Vanderbilt Law Review

Volume 24
Issue 4 *Issue 4 - May 1971*

Article 2

5-1971

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Irving Kovarsky

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I. INTRODUCTION

Seniority as a means of establishing rights and priorities has been important in most societies, both ancient and modern. Although it has been suggested that the use of seniority as a standard for promotion and assignment began in the military,[1] evidence indicates that segregation and concepts of superiority were operative in most ancient philosophical and religious systems.[2] These concepts were carried into modern religious structures and became visible in the United States even before the Civil War.[3] Since many church leaders extolled the virtue of complete segregation of the races, this attitude became embodied in many facets of the American social system. One consequence of this attitude was that blacks seeking employment and promotion encountered resistance from both employers and unions. Craft union practices often forced blacks to accept the least desirable jobs in partially unionized industries and to concentrate in nonunion plants.[4] Since older firms were more likely to be organized than newer firms, black employment was concentrated in newer firms and industries in which the failure rate was high. Even in unionized firms, blacks traditionally were deprived of seniority rights that could lead to better jobs. Seniority systems, therefore, have had an

* Professor of Business Administration, University of Iowa. LL.M. 1961, Yale University; Ph.D. 1956, Iowa University.

1. Mater, *The Development and Operation of the Railroad Seniority System*, 13 U. CHI. J. BUS. 387, 391-92 (1940). Many ancient societies used seniority in gearing family leadership and ownership of property to primogeniture—a system that permitted the eldest male heir to succeed to the family leadership. Primogeniture was not customary in England prior to the Norman Conquest, but it was subsequently adopted for military tenure and was gradually extended to the tenure in socage. F. MAITLAND, THE CONSTITUTIONAL HISTORY OF ENGLAND 37-38 (Cambridge ed. 1961). In the English feudal system 3 tenancies developed—socage (agriculture), chivalry (military), and frankalmoign (religious).

2. For example, the notion in Judaism that Jews are God's chosen people has lead to separation from non-Jews and an inference of Jewish superiority. Other religions have developed similar ideas.

3. *Cf.* W. HUDSON, RELIGION IN AMERICA 224 (1965); Miller, *Southern White Protestantism and the Negro, 1869-1965*, in THE NEGRO IN THE SOUTH SINCE 1865, at 237-38 (C. Wynes ed. 1965).

4. Rapping, *Unionism, Migration, and The Male Nonwhite-White Unemployment Differential*, 32 S. ECON. J. 317, 320 (1966).

adverse effect on blacks in two ways. First, employers who once refused to hire blacks permitted white employees to build up years of seniority. Secondly, employers who hired blacks usually placed them in the least desirable jobs, permitting whites to gain experience and seniority in better jobs. In neither instance is there any easy remedy available today that is compatible with public sentiment, constitutional restrictions, and fair play for the black community.

Although unions initially employed the seniority system to protect their members from the antiunion animus of employers, this protection is no longer as necessary as it once was. The seniority system, however, continues to perform at least four important functions. First, by eliminating the opportunity for discrimination, a seniority system helps to counteract any antiunion bias that is not eliminated by federal legislation. Secondly, the protection provided by a seniority system is part of the *quid pro quo* for employee loyalty. Thirdly, although the turnover of younger workers may be increased, a seniority system usually reduces the overall rate of employee turnover, builds morale, and reduces the number of grievances. Fourthly, a seniority system protects older workers from the job instability and economic insecurity that accompanies rapid technological change.

Although seniority rights can be determined by statute, administrative decision,[5] or custom,[6] legislation promoting meaningful collective bargaining has made seniority primarily a contractual matter.[7] Today, more than 90 percent of collective bargaining agreements contain seniority clauses,[8] and many agreements expressly condemn racial discrimination.[9] The American reverence for freedom of contract, at least in the past, has tended to discourage judicial interference with contractually created seniority rights.

This article focuses primarily upon the remedies that can be used to reconcile the preservation of legitimate objects of a seniority system with equal treatment for black workers. To provide a historical perspective

5. McClure v. Louisville & N.R.R., 16 Tenn. App. 369, 64 S.W.2d 538 (1933).

6. Aulich v. Craigmyle, 248 Ky. 676, 59 S.W.2d 560 (1933); Webb v. Chicago, R.I. & G. Ry., 136 S.W.2d 245 (Tex. Civ. App. 1940).

7. A seniority clause was first included in a collective bargaining contract by the railroad industry in 1875; railroad companies, however, had used seniority to encourage long-term loyalty even before unions gained a secure position. *See* Mitchem, *Seniority Clauses In Collective Bargaining Agreements,* 21 ROCKY MT. L. REV. 156, 160 (1949). *But see* Note, *Seniority Rights in Labor Relations,* 47 YALE L.J. 73, 74 (1937).

8. Gould, *Employment Security, Seniority and Race: The Role of Title VII of the Civil Rights Act of 1964,* 13 How. L.J. 1-2 (1967).

9. United Packinghouse Workers v. NLRB, 416 F.2d 1126 (D.C. Cir. 1969) (employer required to bargain with a union over a clause forbidding racial discrimination).

demonstrating the need for these remedies, the article initially will describe the availability of relief against discriminatory seniority agreements under federal labor legislation. The article will then examine available remedies under Title VII of the Civil Rights Act of 1964 and under recent interpretations of the Civil Rights Act of 1866. In the concluding section, possible ways to utilize existing remedies to combat more effectively the discriminatory effects of seniority agreements will be explored.

II. Experience Under Federal Labor Legislation Prior to 1964

The early growth of organized labor under the auspices of the Railway Labor[10] and Wagner[11] Acts did not produce a corresponding improvement in prevailing attitudes toward black workers.[12] In fact, many unions used their recently acquired collective bargaining power to improve the lot of their white members at the expense of black workers in industries subject to their jurisdiction. When black workers challenged union-negotiated contracts, their claims were generally rejected on the ground that neither applicable federal law nor state contract law proscribed intentional private discrimination by unions or employers.[13]

In *Steele v. Louisville & Nashville Railroad*,[14] the United States Supreme Court rejected this social and legal philosophy by striking down a discriminatory hiring agreement negotiated by an all-white railroad union. Predicating the decision upon the public policy embodied in the Railway Labor Act, the Court said:

> So long as [the] union . . . act[s] as the statutory representative of a craft, it cannot rightly refuse to perform the duty, which is inseparable from the power of

10. Act of May 20, 1926, ch. 347, 44 Stat. 577 (codified in scattered sections of titles 15, 18, 28, and 45 U.S.C.).

11. Act of July 5, 1935, ch. 372, 49 Stat. 449 (codified at 29 U.S.C. §§ 151-66 (1964)).

12. 1. Kovarsky & W. Albrecht, Black Employment: The Impact of Religion, Economic Theory, Politics, and Law 41-50 (1970).

13. Black railroad employees, for example, were unsuccessful in their attempts to end industry discrimination. In Teague v. Brotherhood of Locomotive Firemen & Enginemen, 127 F.2d 53 (6th Cir. 1942), the union and the employer modified an existing agreement in order to give white firemen preference on trains with engines fed by mechanical stokers. The court refused to stop this practice because private discrimination violated neither state law nor the fifth amendment, which forbids only government discrimination. Many pre-*Teague* decisions had considered the need for flexibility in dealing with industrial strife and changing economic conditions to be sufficient to justify the power vested in unions and employers to modify existing contractual seniority rights. *E.g.*, Shaup v. International Bhd. of Locomotive Eng'rs, 223 Ala. 202, 135 So. 327 (1931); Ryan v. New York Cent. R.R., 267 Mich. 202, 255 N.W. 365 (1934); O'Keefe v. Plumbers Local 473, 277 N.Y. 300, 14 N.E.2d 77, 296 N.Y.S. 505 (1938).

14. 323 U.S. 192 (1944).

> representation conferred upon it, to represent the entire membership of the craft. While the statute does not deny to such a bargaining labor organization the right to determine eligibility to its membership, it does require the union, in collective bargaining and in making contracts with the carrier, to represent non-union or minority union members of the craft without hostile discrimination, fairly, impartially, and in good faith . . . .[15]

Although the Court required the union to represent all of its members fairly and equally, it did not specifically condemn the union's exclusion of blacks from membership.

The *Steele* requirement of fair representation was subsequently cited by the Supreme Court in *Syres v. Oil Workers International Union, Local No. 23*,[16] which struck down a lower court decision holding that the negotiation of a discriminatory seniority agreement did not violate the Taft-Hartley Act.[17] In *Syres*, the plaintiffs contended that black union members were unfairly represented when an agreement was negotiated with the employer that continued separate lines of seniority for black and white workers. The Fifth Circuit ruled against the plaintiffs, holding that the Taft-Hartley Act did not pre-empt state contract law.[18] Rejecting the claim that the Taft-Hartley Act was inapplicable, the Supreme Court reversed in a per curiam decision and remanded the case for reconsideration in light of *Steele*. Implicit in this decision is the Court's recognition that a union does not fulfill its duty of fair representation when it negotiates a discriminatory seniority agreement.

In theory, the *Steele* doctrine of fair representation provided an adequate remedy for racially discriminatory seniority agreements. The *Steele* decision, however, did not require unions to admit blacks to membership or to give any weight to their interests beyond the current obligation of good faith representation. Moreover, prior to 1964, none of the agencies charged with administering federal labor legislation had decertified a union as bargaining representative because of discriminatory membership practices or the maintenance of segregated locals.[19] In addition, unions were granted considerable freedom to

15. *Id.* at 204.

16. 350 U.S. 892 (1955) (per curiam).

17. Act of June 23, 1947, ch. 120, 61 Stat. 136 (codified in scattered sections of 18 and 29 U.S.C.).

18. Syres v. Oil Workers Local 23, 223 F.2d 739 (5th Cir. 1955).

19. *See* Hughes Tool Co., 147 N.L.R.B. 1573 (1964) (Board held, without citing Title VII of the 1964 Civil Rights Act, that certification could be rescinded because union maintained segregated locals). Title VII of the Civil Rights Act of 1964 expressly prohibits unions from excluding or classifying individuals on the basis of race, color, religion, sex, or national origin. 42 U.S.C. §§ 2000e-2(c)(1), (2) (1964).

manage their internal and external affairs.[20] Under these circumstances, the remedy that was available in theory proved ineffective in practice because of the difficulty in proving lack of good faith on the part of union officials whose primary loyalty was to their white constituents. This was particularly true in the case of union-negotiated seniority agreements that made no clear racial distinctions but, nevertheless, tended to perpetuate the results of past discrimination.

Judicial reluctance to overturn this kind of seniority agreement under the Taft-Hartley Act is illustrated by the controversial decision in *Whitfield v. Steelworkers Local 2708.*[21] In *Whitfield,* black steelworkers attacked the validity of a collective bargaining agreement that permitted them to transfer to previously all-white lines of progression on a severely restricted basis. Before the agreement, the employer, without union objection, had followed a policy of hiring whites to fill skilled jobs in Line 1 while blacks were given unskilled jobs in Line 2. The jobs in each line of progression were interrelated, and each job provided training for another job requiring greater skill. Blacks were trained to fill better unskilled jobs in Line 2, but they were not prepared for skilled jobs in Line 1. Under the new agreement, black employees could qualify for the skilled jobs in Line 1 by passing a test, but most of them failed it. Blacks who passed the test and moved to better jobs started at the bottom of the new pay grade, sometimes at lower wages than in the old job, and they were stripped of departmental seniority upon leaving the old job. Most black members in the integrated union, composed of 1700 whites and 1300 blacks, had voted against the agreement. Finding for the employer and union, the district court concluded that the employer could not be held responsible for the adverse consequences to blacks resulting from the combination of previous hiring policies and the restrictive transfer provisions of the new agreement. The court said:

> [T]he requirement that promotions be based upon seniority within a Line are actuated by good faith and prudent business management and are not motivated or tainted by bad faith or racial discrimination. To eliminate any of these aspects would decrease efficiency and would result in great harm and disadvantages to both the Company and its employees, white and Negro.[22]

On appeal, the Fifth Circuit held that the contract was negotiated in good faith and that the union fairly represented its black members as

20. Ford Motor Co. v. Huffman, 345 U.S. 330 (1953).

21. 156 F. Supp. 430 (S.D. Tex. 1957), *aff'd,* 263 F. 2d 546 (5th Cir.), *cert. denied,* 360 U.S. 902 (1959).

22. 156 F. Supp. at 435.

required by *Steele* and *Syres*.[23] This holding demonstrates the failure of the judicial remedy under federal labor legislation to reach many of the more subtle forms of discrimination against black workers that are frequently embodied in seniority agreements.

III. THE CIVIL RIGHTS ACT OF 1964

Title VII of the Civil Rights Act of 1964[24] was enacted to attack racial discrimination by unions and employers. Consequently, Title VII provides a more effective remedy against discriminatory seniority agreements than previous federal labor legislation; the issue in Title VII cases is the existence of intentional discrimination by either the union or the employer rather than fair representation by the union. Nevertheless, decisions under the Taft-Hartley and Railway Labor Acts have provided some guidance in Title VII cases.

A. Operative Provisions

Section 703 of Title VII of the Civil Rights Act of 1964 proscribes certain unlawful employment practices by employers and labor organizations. Under this section, an employer may not discriminate against any individual with respect to his "compensation, terms, conditions, or privileges of employment . . . ."[25] He is further prohibited from limiting, segregating, or classifying his employees in any way that would "deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee . . . ."[26] Similarly, unions are prohibited from discriminating against "any individual" and from limiting, segregating, or classifying individuals in a discriminatory manner.[27] A union also violates section 703 when it causes or attempts to cause an employer to discriminate.[28] In case of noncompliance with these provisions, section 706 enables individual complainants to obtain injunctive relief and back pay in civil actions.[29]

23. Whitfield v. Steelworkers Local 2708, 263 F.2d 546, 550-51 (5th Cir. 1959). In 1970, the Fifth Circuit reversed its position to comply with Title VII of the Civil Rights Act of 1964. Taylor v. Armco Steel Corp., 429 F.2d 498 (5th Cir. 1970). *See also* United States v. H.K. Porter Co., 296 F. Supp. 40 (N.D. Ala. 1968).

24. 42 U.S.C. § 2000e (1964).

25. *Id.* § 2000e-2(a)(1).

26. *Id.* § 2000e-2(a)(2).

27. *Id.* §§ 2000e-2(c)(1), (2).

28. *Id.* § 2000e-2(c)(3).

29. *Id.* § 2000e-5(g). The Attorney General also can institute a civil action under Title VII. *Id.* § 2000e-6.

The prohibitions described in section 703 are supported and modified by section 703(h), which permits "different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system . . . *provided that such differences are not the result of an intention to discriminate* . . . ."[30] Section 703(h) substantially codifies decisions under the Taft-Hartley and Railway Labor Acts approving seniority clauses that are not currently racially discriminatory. By preserving nondiscriminatory seniority agreements, this section helped assure passage of Title VII.[31]

The guidance provided in section 703(h) is scant; "bona fide" is not defined, and courts interpreting this section have turned for guidance to the Taft-Hartley and Railway Labor Act decisions in which the basic issue was fair representation and good faith bargaining. A seniority agreement must discriminate against a comparatively large and identifiable group of employees before it will be classified as a non-bona fide agreement.[32] An adverse impact upon a significant number of black employees must be present, therefore, before intent becomes an issue under Title VII. Moreover, there is no assurance that discrimination can be proved even if a large group of employees is negatively affected by a seniority clause; admittedly, such circumstances would ease the burden of establishing intentional wrongdoing.

B. Judicial Implementation

The implementation of Title VII provisions to prevent the use and perpetuation of discriminatory seniority systems is illustrated by a number of recent cases involving diverse industries and agreements. In considering these cases, the courts have been forced to analyze the practical results of seniority agreements since any racial classification within the agreement would clearly violate Title VII.

A major case decided under Title VII arose out of the labor situation in the tobacco industry during the 1960's. In *Quarles v. Philip Morris, Inc.*,[33] the employer segregated and, in practice, paid black employees less than white employees until 1966. During the pre-1966 period, the company followed a system of departmental seniority that favored white employees. Prior to 1966, two of the company's

30. *Id.* § 2000e-2(h) (emphasis added).

31. When Congress considered passage of the 1964 Civil Rights Act, there was considerable sentiment against it, and, to assure enactment, care was taken to protect the employer relying on seniority and testing.

32. *See* notes 16-18 *supra* and accompanying text.

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

departments, prefabrication and stemmery, hired almost entirely black workers, while the other two, fabrication and warehouse receiving-shipping, hired largely whites. Beginning in 1961, a restricted number of transfers was made available to blacks in prefabrication. When the collective bargaining agreement was changed in 1966, black employees in the prefabrication department were permitted to transfer to the formerly all-white departments without the previous limitations, but these transferees were required to begin at the bottom of the new seniority list. The plaintiff, a black employee who had sought a transfer to the warehousing department since 1964, brought suit under Title VII because white employees with less seniority had transferred to the warehousing department before 1966. The plaintiff specifically sought to replace a white truck driver assigned to the job prior to 1966. He contended that the departmental seniority system should be discarded and a system of plant-wide seniority substituted. Defendants, the employer and union, asserted that the current collective bargaining agreement was not discriminatory, that departmental seniority was appropriate and currently permissible, and that practitioners of racial discrimination prior to the effective date of Title VII could not be punished. The district court agreed, in large measure, with the defendants and refused to prohibit departmental seniority or to penalize the defendants for previous discriminatory acts except insofar as the combination of past discrimination and present departmental seniority resulted in perpetuating the impact of pre-1966 discrimination.

In Title VII cases the remedy is perhaps more important than the decision. In *Quarles*, the court ordered the employer to permit qualified blacks in prefabrication to bid for jobs in other departments as soon as openings became available, and to date the departmental seniority of these transferees from the commencement of their employment rather than from their date of transfer. This decision left the system of departmental seniority undisturbed. Thus, although the court based its decision on a finding of current discrimination, it reasoned that it was not precluded from considering past acts of discrimination when fashioning the remedy.[34]

34. Other courts have used past discrimination to show current intent. An example of this is found in a steel industry case, United States v. Bethlehem Steel Corp., 312 F. Supp. 977 (W.D.N.Y. 1970). Because of intentional discrimination, blacks were concentrated in 11 of 82 departments, and seniority was departmental. After 1965, those with the necessary qualifications could move into another department, but they started at the bottom of the pay and promotion list. The court found a violation of Title VII because the system tended to lock in black employees. The court recognized that "the longer a Negro has worked in the hot and dirty department to which he was admittedly

In *Quarles*, the court relied upon *Whitfield v. Steelworkers Local 2708*,[35] a fair-representation case decided under the Taft-Hartley Act, to justify its refusal to abolish a departmental seniority system based upon an employer's decision concerning business necessity. Although the *Quarles* and *Whitfield* courts acknowledged that past discrimination accounted for the absence of blacks qualified for supervisory jobs, they refused to saddle the employers with inexperienced employees in these positions. The Taft-Hartley Act, which provided the basis for the claim in *Whitfield*, does not require an employer to bargain with a union over supervisory positions.[36] Protection provided by the Civil Rights Act of 1964, however, is not limited to rank-and-file employees; *all* aggrieved employees are entitled to redress if either the employer or the union discriminates. Thus, by not requiring that blacks be placed in supervisory positions, the court in *Quarles* failed to take full advantage of Title VII.

The *Quarles* and *Whitfield* decisions differ in their approach to situations in which qualified black employees bid for better jobs. While unwilling to phase out departmental seniority completely, the *Quarles* court ordered the employer to accept black bids for better jobs on a plant-wide basis. In *Whitfield* the court ignored the present impact of past discrimination upon black employees. A departmental seniority system of the type facing the court in *Quarles*, however, cannot always be justified on the basis of an employer's decision concerning operational efficiency. In *Robinson v. Lorillard Corp.*,[37] another tobacco industry case brought under Title VII, a federal district court found that departmental seniority was not essential for efficient operation. Although Lorillard had discontinued overt racial discrimination and segregated departments, the court decided that blacks who were forced to transfer to the bottom of the seniority line with less pay faced current discrimination. The court concluded that a bona fide seniority provision must serve a valid business purpose. In addition, the business purpose must be balanced against the adverse consequences of perpetuating the effects of past discrimination. Thus,

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discriminatorily assigned, the more he has to lose by transfer." *Id.* at 986. Although the union argued that the system of promotion was industry-wide, the court concluded that an agreement resulting in a denial of equal employment opportunity constitutes a violation of Title VII. Considering past discrimination to be evidence of present intent, the court found the necessary intent to discriminate.

35. 263 F.2d 546 (5th Cir.), *cert. denied*, 360 U.S. 902 (1959); *see* notes 21-23 *supra* and accompanying text.

36. *See* 29 U.S.C. § 152(3) (1964).

37. 319 F. Supp. 835 (M.D.N.C. 1970).

"[i]f the *business necessity* is somehow vital to the operation of a particular industry, and . . . *it outweighs whatever vestiges of discrimination are thereby maintained,* [the seniority provision] may be considered *bona fide*."[38] This rationale suggests that a court can invalidate a seniority system for two reasons—absence of a valid business purpose, or a finding that the interests of black workers are paramount to the needs of the employer. *Quarles* and *Robinson* thus appear to be irreconcilable in their respective determinations of the weight that should be given to an employer's decision concerning business necessity.

A problem similar to the one in *Quarles* arose in *United States v. Local 189, United Papermakers and Paperworkers,*[39] a case involving the Crown Zellerbach paper plant in Louisiana. Until 1966, the collective bargaining agreement between Crown Zellerbach and the union had provided for segregated lines of progression for black and white employees. After 1966, segregation was eliminated but the existing system of job seniority was retained. Recognizing the importance attached to efficiency in *Whitfield*, plaintiffs in *Papermakers* insisted that the seniority system was not necessary for efficiency or safety. The district court, agreeing with plaintiffs' contention, required that the job-based system be replaced with a plant-wide system, and further said:

> Where a seniority system has the effect of perpetuating discrimination, and concentrating or "telescoping" the effect of past years of discrimination against Negro employees into the *present* placement of Negroes in an inferior position for promotion and other purposes, that present result is prohibited, and a seniority system which operates to produce that present result must be replaced with another system. We agree . . . that present discrimination cannot be justified . . . because Title VII refers to an effective date and because present discrimination is caused by conditions in the past.[40]

The court's conclusion that a seniority system that perpetuates past discrimination and retards fair employment can be reached under Title VII is in direct conflict with both *Whitfield* and *Quarles*. Moreover, the court in *Papermakers* reached its decision even though training received in one job was necessary for the next job level within that line of progression. The employer's increased costs were not expressly considered, but any additional expense would not be formidable. In any event, industry-wide existence of the same discriminatory pattern would result in the added cost being passed on to the public.

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38. *Id.* at 841.

39. 282 F. Supp. 39 (E.D. La. 1968), *aff'd,* 416 F.2d 980 (5th Cir. 1969), *cert. denied,* 397 U.S. 919 (1970). *See also* Mondy v. Crown Zellerbach Corp., 271 F. Supp. 258 (E.D. La. 1967), *rev'd sub. nom.* Otis v. Crown Zellerbach Corp., 398 F.2d 496 (5th Cir. 1968).

40. 282 F. Supp. at 44-45.

When past discrimination has current impact, there is ample reason to substitute plant-wide for job or departmental seniority. It would be difficult to find an industry, plant, agreement, or past practice that has not discriminated against blacks. Since discrimination has been commonplace, *Papermakers* appears to establish the rule that any seniority system that impedes black progress violates Title VII. This rationale could be applied to all seniority systems that cannot be justified by the need for plant efficiency. In *Papermakers* the Fifth Circuit rejected the so-called status quo concept that permits an employer to meet his responsibility under Title VII merely by satisfying current legal requirements. According to the court, black employees cannot be permanently locked into traditional jobs because of past discrimination. Under this theory, there is no possible neutral or fair system that preserves the status quo. Although the Equal Employment Opportunity Commission (EEOC)[41] does not condemn every seniority system as discriminatory—to do so would contradict the will of Congress—*Papermakers* comes close to this position.

In another paper industry case, *Long v. Georgia Kraft Co.*,[42] blacks had been restricted to two out of eleven lines of progression. In many instances, jobs within the lines of progression prepared workmen for more demanding jobs. Although the restrictions had been lifted, the court ruled that the seniority system violated Title VII because white employees with less plant seniority than blacks occupied jobs in the more favorable lines of progression. Citing *Papermakers,* the court decided that the proper remedy was to substitute plant-wide seniority for the existing system. The court based its holding upon a finding that the system contributed to efficiency but was not "*necessitated* by either efficiency or safety considerations."[43] This novel position indicates that a contribution to efficiency will not protect the employer unless he can prove that the system in use is *necessary* to maintain efficient operation.

When promotion to another job or department results in loss of seniority, and bumping rights in the old job are not retained,[44] black employees are usually unwilling to bid for reassignment, particularly if layoffs are frequent. Consequently, past discrimination encourages

41. *See* 42 U.S.C. § 2000(e)(4) (1964) (establishing EEOC).

42. 62 CCH Lab. Cas. 6712 (N.D. Ga. 1970).

43. *Id.* at 6717.

44. Bumping is an almost universally recognized right of senior employees, under a plant-wide seniority system, to displace junior employees in order to avoid their own layoff. The right is conditioned upon the ability of the senior employee to perform the work of the junior and may be negated by contract language denying the right. Darin & Armstrong, 13 Lab. Arb. 843 (1950) (Platt, Arbitrator).

maintenance of the status quo when the employer and union continue to contract for departmental seniority. A court order that sanctions this result short-circuits the public policy of fair employment. Treatment of seniority following promotion can take several forms. First, the most restrictive plan is to begin seniority on the new job and end it on the old job.[45] Secondly, the employee may continue to accumulate seniority on the old job and accumulate seniority on the new job from the date of assignment. Thirdly, the employee may carry over accumulated seniority into the new job, but without bumping rights. Fourthly, he may be permitted to continue his seniority into the new job and maintain it on the old job—a method preferred by black employees with some longevity.

Although past discrimination alone will not support a finding of current discrimination, section 703(h) is broad enough to reach current employer and union practices that perpetuate the results of past discrimination.[46] Therefore, if blacks are discouraged from taking advantage of their longevity in the firm by the present seniority system, an inference of discrimination is proper. The fact that departmental seniority is necessary for efficient operation may overcome the presumption of guilt, but the burden of proof on this issue should be shifted to the employer and union. If sufficient evidence is not forthcoming, the defendants should be held responsible under Title VII.[47]

45. Today, most agreements provide for a loss of past seniority when an employee moves to another job or department, often without bumping rights. U.S. BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, MAJOR COLLECTIVE BARGAINING AGREEMENTS, SENIORITY IN PROMOTION AND TRANSFER PROVISIONS 32-33 (Bull. No. 1425-11, 1970).

46. Griggs v. Duke Power Co., 39 U.S.L.W. 4317 (U.S. Mar. 8, 1971); United States v. Local 38, IBEW, 428 F.2d 144 (6th Cir.), *cert. denied*, 400 U.S. 943 (1970); United States v. Sheet Metal Workers Local 36, 416 F.2d 123 (8th Cir. 1969).

47. Other practices governing hiring and promotion also have been found to violate Title VII. Construction unions have used nepotistical membership rules and union hiring halls to exclude and prevent the advancement of blacks. In Heat & Frost Insulators Local 53 v. Vogler, 407 F.2d 1047 (5th Cir. 1969), the union by-laws and constitution required applicants for membership to be related to a member. The court found the requirement illegal, recognizing that black entrance to the construction trades is prevented when an all-white union limits its membership to relatives. Other courts have found similar membership requirements illegal. Bing v. Roadway Express, Inc., 70 L.R.R.M. 3043 (N.D. Ga. 1968); Plumbers Local 2, 152 N.L.R.B. 114 (1965), *aff'd*, 62 L.R.R.M. 2211 (2d Cir. 1966). These rulings appear to invalidate all membership requirements that perpetuate past discrimination. In United States v. Sheet Metal Workers Local 36, 416 F.2d 123 (8th Cir. 1969), the collective bargaining agreement provided for union operation of a hiring hall, with referrals based on the experience of the applicant as a sheet metal worker. Since blacks were barred from the union before 1966, the hiring hall agreement was held to violate Title VII. Nondiscriminatory membership was considered irrelevant since the agreement kept blacks on the bottom of the placement list. This case demonstrates the broad principle that unions guilty of past diserimination cannot contract for a seniority clause that perpetuates discrimination through the

The presumption also may be overcome by an employer who demonstrates his good faith by shifting blacks to jobs without loss of pay or seniority. In addition, the employer can show his good faith by training senior black employees for better jobs.[48]

C. *Remaining Problems in Particular Industries*

Despite some success under Title VII in preventing the perpetuation of past discrimination in certain industries, similar problems remain unresolved in other industries. Resolution of these problems will require a broad range of governmental action in addition to more extensive judicial implementation of Title VII.

Take the automobile industry, for example. Before passage of the Civil Rights Act of 1964, blacks were concentrated in the least desirable jobs and departments—foundry work, spraying, sanding, and unskilled labor.[49] Despite the liberal tradition and policies of the UAW, prior seniority agreements discriminated against blacks;[50] those eligible for promotion remained in "black" jobs and in narrow lines of seniority that prevented upward movement. During World War II, General Motors, Ford, Packard, Hudson, the UAW, and others agreed to an industry-wide seniority system that encouraged employee mobility into jobs essential to the war effort.[51] Blacks benefited by this change in policy, but this advantage was short-lived.[52] Southern assembly plants maintained segregated lines of seniority until 1961 without condemnation by the UAW,[53] and even today blacks throughout the industry are concentrated in foundries and maintenance departments.[54] Current seniority provisions covering automobile workers are more favorable to black progress than those established in the paper industry, but without plant-wide seniority black advancement will continue to be slow.

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mechanism of the hiring hall. *See also* Lewis v. Ironworkers Local 86, 2 F.E.P. Cas. 252 (Wash. Super. Ct. 1969).

48. It has been held that failure to train black employees for better jobs is evidence of discrimination. United States v. Hayes Int'l Corp., 415 F.2d 1038 (5th Cir. 1969). *Contra,* United States v. H.K. Porter Co., 70 L.R.R.M. 2131 (N.D. Ala. 1968).

49. Bailer, *The Automobile Unions and Negro Labor,* 59 POL. SCI. Q. 548, 549 (1944).

50. *Id.* at 562-66.

51. Ziskind, *Union Agreements: A War Weapon,* 10 U. CHI. L. REV. 1, 13 & n. 35 (1943).

52. *Summary—Seniority in the Automobile Industry,* 59 MONTHLY LAB. REV. 463-64 (1944).

53. H. NORTHRUP, THE NEGRO IN THE AUTOMOBILE INDUSTRY 9 (The Racial Policies of American Industry Rep. No. 1, 1968) (seniority in the automobile industry was negotiated on a local basis).

54. *Id.* at 49.

In the defense industries, which since World War II have stimulated the national economy because of increased expenditures for research and development,[55] the percentage of hourly employees has decreased substantially while the percentage of engineers and scientists has multiplied.[56] This increase has largely resulted from the development of more sophisticated products by defense and aerospace firms which employ large numbers of engineers and scientists.[57] Since few blacks possess the educational qualifications for these positions, promotion in these industries has been impeded. On the whole, however, black advancement in aerospace has not been restricted. In fact, lines of progression tend to be broad, possibly favoring the qualified black. During periodic layoffs, however, black employees in aerospace are hard hit by bumping.[58]

Another kind of seniority problem is found in the tire manufacturing industry in which most blacks hold production jobs that have been disappearing because of technological change.[59] The United Rubber Workers Union, whose locals have been more influential than the international, represents most of the workers. Although the international officially favors fair employment, the locals are often opposed.[60] Prior to World War II, blacks were restricted to laboring and custodial jobs or confined to the compounding rooms, with separate lines of seniority.[61] After the war, locals pushed for plant seniority in place of departmental seniority to increase the job opportunities available to white members.[62] If fair employment legislation had been in effect at that time, however, locals might have been less willing to push for plant-wide seniority. Notwithstanding contracts calling for plant-wide seniority, some departments remained segregated,[63] and, even now,

55. Between 1950 and 1965, research and development expenditures of the Department of Defense increased from $652 million to $7 billion. Spending for space research increased from $54 million to $5 billion during this period. S. MELMAN, OUR DEPLETED SOCIETY 77 (1965).

56. Fulton, *Employment Impact of Changing Defense Programs*, 87 MONTHLY LAB. REV. 508, 513 (1964).

57. U.S. BUREAU OF LABOR STATISTICS, DEP'T OF LABOR, EMPLOYMENT OUTLOOK AND CHANGING OCCUPATIONAL STRUCTURE IN ELECTRONICS MANUFACTURING, table 16, at 37 (Bull. No. 1363, 1963).

58. *Id.* at 34.

59. H. NORTHRUP, THE NEGRO IN THE RUBBER TIRE INDUSTRY 12-14 (The Racial Policies of American Industry Rep. No. 6, 1969).

60. *Id.* at 22-23. *See also* Local 12, Rubber Workers, 368 F.2d 12 (5th Cir. 1966), *cert. denied*, 389 U.S. 837 (1967).

61. H. NORTHRUP, *supra* note 59, at 34-35.

62. *Id.* at 47-49.

63. United Rubber Workers Union, 150 N.L.R.B. 312 (1964).

few blacks can be found in upper and middle management ranks.[64] Similarly, craftsmen hold fifteen percent of all jobs in the industry, but blacks fill only 2.8 percent of these jobs.[65] It appears that management and organized labor are each partly responsible for the lack of black advancement. The problem for the EEOC and the courts in this situation is one of ending intentional discrimination rather than changing the seniority system. To quickly and effectively abolish discrimination in the tire industry, unions could be decertified by the NLRB[66] and government contracts could be cancelled by the Office of Federal Contract Compliance (OFCC).[67] Admittedly, the track record of the OFCC is poor, since it has not utilized its power to cancel contracts held by employers who continue to discriminate.[68]

In the petroleum industry, unionization has been limited to those employed in refining, with power concentrated at the local level.[69] Although segregated lines of seniority officially ended by 1960, few blacks have moved upward because management has required employees to have high school degrees and satisfactory performance on tests for advancement.[70] In addition, black advancement has been restricted because management has favored departmental seniority and white locals have continued to discriminate.[71] It seems that a decision similar to *Papermakers* will be necessary to eliminate the adverse impact of the seniority system in petroleum.

Research is a key factor in the chemical industry, and many jobs are professional and skilled in nature.[72] Lack of education, failure to bid for open jobs, and technological change have prevented blacks from advancing rapidly.[73] Seniority in the chemical industry tends to be accumulated departmentally for promotion and plant-wide for layoff, permitting bumping, which injures many black employees. An attempt has been made by employers and unions to minimize the adverse impact

64. The employers are primarily responsible for this since the union does not bargain for management employees.

65. H. NORTHRUP, *supra* note 59, at 70-78.

66. Hughes Tool Co., 147 N.L.R.B. 1573 (1964).

67. *See* 41 C.F.R. §§ 60-1.1 to -1.4 (1971).

68. R. NATHAN, JOBS AND CIVIL RIGHTS (Clearing Pub. No. 16, 1969); Jones, *The Bugaboo of Employment Quotas*, 1970 WIS. L. REV. 341, 398.

69. C. KING & H. RISHER, THE NEGRO IN THE PETROLEUM INDUSTRY 16-23 (The Racial Policies of American Industry Rep. No. 5, 1969).

70. *Id.* at 36-38. Similar requirements were successfully attacked under Title VII in Griggs v. Duke Power Co., 91 S. Ct. 849 (1971).

71. *Id.* at 90-91.

72. W. QUAY, THE NEGRO IN THE CHEMICAL INDUSTRY 1-10 (The Racial Policies of American Industry Rep. No. 7, 1969).

73. *Id.* at 64-67.

of seniority upon blacks, but little success has been achieved. Complaints under Title VII have not yet questioned this split system of seniority; but since it has an adverse effect on black employees, a court could reasonably find that it violates Title VII if there is insufficient evidence of business necessity.

IV. The Thirteenth Amendment and the Civil Rights Act of 1866

A black employee who is denied equal employment opportunities may be able to seek protection under the Civil Rights Act of 1866 as well as under Title VII of the 1964 Civil Rights Act. The 1866 Act was largely forgotten after the *Civil Rights Cases*,[74] in which the Supreme Court decided that private discrimination did not violate the thirteenth amendment, which forbids slavery, or the fourteenth amendment, which prohibits state discrimination. In 1968, however, the scope of the thirteenth amendment and the 1866 Act was reconsidered in the case of *Jones v. Alfred H. Mayer Co.*,[75] in which a real estate developer refused to sell a home to blacks and was thereafter sued under the forgotten Civil Rights Act. Section 2 of the Act provides:

> All citizens . . . shall have the same right, in every State . . . as is enjoyed by white citizens . . . to inherit, purchase, lease, sell, hold, and convey real and personal property.[76]

The constitutional issue raised in *Jones* was whether the thirteenth amendment is sufficiently broad to support the 1866 legislation. Upholding the constitutionality of the 1866 Act as a proper exercise of congressional power, the Supreme Court ruled that the defendant's refusal to sell a home to the plaintiffs was a badge of servitude forbidden by the thirteenth amendment.

The decision in *Jones* is bound to unleash a fresh flurry of activity in the civil rights arena. Although the contractual rights protected in section 2 of the 1866 legislation pertain to property, section 1 provides:

> All persons . . . shall have the same right in every State . . . to make and enforce contracts, to sue, be parties, give evidence, and to enjoy the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens . . . .[77]

Sections 1 and 2 are substantially complementary. Yet the right to contract spelled out in section 1 is not limited to "real and personal

74. 109 U.S. 3 (1883).
75. 392 U.S. 409 (1968).
76. 42 U.S.C. § 1982 (1964).
77. *Id.* § 1981.

property," and it could be interpreted as a necessary protection for blacks in their contractual relations with employers. Several recent decisions, relying on *Jones*, have adopted this rationale in holding that section 1 of the 1866 legislation reaches private discrimination in employment.[78]

It seems safe to assume that section 1 of the 1866 Act has not been superseded by Title VII even though the more recent legislation provides a more comprehensive system of relief. This assumption is supported by the Seventh Circuit's holding in *Waters v. Wisconsin Steel Works*[79] that, although Title VII may have modified an aggrieved person's right to sue directly under section 1, it neither expressly nor impliedly overruled the 1866 Act. The court's conclusion is reasonable because, when the 1964 legislation was drafted, Congress was apparently unaware of the 1866 Act's potential use. In this context, an attempt to ascertain congressional intent would be unproductive. A more pertinent approach would be to weigh the need for the cumulative remedy provided by the earlier legislation.[80] This approach would not undermine the validity of the 1866 Act since the coexistence of different remedies for private discrimination is not without precedent.[81]

V. RECOMMENDATIONS

While the negotiation of a collective bargaining agreement is a private matter between a union and an employer, the public is interested in minimizing industrial strife and preventing agreements that contravene public policy. One of the agencies responsible for implementing the public interest in collective bargaining is the Federal Mediation and Conciliation Service (FMCS). Section 7(d)(3) of the Taft-Hartley Act provides for notification of the FMCS 30 days before

78. *See* Waters v. Wisconsin Steel Works, 427 F.2d 476 (7th Cir. 1970); Clark v. American Marine Corp., 304 F. Supp. 603 (E.D. La. 1969).

79. 427 F.2d 476 (7th Cir. 1970) (aggrieved person may sue directly under § 1981 if he pleads reasonable excuse for failure to exhaust EEOC remedies under Title VII); *accord*, Washington v. Baugh Constr. Co., 313 F. Supp. 598 (W.D. Wash. 1969) (jurisdictional prerequisites of Title VII inapplicable to suit under § 1981).

80. In James v. Ogilvie, 310 F. Supp. 661 (N.D. Ill. 1970), the impact of Title VII upon the Civil Rights Act of 1871 was considered. The court found nothing in Title VII to preclude application of the 1871 legislation but felt that an injunction was unwarranted because there had been no showing that the state remedy was inadequate.

81. The means to end discrimination have constantly increased since 1942. When a discriminatory seniority system is part of a collective bargaining agreement, for example, both § 301 of the Taft-Hartley Act, 29 U.S.C. § 185 (1964), and Title VII can be used. Relief also is available under state fair employment law, and the federal government can require government contractors to follow Exec. Order 11,246, 30 Fed. Reg. 12319 (1965).

the expiration of an agreement if its services are desired in the negotiation of a new agreement.[82] Although the primary responsibility of the FMCS is to help parties who are experiencing difficulty negotiating a new agreement, it occasionally helps resolve disputes arising out of an existing agreement.

The best place to minimize the impact of an unfair seniority agreement is at the bargaining table with the aid of a representative of the FMCS. Although a more active role for the FMCS may require express congressional authorization,[83] without this outside assistance, progress for blacks will be slower. Union leaders, who function like politicans, are reluctant to urge positive action that white members will dislike. Employers also are unwilling to take action that will affect employee morale. In addition, employers fear that the integration of departments and jobs will lead to slowdown and inefficiency. Although policy of the FMCS is not to intervene or make suggestions when the employer and union agree, FMCS leadership is necessary in employer-union negotiations on seniority provisions. If allowed to participate, the FMCS conciliator could assess the probable impact of a seniority clause upon black employees and either recommend change[84] or notify the EEOC, the Civil Rights Division of the Department of Justice, or the OFCC. It is axiomatic that improved liaison among federal agencies dealing with civil rights issues can only prove beneficial. Although employers and unions may balk at inspection and resent "spying," their reaction should not be sufficiently adverse to outweigh the obvious merit of FMCS participation. Since employers and unions claim that they support and follow fair employment policies, it would be politically unwise for them to object to inspections and suggestions that are intended to implement these goals.

Another way in which the federal government can effectuate fair

82. 29 U.S.C. § 158(d)(3) (1964).

83. The intervention of third parties in the collective bargaining process to prevent the adoption of discriminatory seniority provisions may be prohibited by § 9(a) of the National Labor Relations Act, 29 U.S.C. § 159 (1964), which requires an employer to bargain exclusively with properly designated employee representatives. This result is indicated by the decision in Hotel Employer's Ass'n, 47 Lab. Arb. 873 (1966) (R. Burns, Arbitrator), in which an agreement between employers and nonunion, civil rights groups for the stated purpose of implementing a policy of "equal employment opportunity" was struck down as an unlawful collective bargaining agreement because it varied terms and conditions of employment of some employees in the unit for which a union was the designated bargaining representative. Although the holding in this case is not necessarily applicable to FMCS participation in the collective bargaining process, it indicates a need for express congressional authorization of such participation.

84. Sinee FMCS activity has reached a new high this approach might prove worthwhile. Summary of Developments, 74 CCH LAB. L. REP. 313 (1970).

employment policy is to scrutinize the impact of seniority clauses upon blacks employed by government contractors. Executive Order 11,246[85] prohibits employment discrimination by government contractors and subcontractors. To implement this order, the OFCC has compiled rules that are applicable to prime contractors and subcontractors who employ more than 50 people and who hold contracts exceeding 50,000 dollars. These rules label unfair seniority systems as contract violations and require employers to take affirmative action to hire and upgrade blacks.[86] Moreover, government contracts cannot be awarded or continued when promotion, training, or seniority systems are discriminatory.[87] Despite the OFCC's poor enforcement record, government agencies that award contracts to private employers may be in the best position to promote fair seniority clauses because they are not usually hampered by the same rules of evidence and procedure that restrict courts.[88]

In 1968, after reviewing the *Papermakers* decision to determine whether additional measures were necessary to insure satisfactory compliance with Executive Order 11,246, the OFCC issued a memorandum containing additional instructions to its contract compliance officers. This memorandum acknowledged that seniority clauses are the primary responsibility of employers and unions, but recognized an OFCC obligation to challenge unfair seniority provisions. Although OFCC officials have instructed agency representatives to check the discriminatory aspects of collective bargaining agreements, the FMCS continues to pursue a hands-off policy. This does not mean, however, that the OFCC has done more than the FMCS to abolish discriminatory seniority clauses. Both have failed to realize their potential because of their inability to coordinate policy and practice.

One means by which employers and unions may avoid a charge of unfairness is the negotiation of a new agreement providing for plant or company-wide seniority in place of job or departmental seniority. In the absence of unusual circumstances, such as would be present if the agreement caused a reduction in the pay of black workers, federal agencies and the courts should accept it as an honest attempt to rectify past injustice. A black employee is more likely to accept a new assignment when seniority continues to run or when backward bumping

85. 30 Fed. Reg. 12319 (1965) (announcing a policy of equal employment opportunity).

86. The rules of the OFCC, which are based on Exec. Order No. 10,925, 3 C.F.R. 448 (Supp. 1963), were made effective on January 30, 1970. *See* 35 Fed. Reg. 2586-90 (1970).

87. Exec. Order No. 10,925, 3 C.F.R. 448, 449 (Supp. 1963).

88. *See* materials cited note 68 *supra*.

rights are contractually reserved. It may be unwise, however, to permit seniority to be carried over to a new assignment if employees already on a job or in a department will suffer.[89] Consequently, it may be reasonable for courts to approve agreements that permit bumping without a transfer of seniority while rejecting agreements in which seniority is lost and bumping is prohibited. Moreover, an employer who is reluctant to grant plant-wide seniority unless employees who seek transfers are required to prove their ability to perform the requested job could contract for a reasonable trial period—30 to 90 days, for example, with full seniority restored after the trial period—that would be sustained under Title VII.[90]

Employers have blamed unions for the perpetuation of the caste system in industry. Blacks, on the other hand, have justifiably insisted that their lack of skill and experience is the result of both employer and union discrimination. Clearly, both are at fault and must share the responsibility equally.

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89. United States v. Bethlehem Steel Corp., 312 F. Supp. 977 (W.D.N.Y. 1970). The broad seniority unit could be damaging to newly hired black employees, particularly sinee many firms and unions that followed discriminatory practices in the past have only recently begun to hire on a fair basis.

90. *See* United States v. Hayes Int'l Corp., 295 F. Supp. 803 (N.D. Ala. 1968), *rev'd on other grounds*, 415 F.2d 1038 (5th Cir. 1969).