UNIT SENIORITY SYSTEMS AND CIVIL RIGHTS: THE NEED FOR LAW REFORM

James D. Donathen *

INTRODUCTION

This note reviews the effect of Title VII of the Civil Rights Act of 1964[1] on unit-based seniority systems established by an employer.

Decisions by United States district courts and Courts of Appeals,[2] and by the Equal Employment Opportunity Commission (E.E.O.C.),[3] have consistently found unit seniority systems which perpetuate the effects of discrimination that began prior to enactment of the Civil Rights Act of 1964 to constitute unlawful employment practices within the meaning of Title VII.

These decisions, in which there was no conflict between any of the Circuit Courts of Appeals, have been in accord with the purpose of Title VII: the elimination of discrimination in employment.[4] In the past, in all circuits and in E.E.O.C. decisions, the concept of unlawful employment practices has included both overt practices as well as practices which, while neutral on their face, "operate" in such a way as "to 'freeze' the status quo of prior discriminatory employment practices."[5]

Despite this uniformity of law and administrative practice, the Supreme Court recently reversed much of the established precedent regarding discriminatory seniority systems. In *Teamsters v. United States,*[6] the Court, by a seven-to-two vote, held that seniority systems which perpetuate the effects of pre-act discrimination are lawful, provided that the seniority system itself was not established or maintained with discriminatory intent.

Many employers base their seniority systems on intra-company production units or departments. This type of system is particularly prevalent in industrial firms, while less common in government agencies, service-oriented businesses, and in foundations, universities and other not-for-profit organizations.

In a unit-based seniority system, pay scales, promotions and transfers are based on the seniority which an individual employee has accrued within the specified unit or department, rather than on the basis of seniority accrued within the firm as a whole.

*A.B., University of Notre Dame, 1975; J.D. Candidate, University of Notre Dame Law School, 1978.

1. 42 U.S.C. §2000e *et seq.*
2. *See* text and notes at n. 32, infra.
3. *See* text and notes at n. 33, infra.
4. McDonnel Douglas Corp. v. Green, 411 U.S. 792, 800 (1973).
5. Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971).
6. 431 U.S. 325 (1977).

There are, in some instances, management advantages through the utilization of unit—rather than company-based seniority systems.[7] Prior to July 2, 1965, however, which was the effective date of Title VII, unit-based seniority systems often had the effect of fostering racial discrimination. Blacks were hired into unskilled and poorly paid units, while whites were hired into skilled and better paid units. The collective bargaining agreements prohibited employee transfers between units, thereby ensuring that the units remained segregated. Additionally, these agreements provided that pay scales, promotions within the units, and lay-off and recall priorities were determined by unit seniority.[8]

After 1965, employers gradually eliminated overt discriminatory practices by hiring blacks into formerly all-white units and permitting blacks to transfer into white units. Unit seniority, however, continued to determine employee rights and benefits, including the newly granted ability to transfer between units.[9]

Such transfers contain built-in limitations which discourage black employees from transfering into more desirable units. First, the transfer to a new unit usually means accepting the least skilled and lowest paid job in the new unit. Second, the transfer means giving up seniority earned in the old unit since seniority in the new unit is measured from the date of transfer.[10]

In effect, the continued use of these unit-based seniority systems often results in black workers being locked into poorly-paid, unskilled positions, thereby perpetuating the effects of pre-act discrimination in the hiring and promotion of blacks and other minority-group members.

The effect of the Supreme Court's decision in *Teamsters v. United States* is to limit the impact of Title VII by excluding a number of seniority systems from its coverage. This will result in many discriminated-against employees no longer having standing to bring a complaint before E.E.O.C. or in district court, and thus having no remedy to redress their grievance. This result is contrary to, and frustrates, the purposes of the government's policy of acting to eliminate discrimination in employment, a policy enacted into law by Congress and the President.

This note reviews the legislative history of Title VII provisions pertaining to seniority, as well as the decisions by the courts interpreting and defining those seniority provisions. Focus is given to interpretations of Section 703(h) of Title VII,[11] a provision which excludes supposedly bona fide seniority systems from coverage under Title VII, with particular reference to the *Teamsters* decision. The conclusion sets forth a suggestion for an amendment to Title VII which would adhere to the history of the Civil Rights Act of 1964 and the goals and legislative purposes of Title VII.

7. *E.g.*, promoting efficiency, encouraging employees to remain within the company to obtain advancements, and limiting the amount of employee retraining. Quarles v. Phillip Morris, Incorporated, 279 F.Supp. 505, 513 (E.D. Va. 1968).
8. *E.g.*, Quarles v. Phillip Morris, Incorporated, 279 F. Supp. at 508, 512; Local 189, United Papermakers & Paperworkers v. United States, 416 F. 2d 980, 983 (5th Cir. 1969), *cert. denied*, 397 U.S. 919 (1970).
9. *E.g.* Quarles, 279 F. Supp. at 508, 512-513; United Papermakers, 416 F.2d at 983-984.
10. Another form of restrictive transfer provision permits the transferee to carry his accrued seniority to the new unit, but limits the number of transfers to a small number per month or per year. *See* Quarles, 279 F.Supp. at 512.
11. §703(h) of Title VII is codified at 42 U.S.C. §2000e-2(h).

LEGISLATIVE HISTORY

Whether unit seniority systems constitute unlawful employment practices within the meaning of Title VII turns upon the construction of the statutory provisions concerning seniority systems. Section 703(a) of Title VII states that it shall be an unlawful employment practice for an employer to segregate or classify employees or applicants on the basis of race, color, religion, sex, or national origin.[12] By itself, Section 703(a) would clearly indicate that unit seniority systems which perpetuate the effects of pre-act discrimination constitute unlawful employment practices.[13] Congress, however, sought to clarify the operation of Section 703 (a) as it affects bona fide seniority systems, reflected in Section 703(h). The pertinent portion of Section 703(h) provides:

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

The legislative history of Title VII, especially that regarding Section 703(h), is admittedly sparse. Problems in determining the proper construction of Section 703(h) have in large part resulted from its inadequate legislative history, contained primarily in statements in Congress rather than in Congressional committee reports.[14]

The House version of the Civil Rights Act of 1964, H.R. 7152, did not contain Section 703(h) when reported by the House Judiciary Committee[15] or when passed by the full House.[16] During its consideration of H.R. 7152, the House made only passing reference to seniority rights.[17]

The subject of seniority rights became a matter of more serious contention during the Senate debate on H.R. 7152.[18] A small number of Senators, including

12. The full text of §703(a), codified at 42 U.S.C. §2000e-2(a), provides:
    (a) It shall be an unlawful employment practice for an employer–
    "(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex or national origin; or
    (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin."

    §703(b), codified at 42 U.S.C. §2003-2(b), contains similar proscriptions regarding employment practices of labor organizations.
13. Federal courts on several occasions have held that a neutral policy which perpetuated pre-act racial discrimination constitutes an unlawful employment practice. *See generally* U.S. v. Sheet Metal Workers Int'l. Ass'n., Local No. 36 et al., 416 F.2d 123 (8th Cir. 1969); Afro-American Patrolman's League v. Dick, 503 F.2d 294 (6th Cir. 1974); Jones v. Lee Way Motor Freight, Inc., 431 F.2d 243 (10th Cir. 1970); Marquez v. Omaha District Sales Office, Ford Motor Co., 440 F.2d 1157 (8th Cir. 1971); United States v. IBEW, Local No. 38, et. al, 428 F.2d 144 (6th Cir. 1970), cert. denied 400 U.S. 943 (1970); Sims v. Sheet Metal Workers Int'l. Ass'n. Local No. 65, 489 F.2d (6th Cir. 1973).
14. Vaas, Francis J., "Title VII: The Legislative History, " 7 B.C. Ind. & Com. L. Rev. 431, 457 (1966).
15. H.R. Rep. No. 914, 88th Cong., 1st Sess. (1963).
16. 110 Cong. Rec. 2804 (1964).
17. *E.g.*, H.R. Rep. No. 914, 88th Cong., 1st Sess., 65-66, 71 (1963) (minority report) and Remarks of Representative John Dowdy, (D., Texas), 110 Cong. Rec. 2726 (Title VII would upset seniority systems); Remarks of Representative Emanuel Celler (D., New York), 110 Cong. Rec. 1518 (1964) (Title VII would not affect seniority systems).
18. *See* Franks v. Bowman, 424 U.S. 747, 759-762 (1976).

the late Minority Leader Everett McKinley Dirksen, feared that Section 703(h) proscriptions of unlawful employment practices would require preferential treatment of minorities. Senate concerns included the belief that Title VII would require employers to fire white workers in order to remedy the effects of pre-act discrimination in hiring, thereby upsetting the traditional seniority lay-off and recall practices.[19]

Senator Joseph S. Clark (D., Pennsylvania), floor manager for Title VII, attempted to quiet these fears of reverse discrimination.[20] His response includes the introduction of three documents into the Congressional Record. These were a set of answers to questions posed by Senator Dirksen, a memorandum submitted by the Justice Department, and a memorandum prepared jointly by Senators Clark and Clifford P. Case (R., New Jersey). The documents stressed that Title VII would not be retrospective, but would apply prospectively to employment practices occuring after its effective date.

Senator Clark's response to Senator Dirksen's questions regarding seniority rights[21] and the Justice Department's memorandum,[22] emphasized that Title VII would not upset seniority rights concerning traditional lay-off and recall practices. The Clark-Case memorandum[23] stressed that Title VII would not require employers to fire white workers in order to remedy past discrimination.

19. *E.g.*, Remarks of Senator Lister Hill, (D., Alabama), 110 Cong. Rec. 486-488 (1964); Remarks of Senator John C. Stennis, (D., Mississippi)., 110 Cong. Rec. 7091 (1964).
20. Remarks of Senator Clark, 110 Cong. Rec. 7207 (1964).
21. 110 Cong. Rec. 7207 (1964). The pertinent portion reads:
"Question. Would the same situation prevail in respect to promotions, when management function is governed by a labor contract for promotions on the basis of seniority? What of dismissals? Normally, labor contracts call for 'last hired, first fired.' If the last hired are Negroes, is the employer discriminating if his contract requires they be first fired and the remaining employees are white?
"Answer. Seniority rights are in no way affected by the bill. If under a 'last hired, first fired' agreement a Negro happens to be the 'last hired' he can still be 'first fired' as long as it is done because of his status as 'last hired' and not because of his race.
"Question. If an employer is directed to abolish his employment list because of discrimination what happens to seniority?
"Answer. The bill is not retroactive, and it will not require an employer to change existing seniority lists."
22. *Id.* The pertinent portion of the Justice Department memorandum states:
"First, it has been asserted that title VII would undermine vested rights of seniority. This is not correct. Title VII would have no effect. 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 . . . . Of course, if the seniority rule itself is discriminatory, it would be unlawful under title VII. If a rule were to state that all Negroes must be laid off before any white man, such a rule could not serve as the basis for a discharge subsequent to the effective date of the title. . . . But, in the ordinary case, assuming that seniority rights were built up over a period of time during which Negroes were not hired, these rights would not be set aside by the taking effect of title VII. Employers and labor organizations would simply be under a duty not to discriminate against Negroes because of their race. Any differences in treatment based on established seniority rights would not be based on race and would not be forbidden by the title."
23. 110 Cong. Rec. 7213 (1964). The full text of the memorandum prepared by Senators Clark and Case states:
"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 Negroes, or to prefer Negroes for future vacancies, or once Negroes are hired, to give them special seniority rights at the expense of the white workers hired earlier. (However, where waiting lists for employment or training are, prior to the effective date of the title, maintained on a discriminatory basis, the use of such lists after the title takes effect may be held an unlawful subterfuge to accomplish discrimination."

Instead, the Clark-Case memorandum indicated that the employers need only fill future vacancies, i.e., those occuring after the effective date of Title VII, on a nondiscriminatory basis.

The context of the debate indicates that Senate concern focused on the effect of Title VII upon vested seniority rights which determine the job security of white workers. The Senate resolved that Title VII would not require preferential treatment of minorities, thereby eliminating the specter of reverse discrimination in hiring future employees.[24] The Senate, however, did not consider the effect of Title VII upon unit seniority systems which perpetuate the effects of pre-act discrimination.

During the course of the Title VII debate, informal conferences were held by the Senate leadership, headed by Majority Leader Mike Mansfield, and Minority Leader Dirksen.[25] These conferences produced a substitute bill, with amendments to H.R. 7152, the bill subsequently passed by both the Senate and House and enacted into law. The Mansfield-Dirksen substitute bill contained Section 703(h).[26] While the amendments concerning Title VII were intended to satisfy the objections of various Senators, especially those of Senator Dirksen,[27] the effect of the Mansfield-Dirksen substitute bill was to clarify rather than to alter the substantive provisions of Title VII. Remarks by the late Senator Hubert H. Humphrey, (D., Minnesota), one of the substitute bill's authors, provide evidence of such intent regarding Section 703(h). Senator Humphrey stated:

> A new subsection 703(h) . . . has been added, providing that it is not an unlawful employment practice for an employer to maintain different terms, conditions, or privileges of employment . . . pursuant to a seniority . . . system, provided the differences are not the result of an intention to discriminate . . . The change does not narrow the application of the title, but merely clarifies its present intent and effect.[28]

Further evidence that the Mansfield-Dirksen substitute bill was intended only to clarify H.R. 7152 is contained in the record of the House Rules Committee[29] regarding House Resolution 789,[30] a resolution to adopt the Senate version of the Civil Rights Act of 1964. While no specific reference is made to Section 703(h) or to seniority rights, the debate in the Rules Committee indicates that a majority of its members believed the Senate amendments merely clarified H.R. 7152. The comments of Representative Emanuel Celler, then chairman of the House Rules Committee, are illustrative:

24. Similar concerns that Title VII mandated reverse discrimination prodeced another Mansfield-Dirksen amendment, §703(j), codified at 42 U.S.C. 2000e-2(j). §703(j) states: "Nothing contained in this title shall be interpreted to require any employer, employment agency, labor organization, or joint labor-management committee subject to this title to grant preferential treatment to any individual or to any group because of the race, color, . . . 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, . . . or national origin employed by any employer . . . in comparison with the total number or percentage of persons of such race, color, . . . 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." Thus, §703(j) provides further indication of Senate concern that Title VII be prospective, rather than retrospective, in its operation.
25. Vaas, note 14, supra, at 445.
26. 110 Cong. Rec. 13310-13319 (1964) (Senate Amendment No. 1052).
27. *See generally,* Remarks of Senator Everett McKinley Dirksen, 110 Cong. Rec. 6449-6551 (1964).
28. *See generally,* Remarks of Senator Hubert H. Humphrey, 110 Cong. Rec. 12723 (1964).
29. H.R. Hearing on H. Res. 789, Committee on Rules, 88th Cong., 2d Sess. (1964).
30. *Id.* at 1.

> [A]s I have indicated, there are no great differences. Most of the 80 amendments to H.R. 7152 have been clarifying amendments. They have been inconsequential.[31]

Thus, the legislative history of Section 703(h) indicates that Congress intended to clarify the operation of Title VII by ensuring the title would not disturb vested seniority rights which determine the job security of white workers. The impact of Title VII upon black employees already employed in unskilled and poorly paid jobs was not considered by Congress.

PRE-*TEAMSTERS v. UNITED STATES* DECISIONS

Following the enactment of Title VII, federal district courts and Courts of Appeals,[32] the Equal Employment Opportunity Commission,[33] and commentators[34] grappled with the question Congress did not consider. They uniformly agreed that Section 703(h) was not intended to immunize unit seniority systems which perpetuated pre-Act discrimination, locking black employees into unskilled and poorly paid jobs.

The leading district court decision, *Quarles v. Phillip Morris Incorporated*[35] established that unit seniority systems which perpetuate the effects of pre-Act discrimination constitute unlawful employment practices.

In ascertaining the meaning of Section 703(h), the *Quarles* court noted that several factors are evident from its legislative history:

> First, it contains no express statement about departmental seniority. Nearly all of the references are clearly to employment security. None of the excerpts upon which the company and the union rely suggests that as a result of past discrimination a Negro is to have employment opportunities inferior to those of a white person who has less employment seniority. Second, the legislative history indicates that a discriminatory seniority system established before the act cannot be held lawful under the act.[36]

The Court concluded that while the legislative intent indicates that Title VII does not require reverse discrimination, "Congress did not intend to freeze an entire generation of Negro employees into discriminatory patterns that existed before the act."[37]

The *Quarles* court provided two grounds for attacking unit seniority systems in light of Section 703(h). First the court stated that while section 703(h) "expressly states that the seniority system must be bona fide, . . . [n]othing in Section 703(h) or its legislative history, suggests that a racially discriminatory seniority system established before the act is a bona fide seniority system under the act."[38] The Court held that "a departmental seniority system that has its genesis in racial discrimination is not a bona fide seniority system."[39]

31. *Id.* at 10.
32. 431 U.S. at 378-379, notes 2-3 (Marshall, J., dissenting and concurring).
33. *Id.* at 380, note 4 (Marshall, J., dissenting and concurring).
34. *Id.*, note 5 (Marshall, J., dissenting and concurring).
35. 279 F. Supp. 505 (E.D. Virginia 1968).
36. *Id. at 516.*
37. *Id.*
38. *Id.* at 517.
39. *Id.*

Second, the court held that a seniority system which presently perpetuates the effects of pre-act discriminatory practices constitutes an unlawful employment practice, though the seniority did not have its "genesis in racial discrimination." The court emphasized:

> The differences between the terms and conditions of employment for white and Negroes . . . are the result of an intention to discriminate in hiring policies on the basis of race before January 1, 1966. The differences that originated before the act are maintained now. The act does not condone present differences that are the result of an intention to discriminate before the effective date of the act, although such a provision could have been included in the act had Congress so intended.[40]

Subsequently, eight Circuit Courts of Appeals agreed with the *Quarles,* rationale.[41] These decisions tended to blend the two holdings of *Quarles,* finding that seniority systems which perpetuate the effects of pre-act discrimination are not bona fide within the meaning of Section 703(h), and therefore constitute unlawful employment practices unless the defendant employer or union could prove an overriding business necessity for their use.

The Courts of Appeals fashioned a "rightful place" remedy which carried out the purposes of Title VII while adhering to Section 703(h) proscriptions of reverse discrimination. One leading decision, *Local 189, United Papermakers and Paperworkers v. United States,*[42] stated:

> A "rightful place" theory stands between a complete purge of "but for" effects and the maintenance of the status quo. The Act should be construed to prohibit the *future awarding* of vacant jobs on the basis of a seniority system that "locks in" prior racial classification. White incumbent workers should not be bumped out of their present positions by Negroes with greater plant seniority; plant seniority should be asserted only with respect to new job openings.[43]

In so doing, the courts dismantled unit seniority systems, replacing them with plant-wide seniority systems tailored to assure that no employees would have a right to a job he could not properly perform.[44] Moreover, the rightful place remedy in no way affected the employment security of white workers. As *United Papermakers* emphasized:

> It is one thing for legislation to require the creation of fictional seniority for newly hired Negroes, and quite another thing for it to require that time actually worked in Negro jobs be given equal status with time worked in white jobs . . . No stigma of preference attaches to recognition of time actually worked in Negro jobs as the equal of white time.[45]

Thus, these decisions appear to correctly adhere to Section 703(h) and its legislative history, agreeing with *Quarles* that the treatment of seniority involves problems different from those considered in the Senate debates. The granting

40. *Id.* at 517-518.
41. Courts of Appeals for the Second, Fourth, Fifth, Sixth, Eighth and Ninth Circuits held in accordance with Quarles. *See* 431 U.S. at 378, n.2 (Marshall, J. dissenting and concurring). Courts of Appeals for the Seventh and Tenth Circuits indicated agreement in *dicta. See Id.* at 380 note 3. (Marshall, J., dissenting and concurring).
42. 416 F.2d 980 (5th Cir. 1969).
43. *Id.* at 988. *See* Note, Title VII, Seniority Discrimination, and the Incumbent Negro, 80 Harv. L. Rev. 1260 (1967).
44. *Id.* at 985, 998.
45. *Id.* at 995.

of a "rightful place" also correctly adheres to Section 703(h), since it does not challenge the employment security of white workers, i.e., does not require employers and unions to engage in reverse discrimination. Instead, these decisions merely ensure that black employees are not presently discriminated against, permitting them to compete on an equal footing with their white counterparts.

TEAMSTERS v. UNITED STATES

Through a misinterpretation of Section 703(h) and its legislative history, the Supreme Court has given new meaning to this section in its *Teamsters* decision. The full effect of *Teamsters* cannot be fully predicted, since both the E.E.O.C. and federal district courts and Courts of Appeals have narrowly construed the Supreme Court decision.[46] However, it is clear that Section 703(h) immunizes otherwise lawful seniority systems which perpetuate the effects of pre-Act discrimination.

In *Teamsters,* both the district court[47] and the Court of Appeals for the Fifth Circuit[48] found that the defendant employer, T.I.M.E.-D.C., Inc., and the defendant union, the International Brotherhood of Teamsters, had (1) engaged in both pre- and post-act discriminatory hiring practices and (2) the effects of this past discrimination were perpetuated by the collective bargaining agreement which restricted inter-unit transfers.[49]

Similar to employers in the *Quarles* progeny, T.I.M.E.-D.C., Inc. organized its trucking operations on the basis of units, with separate unit seniority for line drivers (over the road drivers), maintenance personnel, and local city drivers.[50] While company seniority controlled for the purpose of calculating fringe benefits, e.g. vacations and pensions, unit seniority controlled inter-unit transfers and lay-off and recall priorities.[51]

The Court of Appeals for the Fifth Circuit utilized the "rightful place" remedy, holding that named black and chicano workers were entitled to bid for future linedriver positions on the basis of their company seniority, thereby dismantling the unit seniority system as it applied to inter-unit transfers. Additionally, once a worker had transferred to a line-driver position, his company seniority would be utilized for all purposes, including lay-off and recall.[52]

46. See text accompanying note 68, *infra.*
47. United States v. T.I.M.E.-D.C., Inc., 6 FEP Cases 690 (N.D. Texas 1972). The District Court's memorandum opinion is not officially reported.
48. United States v. T.I.M.E.-D.C., Inc., 517 F.2d 299 (5th Cir. 1975).
49. The action was brought by the Attorney General on behalf of the United States, pursuant to §707(a), 42 U.S.C. §2000e-6(a).
At the time the suit was initiated, § 707(a) granted standing to the Attorney General to bring a Title VII action whenever he had reasonable cause to believe any person or persons is engaged in a pattern or practice of resistance to the full employment of any rights "secured" by Title VII. §707 was amended in 1972 by the Equal Employment Opportunity Act of 1972, 86 Stat. 107, 42 U.S.C. §2000-6(c), to give the EEOC rather than the Attorney General standing to bring "pattern or practice" suits against private employers. In 1974, the EEOC was substituted for the Attorney General for the United States. 431 U.S. at 328-329, n. 1.
50. 431 U.S. at 329-330, note 3.
51. *Id.* at 343-344.
52. *Id.* at 333.

The Supreme Court granted certiorari to petitions by T.I.M.E.-D.C., Inc. and the Teamsters.[53] In a seven-to-two decision, the majority reversed that portion of the Court of Appeals decision concerning Section 703(h) and upheld the seniority system as lawful.

Writing for the majority, Justice Potter Stewart noted that the purpose of Title VII is to eliminate discriminatory employment practices and that but for Section 703(h), the employer's unit seniority system would constitute an unlawful employment practice since it perpetuated the effects of pre-act discrimination in hiring.[54]

Justice Stewart conceded:

> Where, because of the employer's prior intentional discrimination, the line drivers with the longest tenure are without exception white, the advantages of the seniority system flow disproportionately to them and away from Negro and Spanish-surnamed employees who might by now have enjoyed those advantages had not the employer discriminated before the passage of the Act. This disproportionate distribution of advantages does in a very real sense "operate to 'freeze' the status quo of prior discriminatory employment practices."[55]

The majority, however, concluded that "both the literal terms of . . . [Section] 703(h) and the legislative history of Title VII demonstrate that Congress considered this very effect of many seniority systems and extended a measure of immunity to them."[56]

The court majority admitted that the legislative history "did not address the specific issue presented by this case."[57] But the majority construed references in the legislative history that Title VII would not affect seniority rights to include both plantwide and unit seniority systems.[58] Justice Stewart stated:

> In sum, the unmistakeable purpose of . . . [Section] 703(h) was to make clear that the routine application of a bona fide seniority system would not be unlawful under Title VII. As the legislative history shows, this was the intended result even where the employer's pre-Act discrimination resulted in whites having greater existing seniority rights than Negroes.[59]

In order to justify its broad reading of Section 703(h), the majority rejected the key holdings of the *Quarles* progeny. First, the majority rejected holdings that a unit seniority system was not bona fide within the meaning of Section 703(h) if it perpetuated the effects of pre-Act discrimination. Justice Steward stated:

53. 425 U.S. 990 (1976).
54. 431 U.S. at 348-349.
55. *Id.* at 349-350.
56. *Id.* at 350
57. *Id.* at 354, n. 39.
58. *Id.* at 355, n. 41.
59. *Id.* at 332. The Supreme Court also extended §703(h) immunization to seniority systems which perpetuate the effects of past-act discrimination. 431 U.S. at 347-348. This application of §703(h) is clearly erroneous as noted by Justice Marshall's separate opinion, dissenting in regard to §703(h). *Id.* 383-385. However, past-act victims of discrimination can obtain retroactive seniority dating back to their date of hire or the effective date of Title VII, whichever is earlier. *See* Franks v. Bowman, Co., 424 U.S. 747 (1976).

> We cannot accept the invitation to disembowal . . . [Section] 703(h) by reading the words "bona fide" as the Government would have us do. Accordingly, we hold that an otherwise neutral, legitimate seniority system does not become unlawful under Title VII simply because it may perpetuate pre-Act discrimination.[60]

Second, the Court rejected holdings which distinguished the protection of employment security of white workers (a result clearly mandated by the legislative history) from the immunization of unit seniority systems (a subject beyond the scope of the legislative history). Justice Stewart states:

> Although there seems to be no explicit reference in the legislative history to pre-Act discriminatees already employed in less desirable jobs, there can be no rational basis for distinguishing their claims from those of persons initially denied *any* job but hired later with less seniority.[61]

While the majority did not overtly reverse the *Quarles* progeny, in a footnote to its decision it severely limited these holdings "as resting upon the proposition that a seniority system that perpetuates the effects of pre-Act discrimination cannot be bona fide if an intent to discriminate entered into its very adoption."[62] Moreover, the majority did not delineate what factors need be considered in establishing the existence of such intent. In another portion of the opinion, however, the majority briefly noted several factors it considered relevant to holding that the unit seniority system in *Teamsters* was bona fide. Justice Stewart stated:

> The seniority system applies equally to all races and ethnic groups. To the extent that it "locks" employees into nonline-driver jobs, it does so for all . . . The placing of the line drivers in a separate bargaining unit from other employees is rational and in accord with NLRB precedents. It is conceded that the seniority system did not have its genesis in racial discrimination, and that it was negotiated and has been maintained free from any illegal purpose. In these circumstances the single fact that the system extends no retroactive seniority to pre-Act discriminatees does not make it unlawful.[63]

Thus, the majority opinion did not clearly define the impact of its *Teamsters* decision, but left such impact an open question to be answered by subsequent federal court decisions.

The thrust of the separate opinion by Justice Thurgood Marshall,[64] which dissented in regard to the proper interpretation of Section 703(h), stressed the majority's misreading of the legislative history and warned that *Teamsters* would have a severe impact upon discriminated-against employees. Noting that the majority conceded that the legislative history did not consider the question presented in the instant case, Justice Marshall considers what choice Congress would have made had they considered the impact of Title VII upon unit seniority systems. Justice Marshall observed:

60. *Id.* at 353-354. The majority also noted: "For the same reason, we reject the contention that the proviso in §703(h), which bars differences in treatment resulting from 'an intention to discriminate,' applies to any application of a seniority system that may perpetuate past discrimination . . . 431 U.S. at 353, n. 38.
61. *Id.* at 359.
62. *Id.* at 346, n. 28.
63. *Id.* at 355-356.
64. Justice William J. Brennan, Jr. joined in the separate opinion.

> To answer that question, the devasting impact of today's holding validating such systems must be fully understood . . . In many factories, blacks were hired as laborers while whites were trained and given skilled positions; in the transportation industry blacks could only become porters; and in steel plants blacks were assigned to the coke ovens and blasting furnaces . . . The Court holds in essence, that while after 1965 these incumbent employees are entitled to an equal opportunity to advance to more desirable jobs, to take advantage of that opportunity they must pay a price: they must surrender the seniority they have accumulated in their old jobs. For many, the price will be too high, and they will be locked into their previous positions. Even those willing to pay the price will have to reconcile themselves to being forever behind subsequently hired whites who were not discriminatorily assigned. Thus equal opportunity will remain a distant dream for all incumbent employees.[65]

Justice Marshall concluded: "I am in complete agreement with Judge Butzner's conclusion in his seminal decision in *Quarles* . . . : 'It is . . . apparent that Congress did not intend to freeze an entire generation into discriminatory patterns that existed before the Act."[66]

However, in a footnote, Justice Marshall stated:

> I agree with the Court . . . that the results in a large number of the *Quarles* line of cases can survive today's decision. That the instant seniority system "is rational, in accord with the industry practice, . . . consistent with NLRB precedents, . . . did not have its genesis in racial discrimination, and . . . was negotiated had been maintained free from any illegal purpose," . . . distinguishes the facts of this case from those in many of the prior decisions.[67]

Justice Marshall's inconsistent statement undercuts the thrust of his dissent and represents any overly broad summarization of the majority opinion. Thus, the separate opinion, like that of the majority, leaves open the possibility that not all unit seniority systems are immunized by Section 703(h).

POST-*TEAMSTERS* INTERPRETATIONS

As noted earlier, both the E.E.O.C. and recent lower court decisions have attempted to limit the effect of the Supreme Court's *Teamsters* decision. Whether such interpretations will survive the scrutiny of the Supreme Court remains an open question.

A. E.E.O.C. Interpretative Memorandum

Shortly after the Supreme Court handed down its *Teamsters* decision, the E.E.O.C. issued an interpretative memorandum stating that the decision applies only if (1) the seniority system was established prior to the effective date of Title VII and (2) evidence shows that there was no discrimination in the genesis or maintenance of the seniority system.[68]

65. 431 U.S. at 387-388. (Marshall, J., concurring and dissenting).
66. *Id.* at 389-390.
67. *Id.* at 379-380, note 3.
68. 97 S.Ct. at 1881

The E.E.O.C. interpretative memorandum gives a broad definition to the term intent to discriminate, which would further limit the application of *Teamsters*. The memorandom asserted:

> In examining possible discriminatory intent, the commission will review all available evidence including the respondents' collective bargaining history and employment practices. Where union or units were previously segregated, discriminatory intent in the institution of a unit seniority system will be inferred.[69]

Additionally, the memorandum stated:

> When a seniority system is in effect and the employer or union is made aware that it is lacking in minorities or females, discriminatory intent will be inferred if the system is maintained or renegotiated when an alternative system is available.[70]

The E.E.O.C. interpretative memorandum represents an obvious attempt to limit the effect of *Teamsters* upon the E.E.O.C. ability to enter into conciliation agreements, consent decrees, and settlement agreements which require the dismantling of unit seniority systems.[71] While *Teamsters* apparently frames future considerations of the effect of Section 703(h) in terms of intent, the E.E.O.C. definition of intent to discriminate appears too expansive in light of this decision. The Supreme Court has held that such E.E.O.C. interpretations should be afforded "great deference."[72] But its recent decisions in *Teamsters* and *General Electric Co. v. Gilbert* [73] which rejected E.E.O.C. interpretations, casts doubt on the effect of this memorandum.

B. Lower Court Decisions

Recent lower court decisions have agreed that unit seniority systems are bona fide only if evidence shows that there was no discrimination in the genesis or maintenance of the seniority system. Additionally, they have required that departmentalization into particular units be in accord with industry practice. However, these decisions have not adopted the E.E.O.C. definition of intent to discriminate, relying instead on factors briefly mentioned in *Teamsters*.[75]

In *James v. Stockham Valves & Fittings Co.*,[76] the Court of Appeals for the Fifth Circuit noted:

> As we read the [Teamsters] opinion, the issue whether there has been purposeful discrimination in connection with the establishment or continuation of a seniority system is integral to a determination that the system is or is not bona fide.[77]

69. 46 U.S.L.W. 202- (July 19, 1977).
70. *Id.* at 2028.
71. Prior to Teamsters, the EEOC utilizied conciliation agreements, consent decrees, and settlement agreements as major weapons in attacking discriminatory unit seniority systems. *See e.g.*, Conciliation agreement: EEOC and Atlantic Steel (January 7, 1969), reprinted at 8 FEP Manual, §431:60(c) (conciliation agreement); United States v. Allegheny-Ludlum Industries, Inc., Daily Labor Report (April 15, 1974) (consent decree); AT&T Bias Settlement (January 7, 1969) 8 FEP Manual, §431:73 (settlement agreement).
72. Albemarle Paper Co. v. Moody, 422 U.S. 405, 431 (1975).
73. 429 U.S. 125 (1976).
74. See notes 76 and 82, infra.
75. See text accompanying note 63, supra.
76. 559 F.2d (5th Cir. 1977).
77. *Id.* at 351.

The Fifth Circuit indicated that the above necessitates a case by case analysis of seniority systems in light of Section 703(h). "[T]he totality of circumstances in the development and maintenance of the system is relevant to examining that issue."[78]

The Court of Appeals stated:

> In . . . [Teamsters] the Court focused on four factors:
> 1) whether the seniority system operates to discourage all employees equally from transferring between seniority units;
> 2) whether the seniority units are in the same or separate bargaining units (if the latter, whether that structure is rational and in conformance with industry practice);
> 3) whether the seniority system had its genesis in racial discrimination;
> 4) whether the system was negotiated and has been maintained free from any illegal purpose.[79]

In *James*, the Court of Appeals found that (1) the seniority system was adopted when segregation in the South was standard operating procedure, thereby having its genesis in discrimination and (2) the unit seniority system did not consist of separate and distinct bargaining units that correspond to industry practice.[80] The Court remanded the case for further consideration in light of *Teamsters* and its own decision in James.[81]

Recent district court and Court of Appeals decisions seem in accord with *James*, having considered the issue of intent to discriminate and relied on one or more of the *James* factors in this determination.[82] Despite the apparent consistency of post-*Teamsters* precedents, the vagueness of the Supreme Court decision concerning what factors need be considered to establish discriminatory intent casts doubt on whether the Supreme Court will follow these decisions at a later date.

ALTERNATIVES IN LIEU OF TITLE VII

While *Teamsters* limits the ability of the government and aggrieved plaintiffs to attack discriminatory unit seniority systems, several alternatives in lieu of Title VII need be considered. These include enforcement of Executive Order No. 11246 by the U. S. Department of Labor's Office of Federal Contract Compliance (O.F.C.C.), actions brought under the Civil Rights Act of 1866, and actions brought under state fair employment practice acts.

78. *Id.* at 352.
79. *Id.*
80. *Id.* at 352-353.
81. *Id.* at 353.
82. Chrapliwy v. Uniroyal, Inc., 15 FEP cases 795 (N.D. Indiana 1977) (seniority system with genesis in discrimination); Croker v. Boeing Co. (Vertol Div.), 437 F.Supp. 1138 (1977) E.D. Pennsylvania (no evidence of genesis in discrimination); Swint v. Pullman-Standard, 15 FEP cases 144 (N.D. Alabama 1977) (seniority system without genesis in discrimination, not maintained discriminatarily, in accord with industry practice, and affects all employees regardless of race); Dickerson v. United States Steel Corp., 439 F.Supp. 55 (E.D. Pennsylvania 1977) (no evidence that seniority system not rational or not in accord with industry practice); United States v. East Texas Motor Freight System, 564 F.2d 179 (5th Cir. 1977) (seniority system not maintained with discriminatory intent); Alexander v. Machinists, Aera Lodge 735, 15 FEP Cases (6th Cir. 1977). (Seniority system not established or maintained with discriminatory intent and affects all employees regardless of race).

A. Executive Order No. 11246

If Executive Order No. 11246 remains unaffected by *Teamsters*, O.F.C.C. enforcement of this order may provide a successful mode of circumventing the *Teamsters* decision. Following the *Teamsters* decision, O.F.C.C. issued a policy directive to its officers, concluding "that the opinion is not applicable to Executive Order 11246, as amended." O.F.C.C. based this conclusion on the ground that "the Executive Order does not contain an exemption comparable to Section 703(h)." Therefore O.F.C.C. viewed *Teamsters* "as a narrow decision based on the exemption."[83]

Executive Order No. 11246, issued by President Lyndon B. Johnson in 1965, requires that every government contract include the following provision:

> The contractor will take affirmative action to ensure that applicants are employed, and that employees are treated during employment, without regard to their race, color . . . or national origin. Such action shall include, but not be limited to the following: employment, upgrading, demotion, or transfer . . . .[84]

Additionally, government contracts must contain the following enforcement provision:

> In the event of the contractor's noncompliance with the nondiscrimination clauses of this contract or with any of such rules, regulations, or orders, this contract may be cancelled, terminated or suspended in whole or in part and the contractor may be declared ineligible for further Government contracts . . . .[85]

O.F.C.C. regulations require that contracts of $50 thousand or more must be accompanied by written affirmative action programs, including plans for remedying existing discrimination.[86] Often affirmative action plans include alteration of unit seniority systems which perpetuate the effects of pre-act discrimination. While the regulations indicate that failure to meet these self imposed goals does not constitute noncompliance, the contractor must exercise good faith in reaching the goals.[87]

Decisions prior to *Teamsters* regarding the relationship between Title VII and Executive Order No. 11246 would appear to indicate that *Teamsters* should not affect O.F.C.C. enforcement actions. In *Contractors Association of Eastern Pennsylvania*[88] *v. Secretary of Labor,* the Court of Appeals for the Third Circuit stated: "Section . . . 703(h) is a limitation only upon Title VII not upon other remedies."[89] Additionally, the Supreme Court has upheld the government's broad power to fix the terms and conditions of government contracts in cases not involving Executive Order No. 11246.[90]

83. Policy directive from Office of Federal Contract Compliance to compliance officers (July 20, 1977).
84. 30 F.R. 12319, as amended by Executive Order No. 11375, 32 F.R. 14303, §202(1).
85. Id., §202(6).
86. 41 C.F.R. §60-2 *et seq.*
87. *Id.*
88. 442 F.2d 159 (3rd Cir. 1971), cert. denied, 404 U.S. 854 (1971).
89. *Id.* at 172.
90. *E.g.,* Perkins v. Lukens Steel Co., 310 U.S. 113 (1940).

Since *Teamsters,* two decisions have reached inconsistent conclusions. A district court decision has indicated that Section 703(h) does not limit O.F.C.C. enforcement efforts. There the court stated: "Title VII is intended to govern only private contracts, and not contracts with the government."[91]

But in *United States v. East Texas Motor Freight System,*[92] the Court of Appeals for the Fifth Circuit found that Section 703(h) limits O.F.C.C. enforcement of Executive Order No. 11246 against discriminatory unit seniority systems. The Court stressed:

> The argument that Executive Order No. 11246 is unaffected by Section 703(h) cannot be accepted because Congress has declared for a policy that a bona fide seniority system shall be lawful. The Executive may not, in defiance of such policy, make unlawful–or penalize–a bona fide seniority system.[93]

Thus, the ability of O.F.C.C. to enforce Executive Order No. 11246 in the face of *Teamsters* must be questioned. If the Fifth Circuit's rationale is followed in other decisions, O.F.C.C. enforcement as an alternative remedy will be foreclosed.

B. Civil Rights Act of 1866

Another alternative in lieu of Title VII is attacking unit seniority systems by actions brought pursuant to the Civil Rights Act of 1866, codified at 42 U.S.C. Section 1981. Lower court decisions before and after *Teamsters,* however, indicate that 42 U.S.C. Section 1981 must be interpreted in light of Section 703(h) of Title VII.

In *Johnson v. Railway Express Agency, Inc.,*[94] the Supreme Court expressly held that 42 U.S.C. Section 1981 affords a federal remedy against racial discrimination in private employment.[95] The Supreme Court also held in *Johnson* that Title VII and 42 U.S.C. Section 1981 provide "separate, distinct, and independent" remedies.[96]

While the Supreme Court has not considered the issue, lower courts have held that 42 U.S.C. Section 1981 should be interpreted in accordance with the provisions of Title VII, including Section 703(h). Prior to *Teamsters,* Courts of Appeals for the Second[97] and Seventh[98] Circuits held that Section 703(h) protected the traditional last-in, first-out operation of traditional plant-wide seniority systems. Both decisions noted that since the seniority systems involved were lawful under Title VII, no violation of 42 U.S.C. Section 1981 had occured.

Recent district court decisions,[99] handed down after *Teamsters,* indicate that unit seniority systems protected by the Supreme Court's expanded view

91. Crown Zellerbach Corporation v. Marshall, 15 FEP Cases 1628, 1636 (E.D. Louisiana 1977).
92. 564 F.2d 179 (5th Cir. 1977).
93. *Id.* at 185.
94. 421 U.S. 454 (1975).
95. *Id.* at 459-460.
96. *Id.* at 461.
97. Chance v. Board of Examiners and Board of Education, Etc., 534 F.2d 993 (2d Cir. 1976).
98. Waters v. Wisconsin Steel Works of International Harvester Co., 502 F.2d 1309 (7th Cir. 1974).
99. Croker v. Boeing Co., (Vertol Div.), 437 F. Supp. 1138 (E.D. Pennsylvania 1977); Dickerson v. U.S. Steel Corp., 439 F.Supp. 55 (E.D. Pennsylvania 1977); Dickerson, 437 Supp. at 73; Winfield v. St. Joe Paper Co., 16 FEP cases 1497 (N.D. Florida 1977).

of Section 703(h) are not violative of 42 U.S.C. Section 1981. One decision concluded: "if the system cannot be challenged under Title VII, it follows that it also is immune from attack from Section 1981."[100] Subsequent to *Teamsters* this issue has not been considered by either the Supreme Court or a Court of Appeals. However, it seems that the above rationale forecloses the 42 U.S.C. Section 1981 alternative.

C. State Contract Conditions and Fair Employment Acts

Another alternative is attacking unit seniority systems by actions in state courts brought pursuant to state fair employment acts.[101] While Title VII expressly provides that it does not preempt state law, the federal preemption doctrine, as applied to labor law matters, may foreclose this remedy.

Section 708 of Title VII, codified at 42 U.S.C. Section 2000e-7, provides:

> Nothing in this title shall be deemed to exempt or relieve any person from any liability, duty, penalty, or punishment provided by any present or future law of any State or political subdivision of a State, other than any such law which purports to require or permit the doing of any act which would be an unlawful employment practice under this title.[102]

The legislative purpose of this section was to ensure the validity of state fair employment practice acts, indicating that federal law does not preempt state fair employment practice acts.[103]

To date, the cases interpreting Section 708 have not considered whether a fair employment practice act which proscribes discriminatory unit seniority systems is preempted by Section 703(h). While the statutory language of Section 708 and its legislative history does not preclude this alternative remedy, the question awaits judicial resolution.

A more serious challenge to employing state fair employment acts is the labor law doctrine of federal preemption. The Supreme Court has repeatedly held that the National Labor Relations Act, as amended (NLRA),[104] preempts state laws regarding similar matters. Thus, the application of state fair employment practice acts to otherwise valid seniority systems may be preempted by the NLRA.

In *San Diego Unions v. Garmon,*[105] the Supreme Court stated the general preemption doctrine:

100. Croker and Dickerson reach the same result as Chance and Waters by applying the Washington v. Davis, 426 U.S. 229 (1976) Fourteenth and Fifth Amendments standard of intent to discriminate to 42 U.S.C. §1971. The Washington standard is greater than that of Title VII, which only requires proof of discriminatory effect. *See* Griggs v. Duke Power Co., 401 U.S. 424 (1971). Therefore, if a seniority system cannot be challenged under the more lenient Griggs standard, it cannot be challenged under the Washington standard.

101. For comparative study and texts of state fair employment practice acts, *see* 8a FEP Manual, §451 *et seq.*

102. §1104 of Title XI of the Civil Rights Act of 1964 contains a similar provision. §1104, codified at 42 U.S.C. §2000h-4 states:
"Nothing contained in any title of this Act shall be construed as indicating an intent on the part of Congress to occupy the field in which any such title operates to the exclusion of State laws on the same subject matter, nor shall any provision of this Act be construed as invalidating any provision of State law unless such provision is inconsistent with any purposes of the Act, or any provisions thereof."

103. Remarks of Senator Case, 110 Cong. Rec. 7243 (1964); Remarks of Senator Humphrey, 110 Cong. Rec. 12721 (1964).

104. 29 U.S.C. §151 *et seq.*

105. 359 U.S. 236 (1959).

> When an activity is arguably subject to . . . [Section] 7 or . . . [Section] 8 of the National Labor Relations Act, the States as well as the federal courts must defer to the exclusive competence of the National Labor Relations Board if the danger of state interference with national policy is to be averted.[106]

Pursuant to Section 8 and Section 9 of the NLRA, the employer and majority union are under a duty to collectively bargain concerning wages, hours, and other terms and conditions of employment.[107] Failure to bargain in good faith about these mandatory provisions constitutes an unfair labor practice, invoking the jurisdiction of the National Labor Relations Board.[108]

The category of other terms and conditions of employment deals with the relationship of employer and union, encompassing most aspects of the employer-union relationship.[109] Since the Supreme Court has acknowledged that seniority, promotions, and transfers are mandatory subjects about which both the employer and union must bargain,[110] the general preemption doctrine announced in *Garmon* would apply to unit seniority provisions.

The preemption doctrine, however, is riddled with exceptions. Many of the exceptions involve the regulation of matters of deep local concern or matters peripheral to purposes of the N.L.R.A.[111] Another class of exceptions involves cases in which the preemption doctrine is overcome by another strong federal policy, to be implemented by federal and/or state courts.[112] Federal courts may find that state fair employment practices constitute matters peripheral to the purposes of the NLRA or that the federal policy announced in Section 708 overcomes the preemption doctrine.

CONCLUSION

It is as yet too early to discern the full effect of *Teamsters* upon black and Chicano employees who are locked into their present jobs, the result of unit seniority systems which perpetuate pre-act discriminatory hiring and transfer policies. It is clear, however, that the Supreme Court's interpretation of Section 703(h) immunizes discriminatory unit seniority systems, which, while neutral on their face, operate to freeze the status quo of prior discriminatory practices contrary to the purpose of Title VII.

106. 359 U.S. at 245.
107. §8(d), codified at 29 U.S.C. §158(d), and §9(a), codified at §159(a) require the employer and majority union to bargain in good faith with respect to wages, hours and other terms and conditions of employment.
108. §8(a) (5), codified at 29 U.S.C. §158(a)(5), states: "It shall be an unfair labor practice for an employer . . . to refuse to bargain collectively with the representatives of his employees, subject to the provisions of §9(a) of this title.
§8(b)(3), codified at 29 U.S.C. §158(b)(3), provides an identical unfair labor practice regarding labor organizations and their agents.
109. *See,* R. Gorman, Basic Text on Labor Law, ch. XXI, §§1-5 (1976).
110. Katz v. N.L.R.B., 369 U.S. 736 (1962).
111. Garmon, 359 U.S. at 243-244.
112. *e.g.,* Vaca v. Sipes, 368 U.S. 171 (1967).

Therefore, it is imperative that Congress amend Section 703(h) so that is accurately reflects Congress's legislative intent. The following amendment, emerging from an examination of *Teamsters,* is offered as a means of accomplishing this goal:

> Section 703(h). Notwithstanding any other provision of this title, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system, or a system which measures earnings by quantity or quality of production or employees who work in different locations, provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin[.] *A seniority system is not bona fide if it has its genesis in such discrimination; exhibits such discrimination in its maintenance; or perpetuates the effects of discriminatory diring, promotion, or transfer practices engaged in prior to the effective date of this title . . . .*

Additionally, the above amendment should be accompanied by full House and Senate committee hearing reports, clearly deliniating the limited immunization which Section 703(h) provides seniority systems and affirming the "rightful place" remedy of the *Quarles* progeny.[113] By so doing, Congress will effectively reverse the *Teamsters* decision and fulfill the legislative purposes of Title VII as it relates to unit seniority systems which perpetuate the effects of pre-act discrimination.

113. Committee hearing reports should also expressly indicate that §703(h) does not immunize seniority systems which perpetuate the effects of post-Act discriminatory practices. *See supra,* note 59.