. Wiegand Co., 477 F.2d 1038 (3d Cir.), *vacated and remanded on other grounds*, 414 U.S. 970 (1973); United States v. Georgia Power Co., 7 E.P.D. ¶ 9167 (N.D. Ga. 1974); United States v. Lee Way Motor Freight, Inc., 7 E.P.D. ¶ 9066 (W.D. Okla. 1973); Hester v. Southern Ry., 349 F. Supp. 821 (N.D. Ga. 1972), *vacated and remanded on other grounds*, 497 F.2d 1374 (5th Cir. 1974). In United States v. United States Steel Corp., the court states by way of dictum: "Use of plant age or even company age would not necessarily be an appropriate remedy if the company bad been guilty in the past of racial discrimination in hiring." 371 F. Supp. 1045, 1056 n.26 (N.D. Ala. 1973).

The Fifth Circuit has taken the position that Title VII does not permit the award of retroactive seniority to those discriminatorily denied employment under the Act, indicating that this conclusion is compelled by their earlier decision in *Local 189*.[128] This is clearly a nonsequitur.[129] Although the Act may be only prospective[130] and pre-Act seniority rights thereby unaffected,[131] not a word of the 1964 legislative history precludes the fashioning of relief for an injury that was inflicted after the effective date of the Act. The legislative history of the 1972 amendments is evidently hospitable to date-of-application seniority.[132]

In contrast, the Sixth Circuit has concluded that the award of date-of-application seniority, although problematic, is not prohibited, as the Fifth Circuit assumes.[133] The Sixth Circuit has recognized that although the burden of retroactive pay falls upon the party that violated the law, the burden of retroactive seniority for determination of layoff would fall directly upon workers who have had no hand in the wrong-doing. Nevertheless, appropriate occasions for the award of retroactive seniority can be found.[134] When appropriate relief is governed by fringe-benefit seniority rather than competitive-status seniority, i.e. vacation or pension rights, the Sixth Circuit flatly holds that the date of application should apply.

128. Franks v. Bowman Transp. Co., 495 F.2d 398, 417-18 (5th Cir. 1974). Although the company's petition for certiorari has been denied, 95 S. Ct. 625, the Supreme Court has granted certiorari on the cross-application by the NAACP Legal Defense Fund on behalf of plaintiffs' denied date-of-application seniority claim. 43 U.S.L.W. 3515 (U.S. Mar. 24, 1975).

129. Judge Wisdom's dicta were addressed to the propriety of giving a remedy to persons whose rejection before enactment of Title VII was not then unlawful. He also questioned whether remedies should be granted to new employees who were not themselves the victims of past discrimination. He did not address the status of those discriminated against under the Act.

130. *See* text accompanying note 59, *supra*.

131. *Id.*

132. "In dealing with the present § 706(g) the courts have stressed that the scope of relief under that section of the Act is intended to make the victims of unlawful discrimination whole, and that the attainment of this objective rests not only upon the elimination of the particular unlawful employment practice complained of, but *also requires that persons aggrieved by the consequences and effects of the unlawful employment practice be, so far as possible, restored to a position where they would have been were it not for the unlawful discrimination.*" 118 Cong. Rec. 7168 (1972) (Conference Report) (emphasis added).

133. Meadows v. Ford Motor Co., 9 E.P.D. ¶ 9907 (6th Cir. 1975).

134. A long-standing and clearly analogous measure in our national labor policy is the reinstatement with retroactive seniority of employees or applicants for employment who have been discriminated against because of union membership. *See, e.g.*, NLRB v. Cone Bros. Contracting Co., 317 F.2d 3, 7 (5th Cir. 1963); Atlantic Maintenance Co. v. NLRB, 305 F.2d 604 (3d Cir. 1962), *enforcing* 134 N.L.R.B. 1328 (1961) (requiring reinstatement of rejected applicant with full seniority status); NLRB v. Lamar Creamery Co., 246 F.2d 3, 10 (5th Cir. 1957), *enforcing* 115 N.L.R.B. 1113 (1956) (rejected applicant ordered reinstated "without prejudice to seniority").

The sixth *Local 189* doctrine now controverted is the condemnation of segregated seniority rosters. Recently, segregated seniority rosters have appeared in both consent decrees and court decisions.[135] Although race or sex is proscribed as a basis upon which an employment benefit may be denied, recognition of race or sex has been required by the courts when necessary to undo the effects of past discrimination.[136] The decrees in the steel industry litigation[137] provide for separate seniority rosters in the less-skilled production and maintenance units for white males, black males, women, and, where appropriate, Spanish-surnamed Americans. Promotions to the more remunerative trade and craft openings are to be filled from the separately maintained rosters with fifty percent of the openings earmarked for women and minorities, almost certainly according a fictional seniority to members of these groups.

Thus, amid signs of evident economic advance for minorities, the court in *Local 189*, envisioned a complete solution for employment inequities if, in the long run, the minority groups formerly excluded could only be folded in to the seniority system. The heady progress seen in 1969, however, has been stalled. The median income of black families in constant dollars grew by thirty-two percent from the effective date of Title VII in 1965 to the decision in *Local 189* in 1969,[138] but it showed no further growth from 1969 to 1973.[139] In fact, the overall income differential between black and white families has widened since 1969.[140] The unemployment rate for "Negro and other races," which had dropped from 8.1 percent in 1965 to 6.4 percent in 1969, had risen to 8.9 percent by 1973.[141] By February 1975, that figure soared to 13.4 percent.[142] The clamorous demands under Title VII presently being brought, therefore, reflect not only the rising expectations born of realized improvement but

135. United States v. Allegheny-Ludlum Indus., Inc., 8 LAB. REL. REP. 431:125, 139 (N.D. Ala. 1974); Jersey Cent. Power & Light Co. v. Local 327, Electrical Workers, 8 F.E.P. Cas. 959, 960 (D.N.J. 1974); Watkins v. Local 2369, Steelworkers, 8 F.E.P. Cas. 729, 731 (E.D. La. 1974); Chance v. Board of Examiners, 8 F.E.P. Cas. 342 (S.D.N.Y. 1974).

136. NAACP v. Allen, 493 F.2d 614 (5th Cir. 1974); Morrow v. Crisler, 491 F.2d 1053 (5th Cir. 1974) (*en banc*), *cert. denied*, 95 S. Ct. 173 (1974); Carter v. Gallagher, 452 F.2d 315 (8th Cir. 1971) (*en banc*), *cert. denied*, 406 U.S. 950 (1972).

137. United States v. Allegheny-Ludlum Indus., Inc., 8 LAB. REL. REP. 431:125, 138 (N.D. Ala. 1974).

138. U.S. DEP'T OF COMMERCE, BUREAU OF THE CENSUS, THE SOCIAL AND ECONOMIC STATUS OF THE BLACK POPULATION IN THE UNITED STATES 1973, 15 (1974) [hereinafter cited as BLACK POPULATION].

139. *Id.*

140. *Id.*

141. *Id.* at 45, table 28.

142. Wall Street J., Feb. 10, 1975, at 3, col. 2.

also the knowledge that past gains are being lost. Reflecting on the disproportionate job loss that economic downturn holds for minorities, a principal speaker at the 1974 annual convention of the National Business League, the minority counterpart of the National Chamber of Commerce, called for a governmentally established quota system that would allow only a certain percentage of minority employees to be laid off as a sagging economy forces businesses to resort to increased cutbacks in their work forces.[143]

Should certain portions of the workforce, identified by sex, race, or national origin be specially protected absent a finding of prior discrimination by the employer?[144] What are the legal limits for remedying sex or race discrimination in the imposition of layoffs? The following section addresses these questions.

IV. The Peculiar Problems Incident to Layoffs

When layoffs become unavoidable, as in response to economic downturn, employers generally prefer to dispense with those workers least qualified to perform the remaining work and to minimize retraining, transfers, and bumping of junior employees.[145] This is a prerogative a private employer may exercise freely unless it has been qualified or limited by a collective bargaining agreement. The E.E.O.C., for example, has found no cause to give credence to allegations of racial discrimination when the employer's records showed that the more senior employees laid off had experienced problems directly affecting their performance.[146] There is kindred judicial authority holding the layoff of females with greater seniority than retained males not illegal when those retained could perform a wider variety of tasks than those laid off.[147]

Most of the earlier cases decided under Title VII involving layoff concerned workers on seniority rosters segregated by sex[148] or

143. Atlanta Constitution, Oct. 25, 1974, at 16-D, cols. 7 & 8. Compare the 3 decrees discussed in the text accompanying notes 183-88, *infra*.

144. *See* DeFunis v. Odegaard, 416 U.S. 312, 320 (1974) (Douglas, J., dissenting).

145. Layoff, Recall, *supra* note 17, at 1.

146. EEOC Decision No. 75-037, 2 CCH Empl. Prac. Guide ¶ 6437 (Oct. 2, 1974).

147. Trivett v. Tri-State Container Corp., 368 F. Supp. 131 (E.D. Tenn. 1973). A decision to let older workers go, however, even a cleverly henign decision as was proposed for some 860 of New York City's municipal workers, may run afoul of the federal Act Against Age Discrimination in Employment, which protects workers over 40 and under 65. 29 U.S.C. §§ 621 *et seq.*; N.Y. Times, Dec. 19, 1974, at 1, col. 5. Under the New York arrangement, worked out with the City's Municipal Employees Union, 860 workers over 63 would have been prompted to retire immediately rather than at 65. Their pensions, Social Security benefits and free health insurance were calculated to keep them at roughly the same income level as they then enjoyed. N.Y. Times, Dec. 13, 1974, at 1, col. 3.

148. Guthrie v. Colonial Bakery Co., 6 F.E.P. Cas. 662 (N.D. Ga. 1973); Ostapowicz v.

race[149] who had suffered a disproportionate share of unemployment. More recently, however, a group of cases has arisen in which layoff was determined on the basis of a single roster reflecting departmental or other less than plant-wide seniority.[150] In these cases the employee's initial assignment had been limited, if not fixed, by the worker's race or sex. Almost without exception, transfers resulted in a forfeiture of competitive-status seniority. Employees thus "locked-in" were subject to layoff while a white male with less employment seniority was retained. Thus, these cases[151] involved a recessionary analogue to the perpetuation of past discrimination condemned in *Local 189.*

In 1974 a more difficult group of cases caused a division between the courts and the enforcement agencies. The question was whether the belated opening of jobs in a plant to women and minorities forbids reliance on plant-wide seniority in determining layoffs. Does the routine firing of the last-hired perpetuate yesteryear's exclusion of female and minority workers?

The question was first faced in *Watkins v. Local 2639, United Steelworkers of America,*[152] when the court confronted the aftermath of a major cutback in the operations of a southern Louisiana can factory. The plant had hired two blacks during World War II but hired no others until 1965. Significant minority hiring in 1969, 1970 and 1971 resulted in a peak of more than fifty black employees in 1971. Subsequent economic downturn, however, caused the layoff of plaintiff and other employees hired as far back as 1951. When the case got to court, the company had an all-white work force except for the two blacks hired during World War II. Awarding summary judgment, the court rejected the reliance on seniority, even though it was plant-wide.[153] The court bottomed its decision on the principle that "employment preference cannot be allocated on the basis of length of service or seniority, where blacks were, by virtue of prior discrimination, prevented from accumulating relevant seniority."[154]

The district judge explicitly addressed the previously quoted

Johnson Bronze Co., 369 F. Supp. 522 (W.D. Pa. 1973); Glus v. G.C. Murphy Co., 329 F. Supp. 563 (W.D. Pa. 1971).

149. *E.g.*, Buckner v. Goodyear Tire & Rubber Co., 339 F. Supp. 1108 (N.D. Ala. 1972), *aff'd*, 476 F.2d 1287 (5th Cir. 1973).

150. Bowe v. Colgate, Palmolive Co., 489 F.2d 896 (7th Cir. 1973); Cox v. Allied Chem. Corp., 382 F. Supp. 309 (M.D. La. 1974); Wells v. Frontier Airlines, 381 F. Supp. 818 (N.D. Tex. 1974).

151. *See, e.g.*, Cox v. Allied Chem. Corp., 382 F. Supp. 309 (M.D. La. 1974).

152. [merits] 369 F. Supp. 1221 (E.D. La. 1974), [remedial order] 8 F.E.P. Cas. 729.

153. *Id.* at 1226.

154. *Id.*

comments of Senator Clark,[155] but denied their dispositive authority by noting that the Senator's comments were addressed to the House-passed version, which the Senate did not adopt and antedated by fifty days the introduction of the subsequently-enacted, revised substitute bill that first contained section 703(h),[156] the exemption for the bona fide seniority system. The district judge considered the court in *Local 189* to have been preoccupied by the problems of the internally segregated plant and thus undeliberatively to have shunted aside the question of the all-white plant. Viewing *Local 189* as not having dealt with the question before him, the district judge opted to follow the Equal Employment Opportunity Commission decision discussed earlier[157] in which the Commission respectfully disagreed with the holding in *Local 189*.

Recently, the reasoning of *Watkins* was reiterated by another trial court in the Fifth Circuit. In *Delay v. Carling Brewing Co.*,[158] defendant's belated (1963) hiring of blacks occasioned a disproportionately large percentage of minority-employee layoffs when plant-wide seniority was relied upon. The court denied defendant's motion for summary judgment, holding that affirmative action is required to eliminate such vestiges of pre-Act discrimination even when perpetuated by a system of plant-wide seniority.

Support for the view set forth in the *Watkins* and *Delay* decisions is to be found in the temporary restraining order entered in *Loy v. City of Cleveland*.[159] There, recently-appointed female police officers sought to enjoin an announced layoff of the eighty-nine most junior officers. The reduction was based on seniority and would have meant a layoff of eighty-seven percent of the females appointed in 1973, but only 42.5 percent of the males appointed in that year. The court noted:

> In this case, the stipulated facts indicate a strong likelihood that plaintiffs will be able to show a history of discrimination against women applicants. The facts also indicate a strong likelihood that the plaintiffs will be able to show that the seniority system is based on past discriminatory hiring and further to show that the Court's duty to affirmatively correct past discrimination would warrant the preclusion of the use of seniority.[160]

A view wholly contrary to *Watkins* and *Loy* was taken by the Seventh Circuit in its recent decision in *Waters v. Wisconsin Steel*

155. *Id.* at 1227-28.
156. *Id.* at 1228.
157. *See* note 70 *supra* and accompanying text.
158. 9 E.P.D. ¶ 9877 (N.D. Ohio 1974).
159. 8 F.E.P. Cas. 614, *dismissed as moot*, 8 F.E.P. Cas. 617 (N.D. Ohio 1974). *But cf.* Bales v. General Motors Corp., 9 F.E.P. Cas. 234 (N.D. Cal. 1975).
160. *Id.* at 616.

Works[161] (hereinafter referred to as *Waters II*). The appellate court reversed a district court decision[162] that defendant's pre-1964 refusal to hire blacks was perpetuated by the imposition of layoffs based on actual-employment seniority. The appeals court found the plant-wide seniority system to be free of the infirmities that could infest a system of departmental seniority, saying that under the latter ". . . continuing restrictions on transfer and promotion create unearned or artificial expectations of preference in favor of white workers when compared with black incumbents having an equal or greater length of service."[163] The court felt, on the other hand, that a plant-wide seniority system preserved "only the earned expectations of long-service employees."[164] The comments of Senator Clark[165] were relied on by the appeals court, as were excerpts from *Local 189* requiring "that time actually worked in Negro jobs be given equal status with time worked in white jobs."[166] The court concluded that "creating fictional employment time for newly-hired Negroes would comprise preferential rather than remedial treatment."[167]

The court considered defendant's plant-wide seniority system wholly worthy of the "bona fide" characterization, thus bringing it within the exemption of section 703(h).[168] The court then announced in a footnote that since it passed scrutiny under Title VII, the seniority system did not violate 42 U.S.C. § 1981,[169] on which plaintiffs had relied in the alternative.[170]

Emphatic support for the *Waters II* view was registered in the Third Circuit's split decision in *Jersey Central Power & Light Co.*

161. 502 F.2d 1309 (7th Cir. 1974). The Roman numeral is affixed to distinguish this decision from the previous Court of Appeals ruling in this same litigation on whether a cause of action was made out under 42 U.S.C. § 1981. *See* 427 F.2d 476 (7th Cir. 1970).

162. Waters v. Wisconsin Steel Works, 8 F.E.P. Cas. 234 (N.D. Ill. 1973).

163. 502 F.2d at 1320.

164. *Id.*

165. *Id.* at 1318-19 (quoted in note 61 *supra*).

166. *Id.* at 1319 (quoting from 416 F.2d 980, 995 (5th Cir. 1969)).

167. *Id.*

168. 42 U.S.C. § 2000e-2(h). *See* text accompanying note 60 *supra*.

169. 502 F.2d at 1320 n.4. "All persons within the jurisdiction of the United States shall have the same right in every state and territory to make and enforce contracts . . . as is enjoyed hy white citizens . . . ." 42 U.S.C. § 1981 (1970) (derived from the Civil Rights Acts of 1866 and 1870). A ruling that seniority systems perpetuate past discrimination in violation of 42 U.S.C. § 1981, but not of Title VII, would be vexing to female workers because § 1981 is construed as not reaching situations of sex discrimination. *See* Braden v. University of Pittsburgh, 343 F. Supp. 836 (W.D. Pa. 1972); Williams v. San Francisco Unified School Dist., 340 F. Supp. 438 (N.D. Cal. 1972); Fitzgerald v. United Methodist Community Center, 335 F. Supp. 965 (D. Neb. 1972).

170. The absence of any analogous exemption for "bona fide" seniority systems under § 1981 leaves this portion of the court's opinion unsatisfyingly elliptical.

v. Local 327, Electrical Workers.[171] That court found a facially neutral, plant-wide seniority system to be bona fide, notwithstanding evidence that it perpetuated the effects of past employment discrimination. The court reasoned:

> Congress, while recognizing that a bona fide seniority system might well perpetuate past discriminatory practices, nevertheless chose between upsetting all collective bargaining agreements with such provisions and permitting them despite the perpetuating effect they might have. We believe that Congress intended a plant-wide seniority system, facially neutral but having a disproportionate impact on female and minority group workers, to be a bona fide system within the meaning of § 703(h) of the Act.[172]

The federal government's administrative enforcers, O.F.C.C. and E.E.O.C., have publicly assumed divergent stances on the differing court decisions. Solicitor of Labor William Kilberg, who directs the O.F.C.C.'s efforts at judicial enforcement, has stated: "A man has certain property rights in his present job and, in order to take this away from him, you should be able to say more than, 'The company in years past discriminated against another worker and therefore we are going to take your job away from you.' "[173] Kilberg accepts the Seventh Circuit decision in *Waters II*, explaining: "The court is saying 'we recognize there may have been a wrong committed in layoffs, but the remedy creates another wrong.' Upsetting the seniority system doesn't look like a viable legal remedy in view of that ruling."[174] Solicitor Kilberg feels that the *Watkins* decision, on the other hand, should not be upheld because it gives blacks false or fictional seniority.[175]

The E.E.O.C., in contrast, has filed an *amicus* brief seeking to uphold the *Watkins* decision now on appeal in the Fifth Circuit. In the brief the E.E.O.C. argues that even a plant-wide seniority system that carries forward the incidents of past discrimination is not bona fide and thus is not within the exemption of section 703(h).[176] Alternatively, the Commission argues that even if that kind of seniority system is exempted under Title VII, it must succumb under 42 U.S.C. § 1981, which lacks an analogous exemption.[177]

The authors of the *amicus* brief take pains to stress the narrowness of the rule for which they argue. It is applicable only when past

171. 508 F.2d 687 (3d Cir. 1975).
172. *Id.* at 708.
173. B.N.A., Daily Labor Report, May 29, 1974, p. C-3.
174. Wall Street J., Nov. 5, 1974, at 27, col. 5.
175. N.Y. Times, Nov. 10, 1974, at 5, col. 3.
176. Brief for EEOC as Amicus Curiae at 11, Watkins v. Local 2369, Steelworkers, Civil No. 74-2604 (5th Cir., 1974).
177. *Id.* at 15.

discrimination is still reflected in the seniority system. Absent a continued reflection of past discrimination, even a layoff falling with particular severity on minorities would not be illegal.[178] "For example, if an employer demonstrated that for several years it has attempted to recruit blacks to fill positions as aeronautical engineers, but succeeded in hiring only four in 1971, an economic layoff in 1974 which, on a seniority basis, would require the layoff of the four blacks would not be unlawful even though it had a disparate effect on blacks."[179]

An additional narrowness not urged by the brief-writers also may find its way into the Court of Appeals decision. In two of that court's recent opinions,[180] the retroactive reach of section 1981 in a back-pay claim was limited to July 2, 1965, the effective date of Title VII. The court in each case reasoned that section 1981 had fallen into disuse and had left parties without any distinct notice of potential liability for employment discrimination until Title VII came into effect. The same reasoning might prompt a similar ruling with regard to the reform of seniority systems. Furthermore, the choice of July 2, 1965, would coincidently give effect to Senator Clark's averment that seniority earned prior to the effective date of Title VII would not be disturbed.[181]

On the more basic question, whether the Fifth Circuit will uphold *Watkins'* finding of a violation, it is interesting to note an aside in one of that court's recent footnotes: "We have observed that past discrimination may penalize black employees in a reduction-in-force situation, and think that affirmative relief is necessary to remedy such effects."[182] Whether the Court of Appeals will uphold the

178. It might he instructive to look at the decision in Roman v. E.S.B., Inc., 368 F. Supp. 47 (D.S.C. 1973), as an approximation of the principle here contended for. The court in that case found there to be no history of overt discrimination in a plant built in 1965. Consequently a layoff imposed on the basis of seniority did not violate Title VII even though the impact fell with greater severity on the black component of the workforce than upon the white. A similar approximation of this principle is found in a recent decision of the District Court in Oregon. A preliminary injunction against a county that used a seniority roster to lay off employees for budgetary reasons was denied even though the use of a seniority roster would result in a harsher impact upon racial minorities. The court explained in an oral opinion that the statistics presented to it failed to show past racial discrimination by the county. United Community Action Comm. v. Gleason, No. 74-438 (D. Ore., *entered* June 24, 1974), reported in Rappoport, *Laying Off Employees Pursuant to a Seniority System*, BNA SPECIAL REPORT (Feb. 21, 1975).

179. Brief for EEOC as Amicus Curiae at 14, Watkins v. Local 2369, Steelworkers, No. 74-2604 (5th Cir. 1974).

180. Johnson v. Goodyear Tire & Rubber Co., 491 F.2d 1364, 1379 (5th Cir. 1974); Pettway v. American Cast Iron Pipe Co., 494 F.2d 211, 255-56 (5th Cir. 1974).

181. *See* text accompanying note 61 *supra*.

182. Pettway v. American Cast Iron Pipe Co., 494 F.2d 211, 248 n.103 (5th Cir. 1974).

lower court's two-part remedial order merits separate consideration. Concerning layoffs, the subject of the first part of the remedial order, the trial court decreed that "additional layoffs . . . shall be allocated between white employees and black employees in accordance with their respective percentage of the work force at the time the layoffs are to be made . . . . Within each racial group, persons shall be laid off in reverse order of their plant seniority."[183] In this regard, however, it should be noted that whenever a seniority list that does not embody perfect alternation is subdivided on the basis of race or sex, fictional seniority arises. The employee finds himself or herself nearer the top in the subdivided list than he or she would have been if an undivided list had been used. Even though fictional seniority for the newly hired was condemned by the Fifth Circuit in 1969[184] and again in 1974,[185] in this case the distinction exists that the fictional seniority goes first to old hands.

In structuring future layoffs to avoid diminishing the percentage share of the workforce represented by minorities, the *Watkins* order has been joined by at least two like orders. In the recently reversed case of *Jersey Central Power Co. v. Local 327, Electrical Workers* the district court ordered that three seniority lists be drawn up, one for minority employees, one for female employees, and one for "all other" employees. If a white male had the right under the collective bargaining agreement to bump a less senior employee, he nevertheless was barred from bumping a less senior female or minority employee if the percentage of women and minorities in the work force was already fifteen percent below the goal of the affirmative action program. The court's stated intention was to ensure that when layoffs were completed minority employees and female employees would constitute essentially the same proportion of the total work force that they did when the layoff process began.[186]

On November 22, 1974, a currently unreported order was entered by Federal District Judge Harold R. Tyler, Jr., as a sequel to the litigation in *Chance v. Board of Examiners*.[187] The order provides that budgetarily induced layoffs in the New York City School System must not reduce the existing percentage of positions enjoyed by black or Puerto Rican supervisors. The ratio reflected in the separate listing of black, Puerto Rican or other Latin American, and

183. 8 F.E.P. Cas. 729, 731 (E.D. La. 1974).

184. Local 189, United Papermakers v. United States, 416 F.2d 980, 995 (5th Cir. 1969), *cert. denied*, 397 U.S. 919 (1970).

185. Franks v. Bowman Transp. Co., 495 F.2d 398, 417-18 (5th Cir.), *cert. granted*, 43 U.S.L.W. 3515 (U.S. Mar. 24, 1975).

186. 8 F.E.P. Cas. 959, 960 (D.N.J. 1974).

187. 330 F. Supp. 203 (S.D.N.Y. 1971), *aff'd*, 458 F.2d 1167 (2d Cir. 1972).

all other supervisors must be used to apportion future layoffs.[188]

The second dimension of the remedial order in *Watkins*—that relating to recall—is even more problematic.

> 1. The names on the existing recall list shall be divided into separate black and white recall lists. Recalls then should be accomplished on a one-for-one basis, using the separate lists, until all persons on the black list have been recalled to work.
> 2. Subsequently, the Company shall fill existing vacancies from the white list until either all the names on the list are recalled to work, or until remaining persons on the list have lost recall rights under the collective bargaining agreement. The Company shall then exclusively hire black persons, if available, until the then current percentage of black employees in the work force is equal to the percentage of black employees on active non-probationary status as of the last date in 1971 on which a new employee was hired.
> 3. Thereafter, the Company may employ additional persons from any other source, as necessary in a manner consistent witb the requirements of the Civil Rights Act of 1964 as amended.[189]

The first paragraph embodies the same sort of fictional seniority created by the first part of the remedial order, although again veteran employees are benefited first. This paragraph effectively supplants the collective bargaining agreement's provision providing for recalls from layoff in a single sequence of plant seniority. Several courts have imposed a reduction in recall rights in order to increase the number of vacancies available for remedial action.[190] These decisions can be justified by the argument that a laid off employee has no vested right in a future vacancy. Therefore, the need to rehire on the basis of seniority is less compelling than the requirement to lay off on that basis.

The second paragraph is the most likely to draw criticism, especially for its second sentence, since the blacks hired are not likely to be those who were rebuffed in years past. Another federal judge has criticized the windfall under *Watkins* to "minority individuals who have not themselves suffered the effects of discrimination,"[191] echoing the dictum of *Local 189*.[192] Nevertheless, no telling objection can be made to the remedy of racially-exclusive hiring of qualified applicants for a calculable period. This practice was approved under the conceptual endorsement of "a *temporary* . . . freeze on white hiring" in *Morrow v. Crisler*.[193] Whatever preferential treatment section 703(j) may forbid, it is now widely understood that "the present

188. Chance v. Board of Examiners, Civil No. 70-4141 (S.D.N.Y., *entered* Nov. 22, 1974).
189. 8 F.E.P. Cas. at 731.
190. *See* note 21 *supra*.
191. Cox v. Allied Chem. Corp., 382 F. Supp. 309, 319 (M.D. La. 1974).
192. 416 F.2d at 995.
193. 491 F.2d 1053, 1056 (5th Cir.), *cert. denied*, 95 S. Ct. 173 (1974).

correction of past discrimination is not preferential treatment."[194] If the second paragraph's second sentence is to be faulted successfully, the criticism most likely will be centered on its creation of constructive seniority in newly hired blacks: if, in the midst of the racially-exclusive hiring phase, a layoff is necessitated, newly-hired blacks could be laid off only in alternation with previously recalled whites.

A fundamental cause of the division between the *Watkins/Delay/Loy* line of cases and the *Waters II/Jersey Central* line lies in disagreement over whether Senator Clark's remarks are dispositive of the legislative history.[195] Inquiry into the *more plausible* reading of the legislative history, which has produced a wide array of judicial conclusions, may soon cease to be the relevant inquiry. Three days after the Third Circuit's decision in *Jersey Central*, it was reported that E.E.O.C. Chairman John H. Powell, Jr., soon would seek the adoption by the Commission of guidelines on layoff.[196]

Once guidelines are adopted by an agency charged with the administration of the statute, a judicial deference comes into play[197] and defense counsel must show not just that its reading is the more plausible, but rather that the agency's reading clearly contravenes the legislative history.[197.1] Indeed, while the proposed guidelines have not been set out as of this writing, it is not likely that they will fall short of the Commission's amicus position in the appeal of *Watkins* before the Fifth Circuit—that plant-wide seniority systems violate Title VII if they perpetuate the consequences of past discrimination and that in these situations the percentages that females and minorities constitute of an employer's workforce should not be diminished by the imposition of layoff. Thus, the issuance of layoff guidelines would not only leave plaintiffs better armed to argue that the perpetuation of prior discrimination via plant seniority violates Title VII, but may well avoid Supreme Court affirmance of the Third Circuit's decision in *Jersey Central* and the seventh circuit's decision in *Waters II*.[198]

194. Jones v. Lee Way Motor Freight, Inc., 431 F.2d 245, 250 (10th Cir. 1970), *cert. denied*, 401 U.S. 954 (1971); *accord*, United States v. Lathers Local 46, 471 F.2d 408, 412-13 (2d Cir.), *cert. denied*, 412 U.S. 939 (1973); United States v. Local 38, Electrical Workers, 428 F.2d 144, 149-50 (6th Cir.), *cert. denied*, 400 U.S. 943 (1970).

195. *Compare* Waters v. Wisconsin Steel Works, 502 F.2d 1309, 1318-19 (7th Cir. 1974) *with* Watkins v. Local 2369, Steel Workers, 369 F. Supp. 1221, 1227-29 (E.D. La. 1974); and *compare* majority opinion in Jersey Cent. Power & Light Co. v. Electrical Workers Union 9 F.E.P. Cas. 117 (3d Cir. 1975) *with* dissenting opinion.

196. N.Y. Times, Feb. 3, 1975, at 15, cols. 2-3.

197. Love v. Pullman Co., 404 U.S. 522 (1972); Griggs v. Duke Power Co., 401 U.S. 424 (1971); Udall v. Tallman, 380 U.S. 1 (1965).

197.1. Espinoza v. Farah Mfg. Co., 414 U.S. 86 (1974).

198. If, prior to a decision by an appellate court, the law is changed by an administra-

V. Liability Minimizing Initiatives Open to Employers

In view of the additional occasions for liability that economic downturn reveals, it must be asked what avenues are open to management in restructuring a discriminatory seniority system? The presumptively available remedy of class-wide back pay[199] is a powerful inducement for management to pursue any avenues that may be open. The employer whose workforce has not been organized is free, both in terms of antidiscrimination statutes and prospective collective-labor strife, to lay off workers who have performed with demonstrated lesser efficiency. If the lesser efficiency of those laid off is objectively determined and documented, the decisions will withstand scrutiny under Title VII.[200] The same scenario may be open to the employer with an organized workforce if the collective bargaining agreement gives uncertain weight to the consequence of seniority, and the union, by virtue of weakness or immaturity, has not succeeded in imposing its unwritten expectations to limit management's options.

Management, however, will have less prospect for success in shelving a discriminatory seniority system when strong union opposition is encountered.[201] Agreeing to a change in the traditional expectation of insulation from layoff might well prove to be political suicide for elected officials of the local.

Even the spectre of having to shoulder part of a back pay award to victims of discrimination may not prompt action from the local.[202] Inaction is likely particularly when an impecunious local is involved; the officials of the local could feel that its lack of funds would dissuade litigants from targeting it or from persisting in efforts to collect a judgment against it. If, on the other hand, the more

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tive agency acting pursuant to legislative authorization, the appellate decision will be rendered in light of that change. Thorpe v. Housing Authority of City of Durham, 393 U.S. 281 (1969).

199. Pettway v. American Cast Iron Pipe Co., 494 F.2d 211 (5th Cir. 1974); Johnson v. Goodyear Tire & Rubber Co., 491 F.2d 1364 (5th Cir. 1974); Moody v. Albemarle Paper Co., 474 F.2d 134 (4th Cir. 1973), *cert. granted*, 43 U.S.L.W. 3349 (U.S. Dec. 17, 1974)(No. 74-389).

200. EEOC Decision No. 75-037, 2 CCH Empl. Prac. Guide (P) 6437 (Oct. 2, 1974). Caution must, of course, be exercised to assure that determinations as to who is least qualified are not tainted by unvalidated objective criteria or by prejudiced subjective judgments. The latter, when reached by white, male supervisors, have been condemned in Brown v. Gaston County Dyeing Mach. Co., 457 F.2d 1377 (4th Cir. 1972); Rowe v. General Motors Corp., 457 F.2d 348 (5th Cir. 1972); Newman v. Avco Corp., 7 F.E.P. Cas. 385 (M.D. Tenn. 1973).

201. *See generally* Santo, *The Peculiar Problems of a Company with a Labor Union*, in Equal Employment Opportunities Compliance 185 (2d ed. P.L.I. 1973).

202. *See* Rodriguez v. East Tex. Motor Freight, 505 F.2d 40 (5th Cir. 1974); Carey v. Greyhound Bus Co., 500 F.2d 1372 (5th Cir. 1974); Guerra v. Manchester Terminal Corp., 498 F.2d 641 (5th Cir. 1974).

prosperous international[203] or regional conference[204] is named as a co-defendant, prospects of both collection and leverage are enhanced. Consequently, management is occasionally advised by counsel to file an employment discrimination charge with the E.E.O.C. naming unions as respondents when the charge initially filed by an aggrieved worker fails to do so.

Labor opposition, even threat of strike, is of no avail to management in defending the continuance of a seniority system attacked as discriminatory under Title VII.[205] Continuance of this type of system has been held not to be attributable to business necessity.

If management cannot be exonerated by the union's opposition to change in the seniority system, what course must management follow? At first blush the possibilities seem remote. Seniority is among those "terms and conditions of employment" that are mandatory subjects of collective bargaining under the National Labor Relations Act.[206] Moreover, unilateral changes become unfair labor practices unless good-faith bargaining on the matter has reached an impasse.[207] Federal court enforceability of the arbitration clauses of collective bargaining agreements supplements the NLRA's statutory prohibitions.[208]

Federal laws governing labor relations, however, are to be construed so as not to frustrate civil rights legislation.[209] Out of that high-level proposition grows a working principle that if, as a result of an O.F.C.C. review or an E.E.O.C. investigation, particular changes are designated as prerequisites to compliance, responsive, unilateral steps may be taken by management without thereby committing an unfair labor practice[210] or a breach of contract.[211]

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203. *E.g.*, Guerra v. Manchester Terminal Corp., 498 F.2d 641, 645 (5th Cir. 1974).

204. *E.g.*, Rodriguez v. East Tex. Motor Freight, 505 F.2d 40 (5th Cir. 1974).

205. "Labor unrest stemming from interference with the expectations of whites was found not to amount to a business necessity in United States v. Bethlehem Steel Corp., 2 Cir. 1971, 446 F.2d 652, Robinson v. Lorillard Corp., 4 Cir. 1971, 444 F.2d 791, 798-99 and Local 189, United Papermakers & Paperworkers, 5 Cir. 1969, 416 F.2d 989." Rodriguez v. East Tex. Motor Freight, 505 F.2d 40, 58 n.22 (5th Cir. 1974).

206. 29 U.S.C. § 158(d) (1970); NLRB v. Frontier Homes Corp., 371 F.2d 974 (8th Cir. 1967); *see* NLRB v. Katz, 369 U.S. 736 (1962). *See generally* THE DEVELOPING LABOR LAW 406 (C. Morris ed. 1971).

207. *See* NLRB v. Almeida Bus Lines, Inc., 333 F.2d 729 (1st Cir. 1964); Eddie's Chop House, Inc., 165 N.L.R.B. 861 (1967); American Laundry Mach. Co., 107 N.L.R.B. 1574 (1954).

208. *See* Textile Workers Union v. Lincoln Mills, 353 U.S. 448 (1957).

209. United Packinghouse Workers Union v. NLRB, 416 F.2d 1126, 1133-38 (D.C. Cir.), *cert. denied*, 396 U.S. 903 (1969); Local 12, United Rubber Workers v. NLRB, 368 F.2d 12, 24 (5th Cir. 1966), *cert. denied*, 389 U.S. 837 (1967).

210. In finding that mid-term contract changes in order to comply with equal employment opportunity legislation after notification to the union would not give rise to an unfair labor charge, the General Counsel of NLRB commented:

While the employer's prerogatives in extricating himself from a position of non-compliance after agency notice thus have been established, the rules governing employer's efforts to avoid situations of non-compliance are less clear. The decision in the *Savannah Printing* case seems to extend to pre-agency-order situations in its alternate holding that the employer is to be excused from arbitration lest he violate Title VII.[212] The recently decided *Mansion House* case[213] would appear to excuse the NLRA-imposed duty to bargain[214] with a union that could be shown to discriminate. Unfortunately, Board decisions elaborating on the scope of the *Mansion House* excusal defy reconciliation.[215] The Board has been criticized[216] for its failure in the *Williams Enterprises, Inc.* case[217] to offer guidance to an employer seeking to take unilateral action to avoid non-compliance.

Should the enforcement effort proceed to litigation, injunctive control is available[218] and has been used to achieve union observance of a shift in determining seniority.[219] A radically different path, how-

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". . . [T]he change effected by the Employer was consistent with the views of a federal administrative agency having direct responsibility for this subject. The General Counsel was convinced that the obvious necessity revealed by these facts for accommodating the statutory schemes of the Civil Rights Act and the NLRA in this instance brought into play the principles of the Supreme Court's decision in Southern Steamship v. NLRB, 316 U.S. 31, [62 S. Ct. 886, 86 L.Ed. 1246]." Quarterly Report on Case Developments, Rep. No. R-1229 (1972) at 4.

EEOC v. American Tel. & Tel. Co., 365 F. Supp. 1105, 1129-30 n.31 (E.D. Pa. 1973), *aff'd*, 506 F.2d 735 (3d Cir. 1974).

Similarly, the National Labor Relations Board has adopted the position that where unilateral changes in collective bargaining agreements are essential to comply with federal laws, these revisions would not constitute unfair labor practices. Standard Candy Co., 147 N.L.R.B. 1070, 1073 (1964); Southern Transport, Inc., 145 N.L.R.B. 615, 617-18 (1963) . . . .

365 F. Supp. at 1129.

211. Savannah Printing Local 604 v. Union Camp Corp., 350 F. Supp. 632, 636-37 (S.D. Ga. 1972). *But cf.* United States v. Central Motor Lines, Inc., 352 F. Supp. 1253 (W.D.N.C. 1972).

212. 350 F. Supp. 632 (S.D. Ga. 1972). *See* discussion of *Savannah Printing* in Kilberg, *Current Civil Rights Problems in the Collective Bargaining Process: The Bethlehem & AT&T Experiences*, 27 VAND. L. REV. 81, 111-12 (1974).

213. NLRB v. Mansion House Center Management Corp., 473 F.2d 471 (8th Cir. 1973) (*en banc*).

214. 29 U.S.C. § 158(d) (1970).

215. Grants Furniture Plaza, Inc., 213 N.L.R.B. 80 (1974); Bell & Howell, 213 N.L.R.B. 79 (1974); Williams Enterprises, Inc., 212 N.L.R.B. 132 (1974); Alden Press, Inc., 212 N.L.R.B. 91 (1974); Bekins Moving & Storage, 211 N.L.R.B. 7 (1974).

216. *See* remarks of Lloyd Sutter before 9th Annual Labor Relations Institute, reported at 87 LAB. REL. REP. 292 (1974).

217. 87 L.R.R.M. 1044 (1974).

218. 42 U.S.C. § 2000e-6(h) (1970).

219. United States v. Local 189, Papermakers, 1 E.P.D. ¶ 9862 (E.D. La. 1968). Note, however, the contrasting use of preliminary injunction in Johnson v. Goodyear Tire & Rubber Co., 349 F. Supp. 3 (S.D. Tex. 1972).

ever, is open to the employer loath to rely on district court absolution from the duty to arbitrate or to bargain; he can seek a declaratory judgment against the enforcement agencies. Rutgers Law School Dean Albert Blumrosen, formerly E.E.O.C.'s Director of Compliance, has been advising lawyers for employers contemplating layoff to seek such a declaratory judgment, as was done in *Jersey Central*.[220]

220. *See* note 162 *supra*; Wall Street J., Nov. 5, 1974, at 27, col. 5.