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IN THE
Supreme Court of the United States

October Term, 1988

WARDS COVE PACKING COMPANY, INC.
CASTLE & COOKE, INC.,

Petitioners,

v.

FRANK ATONIO, et al.,

Respondents.

BRIEF OF RESPONDENTS

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STATEMENT OF THE CASE

1. INTRODUCTION

This class action under Title VII, 42 U.S.C. § 2000e *et seq.*, and 42 U.S.C. § 1981 challenges a pattern of racial segregation in jobs, housing and messing at three Alaska salmon canneries.¹ The employers are Wards Cove Packing Co., Inc. (“WCP”), which owns Wards Cove and Red Salmon canneries, and Castle & Cooke, Inc. (“BBS”), which owns Bumble Bee cannery. (App. Cert. I:4-5.²) Because it involves migrant, seasonal work, the case has unique features.

First, the work force³ of the Alaska salmon canning industry is—as is true of other migrant, seasonal industries—far more heavily non-white than the areas from which it is drawn. (J.A. 90, 93-95, 103-4, 369, 372-73; *see also* Tr. 336-37, 344, 423, 434-35, 483, 607.) For the eight decades spanning 1906-78, it has been 47-70% non-white. (App. Cert. I:42.) While non-whites in the industry in recent years have been largely of Filipino or Alaska Native descent, workers of Chinese, Japanese and Mexican descent preceded them, but left the industry,

¹The case originally encompassed two other canneries—namely, Ekuk and Alitak, which are run by WCP and BBS as part of their Columbia Wards Fisheries (“CWF”) joint venture. (App. Cert. I:4-6.) Title VII claims against CWF were dismissed on procedural grounds. *Atonio v. Wards Cove Packing Co.*, 703 F.2d 329 (9th Cir. 1983). Title VII claims against WCP and BBS for their role in the CWF venture were dismissed on the ground they were outside the scope of the EEOC charges (App. Cert. I:95-96, III:14, VIII:2), although the charges allege “each discriminates throughout its Alaska operations in Alitak . . . and other facilities.” (Ex. 1-3, 5-10; R.P.O. 132.) The charges were later amended to clarify they cover WCP and BBS as joint venturers. (Ex. 31-35; R.P.O. 132, 134.) The district court dismissed 42 U.S.C. § 1981 claims and the court of appeals affirmed. (App. Cert. I:96-97, I:129-30, III:15-43, VI:16.) This Court declined to grant certiorari on issues which affect claims involving the CWF canneries. (No. 87-1388.)

²“App. Cert.” refers to the appendix to the petition for certiorari, “J.A.” to the joint appendix, “E.R.” to the excerpt of record, “R.P.O.” to the revised pretrial order and “Tr.” to the transcript of proceedings.

³“Work force” refers to those employed by an employer or an industry. (See J.A. 90-91, 369-70.) “Labor force” or “labor supply” refers to individuals employed in and rejected applicants for work in an industry. (See *ibid.*) “Labor market” refers to areas from which workers are or could be hired. See *Hazelwood School District v. United States*, 433 U.S. 299, 308, 310-12 (1977).

in part because of changes in immigration laws. (Ex. 625; Tr. 345-46, 433, 771, 775; App. Cert. I:42.)

Second, because of the migrant, seasonal nature of the work, WCP and BBS provide bunkhouses as well as meals to employees (App. Cert. I:17), so patterns of segregation extend beyond jobs into several layers of an employee's life (*see* p.19-21, *infra*). Whether because of the extent of the segregation or for other reasons, there is "pervasive" race labelling (App. Cert. VI:33) of jobs, bunkhouses and messhalls, with terms such as "Native Crew," "Filipino cannery worker," "Phillipine [*sic*] Bunkhouse," "Native Galle[]y Cook" and "Filipino Mess" in use. (App. Cert. I:76-77.) Even the salmon butchering machine has a name with racial overtones, the "Iron Chink." (App. Cert. VI:33; *see also id.* at I:22.)

Third, because the industry is seasonal, workers often have other pursuits during the rest of the year, so their jobs with WCP or BBS do not necessarily reflect the full measure of their skills. Of the ten named plaintiffs, seven had some college when they worked in the canneries. (J.A. 38, 52; Tr. 951-52, 1036, 1050, 2214-15; Dep. Viernes-1975 3-4.⁴) One was a structural engineer when he sought but was denied an upper-level job. (App. Cert. I:86.) Others later became architects (Tr. 951, 2214), mechanics (Tr. 869-70, 872; 2061(a)), a captain in the Air Force (Tr. 2215) and a graduate student in public administration (Tr. 76). Several were students when they worked for WCP or BBS, but they held menial jobs, while white students frequently held choice jobs. (J.A. 78, 114, 118; Tr. 1010, 1320-21, 1373, 2534-35, 2838-39, 2926-27, 3315.) Whites were hired as deckhands as early as age 14, 17 and 18 (J.A. 196-97, 200; Tr. 2757-58), as fishing boat crew members as early as age 15 (Dep. Aiello 30), on the beach gang as early as age 16 (Tr. 2652-53) and as machinist helpers as early as age 16 (J.A. 133-34). Since they live in coastal regions, residents of the Alaska Native villages where WCP and BBS recruit often have vast boating and fishing experience, which more than qualifies them for almost any tender or fishing job. (*See* J.A. 414, 418-19; *cf. id.* at 362-63.)

⁴A number of witnesses testified by deposition, which were admitted in evidence. (Tr. 2291.)

Some non-white employees have been working in the canneries for decades without promotion (Tr. 953, 967), but could have acquired skills for other jobs.

2. RACIAL STRATIFICATION IN JOBS

The court of appeals accepted statistics showing racial stratification in jobs as proof of disparate impact, regardless of the racial mix of the labor supply. (App. Cert. VI:14-17.) Because the subjective criteria on which WCP and BBS rely have a disparate impact on non-whites, the court of appeals did not require the employees to offer statistics differentiated by qualifications. (*Id.* at VI:17, VI:24-27.)

While the degree varies, the administrative, machinist, fisherman, tender, carpenter, beach gang, clerical, quality control and miscellaneous departments are all white or heavily white. (Ex. 588-90 (E.R. 35-37); Tr. 2231, 2261.) By contrast, the largest department—cannery worker—is heavily non-white. (*Ibid.*) At one cannery, the laborer department is also heavily non-white. (Ex. 589 (E.R. 36); Tr. 2231, 2261.) For the Court's convenience, work force statistics offered by each side are contained in Appendices A and B.⁵

A. Job Departments

Cannery machinists operate and maintain machinery, but despite the similarity in name, are not true machinists as the term is used in the Lower 48. (J.A. 399, 541-42.) They are apparently called machinists because they are represented by the machinists union. (*Ibid.*) Their supervisors characterized them—in interviews with the WCP and BBS expert on qualifications—as machine operators almost as frequently as they described them as craft workers. (Tr. 2955.) The machinist crew is a small one, supervised by two skilled foremen—the cannery foreman and first machinist—who oversee all major

⁵The main difference between each side's statistics in Appendices A and B is in the way vacancies are counted. The employees counted year-round employees once at the initial point of hire in the job in question and seasonal employees each season they were hired or re-hired. (Tr. 2234-36.) The employers omitted year-round employees, counted seasonal employees only in the year they were first hired in a job and eliminated seasonal employees who worked some of the winter months at Lake Union Terminals, a CWF subsidiary. (J.A. 261-62.)

and many minor repairs,⁶ a division of duties which reduces the need for skills among the machinists themselves. Machine overhauls are done in the winter in Seattle rather than at the cannery by the machinists. (J.A. 709; Dep. Snyder 34; Dep. Mullis 32; Dep. Jorgensen 28; Dep. Rohrer 11-12.) While not always available, manufacturer's representatives assist with some machine repairs and set-ups. (Tr. 239, 3062-63; Dep. Snyder 34-36; Dep. Rohrer 10-11; Dep. Jorgensen 27-29; Dep. Mullis 32-34.)

The quality control job is often filled by a college student, who receives on-the-job orientation in conducting the necessary tests. (See J.A. 78-79.)

Fishing boats in Bristol Bay—the only locale where WCP and BBS have employee fishermen (J.A. 179)—are small vessels which are limited by Alaska law to 32' in length. They are staffed by two people, a captain and a puller. (J.A. 180-81; Tr. 902(c).)

Tenders bring the fish from the fishing boats to the cannery grounds. (Tr. 1144.) They have crews usually of four (*ibid.*), so the tender cook prepares family-size meals (Tr. 124, 2384-85), although sometimes in Bristol Bay the cook also feeds fishermen (J.A. 21). Lacking brine refrigeration, dry tenders generally stay less than a day from shore, since salmon must be processed within 48 hours of catch. (Tr. 1144; App. Cert. I:21.) Because they can chill the catch, brine tenders make longer voyages. (*Ibid.*; Tr. 1144.) The major repair work on tenders is done at the CWF shipyard in Seattle before the season rather than in Alaska by the tender crews. (Tr. 2385.) Once at the cannery, port engineers help tender engineers with some repairs. (J.A. 124; Tr. 123; Dep. Milholland 12; Dep. Rohrer 24; Dep. Jorgensen 25.) There are no licensing requirements for tender jobs. (Dep. Leonardo-1978 14; Dep. J. Brindle 18-19.)

Beach gang involves largely laborer work (*cf.* Tr. 1514; App. Cert. I:66-67) for which unskilled personnel have been hired. (*e.g.* Tr. 1546; Dep. Sifferman-1980 30, 33-34, 41).

B. The Statistics

Each side's statistics show between six and seven upper-

⁶J.A. 119, 542-43; Tr. 239, 708-09, 3062-64, 3267; Dep. Snyder 15, 23; Dep. Rohrer 4-7; Dep. Jorgensen 18-19; Dep. Mullis 14-15, 22-23, 26-27, 29; Dep. Landry 24-25.

level departments at Bumble Bee during 1971-80 were at least 90% white, although the cannery worker department was between 52% and 59% non-white. (Ex. 588 (E.R. 35); Tr. 2231, 2261; Ex. A-278 Table 4 SN (E.R. 4); Tr. 2646-47; App. A-1, B-1.) During this period there were 741 hires counting re-hires and 335 hires not counting re-hires in departments which were at least 90% white. (*Ibid.*)

Each side's statistics show five upper-level departments at Red Salmon during 1971-80 were at least 94% white, although the cannery worker department was between 64% and 70% non-white. (Ex. 589 (E.R. 36); Tr. 2231, 2261; Ex. A-278 Table 4 RS (E.R. 3); Tr. 2646-47; App. A-2, B-2.) During this period, there were 384 hires counting re-hires and 152 hires not counting re-hires in departments which were at least 94% white. (*Ibid.*)

Each side's statistics show between four and six upper-level departments at Wards Cove during 1971-80 were at least 93% white, although the cannery worker department was between 31% and 37% non-white. (Ex. 590 (E.R. 37); Tr. 2231, 2261; Ex. A-278 Table 4 WC (E.R. 2); Tr. 2646-47; App. A-3, B-3.) During this period, there were 612 hires counting re-hires and 227 not counting re-hires in departments which were at least 93% white. (*Ibid.*)

Even departmental figures do not tell the whole story. Fully 61 of 95 job titles filled more than once at Bumble Bee were at least 90% white or 90% non-white during 1971-80. (Ex. 598 (E.R. 38-44); Tr. 2231, 2261.) During the same period, fully 62 of 93 job titles filled more than once at Red Salmon were at least 90% white or 90% non-white. (Ex. 599 (E.R. 45-51); Tr. 2231, 2261.) Similarly, at Wards Cove during 1971-80, fully 54 of 72 job titles filled more than once were at least 90% white or 90% non-white. (Ex. 600 (E.R. 52-56); Tr. 2231, 2261.)

The wage disparities between the upper-level and lower-level jobs are extreme, with upper-level jobs often paying three or four times as much as lower-level jobs for a season only about a month longer. (Ex. 598-600 (E.R. 38-56); Tr. 2231, 2261; App. Cert. VI:17.)

The recent job segregation reflects a long standing pattern both at WCP and BBS canneries and industry-wide. From 1949, when WCP purchased the cannery, until 1972, the machinists, tendermen, storekeepers and clerical workers at Red

Salmon were 100% white, while cannery workers were heavily non-white. (J.A. 151-52, 154.) For the same quarter century, some Alaska Natives but no Filipinos, Chinese, Japanese or blacks worked on the beach gang or as company fishermen. (*Ibid.*) Similarly, industry-wide statistics show tender jobs were between 90% and 99% white each year during 1907-39 and 1941-55, although the industry as a whole was between 47% and 70% non-white. (Ex. 63⁷ (E.R. 21-34); Tr. 771, 776; App. Cert. I:42.)

3. RACE LABELLING OF JOBS

Race labelling at the highest levels of management enforces the racial identifiability of jobs and departments. (*See* App. Cert. VI:33; *see also id.* at I:76-79.) While a more extensive recap is contained in Appendix C, the employees summarize some of it here.

Far from condemning race labelling, Alec Brindle—WCP's current president—testified cannery workers are called "the Native crew" for "mere ease or habit of identification," since "[o]ne would normally assume, if you recruited from a Native or Eskimo village, the people who came from there . . . would often be referred to in that manner . . ." (J.A. 156-57, 182-83.)

A.W. Brindle, who until 1977 was president of WCP and superintendent of Red Salmon, referred from 1970 on to resident cannery workers⁸ as "Eskimo labor," "these Eskimos," "Eskimo males," "Young native boys," "those natives," "Eskimos," "those Natives" and "the Eskimos" (App. Cert. I:24, I:28; Ex. 245, 254, 397, 452, 721, 749-50; R.P.O. 132, 145, 154; Tr. 2279); non-resident cannery workers as "the Filipinos" (Ex. 484, 497; Tr. 2279); other employees as "the four natives that work with Vern" (Ex. 376; R.P.O. 132, 153); salmon butchering machines as "chinks" and the operator as the "chink man" (Ex. 289; R.P.O. 132, 147); the flight carrying non-resident cannery workers as the "Filipino Charter Flight" (Ex. 502; Tr. 2279); and Local 37, ILWU as the "Filipino Union" (Ex. 328, 508; Tr. 311, 313, 2279). He also wrote,

⁷The "transporters" in Exhibit 63 are tendermen who bring fish from the fishing grounds to the cannery. (*See* Tr. 560.)

⁸"Resident" cannery workers are those who normally reside in Alaska and "non-resident" cannery workers those who normally reside in the Lower 48. (App. Cert. I:29-30.)

[T]hese Eskimos are completely impossible. We have had nothing but trouble and we probably had less trouble than the majority There is no question in my mind that the Eskimo labor is going to be less desirable as time goes on and actually it will be a detriment. The trouble comes pretty much from these younger ones that have gone to college.

(App. Cert. I:79; Ex. 452; Tr. 2279.)

Warner Leonardo, superintendent of Bumble Bee, referred from 1970 on to non-resident cannery workers as the "Filipino cannery crew," "21 Filipino" and the "Filipinos" (J.A. 216; Ex. 294, 407, 414; R.P.O. 132, 148, 155); classified employees as "Women cannery workers," "Filipino cannery workers," "Native cannery workers," "Japanese," "Filipinos," "Natives" and "Native Galley Cook" (Ex. 327, 342-50; R.P.O. 132, 150-51); and called cannery worker sign-on pay "Filipino sign-on pay" (Ex. 414; R.P.O. 132, 155). Badge assignments at Bumble Bee include, "09-525 thru 09-574 Filipinos" and "09-575 thru 09-659 Natives". (App. Cert. I:77-78.)

Even laundry bags and mail slots are marked with racial designations like "Oriental Bunkhouse." (App. Cert. I:78.)

4. SEGREGATED HIRING CHANNELS

The district court did not directly address use of essentially segregated hiring channels, but the court of appeals found the practice had an obvious disparate impact for which—on the findings made—there was no business necessity. (App. Cert. VI: 27-32.)

WCP and BBS solicit for low-paying cannery worker jobs in Alaska Native villages, such as Tuluksak, Kwethluk and Napasiak, which are 96-99% Alaska Native.⁹ Typically, a bush pilot or village leader lines up the workers at the direction of the home office or the cannery superintendent. The practice cuts village residents off from the more desirable jobs, which are filled in the Lower 48 through different channels. (See p. 9-10, *infra*.) WCP and BBS hire laborers from heavily Alaska Native areas immediately around the canneries. (App. Cert. I:32, I:38.)

⁹App. Cert. VI:28; Ex. 480; Tr. 2026; Ex. A-382; Tr. 1390-31, 1433; J.A. 4-5; Tr. 637-40, 1125, 2527-28; Dep. Leonardo-1975 41-42; Dep. Leonardo-1978 7-8; see also Tr. 2439; Dep. Ekern-1978 10-11; Dep. W.F. Brindle-1978 17-18.

WCP and BBS also recruit for low-paying cannery worker jobs through cannery worker foremen of Asian descent and Local 37, ILWU, a union whose membership is largely Filipino. (App. Cert. I:36, VI:38; J.A. 3-6, 223, 645-46; Tr. 2923-25, 3120-21, 3136.) The parties stipulated,

The majority of non-resident cannery workers are lined up by the cannery worker foremen after management has estimated the number that will be needed.

(J.A. 3.) The foremen are management, for the Local 37 labor contract provides they "...shall be selected by the Company... [and be] *representative[s] of and responsible to the Company.*" (Ex. A-1 through A-11, Local 37, ILWU; Tr. 2345-46; *see also id.* at 3136) (emphasis added). The racial impact of this recruitment is evident in a letter from a foreman to the Alitak superintendent.¹⁰

Yes, the entire crew will be Asians, unless Local #37 slips a 'stray' in there. However, anytime you want some more whites or blacks, just let me know as I can recruit some good ones, I believe.

(Ex. 394; Tr. 3121, 3140-41.)

The upshot is every cannery worker hired under the contract was initially selected by the company, for the union has no formal role in selecting employees. Under the contract, first preference goes to past company employees at the same cannery, second preference to past company employees at a different cannery and third preference to,

Persons satisfactory to the Company, including but not limited to Union members or men recruited for employment by the Union.

(Ex. A-1 through A-11, Local 37, ILWU (*e.g.* E.R. 1); Tr. 2345-46.) (Emphasis added.) A number of cannery workers testified they were hired directly by the foreman. (J.A. 53, 817-18, 926.) Local 37 does not have an exclusive hiring hall, for its contract simply provides,

Persons selected and employed by the Company shall register with the Union, or their names shall be furnished

¹⁰Evidence of policies at Ekuk and Alitak is relevant, for while they are no longer covered by the case, their policies were set by WCP and BBS. The district court found WCP and BBS "operated the [CWF joint] venture jointly and equally" and set its "hiring policies, firing policies, promotion policies and employee regulations." (App. Cert. I:5, I:26.)

to the Union by the Company prior to leaving port of embarkation.

(Ex. A-1 through A-11, Local 37, ILWU; Tr. 2345-46.) Some nonresident cannery workers—particularly women, who are nearly all white—are hired at company offices with no contact with the union. (R.P.O. 17; J.A. 4-6, 459-62; Tr. 646-47, 695, 939-40, 2593, 2600, 2935, 2939.)

Hiring channels for cannery workers are clearly isolated, for as WCP's president testified, "None of the cannery worker foremen . . . is vested with authority to hire for any position outside the cannery worker department" or "to even discuss those jobs on behalf of management." (J.A. 156-57, 163.) Nor are the bush pilots who recruit in Alaska Native villages. (Tr. 2527-28.)

Word-of-mouth recruitment is the norm in filling upper-level jobs, a fact freely conceded by nearly all management witnesses.¹¹ Nearly all the people who recruit this way for upper-level jobs are white. (See Ex. 598-60 (E.R. 38-56); Tr. 2231, 2261.)

The Bumble Bee cannery superintendent acknowledged a "preference [in all upper-level jobs] for people who have been recruited over people who have applied on a walk-in basis." (J.A. 216, 229-30; see also *id.* at 222-24.) WCP's president testified—as in essence did Bumble Bee's cannery superintendent—fish boat captains have "complete latitude in hiring" crew members. (J.A. 156, 180-81; see also *id.* 460; Tr. 1514, 3163.) One cannery superintendent wrote an applicant,

It is pretty much the universal practice that each captain selects crew members *It is not simple, of course, to find captains who are looking for crew men as they usually have relations or friends they think of first when an opening comes up.*

(Ex. 464; Tr. 2537-38; see also Ex. 465; Tr. 2279.) (Emphasis added.) Tender captains—who are given discretion in hiring because they live in close quarters with their crews—often select friends and relatives. (Tr. 631, 1141, 1374, 2909; Dep. Leonardo-1978 13; Dep. Ekern-1978 15; Ex. 603-605 (E.R.

¹¹App. Cert. VI:38; R.P.O. 16-18; J.A. 13-15, 222-24, 229-30; Tr. 627-37, 1146, 2772; Dep. Gilbert-1975 98; Dep. Snyder 4-5; Dep. Lessley 7-8; Dep. Leonardo-1978 13; Dep. A.W. Brindle-1975 27-29, 77; Dep. Landry 4, 12.

65-101), 608-10 (E.R. 102-104); Tr. 2231, 2237, 2244-46, 2261.) WCP's president acknowledged, "the machinists' foreman would generally select his own crew, just like the skipper of a cannery tender selects his crew." (Dep. A.W. Brindle-1975 28.)

WCP and BBS do not publicize vacancies in upper-level jobs. (App. Cert. I:28-29.) Nor do they generally require written applications for upper-level jobs. (J.A. 225; Tr. 1316-17, 2917-19; Dep. Leonardo-1975 26; Dep. Aiello 32; Dep. A.W. Brindle-1975 77; *see also* Dep. Bozanich 24.)

The court of appeals commented the disparate impact of segregated hiring channels is "obvious." (App. Cert. VI:28.) During 1971-80, 90% of non-whites at Bumble Bee, 80% of non-whites at Red Salmon and 90% of non-whites at Wards Cove were hired in cannery worker or laborer jobs, while only 40% of whites at Bumble Bee, 22% of whites at Red Salmon and 58% of whites at Wards Cove were. (Ex. 588-90 (E.R. 38-56); Tr. 2231, 2261.) The district court found these imbalances were caused by: (1) tapping Local 37, a union with a "predominantly [sic] Filipino" membership; and (2) hiring from villages near the canneries, where "Alaska Natives comprise a high percentage of the . . . local labor market." (App. Cert. I:32, I:36-38.)

5. NEPOTISM IN UPPER-LEVEL JOBS

The district court made confusing findings on nepotism, citing the "pervasive incidence of nepotism," "the nepotism which is present in the at-issue jobs" and "the strength of the nepotism evidence," but writing "the nepotism . . . does not exist because of a 'preference' for relatives." (App. Cert. I:103, I:105, I:114.) The court of appeals reversed, noting, "If nepotism exists, it is by definition a practice of giving preference to relatives." (*Id.* at VI:21.)

Fully 345 of 347 nepotistic hires during 1970-75 at WCP and BBS in eight upper-level departments were of whites,¹² including 129 hires in tender jobs, 93 in fishing jobs, 67 in machinist jobs, 24 in clerical jobs, 15 in beach gang jobs, 9 in carpenter jobs, 6 in quality control jobs and 4 in administrative

¹²The Court of Appeals noted 349 nepotistic hires in four departments at five canneries originally covered by the case. (*See* App. Cert. VI:21.)

jobs. (Ex. 608-10 (E.R. 102-104); Tr. 2231, 2261.) WCP's president tried to justify hiring relatives as "a reasonable business practice," saying "it is the incentive to get the relative back to Alaska or is part of an economic package which makes working for our company more attractive." (J.A. 184.)

6. LACK OF OBJECTIVE OR DISCERNIBLE QUALIFICATIONS

The district court commented on the "general lack of objective qualifications" (App. Cert. I:106; *see also id.* at IV:23), finding in essence there were no fixed criteria since "[q]ualifications for any individual position depend to a certain extent on . . . the age and condition of equipment, skill level of other incumbents and supervisors, and other such factors" (*id.* at I:46). The expert WCP and BBS called on qualifications concurred, saying "jobs are often structured around the skills of the people who are available to fill them, rather than the other way around." (Tr. 2941, 3000.)

Bumble Bee's cannery superintendent acknowledged there were no established qualifications, so he "just rel[ied] on [his] own judgment and the judgment of the foreman who [was] hiring." (Dep. Leonardo-1978 2, 46-47; *see also* Tr. 2617, 2642.) A home office employee who recruited in nearly all upper-level jobs acknowledged "there were no set qualifications a person had to meet." (J.A. 105-11.) WCP's president testified qualifications for tender captain, engineer and—to some degree—deckhand jobs are so fluid they vary from boat to boat. (J.A. 210-12; *see also* Dep. E. Sifferman-1980 9.) A fish boss testified "[t]here were no qualifications" for fishing boat crews, since each captain decided what—if any—criteria to impose. (J.A. 582; *see* App. Cert. I:72.) Electing to "take calculated risks," Bumble Bee's cannery superintendent testified he waives what might be considered minimum qualifications. (J.A. 463-67.)

WCP and BBS were unable throughout fourteen years of litigation to identify the qualifications they actually applied. While the district court made findings on qualifications which could be "reasonably required" (App. Cert. I:58), it is clear the qualifications were never actually imposed. The court of appeals observed the district court "did not . . . find that these specific criteria were actually applied," "[t]here is anecdotal evidence

which suggests that these criteria were not applied” and the district court “must make findings as to the job-relatedness of criteria actually applied.” (*Id.* at VI:23, VI:25, VI:27.)

On May 28, 1974, the employees served interrogatories asking, “what qualifications [WCP and BBS] required for [each] job . . . including . . . what prior work experience if any and what special training if any were required . . .”. (First Interrogs. to Defs. 17.) The answers do not give qualifications as they were applied. One cannery superintendent acknowledged they were his “ideal for qualifications,” rather than “qualifications as they were actually imposed at Alitak from 1970 onward.” (J.A. 463, 468-69.)

WCP and BBS then offered an entirely different set of qualifications at trial, namely, one which their expert—Larry DeFrance—believed could be “reasonably required” (J.A. 471, 499). The district court adopted DeFrance’s hypothetical qualifications verbatim (App. Cert. I:58-71; J.A. 499-508), even though they had never actually been applied.¹³

THE COURT: All right. Mr. DeFrance, in this case, I believe you have already testified that the Defendants have not adopted, to your knowledge, the minimum qualifications that you recommended; is that correct?

THE WITNESS: That’s correct. I don’t know that they have ever been adopted.

(J.A. 574-75; *see also id.* at 545.) WCP and BBS openly stipulated some employees in upper-level jobs could not meet DeFrance’s suggested qualifications.¹⁴ (Tr. 3076-79.) Even so, many are indefinable, for they are phrased as “ability to” per-

¹³The district court also found it takes “extensive experience” or “substantial prior skill and experience” to perform a number of jobs (App. Cert. I:55-57), but did not say what the experience or skill was or what qualifications were actually applied. The employees acknowledge some—but not all—of these jobs require special skills, but they can generally be acquired in entry-level jobs at the cannery. (*See* p. 13-14, *infra.*) The skills necessary for other jobs are by no means apparent. The shop machinist job has been filled by a white who took a night school course, but never served an apprenticeship or worked as a shop machinist. (Dep. Rohrer 22-23.) The port engineer job—which entails repairing tenders and fishing boats—can be filled by one whose only mechanical experience is working on his or her own car. (*Id.* at 25; *see also* Dep. Snyder 43; Dep. Mullis 37.)

¹⁴Lacking information on the skills or background of their own employees,

form instead of the standards by which such ability is measured, while others are highly subjective. These features of DeFrance's hypothetical qualifications are summarized in Appendix D. Faced with this, the employees offered anecdotal evidence of employees hired on far more modest qualifications than DeFrance's.¹⁵

WCP and BBS also called lay witnesses on qualifications, but since they almost all lacked hiring authority, they could not say what qualifications were actually imposed. (Tr. 1339, 2357, 2548, 2569, 2617, 2632, 2642, 2742, 2842, 2848, 2884, 3172, 3267, 3272.) Of the qualifications lay witnesses cited, many are in any case entirely subjective. They also are summarized in Appendix D.

Whites advanced from entry-level jobs to the more difficult jobs at the cannery.¹⁶ A cannery superintendent's nephew rose from machinist helper—an unskilled job (App. Cert. I:107-08)—at age 18 to seamer machinist at age 19 to salmon butchering machinist at age 20 to first machinist at age 21, all while he attended college during the winter months. (J.A. 114-22; Tr. 705-10, 770.) White relatives of management progressed to tender captain from tender deckhand, another unskilled job (App. Cert. I:107-08), some starting as early as age 14 (Tr.

WCP and BBS retained a firm to interview some of them in 1980. (See Tr. 1144 *et seq.*) From the interviews, DeFrance could say only 80%—155 of 193—of employees in upper-level jobs would have survived even a first cut or prescreening based on his qualifications when first hired from 1971 on. (J.A. 525.) DeFrance did not require they meet the hypothetical qualifications when first hired before 1971 as long as they later acquired the relevant experience. (J.A. 572-73.)

¹⁵One white dry tender engineer who was related to a CWF home office employee “had no mechanical experience or training other than performing preventative maintenance on his car, and no experience working on a boat.” (App. Cert. VI:26; *see also* J.A. 20-21, 22-24; Dep. Millholland 3.) Other white tender engineers had a similar lack of background. (J.A. 60-62; *see also id.* at 123-24, 131-35.) Two whites—one a cannery worker and the other a stock-room clerk—were promoted to machinist jobs without any such experience. (J.A. 25-29, 30-31, 34-37; *see also* Dep. Landry 15-17.) Other machinists could not meet DeFrance's proposed qualifications when first hired. (J.A. 144-45, 500; Tr. 2534-35.)

¹⁶Even under DeFrance's hypothetical qualifications, upper-level jobs—such as machinist—can be learned largely or exclusively through experience in positions the district court found were unskilled. (J.A. 499, 505; App. Cert. I:107-08.)

1319-20; *see also* J.A. 131-36; *see also* Dep. Sifferman-1978 20). The parties stipulated a fishing boat captain's job can be learned through prior experience as a fishing boat partner. (J.A. 7.)

The effects of the regime of subjectivity are apparent from the same statistics as word-of-mouth recruitment. WCP and BBS do not require written applications (*see* p. 10, *supra*), so there are no systematic applicant flow records. Bumble Bee and Red Salmon destroyed applications through 1977 and Wards Cove through 1979. (Tr. 1143, 1518, 2718, 2773.) Even when they retained applications, WCP and BBS rarely race-identified applicants, so applicant flow figures are unreliable. (Tr. 1403; *see* p. 18 n.20, *infra*.) Given this, one cannot separate the impact of subjective qualifications from the impact of the recruitment process.¹⁷

7. RE-HIRING PAST EMPLOYEES IN THEIR OLD DEPARTMENTS

WCP and BBS have a practice of re-hiring past incumbents in their old departments. (App. Cert. I:29, VI:32.) For union jobs, the practice is memorialized in re-hire preferences in collective bargaining agreements. (*Ibid.*) The district court held the practice did not have a disparate impact, reasoning it could not perpetuate past discrimination unless such discrimination were first proved. (*Id.* at 120-21.) But it also made a hypothetical or alternate finding of business necessity. (*Id.* at 122.) The court of appeals held the practice in fact had a disparate impact since "[w]hen jobs are racially stratified, giving rehire preference to former employees tends to perpetuate existing stratification." (*Id.* at VI:32.) But it affirmed the finding of business necessity (*id.* at 33), despite the absence of any supporting evidence.

¹⁷While never imposed, DeFrance's requirements—even as a proxy for actual criteria—have a disparate impact on non-whites. WCP and BBS hiring area statistics which incorporate his views on skills show the percent non-white who meet the qualifications is lower than the percent non-white in the general labor force in the hiring areas in every at-issue job family except fishermen and culinary. (Ex. A-278 Tables 1 and 3 WC, RS and SN; Tr. 1929-32, 2231, 2261.) Similarly, DeFrance's review of 1980 employee interviews shows the pass rate of non-white employees under his hypothetical qualifications is less than 80% of the pass rate for whites. (Tr. 1985-86.)

8. INDIVIDUAL INSTANCES OF DISCRIMINATION

Twenty-two non-whites testified they applied unsuccessfully for or were deterred from seeking upper-level jobs. (See App. Cert. I:84-94.) Many had special skills or rose rapidly with other employers, but were confined to menial jobs at the canneries. (See p. 2, *supra*; see also J.A. 64; Tr. 806.) The district court did not find any unqualified for the jobs they sought or were deterred from seeking. (App. Cert. I:84-94, VI:30.)

Of the 22, 12 applied orally, in writing or both (App. Cert. I:84-90), but the district court found they applied too early, too late or to the wrong person (*id.* at I:86, I:88-89, I:115-17). When one asked a machinist foreman for work as a machinist, he was asked in turn, "What's wrong with being on the Filipino crew?" (J.A. 52, 56-57.) Others were deterred by foremen who told them they "had to know someone" to be hired as a machinist (J.A. 77), advised them "not to make waves" by seeking promotions (J.A. 76), refused to tell them how to seek upper-level jobs (J.A. 85-86) and said Filipinos "were not supposed to have" upper-level jobs (Tr. 832). Yet others were deterred by segregation in jobs, housing and messing. (App. Cert. I:92-93; Tr. 282, 294, 872-73, 953, 967-68, 1037, 1051-52.) The district court gave little weight to evidence of deterrence, since it believed "the test for . . . discrimination is whether a defendant in fact discriminates, and not whether class members subjectively believe a defendant discriminates." (App. Cert. I:117.) The court of appeals held findings on individual claims were premature until liability issues were resolved. (*Id.* at VI:41.) Beyond noting the deterrent effect of race-labelling, segregation in housing and segregation in messing (*id.* at 33), it held informal, discriminatory hiring practices "should serve to excuse the cannery workers from the necessity of establishing the timeliness of their applications and automatically elevate oral inquiries to the status of applications" (*id.* at 41-42).

9. THE LABOR SUPPLY

The district court found the percentage of non-whites working in the industry during 1906-39 and 1941-55 "has historically been from about 47% to 70%," "[t]oward the end of this period it stbilized [*sic*] at about 47% to 50%" and a sample of about half the industry showed it to be 48% non-white during

1970-78. (App. Cert. I:42.)

Since the Census is dominated by people unwilling to take migrant, seasonal work, Drs. Robert Flanagan and Shirley Smith—a labor economist and demographer, respectively—found industry statistics to be the best available measure of the racial mix of the labor supply here. (J.A. 90, 369, 373-78; Tr. 370-73, 571-77.) From these statistics, they concluded the labor supply is about 47% non-white. (J.A. 378-79; Tr. 353, 370.) This figure matches closely: (1) the 47% non-white in all Alaska fruit, vegetable and seafood processing industries as shown by the 1970 Census (Ex. 626; Tr. 347-48, 776); and (2) the 42% non-white in the work forces during 1971-80 of the five canneries covered by this case (Ex. 588-92; Tr. 2231, 2261).

Using the 47% non-white figure, Dr. Flanagan found a pattern of race segregation, with non-whites significantly under-represented in upper-level jobs by margins of two or more standard deviations. (J.A. 379-90; Ex. 634-36 (E.R. 122, 124-25); Tr. 2278.) Skills adjustments were hampered by: (1) the absence of statistics by race on people qualified for the more skilled jobs in the industry (J.A. 100-02; *see also id.* at 373-78); and (2) the lack of objective qualifications at WCP and BBS which would enable one to use such statistics even if they existed (*id.* at 384). Dr. Flanagan compensated for these difficulties by making the extremely conservative assumption WCP and BBS hired every available non-white qualified for truly skilled jobs, basing his computations largely instead on jobs without significant skill barriers. (*Id.* at 384-86.)

By contrast, Dr. Albert Rees—a labor economist for WCP and BBS—concluded the labor supply is about 10% non-white, only about a fifth of the actual percent non-white in the industry since the turn of the century. (J.A. 250, 292.) The district court accepted this view, holding it rebutted the prima facie case of disparate treatment based on work force statistics. (App. Cert. I:41-43, I:118-19, I:124.) The court of appeals did not rule on the labor supply question, which it believed was relevant to disparate treatment but not disparate impact claims. (*Id.* at VI:15-19.)

Faced with a work force which is about 42% non-white, WCP and BBS could justify job segregation only by arguing they hired too many non-whites in the menial jobs rather than

too few in the choice jobs. The centerpiece of their approach was a Census-based study, which bears two unusual features.

First, the study shows an absence of non-whites at statistically significant levels in several departments, which led Dr. Rees to “conclude that [at WCP] non-whites are significantly under-represented in hiring in the tender job family” (J.A. 269-70); “[t]he under-representation of nonwhites” in the tender job family at Red Salmon is “statistically significant at the 5% level” (J.A. 271); and “non-whites were significantly under-represented in hiring in the fisherman and machinist job family at South Naknek [i.e., Bumble Bee]” (J.A. 274; see also *id.* at 289-90). (Emphasis added.)

Second, the study’s non-white availability figure is so low it suggests a striking under-representation of whites in the menial jobs.¹⁸ (J.A. 347; see also *id.* at 356-57.) The suggestion of discrimination against whites arises from an over-inclusive measure of the labor supply.¹⁹ Of the two types of availability

¹⁸When the figures in the “comps dev” row of the defense labor market tables reach minus 1.96 standard deviations, there is statistically significant under-representation of whites, which raises the inference of discrimination against whites. (J.A. 341; Tr. 1851.) Exhibit A-278 Table 4—the one Dr. Rees prefers (see J.A. 267)—shows overall discrimination against whites at Bumble Bee, Red Salmon and Wards Cove at levels ranging from minus 23.139 to minus 10.269 standard deviations. (Ex. A-278 Table 4 WC, RS and SN; Tr. 2647.) They show under-representation of whites at the same facilities in cannery worker and laborer jobs at levels of minus 28.187 to minus 11.537 standard deviations. (*Ibid.*) Similarly, they show under-representation of non-whites at Bumble Bee and Red Salmon in at-issue jobs at levels of minus 4.585 and minus 3.672 standard deviations respectively and under-representation of whites in at-issue jobs at Wards Cove but not at a statistically significant level. (*Ibid.*)

¹⁹Dr. Rees believed “to the extent” whites are under-represented “it is the result of the influence of Local 37.” (J.A. 298; see also *id.* at 294-95.) But his study shows whites are markedly under-represented at Ekuk, which has no Local 37 workers (*id.* at 342, 344-45, 347-48) and at several canneries in jobs outside Local 37’s jurisdiction (*id.* at 348-49). Similarly, historical statistics show the percentage of non-whites actually declined slightly after Local 37 came into being. (J.A. 96-98.) With whites concentrated in the choice jobs at WCP and BBS (J.A. 355-56), whites dominating management at WCP and BBS (*id.* at 356-57) and discrimination in the society as a whole far more pervasive against non-whites than whites (*id.* at 354-55), Dr. Rees conceded—as did his statistician—the suggestion of discrimination against whites might be a sign his non-white availability figure was too low. (Tr. 1851; J.A. 237, 246-48; see also *id.* at 350-52.)

figures Dr. Rees offered, one makes no effort to adjust for migrant, seasonal work, leading him to repudiate it at trial. (Tr. 1934; *see also* J.A. 2576, 305-07.) The other purports to adjust for availability for seasonal but not migrant work. (J.A. 307-08.) Since it is the migrant rather than the seasonal element of work in the industry which largely accounts for the high percentage of non-whites (J.A. 103-4; *see also* Tr. 403-08), these figures assume away the central issue in defining the labor supply.

Dr. Rees includes people in Alaska fruit, vegetable and seafood processing industries (J.A. 257, 311; Tr. 1598), who are 47% non-white. (*See* p. 16, *supra*.) But he also includes: (1) university professors with no interest in work in this industry (J.A. 310-11, 316-18; *see also id.* at 319-20; Tr. 385); (2) construction workers, whose season peaks at the same time as the salmon season, leaving them largely unavailable for work in the industry (J.A. 310-14; Tr. 382-83); (3) unionized construction workers who might have to forfeit seniority to work in a salmon cannery (J.A. 313-16); (4) construction contractors, whose investment in an on-going business makes them unlikely candidates for migrant, seasonal work (*see* Tr. 1774); (5) year-round workers in industries with a seasonal component, who have no interest in migrant, seasonal work (J.A. 320-21); and (6) all unemployed, regardless of whether they would accept migrant, seasonal work (*see* J.A. 310). With these increasingly remote categories, the non-white availability figure drops from 47% to roughly 10%.

Even WCP and BBS statistics show fully 26% of race-identified applicants in 1978-80 were non-white (Ex. A-133 Table 1; Tr. 1433, 1438), despite the fact they severely underestimate non-white availability.²⁰

²⁰The statistics were compiled from written applications made directly to company offices. (*See* Tr. 1518, 2718, 2773.) Yet non-whites are hired in the low-paying jobs through oral solicitation by cannery worker foremen, by bush pilots and at Local 37. (*See* p. 7-9, *supra*.) Of 278 applicants for cannery worker jobs, only two were identified as Filipino or Alaska Native (Ex. A-133 Table 3), the non-white groups which contribute most heavily to cannery worker jobs. Beyond this, many race identifications were made on the basis of those ultimately hired. (Tr. 1403.) Since they generally occupy the very departments from which non-whites are excluded, this undercounts non-whites. Finally, employment practices at WCP and BBS deter non-whites from applying for upper-level jobs (*see* p. 15, *supra*), so once again the applications underestimate non-white availability.

10. HOUSING SEGREGATION

WCP and BBS house employees at the canneries almost completely along racial lines. (Ex. 615-17 (E.R. 105-19); Tr. 2231, 2261.) The district court found "housing where non-whites predominate has generally been poorer than housing whites predominate [sic]." (App. Cert. I:82.) But it held the disparate impact on non-whites was justified by a desire to avoid winterizing large bunkhouses by opening small ones first for the heavily white crews who arrived early. (*Id.* at I:126-27.) The court of appeals reversed, holding this rationalization "without more" would not "sustain a finding of business necessity." (*Id.* at VI:37.)

One home office employee wrote an applicant for a cannery worker job,

We are not in a position to take many young fellows to our Bristol Bay canneries as they do not have the background for our type of employees. *Our cannery labor is either Eskimo or Filipino and we do not have the facilities to mix others with these groups.*

(App. Cert. I:81-82, II:1-2; J.A. 105-9.) (Emphasis added.)

Like jobs, bunkhouses are labelled by race. A.W. Brindle, until 1977 president of WCP, referred from 1970 on to cannery worker bunkhouses as "the Filipino house," "the Eskimo quarters" and "the Filipino and Eskimo areas." (Ex. 328, 361, 366; Tr. 2026; R.P.O. 132, 152.) Warner Leonardo, the Bumble Bee cannery superintendent, referred to them from 1970 on as "the native bunkhouse" and the "Filipino house." (Ex. 340; R.P.O. 132, 150.) The recent housing patterns are part of a long tradition of racial segregation in housing. (J.A. 152-54; Tr. 681, 2387; Dep. Leonardo-1978 36; Dep. J. Brindle 24; *see also* Tr. 1348-51.) Housing follows job lines to some degree but by no means exclusively, so assignments cannot be justified solely by time of arrival of different crews.²¹ Housing does not follow

²¹Filipino culinary workers are housed with Filipino cannery workers. (J.A. 39, 228; Tr. 672, 2061-62; Ex. 83-87 *passim*; R.P.O. 132, 136-37.) Filipino cannery workers are invariably housed apart from Alaska Native cannery workers. (J.A. 43, 88, 127-28; Tr. 197, 834; Ex. 83-85 *passim*; R.P.O. 132, 136-37.) Both groups, which are almost all male, are housed apart from white cannery workers, who are nearly all female. (J.A. 43, 69, 88; Tr. 37, 41, 2202-203; Ex. 83-85 *passim*; R.P.O. 132, 136-37.) These women are housed with males on other white crews, at least at two canneries. (J.A. 43, 69; (cont.)

union lines consistently either.²²

11. MESSING SEGREGATION

Each cannery has two messhalls, of which one is identifiably non-white and the other identifiably white. (*E.g.* J.A. 45-46, 112-13, 128-29, 141-42; Tr. 36, 162, 196.) The non-white messhall is invariably located in or near the non-white cannery worker bunkhouses. (*Ibid.*) The district court acknowledged the disparate impact of the messing practices on non-whites, but held they were justified by a union contract which provides for a separate culinary crew for Local 37 workers. (App. Cert. I:126-28.) Since the district court also recognized a union contract will not immunize an employer under Title VII (*id.* at 128-29), the court of appeals wrote it was "unsure what the [district court's] conclusion was as to" the disparate impact claim of separate messing (*id.* at VI:38).

Like jobs and bunkhouses, messhalls are often designated by race. A.W. Brindle, until 1977 WCP's president, referred from 1970 on to the "Filipino mess house" and the "white messhouse." (Ex. 359, 426; R.P.O. 132, 152, 156.) Company records refer to the "Filipino mess hall," "native cook" and "native galley cook." (Ex. 300, 347-50, 382, 504; R.P.O. 132, 148, 151, 153; Tr. 2279.) Messing practices should be viewed against the backdrop of a long pattern of segregation. (J.A. 153-

²¹(cont) Tr. 37, 2202-203; Ex. 84-85 *passim*; R.P.O. 132, 136-37.) On occasion, white males performing the same jobs as non-white males are housed separately. (J.A. 69, 628-30; Tr. 941, 2202-03.) Culinary workers for the predominantly non-white messhalls are almost all housed apart from culinary workers for the predominantly white messhalls. (*See* J.A. 228; Tr. 2067; Ex. 83-85 *passim*; R.P.O. 132, 136-37.) Different white crews are commonly housed together. (Tr. 239, 655-57; Ex. 83-85 *passim*; R.P.O. 132, 136-37.)

²²Male Local 37 members are nearly all non-white, but are housed apart from female members who are nearly all white. (*See* p. 19 n.21, *supra.*) In turn, female Local 37 workers are housed with white male members of other unions. (*See* p. 19 n.21, *supra.*) Beachmen, fishermen and certain culinary workers are all members of the Alaska Fishermen's Union. (Ex. A-1 through A-11, Alaska Fishermen's Union; Tr. 2646-47.) Yet they are frequently housed apart from one another. (*See*, Ex. 83-85 *passim*; R.P.O. 132, 136-37.) Conversely, whites who have different union affiliations or no union affiliation at all are often housed together. (*See, e.g.*, Tr. 239.)

54; Tr. 668; *see also* Tr. 2589.) Non-white male Local 37 workers are fed separately from white female Local 37 workers. (*E.g.* J.A. 45-46, 83-84, 112-13, 141-42, 154; Tr. 78-79.) Instead, they are often fed with Alaska Native cannery workers, who are not represented by Local 37. (*E.g.*, J.A. 45-46, 88-89; *cf.* App. Cert. I:36.)

SUMMARY OF ARGUMENT

Under § 703(a)(2), it is illegal to “limit, segregate, or classify” employees by race, regardless of what labor market comparisons show. 42 U.S.C. § 2000e-2(a)(2). (Emphasis added.) Title VII’s only mention of labor market comparisons is in § 703(j), which discourages labor market defenses because it prohibits “preferential treatment . . . on account of an imbalance” between the race of those hired and those “in the available work force in any community, State, section or other area.” 42 U.S.C. § 2000e(2)(j). The labor market showing WCP and BBS urge is a form of “bottom line defense,” since it focuses on the number of jobs filled, rather than on limitations of job opportunities. But the Court has squarely rejected “bottom line” defenses to disparate impact claims. *Connecticut v. Teal*, 457 U.S. 440 (1982). Job segregation statistics serve Title VII’s prophylactic aim, since they afford certainty, simplicity and ease of use, while labor market comparisons often involve uncertainties and arcane variables. The district court’s adoption of the labor market defense here in any case (1) incorrectly assumes the legitimacy of racially segregated hiring channels; (2) stems from a misreading of the union contracts and (3) overrides eight decades of 47-70% non-white employment by finding the labor supply is only 10% non-white.

Skill issues do not detract from job segregation statistics here, because jobs are often unskilled or low-skilled or require only skills which can be acquired at the entry level. Nor were the employees required to offer statistics on non-whites qualified for even ostensibly skilled jobs, since: (1) WCP and BBS failed to identify qualifications actually applied, providing instead qualifications prepared for litigation; (2) WCP and BBS only have subjective criteria, which themselves often mask prejudices or stereotypes; (3) Employees need not show they meet qualifications which have a discriminatory effect, unless the

business necessity of the qualifications is first established.

Housing and messing segregation and race-labelling are prohibited by § 703(a)(2), since—as “dignitary” wrongs (*Curtis v. Loether*, 415 U.S. 189, 196 n.10 (1974))—they “adversely affect [one’s] status as an employee.” 42 U.S.C. § 2000e-2(a)(2). Room and board are fringe benefits whose allocation may be challenged on a disparate impact theory. Because they deter non-whites from seeking upper-level jobs, housing and messing segregation and race-labelling all “tend to deprive . . . [non-whites] of employment opportunities.” 42 U.S.C. § 2000e-2(a)(2). Citing only those of the district court’s contradictory findings on nepotism which favor them, WCP and BBS maintain they give no preference to relatives, but even the testimony of WCP’s president establishes a preference.

Despite claims by WCP and BBS, issues of causality are largely absent from this case. The employees offered separate proof of the disparate impact of several practices. WCP and BBS conceded causality in briefs in the court of appeals and this Court. They offered evidence and proposed findings establishing causality in the district court. They omitted causality as a ground for their motion to dismiss for failure to make a prima facie case. Since the district court denied the motion, the sufficiency of the prima facie case is in any event beyond challenge. *United States Postal Service Board of Governors v. Aikens*, 460 U.S. 711 (1983). The failure of WCP and BBS to articulate their hiring criteria or to maintain systematic records prevented the employees from compiling separate statistics on the impact of subjective qualifications. Even so, employees need not always prove specific practices cause racial imbalances. Congress intended to prohibit “‘complex and pervasive’” discrimination (*Teal*, 457 U.S. 440, 447 n.8), which does not always lend itself to easy correlations between cause and effect. The Uniform Guidelines on Employee Selection Procedures require employers to maintain “records or other information” on the adverse impact of each facet of the overall selection process. 29 CFR § 1607.15A(2)(a). Requiring employees to show causality in every case would make employers the beneficiaries of their own record-keeping violations.

Unlike the “articulation” of a legitimate reason for ostensibly disparate treatment, business necessity is an affirmative

defense on which the employer bears the burden of persuasion, for it allows the employer to prevail by proving facts unrelated to the prima facie case. It entails showing a practice is essential to job safety and efficiency, a standard designed to limit deference to an employer's belief in the reasonableness of its own practices. Because they set independent standards which serve the same purpose, the Uniform Guidelines provide an alternate standard for business necessity—namely, job relatedness. When it amended Title VII in 1972, Congress ratified this view of the business necessity defense.

Disparate treatment provides an alternate basis for affirming. Segregated hiring channels which funnel employees to race-labelled jobs are facially discriminatory, so the shifting burden analysis is inappropriate. *See TransWorld Airlines, Inc. v. Thurston*, 469 U.S. 111 (1985). But even if it applied, the justifications WCP and BBS offer for racial disparities in treatment—namely, job qualifications prepared for litigation and a misreading of the Local 37 contract—are clear pretext.

ARGUMENT

1. STATISTICS ON JOB SEGREGATION OR PRACTICES WHICH FOSTER IT ESTABLISH DISPARATE IMPACT REGARDLESS OF WHAT LABOR MARKET COMPARISONS SHOW

A. The Language of Title VII Makes Job Segregation and Practices Which Promote it Illegal

Under §703(a)(2), it is illegal for an employer to “limit, segregate, or classify his employees or applicants” in any way which “would tend to deprive any individual of employment opportunities or otherwise adversely affect his status” as an employee because of race.²³ 42 U.S.C. §2000e-2(a)(2). The statute makes job segregation and practices which promote it illegal *per se*, subject only to the affirmative defense of business necessity. (*See* p. 44 - 45, *infra*.)

²³ Claims of disparate impact arise under § 703(a)(2). *Watson v. Fort Worth Bank and Trust*, 108 S.Ct. 2777, 2783-84 (1988); *Connecticut v. Teal*, 457 U.S. 440, 445-46 (1982); *Satty v. Nashville Gas Co.*, 434 U.S. 136, 144 (1977); *Griggs v. Duke Power Co.*, 401 U.S. 424, 426 n.1 (1971). The Court has not yet decided whether they also arise under §703(a)(1). *Satty*, 434 U.S. 136, 144.

Segregated hiring channels "limit, segregate, or classify" employees or applicants by the way they are recruited. Since the abilities of individuals recruited through different channels are never compared, non-whites cannot compete effectively on the basis of job qualifications for upper-level jobs. The absence of fixed, objective job qualifications reinforces the effect of separate hiring channels by giving white foremen free rein in selecting their acquaintances. Nepotism "limit[s], segregate[s], or classif[ies]" employees or applicants on the basis of family ties, which gives whites an edge in obtaining upper-level jobs. Similarly, a policy of re-hiring past incumbents in their old departments "limit[s], segregate[s], or classif[ies]" employees or applicants by the jobs they held with WCP or BBS in past seasons. Because jobs are racially stratified, this limits opportunities for non-whites.

"The language of Title VII makes plain the purpose of Congress" to "eliminate those discriminatory practices and devices which have fostered *racially stratified* job environments. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 800 (1973) (emphasis added); see also *Teamsters v. United States*, 431 U.S. 324, 348 (1977). Since the words of the statute are clear, they should be applied as read. See *Consumer Product Safety Comm'n v. GTE Sylvania, Inc.*, 477 U.S. 102, 108 (1980); *Chandler v. Roudebush*, 425 U.S. 840, 848 (1976). The Court has repeatedly applied the disparate impact analysis to practices which promote job segregation. *Griggs v. Duke Power Co.*, 401 U.S. 424, 427, 432 (1971) (transfer criteria operated as "built in headwinds" in plant where "Negroes were employed only in the labor department" while "only whites were employed" in four others); *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 409 (1975) (tests inhibited transfers in plant which still carried effects of "racial[ly] identifiabl[e]" lines of progression); see also *Teamsters*, 431 U.S. 324, 344 (dictum).

Contrary to assertions by WCP and BBS, work force statistics are evidence of discrimination in hiring as well as promotions. *E.g.*, *Teamsters*, 431 U.S. 324, 329, 342 n.23 (job segregation statistics accepted where discrimination "in hiring . . . line-drivers" is alleged, since they show "[t]hose Negroes and Spanish-surnamed persons who had been hired . . . were given lower paying, less desirable jobs"); accord *Domingo v. New England*

England Fish Co., 727 F.2d 1429, 1436 (9th Cir. 1984), modified, 742 F.2d 520 (1984); *Carpenter v. Steven F. Austin State University*, 706 F.2d 608, 618, 622-25 (5th Cir., 1983); *James v. Stockham Valves and Fittings Co.*, 559 F.2d 310, 321-28 (5th Cir. 1977), cert. denied, 434 U.S. 1034 (1977). Crediting work force statistics only when an employer announces a policy of promoting from within makes the employer the arbiter of its own discrimination, for it enables the employer to avoid liability by simply declining to announce the policy. Giving work force statistics weight only when the employer promotes from within permits an employer to freely perpetuate job segregation by a systematic failure to promote, which is itself discriminatory.²⁴ See *Giles v. Ireland*, 742 F.2d 1366, 1381 (11th Cir. 1984) ("The failure to promote would appear to operate to 'freeze' blacks in the lowest . . . categories . . ."); *Griggs*, 401 U.S. 423, 424 (practice which "freeze[s] the status quo of prior discrimination]" illegal unless justified by business necessity); see *Teamsters*, 431 U.S. 324, 349-50 (same) (dictum).

B. Even The Labor Market Statistics WCP and BBS Offer Establish a Prima Facie Case For Many Jobs

While WCP and BBS broadly challenge the sufficiency of the prima facie case, their own statistics establish a significant exclusion of non-whites from several jobs. For these jobs, their labor market and skills contentions are irrelevant.

From the "table[s] that in [his] judgement best enable[] one to test the allegations of racial discrimination" (J.A. 267), Dr. Rees acknowledged a statistically significant absence of non-whites in: (1) tender jobs at WCP; (2) tender jobs at Red Salmon; and (3) machinist and fisherman jobs at Bumble Bee (See p. 17, *supra.*) Certainly, an employer "is free to adduce countervailing evidence" if it "discerns fallacies or deficiencies in the data" offered by employees to show disparate impact. *Dothard v. Rawlinson*, 433 U.S. 321, 331 (1977); see also *Wat-*

²⁴WCP and BBS discourage mid-season promotions of Local 37 workers, because they entail paying the same person two season guarantees. (Tr. 1104, 1134, 1352-53; see App. Cert. I:39.) Once the season is over, re-hire preferences and word-of-mouth recruitment inhibit promotions for the next season. (See p. 7-9, 11, *supra.*) But even the relatively few promotions awarded go disproportionately to whites. (See Ex. 613-14; Tr. 2231, 2261.)

son v. Fort Worth Bank and Trust, 108 S. Ct. 2777, 2789 (1988) (O'Connor, J.). But the rule has only academic relevance for jobs like these in which even the employer concedes a significant exclusion of non-whites.

Beyond this, Dr. Rees concedes a statistically significant absence of non-whites in other jobs when re-hires are counted, even though his skill and labor market contentions remain intact.²⁵ They are: (1) fisherman, machinist, tender and carpenter jobs at Bumble Bee; (2) tender and machinist jobs at Wards Cove; (3) tender and fisherman jobs at Red Salmon; and (4) tender and fisherman jobs at WCP as a whole. (J.A. 332-36; Ex. A-280 Table 4 WC, RS, SN and WC-RS; Tr. 2646-47.) Unless re-hire preferences are justified by business necessity, re-hires must be counted, for "treating as unassailable" a right of past incumbents to return in their old jobs in largely white departments "perpetuate[s] impermissibly the result of earlier discrimination." *Grant v. Bethlehem Steel Corp.*, 635 F.2d 1007, 1018 (2nd Cir. 1980), *cert. denied*, 452 U.S. 940 (1981); see *Teamsters*, 431 U.S. 324, 349-50, 372-76. For reasons given below, the re-hire preferences are not justified by business necessity. (See p. 48, *infra*.)

C. Labor Market Comparisons Cannot Rebut or Justify Statistical Showings of Job Segregation

Title VII's only language on labor market comparisons appears in § 703 (j), which prohibits "preferential treatment . . . on account of an imbalance" between the race of those hired and those "in the available work force in any community, State, section or other area." 42 U.S.C. § 2000e-2 (j). This provision discourages uncritical labor market defenses.

WCP and BBS argue the racial imbalances in their work force are acceptable, because hiring area comparisons show they employ too many non-whites in lower-level jobs rather than too few in upper-level jobs. But this confuses the end with the means, for while hiring area comparisons are evidence of

²⁵The tables Dr. Rees prefers count employees only in the first season they held a given job, rather than each season they filled it. (See p. 3, n. 5 *supra*.) But by narrowing the statistical case, they decrease the likelihood any instance of under-representation will be statistically significant. (See Tr. 2121(k)-(1).)

violations (*Hazelwood School District v. United States*, 433 U.S. 299, 307 (1977)), they do not define the violations. "Title VII imposes no requirement that a work force mirror the general population." *Teamsters*, 431 U.S. 324, 340 n.20. Courts, in any case, have rejected precisely the reasoning WCP and BBS urge. *Carpenter*, 706 F.2d 608, 622 (labor market statistics showing non-whites "over-represented" in lower-level jobs do not rebut job segregation statistics in hiring discrimination case).²⁶

Section 703(a)(2) "speaks, not in terms of jobs and promotion, but in terms of *limitations* and *classifications*."

This Court has never read §703(a)(2) as requiring the focus to be placed instead on the overall number of minority or female applicants actually hired or promoted.

Connecticut v. Teal, 457 U.S. 440, 448, 450 (1982) (emphasis in original). Where practices conspicuously limit opportunities for non-whites, a labor market defense would reverse the focus back from opportunities to jobs, which in turn would encourage employers to adopt not remedial or affirmative goals but exclusionary quotas, which have been historically disfavored. *Cf. Steelworkers v. Weber*, 433 U.S. 193, 208 (1979).

Labor market showings are a form of "bottom line" defense, which are ineffective against disparate impact claims.²⁷

Although we noted in passing [in *Dothard*, 433 U.S. 321] that women constituted 36.89 percent of the labor force and only 12.9 percent of correctional counselor positions, our focus was not on this "bottom line."

²⁶ See also *James*, 559 F.2d 310, 341 (same in hiring and promotion discrimination case); *Paxton v. United National Bank*, 688 F.2d 552, 563-64 (8th Cir. 1982), cert. denied, 460 U.S. 1083 (1983) (same in promotion discrimination case); *Payne v. Travenol Laboratories, Inc.*, 673 F.2d 798, 823-24 (5th Cir. 1982), cert. denied, 459 U.S. 1038 (1982) (hiring area statistics do not rebut applicant flow statistic in hiring discrimination case).

²⁷ The Court has never insisted on labor market statistics to establish disparate impact, but has instead relied on scores for written exams given by the employer (*Teal*, 457 U.S. 440, 443 and n.4), pass rates for standardized exams compiled in other cases (*Griggs*, 401 U.S. 424, 430 n.6), national height and weight statistics (*Dothard*, 433 U.S. 321, 330) and statewide education statistics (*Griggs*, 401 U.S. 424, 430 n.6). See also *Beazer*, 440 U.S. 568, 585 (where reliable, applicant flow statistics are preferable to hiring area statistics); cf. *Dothard*, 422 U.S. 321, 330 (same).

* * *

The suggestion that disparate impact should be measured only at the bottom line ignores the fact that Title VII guarantees these individual respondents the *opportunity* to compete equally with white workers on the basis of job-related criteria.

Teal, 457 U.S. 440, 450-51 (emphasis in original).

Three times before *Teal*, the Court rejected labor market defenses. While it found the statistics flawed in *Beazer*, the Court held a disparate impact approach was not precluded by the fact "the percentage of blacks and Hispanics in [the employer's] work force is well over twice that of the percentage in the work force in the New York Metropolitan area." *New York Transit Authority v. Beazer*, 440 U.S. 568, 584 n.25 (1979). Facing criticisms of labor market statistics on disparate treatment claims in *Teamsters*, the Court held,

At best, these attacks go only to the accuracy of the comparison between the composition of the company's work force at various terminals and the general population of the surrounding communities. *They detract little from the Government's further showing that Negroes and Spanish-surnamed Americans who were hired were overwhelmingly excluded from line-driver jobs.*

Teamsters, 431 U.S. 324, 342 n. 23 (emphasis added). Similarly, confronting disparate treatment claims in *Furnco*, it wrote an employer must "provide an equal opportunity for *each* applicant regardless of race, without regard to whether members of the applicant's race are already proportionately represented in the work force." *Furnco Construction Corp. v. Waters*, 438 U.S. 567, 579 (1978) (emphasis in original).

Hiring area statistics cannot rebut job segregation statistics, because they do not answer the violation alleged—namely, among those hired choice jobs are allocated unfairly. Clearly, an employer may not limit non-whites to the same share of its payroll as they comprise in the hiring area, for if they are more heavily represented in its work force than the hiring area, this condemns them to lower wages than whites for reasons unrelated to merit, which is itself discriminatory. *Cf. Bazemore v. Friday*, 478 U.S. 385 (1986). For the same reason, an employer may not limit non-whites to the same percentage of choice jobs as non-whites comprise in the hiring area, for when—as WCP and BBS claim here—they are "over-represented" in an em-

ployer's menial jobs, this ensures a pattern of racial segregation for reasons unrelated to merit, which once again is discriminatory.

Relying on work force statistics facilitates " 'self examination' " and " 'self-evaluat[ion],' " which enable employers to voluntarily " 'eliminate . . . the last vestiges of discrimination' " (*Albemarle*, 422 U.S. 405, 417-18), for they afford certainty, simplicity and ease of use. The Uniform Guidelines and other EEOC regulations require employers to record and report the race of employees in different job categories (29 CFR § 1602.7, § 1602.13, § 1607.4A-B, § 1607.15A(1)-(2)), so employers already have the information necessary to compile work force statistics. By contrast, labor market questions involve uncertainties, such as the effect of weighting schemes (*see Markey v. Tenneco Oil Co.*, 635 F.2d 497, 499 (5th Cir. 1981)), the effect of an employer's recruitment practices (*see Williams v. Owens-Illinois, Inc.*, 665 F.2d 918, 927 (9th Cir. 1982), *cert. denied*, 459 U.S. 971 (1982)) and perhaps distortions of the labor market (*Hazelwood*, 433 U.S. 297, 313 n.20). WCP and BBS prevailed here on virtually the same labor market statistics courts rejected in two companion cases involving the same industry. *Domingo v. New England Fish Co.*, 445 F. Supp. 421, 431-33 (W.D. Wash. 1977), *reversed on other issues*, 727 F.2d 1429 (9th Cir. 1984), *modified*, 742 F.2d 520 (1984); *Carpenter v. Nefco-Fidalgo Packing Co.*, No. C74-407R (W.D. Wash. May 20, 1982) (order on liability). Far from yielding certainty, reliance on hiring area statistics here " 'produce[d] different results for breaches of duty in situations that cannot be differentiated in policy.' " *Albemarle*, 422 U.S. 405, 417.

WCP and BBS argue reliance on work force statistics would invite employers to reduce the number of non-whites in low paying jobs to eliminate a pattern of job segregation. (Brief of Pet. 21.) But this is simply to say employers will deny non-whites all opportunities if they must afford them equal opportunities, which is no basis for limiting a statute whose aim is "to assure equality of employment opportunities" by eliminating practices "which have fostered" racial segregation in jobs. *McDonnell Douglas*, 411 U.S. 792, 800. WCP and BBS also maintain work force statistics are an unwieldy measure of discrimination, since an employer will not know the percentage of non-whites it employs until after it has finished hiring. (Brief of

Pet. 21-22.) But few employers have turnover so rapid this uncertainty will be meaningful. Even WCP and BBS—seasonal employers who reconstitute their work forces every year (see App. Cert. I:40)—have had a relatively constant percentage of non-whites in their work force for decades. (See, e.g. J.A. 151-53.)

D. The Labor Supply Findings Were Induced by Errors of Law

The district court's findings on the labor supply were induced by three errors of law.²⁸

First, one of two factors to which the district court attributed the concentration of non-whites in menial jobs is hiring from near the canneries. (App. Cert. I:37-39.) But since it relied on a line of cases which—like *Hazelwood*—define the relevant labor market as the community surrounding the work place (*id.* at I:109), it could not logically discount the effects of the practice by saying it distorts the work force. Recruiting from heavily non-white areas only for lower level jobs can itself be discriminatory. *Domingo*, 445 F. Supp. 421, 433; see also *Williams*, 665 F. 2d 918, 927; *Markey*, 635 F.2d 497, 500-01. By assuming the legitimacy of the practice without proof of business necessity, the district court prevented the employees from even challenging it.

Second, the other factor to which the district court attributed the concentration of non-whites in low-paying jobs is Local 37 dispatching. (App. Cert. I:36.) But under its labor contract, Local 37 enjoys no control over selecting non-resident cannery workers. (See p. 8-9, *supra.*) Nor does it have an exclusive hiring hall.²⁹ (*Ibid.*) The hiring provisions in the Local

²⁸The Court may affirm on this basis, even though the court of appeals did not reach it. See *TransWorld Airlines, Inc. v. Thurston*, 469 U.S. 111, 119 n.14 (1985). Findings of fact affected by errors of law are infirm. See *Pullman Standard v. Swint*, 456 U.S. 273, 292 (1982). A remand to re-determine the labor supply is unnecessary, since the errors in the district court's findings signal the inability of WCP and BBS to discredit the job segregation statistics. See *Dothard*, 433 U.S. 321, 331.

²⁹If Local 37 has a role in hiring, it is only because WCP and BBS informally delegate authority to it. Yet an employer may not avoid liability under Title VII by delegating management prerogatives to third parties. See *Arizona Governing Committee v. Norris*, 463 U.S. 1073, 1089-91 (1983). Whether an informal grant of authority to a union is an "institutional constraint" (cont.)

37 contract are almost identical to those in contracts covering upper-level jobs. (Ex. A-1 through A-11, Local 37, ILWU, Alaska Fishermen's Union, Machinists Union, Carpenters Union; Tr. 2345-46.) Yet neither the employers nor the district court attributed any distortion of the work force to other unions. The district court's erroneous reading of the Local 37 agreement may be freely reviewed on appeal. *Mackey v. National Football League*, 543 F.2d 606, 612 (8th Cir. 1976), cert. dismissed, 434 U.S. 801 (1977); see also C. Wright and A. Miller, 9 *Federal Practice and Procedure* § 2588 p. 750 (1971). Even so, of the five canneries originally covered by this case, only one—Ekuk—does not use Local 37. (App. Cert. I:35, I:37-38.) While it has the lowest percentage of Filipinos (*id.* at 37-38), it has the highest percentage of non-whites generally (Ex. 588-92; Tr. 2231, 2261). Even if every worker from the Lower 48—where Local 37 has jurisdiction—were white, the WCP and BBS work force would still be 29% non-white, because of the number of Alaska Natives. (Tr. 366.)

Third, courts credit hiring area statistics only because,

Absent explanation, it is *ordinarily* to be expected that nondiscriminatory hiring practices will in time result in a work force more or less representative of the racial and ethnic composition of the population in the community from which employees are hired.

Teamsters, 431 U.S. 324, 340 n.20 (emphasis added). But since for eight decades this industry has been far more heavily non-white than its hiring areas, the rationale for using such statistics is absent. Even so, WCP and BBS actively recruit for all jobs, so the issue is not whether their work force fairly reflects the areas from which they hire, but whether in recruiting they give whites and non-whites an equal chance at the desirable jobs. On this issue, work force statistics speak eloquently. Significantly, in an industry which has been 47-70% non-white for eight decades, upper-level jobs at WCP and BBS remain at least 90% white. See *Domingo*, 445 F. Supp. 421, 432.

²⁹(cont.) is distinct from the issue in *General Building Contractors Association, Inc. v. Pennsylvania*, 458 U.S. 375 (1982)—namely, whether an employer who delegates authority to a union in collective bargaining makes the union its agent.

E. Alleged Skill Requirements Do Not Detract From Work Force Statistics Here

WCP and BBS erroneously suggest work force statistics have no value, since their upper-level jobs require special skills not found generally among their workers.

First, this rationale cannot apply to those jobs which the district court found were unskilled. (*See* App. Cert. I:107-08.)

Second, this rationale cannot apply to jobs for which the required skills can be acquired through experience in entry-level jobs in white departments (*see* p. 13-14, *supra*), since experience requirements "cannot be automatically applied to freeze out" non-whites, when "for the years of its segregated policy" the employer did not "afford them an opportunity to acquire experience." *Rowe v. General Motors Corp.*, 457 F.2d 348, 358 (5th Cir. 1972).

Third, this rationale cannot apply to jobs which—even assuming the accuracy or pertinence of the district court's findings on qualifications which could be "reasonably required" ³⁰ (App. Cert. I:58)—entail only skills "many persons possess or can fairly readily acquire." *Hazelwood*, 433 U.S. 299, 308 n.13. The district court construed "skills" in a highly rarefied sense, for while this Court held statistics on qualified non-whites are unnecessary for cross-country truck driving jobs (*see id.* at 308 n.13), it ruled they are required for truck driving on the beach (App. Cert. I:108), because in a seasonal industry the particular skill of driving vehicles is "not readily acquirable" (*ibid.*).

For reasons given below, the work force statistics showed disparate impact even for ostensibly skilled jobs.

2. THE EMPLOYEES DID NOT HAVE TO OFFER STATISTICS ON QUALIFIED NON-WHITES, SINCE THE EMPLOYERS NEVER IDENTIFIED CRITERIA ACTUALLY APPLIED, THEY LACKED OBJECTIVE QUALIFICATIONS AND THE QUALIFICATIONS THEY DID USE HAD A DISPARATE IMPACT

For three reasons, the employees were not required to offer statistics on qualified non-whites for any jobs here.

³⁰*See* App. Cert. I:66-67, I:70-71, I:73 (quality control, beach gang, truck driver, office assistant and tender cook).

First, WCP and BBS failed to show what hiring criteria were actually applied. Under Title VII, ability is tested only under qualifications actually applied. *Franks v. Bowman Transportation Co.*, 424 U.S. 747, 773 n. 32 (1976) (back pay defeated only under “non-discriminatory standards *actually applied*”); *Albemarle*, 422 U.S. 405, 433 (use of subjective rankings in validation inappropriate since “no way to determine whether the criteria *actually considered*” were job related) (emphasis in original in each). The burden of proving a job requires special skills or experience rests with the employer.³¹ Only qualifications actually applied can be tested for fair application (see *McDonnell Douglas*, 411 U.S. 792, 804) or business necessity (see *Albemarle*, 422 U.S. 405, 433). While—within these limits—Title VII makes qualifications the employer’s prerogative (see *Rowe*, 457 F.2d 348, 358), the employer must at least disclose the criteria it applied, for “‘[o]ne clear purpose of discrimination law is to force employers to bring their employment processes into the open.’” *Segar v. Smith*, 738 F.2d 1249, 1276 (D.C. Cir. 1984), *cert. denied*, 471 U.S. 1115 (1985). Only then can qualifications be the “controlling factor” Congress intended. *Griggs*, 401 U.S. 424, 436. When an employer fails to disclose criteria actually applied, an employee need not offer statistics on qualified non-whites. *EEOC v. Rath Packing Co.*, 787 F.2d 318, 328, 336 (8th Cir. 1986), *cert. denied*, 107 S. Ct. 307 (1986); *Domingo*, 727 F.2d 1429, 1437 n.4; *Trout v. Lehman*, 702 F.2d 1094, 1102 n.10 (D.C. Cir. 1983), *vacated on other grounds*, 465 U.S. 1056 (1984).

By relying on qualifications prepared for litigation, WCP and BBS adopted a strategy which was rejected in two companion cases. *Domingo*, 445 F. Supp. 421, 437-38; *Carpenter*, No. C74-407R (W.D. Wash. May 20, 1982) (order on liability). An employer may not impose more stringent qualifications on non-whites than whites either in practice (*McDonnell Douglas*, 411 U.S. 792, 804) or in proof (*Domingo*, 445 F. Supp. 421, 438). Even standards which are “reasonable” will not defeat a Title

³¹ *EEOC v. Rath Packing Co.*, 787 F.2d 318, 336 (8th Cir. 1986), *cert. denied*, 107 S. Ct. 307 (1986); *Domingo*, 727 F.2d 1429, 1437 n.4; *Moore v. Hughes Helicopters, Inc.*, 708 F.2d 475, 483 (9th Cir. 1983); *Chrisler v. Complete Auto Transit, Inc.*, 645 F.2d 1251, 1259 n.5 (6th Cir. 1981); *EEOC v. Radiator Specialty Co.*, 610 F.2d 178, 185 (4th Cir. 1979).

VII claim, if they were never imposed during the liability period. *Laffey v. Northwest Airlines, Inc.*, 567 F.2d 429, 456-57 (D.C. Cir. 1976), *cert. denied*, 434 U.S. 1086 (1977).

Second, an employee need not as part of a prima facie case offer statistics on non-whites who meet subjective qualifications. When it endorsed use of statistics on experienced teachers in *Hazelwood*, the Court did not insist on a further showing of non-whites who met the subjective qualifications of " 'most competent' " or " 'personality, disposition, appearance, poise, voice, articulation, and ability to deal with people.' " *Hazelwood*, 433 U.S. 299, 302, 308 n.13. Even where skilled jobs are at issue, courts do not insist on statistics on non-whites who meet subjective qualifications.³² Since subjective criteria can mask "subconscious stereotypes and prejudices" (*Watson*, 108 S. Ct. 2777, 2786), statistics on them just "measure . . . the amount of discrimination operating through" them. *Segar*, 738 F.2d 1249, 1276. Simply saying—as WCP and BBS do—they look for a "qualified person," "skill" or "experience" is no substitute for having objective qualifications, since " 'affirmations of good faith in making individual selections are insufficient to dispel a prima facie case of systematic exclusion.' " *Teamsters*, 431 U.S. 324, 343 n. 24. Undefined "job related experience" is not considered objective when—as here—" [e]ach hiring decision [is] made by a cannery superintendent or a foreman on the basis of his personal judgment." *Domingo*, 727 F.2d 1429, 1433.

Third, an employee "cannot be required to prove that he was qualified . . . under a system he alleges to be discriminatory unless the legitimacy of the system is first established." *Wang*

³² *Segar*, 738 F.2d 1249, 1274-75 (GS-7 to GS-12 positions); *Caviale v. State of Wisconsin*, 744 F.2d 1289, 1294 (7th Cir. 1984) (regional director); *Mozee v. Jeffboat, Inc.* 746 F.2d 365, 372-73 (7th Cir. 1984) (foreperson); *Wang v. Hoffman*, 694 F.2d 1146, 1148 (9th Cir. 1982) (GS 12 positions); *De Medina v. Reinhart*, 686 F.2d 997, 1007 (D.C. Cir. 1982) (technicians, writers and editors); *Burrus v. United Telephone Company of Kansas, Inc.*, 683 F.2d 339, 342 (10th Cir. 1982), *cert. denied*, 459 U.S. 1071 (1982) (accounting supervisor); *Lynn v. Regents of the University of California*, 656 F.2d 1337, 1344-45 (9th Cir. 1981), *cert. denied*, 459 U.S. 823 (1982) (university professor); *Davis v. Califano*, 613 F.2d 957, 964 (D.C. Cir. 1979) (research chemist); *see also Domingo*, 727 F.2d 1429, 1437 n.4.

v. Hoffman, 694 F.2d 1146, 1148 (9th Cir. 1982).³³ *Hazelwood*, a disparate treatment case, is distinguishable,³⁴ since a prima facie case of disparate treatment is designed to raise the inference of illegal intent by eliminating "the two most common legitimate reasons on which an employer may rely" in rejecting applicants, one of which is "an absolute or relative lack of qualifications." *Teamsters*, 431 U.S. 324, 358 n.44; see also *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 253-54 (1981). By contrast, the aim of a prima facie case of disparate impact is to show non-whites fail "in a significantly discriminatory pattern" to meet the qualifications imposed. *Dothard*, 433 U.S. 321, 329. Because the employees showed disparate impact (see p. 39-40, *infra*), they were relieved of the need to offer statistics on qualified non-whites. See *Beazer*, 440 U.S. 568, 585 (statistics on "otherwise qualified" non-whites required when some qualifications remain unchallenged) (emphasis added).

3. HOUSING AND MESSING SEGREGATION AND RACE-LABELLING HAVE A DISPARATE IMPACT ON NON-WHITES

Because they "limit, segregate, or classify" employees along racial lines, housing and messing segregation and race-labelling fall within the literal terms of § 703(a)(2)'s prohibition. See 42 U.S.C. § 2000e-2(a)(2). Even if housing and messing are assigned by crew or time of arrival rather than race (see App. Cert. I:126), the racial impact is still clear (see Ex. 615-17 (E.R. 105-19); Tr. 2231, 2261).

WCP and BBS argue these practices do not "tend to deprive any individual of employment opportunities" (42 U.S.C. § 2000e-2(a)(2)), so they survive a § 703(a)(2) challenge. (Brief of Pet. 28-29.) But § 703(a)(2) also covers practices which "adversely affect [an individual's] status as an employee." 42

³³ Accord *EEOC v. St. Louis-San Francisco Ry. Co.*, 743 F.2d 739, 742 (10th Cir. 1984); *Fadhal v. City and County of San Francisco*, 741 F.2d 1163, 1165-66 (9th Cir. 1984); *Bushey v. New York State Civil Service Commission*, 733 F.2d 220, 225 (2nd Cir. 1984), cert. denied, 469 U.S. 1117 (1985).

³⁴ See also *Mayor of Philadelphia v. Educational Equality League*, 415 U.S. 605, 620-21 (1974) (statistics on qualified non-whites required only when plaintiffs "do not challenge the qualifications for service").

U.S.C. § 2000e-2(a)(2). Since racial segregation is a “dignitary” wrong (*Curtis v. Loether*, 415 U.S. 189, 196 n.10 (1974)), it “adversely affect[s]” one’s status as an employee. (See, e.g., J.A. 405-06; Tr. 79, 836-37.) “Title VII is not limited to ‘economic’ or ‘tangible’ discrimination,” but “affords employees the right to work in an environment free from discriminatory intimidation, ridicule and insult.” *Meritor Savings Bank v. Vinson*, 477 U.S. 57, 64-65 (1986) (construing § 703(a)(1)).

Second, in any case, room and board are fringe benefits. See e.g. *Domingo*, 727 F.2d 1429, 1446. Claims of discrimination in fringe benefits may be raised under a disparate impact theory.³⁵ Non-whites lost fringe benefits because largely non-white bunk-houses were “generally poorer” (App. Cert. I:82), less spacious (Ex. 620-22; Tr. 2231, 2261) and often simply squalid (see, e.g., J.A. 39-40, 44-45, 127-28, 143; Tr. 31, 38, 77-78, 162, 197-98, 808, 1039). Non-whites were so dissatisfied with the food they held food strikes.³⁶ (See, e.g., J.A. 47; Tr. 200, 284.)

Third, segregation in housing and messing “isolate[s non-whites] . . . from the ‘web of information’ about higher-paying jobs.” *Domingo*, 445 F. Supp. 421, 439. Similarly, it deters non-whites—as does race-labelling—from seeking upper-level jobs, because of the clear message it conveys. (See p. 15 *supra*.) These practices thus “tend to deprive . . . [non-whites] of employment opportunities.” 42 U.S.C. § 2000e-2(a)(2).

WCP and BBS argue racial imbalances in housing and messing are due to the abundance of non-whites Local 37 dispatches. (Brief of Pet. 27.) But the district court found on stipulated facts cannery superintendents were “ultimately res-

³⁵ *Nashville Gas Co. v. Satty*, 434 U.S. 136, 139-45 (1977) (under § 703(a)(2)); *EEOC v. J.C. Penney Co.*, 843 F.2d 249, 251-52 (6th Cir. 1988); *Colby v. J.C. Penney Co.*, 811 F.2d 1119, 1126-27 (7th Cir. 1987); *Wambheim v. J.C. Penney Co.*, 705 F.2d 1492, 1494 (9th Cir. 1983), *cert. denied*, 467 U.S. 1255 (1984) (under § 703(a)(1)).

³⁶ WCP and BBS say differences in food are due to requests by Local 37, the ability of the cooks and personal tastes of older Filipino crew members. (Brief of Pet. 27-28.) But even if this explained segregated messing for Alaska Natives or feeding largely white Local 37 female workers apart from their largely non-white male counterparts (see p. 21, *supra*), WCP and BBS could not escape liability for the racial differences by delegating decisions to third parties. *Arizona Governing Committee v. Norris*, 463 U.S. 1073, 1089 and n.21 (1983); *Grant*, 635 F.2d 1016.

possible for assigning employees to bunkhouses [and] assigning crews to dining areas.” (App. Cert. I:37; R.P.O. 9; *see also*, e.g., J.A. 39, 53-55, 73, 128-29; Tr. 833.) Beyond this, housing and messing assignments often have little to do with job or union affiliation. (*See* p. 19-20 n. 21-22, *supra*.) WCP and BBS maintain non-whites could “opt out” of discriminatory messing practices by taking occasional meals in largely white messhalls on appropriate notice. (Brief of Pet. 29.) But non-whites who tried to eat in largely white messhalls were sometimes rebuffed. (*See*, e.g., J.A. 73-74; Tr. 40; *see also* Tr. 668.) Even so, because messhalls were “assign[ed]” (App. Cert. I:37), non-whites did not have an “entirely voluntary” choice. *Bazemore*, 478 U.S. 385, 408.

4. NEPOTISM HAS A DISPARATE IMPACT ON NON-WHITES HERE

The district court made contradictory findings on nepotism, citing on the one hand its “pervasive” nature, while saying on the other there was no “preference” for relatives. (*See* p. 10, *supra*.) Invoking only findings in their favor, WCP and BBS disclaim any nepotism, saying relatives were “chosen because of their qualifications” and not “due to inexperience.”³⁷ (App. Cert. I:105, I:122.) But even if the latter findings control, they are premised on too narrow a legal standard, for nepotism can involve preference in recruiting employees and publicizing job opportunities as well as in evaluating qualifications. *Domingo*, 747 F.2d 1429, 1436; *Grant*, 635 F.2d 1007, 1012, 1016-17. On this, WCP’s president acknowledged, “[T]here is no doubt relatives have better information as to what jobs are available.” (J.A. 156, 183-84.) Significantly, the district court found applications of non-whites often failed because they were untimely or made to the wrong person. (App. Cert. I:115-17.)

During 1970-75, roughly 67% of administrative jobs, 43% of quality control jobs, 39% of clerical jobs, 37% of fisherman jobs, 29% of machinist jobs, 27% of tender jobs and 20% of beach gang jobs were filled by individuals who had a relative at

³⁷ WCP and BBS argue the findings they cite are not clearly erroneous. (Brief of Pet. 25.) But the “clearly erroneous” rule does not apply to contradictory findings. *See Legate v. Maloney*, 334 F.2d 704, 707-08 (1st Cir. 1964), *cert. denied*, 379 U.S. 973 (1965); C. Wright and A. Miller, 9 *Federal Practice and Procedure* § 2614 p. 812 (1971).

the same cannery in the same or a prior year.³⁸ The justification WCP's president offered—namely, hiring a candidate's relatives is a way of attracting him or her to the company (*see* p.11, *supra*)—establishes relatives are hired for reasons other than merit. Finally, the criticisms WCP and BBS offer of the statistics are without real basis.³⁹

5. THE EMPLOYEES ESTABLISHED CAUSATION

Of the three requirements the court of appeals articulated for a *prima facie* case of disparate impact, one is “show[ing] the causal relationship between the identified practices and the [disparate] impact.” (App. Cert. V:19-20.) WCP and BBS conceded this element, for the court of appeals observed “[T]he challenged practices are agreed to cause [the] disparate impact” (*id.* at V:29) and “[T]he companies concede the causal relationship between their hiring criteria and the number of non-whites in the at-issue jobs” (*id.* at VI:24-25⁴⁰). Even in their

³⁸ *See* Ex. 583-85, 608-10 (E.R. 102-104); Tr. 2231, 2261. Exhibits 608-10 show nepotistic hires for 1970-75, while Exhibits 583-85 show total hires for 1970-80. To compute the ratio of nepotistic to total hires in 1970-75, the employees assumed roughly 55% of the total 1970-80 hires were made in 1970-75.

³⁹ WCP and BBS argue the statistics fail to exclude persons who become related by marriage after they were hired. (Brief of Pet. 26 n.40.) But they failed to meet their burden of showing this would affect the racial impact apparent from the charts. *See Capaci v. Katz and Besthoff, Inc.*, 711 F.2d 647, 653-54 (5th Cir. 1983), *cert. denied*, 466 U.S. 927 (1984). Similarly, WCP and BBS maintain the first of two relatives hired should not be counted. (Brief of Pet. 26 n.40.) The nepotism charts take account of this criticism when the relatives work in different years. (Ex. 603-05 (E.R. 65-101); Tr. 2231, 2261.) Even so, halving the nepotistic hires—to 172 white and 1 non-white—would not alter the clear pattern.

⁴⁰ WCP and BBS said recruiting for cannery workers in Alaska Native villages and through a largely Filipino local creates the abundance of non-whites in menial jobs. (Brief of Appellees 8 and 29.) But this only means hiring through separate channels has a disparate impact on non-whites. WCP and BBS argued counting re-hires aggravates the statistical picture, since half of the challenged hiring decisions are attributable to a practice of re-hiring incumbents in their old jobs. (*Id.* at 34.) But this is simply to say the practice has a “lock-in” effect in an already segregated job environment. Similarly, WCP and BBS claim the racial imbalance in jobs results from the inability of non-whites to meet the undisputedly subjective qualifications they impose. (*See id.* at 27-28.) But this only means the criteria disqualify non-whites at a higher rate than whites, an observation which virtually defines disparate impact.

brief before this Court, WCP and BBS openly concede the causal links.⁴¹ Yet they argue the Court should disregard their admissions, forcing the employees to show what everyone agrees is true.

First, in any case, the employees offered separate proof of the racial impact of separate hiring channels,⁴² although it might have been superfluous, since the causal link "is quite clear." *Domingo*, 727 F.2d 1429, 1436 n.3. They offered separate statistics on the racial impact of nepotism (*See* p. 10-11, *supra*) and re-hire preferences (*see* p.14, *supra*). They could not offer separate statistics on the disparate impact of subjective qualifications, since: (1) WCP and BBS never identified the criteria they actually applied, leaving qualifications invisible apart from their application through word-of-mouth recruitment; (2) WCP and BBS destroyed applications throughout nearly the entire case period (*see* p. 14, *supra*), so the effects of subjective qualifications and word-of-mouth recruitment could not be separated; and (3) Their personnel records are so sketchy WCP and BBS had to hire a firm to collect background information on their employees through interviews in Alaska just before trial (*see* p. 13 n.14, *supra*), a circumstance which makes regression analysis impractical. Under these conditions, separate statistics were not required. *See Watson*, 108 S. Ct. 2777 (effect of subjective criteria measured through application in interview process). Even so, once DeFrance identified his hypothetical qualifications, the employees showed they had a dis-

⁴¹WCP and BBS say "the relatively low percentage of non-whites in the at-issue jobs is attributable ... [in part] to the 'rehire' practice." (Brief of Pet. 36.) They acknowledge use of separate hiring channels is a cause of job segregation, saying Local 37 is a "'source' [which] produced an over-representation of non-whites in the cannery worker jobs." (*Id.* at 23; *see also id.* at 39.) Similarly, they appear to concede their asserted qualifications have a disparate impact. (*Id.* at 45.)

⁴²This includes statistics on the racial mix of Alaska Native villages (Ex. 480; Tr. 2026), stipulations on the race of cannery workers dispatched by Local 37 (J.A. 3-6), statistics on the race of incumbents in each job (*see* p. 4-6, *supra*), admissions on the racial impact of the practices (*see, e.g.*, Ex. 394; Tr. 3121, 3140-41) and anecdotal evidence, such as the testimony of the machinist foreman whose years of word-of-mouth recruitment turned up whites but no non-whites. (J.A. 14-18.)

parate impact.⁴³ WCP and BBS say the employees claimed other practices—a total of 16—contributed to job segregation (Brief of Pet. 31), but this simply is not true.⁴⁴

Second, WCP and BBS never asserted in their motion to dismiss the employees failed to prove causality. (Tr. 2294-98, 2310-12.) The district court in any case denied the motion, saying “I feel that [plaintiffs] have established a prima facie case”. (Tr. 2313.) When an employer “fails to persuade the district court to dismiss [a Title VII] action for lack of a prima facie case,” the sufficiency of the prima facie case can no longer be challenged either in the trial court or an appellate court. *United States Postal Service Board of Governors v. Aikens*, 460 U.S. 711, 714-15 (1983) (disparate treatment); *Bazemore*, 478 U.S. 385, 398 (same). Once the employees rested, WCP and BBS offered evidence showing separate hiring channels caused job segregation, re-hire preferences perpetuated the job segregation and DeFrance’s hypothetical qualifications had a disparate impact. (E.g. Tr. 1868-69, 1880-82; see p. 13-14 n. 14, 17, *supra*.) Following trial, they even proposed findings on causality, which the district court adopted. (Defs. Prop. Find. and Concl. 4-6, 31.)

Whether or not in other cases it is “unrealistic to suppose that employers can . . . discover and explain the myriad of innocent causes that may lead to statistical imbalances in the composition of their work forces” (*Watson*, 108 S. Ct. 2777, 2787 (O’Connor, J.)), it clearly is not when the employer has already done so. WCP and BBS defended disparate treatment

⁴³ See p. 13-14, n.14, 17, *supra*. The employee interviews showed disparate impact under the Four Fifth’s rule of the Uniform Guidelines. 29 CFR §1608.4.C; see *Teal*, 457 U.S. 440, 443 n.4.

⁴⁴ Besides the practices discussed here: (1) failure to post openings was treated as part of word-of-mouth recruitment; (2) lack of formal promotion procedures highlights the job segregation statistics (see p. 25 and n. 24, *supra*); and the employees challenged (3) discriminatory terminations, (4) pay discrimination, (5) retaliatory discharge, (6) no-fraternization rules and (7) assigning non-whites menial make-work tasks, but all as independent violations, rather than practices which contribute to job segregation. The employees (8) never challenged the English language requirement, because WCP and BBS interrogatory answers showed all or nearly all class members met it. (Ex. 73-75; R.P.O. 132, 136.) The district court observed “this issue is not squarely addressed by the parties.” (App. Cert. I:102.)

claims here “by introduc[ing] evidence showing that [specific] employment practice[s] in fact cause[d] the observed [statistical] disparity,” but in so doing they made the case “ripe for resolution using disparate impact analysis.”⁴⁵ If they now complain the courts believed their evidence or accepted their arguments, it is an odd complaint indeed.

Since §703(a)(2) prohibits not just practices which cause job segregation but the segregation itself (42 U.S.C. §2000e-2(a)(2)), separate proof of the causes underlying the statistics should in any case not be required. Beyond this, when it amended Title VII in 1972, Congress stated its intent to reach “complex and pervasive” discrimination, which “[e]xperts familiar with the subject generally describe . . . in terms of ‘systems’ and ‘effects’”⁴⁶ Similarly, it recognized “ ‘[u]nrelenting broad-scale action against patterns or practices of discrimination’ was essential if the purposes of Title VII were to be achieved.” *EEOC v. Shell Oil Co.*, 466 U.S. 54, 69 (1984). Complex discrimination is not always amenable to easy correlations between cause and effect, so requiring them can defeat this aim. A selection process can be “so poorly defined that no specific criterion can be identified with certainty, let alone be connected to the disparate impact.” *Watson*, 108 S. Ct. 2777, 2797 n.10 (Blackmun, J.). Even relatively well-defined practices overlap, as nepotism and word-of-mouth recruitment do here, making it hard to separate out each’s effects. Sometimes it is “the interaction of two or more components” of a selection

⁴⁵ *Segar*, 738 F.2d 1249, 1270; accord *Latinos Unidos De Chelsea v. Secretary of Housing*, 799 F.2d 774, 787 n.22 (1st Cir. 1986); *Lewis*, 773 F.2d 561, 571 n. 16; *Griffin v. Carlin*, 755 F.2d 1516, 1528 (11th Cir. 1985). The same reasoning applies when an employer counters broad statistics showing disparate impact by showing the disparities were caused by practices which are justified by business necessity. See, e.g., *Green v. USX Corp.*, 843 F.2d 1511, 1524-25 (3rd Cir. 1988), petition for cert. filed, 57 U.S.L.W. 3123 (U.S. July 23, 1988) (No. 88-141).

⁴⁶ *Teal*, 457 U.S. 440, 447 n.8, quoting S. Rep. 92-415 p. 5 (1971); see also H.R. Rep. No. 92-238 p. 8 (1971). This legislative history is pertinent, since Congress amended §703(a)(2) in 1972 to include the phrase “applicants for employment” and expanded its scope to cover local, state and federal employers. See *Teal*, 457 U.S. 440, 447 n.8; compare *Teamsters*, 431 U.S. 324, 354 n.39 (this legislative history of little value in construing sections unaffected by 1972 amendments).

process which creates the disparate impact. *Griffin v. Carlin*, 755 F.2d 1516, 1525 (11th Cir. 1985). This is especially true when they interact simultaneously—as do word-of-mouth recruitment and lack of objective criteria—rather than serially. The employee need not always shoulder the burden of proof on causation alone. *Mt. Healthy City Board of Education v. Doyle*, 429 U.S. 274, 286-87 (1977) (employee need only show constitutionally protected conduct was a “‘substantial factor’” or a “‘motivating factor’” leaving employer to establish “by a preponderance of the evidence” it was not the “cause” of the discharge).

The Uniform Guidelines require each employer with over 100 employees to “maintain and have available for inspection records or other information which will disclose the impact which its tests and other selection procedures have” 29 CFR § 1607.4A; *see also* 29 CFR § 1607.15A(2)(a). “Where a total selection process for a job has an adverse impact, the [employer] should maintain and have available records or other information *showing which components have adverse impact.*”⁴⁷ 29 CFR § 1607.15A(2)(a) (emphasis added). Because the EEOC issued these regulations under an express mandate from Congress,⁴⁸ they have the “force of law.” *See United States v. Nixon*, 418 U.S. 683, 695 (1974). While WCP and BBS argue “it is entirely unlikely that [an employer] does or could keep track of the *statistical effect*” of its practices (Brief of Pet. 35) (emphasis in original), this is exactly what the law requires. When compliance “would result in undue hardship,” the em-

⁴⁷There are abbreviated requirements for employers with fewer than 100 employees (29 CFR § 1607.15A(1)), but they are inapplicable here. (*See Ex. 588-90* (E.R. 35-37); Tr. 2231, 2261.) A more general regulation requires employers to keep applications for at least six months. 29 CFR § 1602.14(a). While it exempts seasonal jobs (29 CFR § 1602.14(b)), the exemption does not affect the more specific obligation to keep records showing adverse impact. The previous EEOC Guidelines on Employee Selection Procedures imposed record-keeping obligations like those in the Uniform Guidelines. 29 CFR § 1607.4(a)(1978).

⁴⁸43 F.R. 38, 312 (1978). The EEOC “shall, by regulation, require each employer . . . to maintain such records as are reasonably necessary to carry out the purposes of this title,” “consult[ing] with other interested federal agencies” to “coordinate its requirements with those adopted by such agencies.” 42 U.S.C. § 2000e-8(c) and (d).

ployer may apply to the EEOC or a district court for an exemption (42 U.S.C. § 2000e-8(c)), but there is no evidence WCP or BBS ever did so. Requiring the employee to prove causality when the employer's record-keeping violations make it impossible rewards the employer for its wrong-doing, when in fact "the wrongdoer [should] bear the risk of the uncertainty which his own wrong has created." *Bigelow v. RKO Pictures, Inc.*, 327 U.S. 251, 265 (1946).

6. WCP AND BBS HAVE NOT MET THEIR HEAVY BURDEN OF PROVING BUSINESS NECESSITY

When an employee makes a showing of disparate impact, the burden shifts to the employer to prove business necessity. *E.g. Teal*, 457 U.S. 440, 446; *Dothard*, 433 U.S. 321, 329; *Albemarle*, 422 U.S. 405, 425.

The employer's burden is one of persuasion rather than production, for the Court has twice held evidence which would qualify as an "articulation" in a treatment case fails as proof of business necessity in an impact case. First, in *Griggs*, the employer offered testimony from a vice president to the effect the challenged transfer "requirement[s] were instituted on the Company's judgment that they generally would improve the overall quality of the work force," but the Court held it insufficient to establish a "demonstrable relationship to successful performance." *Griggs*, 401 U.S. 424, 431. Second, in *Albemarle*, the Court held an employer could not meet its burden simply by saying it validated an exam, since,

[N]o record of this validation was made. Plant officials could recall only the barest outlines of the alleged validation. Job relatedness cannot *be proved* through vague and unsubstantiated hearsay.

Albemarle, 422 U.S. 405, 428 n. 23 (emphasis added). Similarly, the Court has repeatedly described the employer's burden as in essence one of persuasion.⁴⁹

⁴⁹*Teal*, 457 U.S. 440, 446 ("employer must . . . demonstrate that 'any given requirement [has] a manifest relationship to the employment in question'"); *Albemarle*, 422 U.S. 405, 425 (employer has "burden of *proving* that its tests are 'job related'"); *Dothard*, 433 U.S. 321, 329 (employer must "*prov[e]* that the challenged requirements are job related"); *Griggs*, 401 U.S. 424, 432 (employers has "the burden of *showing* that any given requirement [has] a manifest relationship to the employment in question"); see *Beazer*, (cont.)

When it amended Title VII in 1972, Congress “recognized and endorsed the disparate impact analysis employed by the Court in *Griggs*,” which places the burden of persuasion on business necessity squarely on the employer.⁵⁰ Similarly, “[i]n any area where the new law does not address itself” Congress “assumed that the present law”—including *Griggs* (*Teal*, 457 U.S. 440, 447 n.8)—“would continue to govern.” 118 Cong. Rec. 7166, 7564 (1972). With this express ratification, altering the burdens would undermine the clear intent of Congress. See *Square D Co. v. Niagara Frontier Tariff Bureau, Inc.*, 476 U.S. 409, 419 (1986); *Patsy v. Florida Board of Regents*, 457 U.S. 496, 508-09 (1982). The courts of appeals have widely imposed the burden of persuasion of business necessity on employers.⁵¹

Unlike its disparate impact counterpart, a prima facie case of disparate treatment raises a classic presumption, “requir[ing] the existence” of one fact “to be assumed” from evidence of another until rebutted. J. Weinstein and M. Berger, 1 *Weinstein’s Evidence* Para. 300[01] p. 300-1 (1988); see *Burdine*, 450 U.S. 248, 254. The employer’s “articulation” is a “negative” defense, “merely controvert[ing] plaintiff’s prima facie case.” See J. Moore, 2A *Federal Practice* Para. 8.27[4] p. 8-193 (1987). By contrast, the employer’s burden of business necessity, is an “affirmative defense,” since it “constitut[es] an avoidance” (Fed. R. Civ. Pro. 8(c)) or “raises matter outside the

⁴⁹(cont.) 440 U.S. 568, 587 (prima facie case “rebutted by [employer’s] demonstration that its narcotics rule . . . ‘is job related’”) (emphasis in each added). The Court has cited with approval court of appeals decisions placing the burden of persuasion on employers (*McDonnell Douglas*, 411 U.S. 792, 802 n.14)—namely, *Castro v. Beecher*, 459 F.2d 725, 732 (1st Cir. 1972) (employer “must come forward with *convincing facts* establishing a fit between the qualifications and the job”); *Chance v. Board of Examiners*, 458 F.2d 1167, 1176 (2nd Cir. 1972) (employer bears “a *heavy burden* of justifying its contested examinations”) (emphasis in each added).

⁵⁰*Teal*, 457 U.S. 440, 447 n.8; see also S. Rep. No. 92-415 p. 5 (1971); H.R. Rep. No. 92-238 p. 8 (1971).

⁵¹*E.g.* *Lewis v. Bloomsburg Mills, Inc.*, 773 F.2d 561, 571 (4th Cir. 1985); *Moore v. Hughes Helicopters, Inc.*, 708 F.2d 475, 482 (9th Cir. 1983); *Johnson v. Uncle Ben’s, Inc.*, 657 F.2d 750, 753 n.3 (5th Cir. 1981), *cert. denied*, 459 U.S. 967 (1982); but see *Crocker v. Boeing Co. (Vertol Div.)*, 662 F.2d 975, 991 (3rd Cir. 1981).

scope of plaintiff's prima facie case."⁵² J. Moore, 2A *Federal Practice* ¶ 8.27[4] p. 8-193 (1987); accord *Guardians Ass'n v. Civil Service Commission of the City of New York*, 463 U.S. 582, 598 (1983) (White, J.) (employer "bear[s] the burden of proving some 'business necessity' " as "affirmative defense") (Title VI case) (emphasis added). A prima facie case of disparate impact does not make the existence of business necessity more or less likely, so it does not create an inference for the employer to dispel.⁵³ The impact itself is the violation. *Nashville Gas Co. v. Satty*, 434 U.S. 136, 144 (1977) ("[A] violation of §703(a)(2) can be established by proof of a discriminatory effect"). Given this, business necessity must be a defense which the employer affirmatively proves.

A party raising an affirmative defense usually bears the burden of persuasion on it (E. Cleary, *McCormick on Evidence* §337 p. 948-49 (3rd Ed. 1984); D. Louisell and C. Mueller, 1 *Federal Evidence*, §66 p. 528 (1977)), a rule which the Court should apply here. Because the employer has superior access to the relevant proof, it is better able to bear this burden. *Chance v. Board of Examiners*, 458 F.2d 1167, 1176 (2nd Cir. 1972) (employer "has responsibility of designing . . . examinations" so it bears the "heavy burden of justifying" them); see also E. Cleary, *McCormick on Evidence* §337 p. 950 (3rd Ed. 1984); J. Chadbourn, 9 *Wigmore on Evidence* §2486 p. 290 (1981). "Policy" and "fairness" dictate the same result. See *Keyes v. School District No. 1*, 413 U.S. 189, 209-10 (1973); E. Cleary, *McCormick on Evidence* §337 p. 952 (3rd Ed. 1984). Since a prima facie showing of disparate treatment in a non-statistical case is "not onerous" (*Burdine*, 450 U.S. 248, 253), the employer bears only the light "articulation" burden as rebuttal. Because a prima facie case of disparate impact usually involves

⁵²The related BFOQ showing of "reasonable necessity" is also an affirmative defense. See *Western Airlines, Inc. v. Criswell*, 472 U.S. 400, 408-09 n. 10, 413-17 (1985) (ADEA case); *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 122 (1985) (same).

⁵³Fed. R. Evid. 301 is irrelevant, since it "merely defines the term 'persuasion,' " but "in no way restricts the authority of a court . . . to change the customary burdens of persuasion in a manner that otherwise would be permissible." *NLRB v. Transportation Management Corp.*, 462 U.S. 393, 404 n.7 (1983).

a showing of systematic effects (see *Watson*, 108 S.Ct. 2777, 2789 n.3), the employer's rebuttal burden increases accordingly.⁵⁴

However suggestive, the plurality opinion in *Watson* does not compel a different result. Saying the ultimate burden of proof cannot be shifted to the employer (*Watson*, 108 S. Ct. 2777, 2790) (O'Connor, J.) does not relieve the employer of the burden of persuasion on an affirmative defense.⁵⁵ Nor does permitting an employee to "show that other tests or selection devices, without a similarly undesirable racial effect, would also serve the employer's legitimate interest" (*ibid.*) suggest anything contrary, for it simply gives the employee a chance to resist the affirmative defense by showing the challenged practice is not really necessary.⁵⁶

Under *Griggs*, "[t]he touchstone [of an employer's defense to a showing of disparate impact] is business necessity." *Griggs*, 401 U.S. 424, 431. This defense triggers a "more probing judicial review of, and less deference to, the seemingly reasonable acts" of employers than does the rebuttal to a showing of

⁵⁴*Lewis v. Bloomsburg Mills, Inc.*, 773 F.2d 561, 572 (4th Cir. 1985); *Moore v. Hughes Helicopters, Inc.*, 708 F.2d 475, 482 (9th Cir. 1983). *Vuyanich v. Republic National Bank*, 521 F. Supp. 656, 661 (N.D. Tex. 1981), *vacated and remanded on other grounds*, 723 F.2d 1195 (5th Cir. 1984), *cert. denied*, 469 U.S. 1073 (1984). A statistical showing of even disparate treatment forces from the employer a more exacting rebuttal than a mere "articulation." *Segar*, 738 F. 2d 1249, 1268-70; see also *Teamsters*, 431 U.S. 324, 342-43 n. 24 (affirmation of "best qualified" hiring insufficient to meet proof of "systematic exclusion"); cf. *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 121 (1985) (burden does not shift when evidence of discrimination is direct).

⁵⁵See *NLRB v. Transportation Management Corp.*, 462 U.S. 393, 400-01 (1983) (statute placing on NLRB's General Counsel "burden of proving the elements of an unfair labor practice" is consistent with rule placing on the employer "affirmative defense" of proving "by a preponderance of the evidence" its actions would have been the same "regardless of [its] forbidden motivation"); see also *Western Air Lines, Inc. v. Criswell*, 472 U.S. 400, 408-09 n. 10 (1985) (placing burden of proving BFOQ on employer as affirmative defense consistent with leaving burden of persuasion on disparate treatment on employee).

⁵⁶An employee wishing to pursue disparate treatment claims may also show pretext at this stage (see *Teal*, 457 U.S. 440, 447; *Albemarle*, 422 U.S. 405, 436), for "[e]ither [the disparate impact or the disparate treatment] theory may... be applied to a particular set of facts." *Teamsters*, 431 U.S. 324, 336 n.15.

disparate treatment. *Washington v. Davis*, 426 U.S. 229, 247 (1976); see also *Western Airlines, Inc. v. Criswell*, 472 U.S. 400, 422 (1985) (“under a ‘rational basis’ standard” a court “might well consider that its ‘inquiry is at an end’ with an expert witness’ articulation of any ‘plausible reaso[n]’ for the employer’s decision”) (construing BFOQ defense of reasonable necessity in ADEA case). Proving it entails showing “a discriminatory practice” is “necessary to safe and efficient job performance”. *Dothard*, 433 U.S. 321, 332 n.14; see also *Satty*, 434 U.S. 136, 143 (employer must show “company’s business necessitates” the challenged policy).

Griggs accepts the alternative showing of “job relatedness” through validation under EEOC Guidelines, since the regulations serve the same purpose of limiting deference to the employer’s belief in the reasonableness of its own practices. See *Griggs*, 401 U.S. 424, 433 n.9. Following *Griggs*, *Albemarle* “clarified” the “appropriate standard of proof for job relatedness,” holding a “validation study [was] materially defective” when “[m]easured against the [then current EEOC] Guidelines,” which were “‘entitled to great deference’ ” as “‘[t]he administrative interpretation of the Act by the enforcing agency.’ ” *Albemarle*, 422 U.S. 405, 431 436; see also *Teal*, 457 U.S. 440, 445, 446 (test must be “shown to be job related” through evidence it “[has] a manifest relationship to the employment in question”). Since *Griggs*, the Court has with reasonable consistency required employers to show a practice with disparate impact is either (1) “necessary to safe and efficient job performance” (*Dothard*, 433 U.S. 321, 332 n.14); or (2) “job related” under prevailing validation standards in EEOC Guidelines.⁵⁷ When it amended Title VII in 1972, Congress ratified *Griggs*, citing the employer’s need to show “overriding business

⁵⁷ Only *Beazer* might be read to depart from these requirements. *Beazer*, 440 U.S. 568, 587 n.31 (even absent validation, business necessity is shown where safety and efficiency are “significantly served by—even if they do not require” challenged practice). But to the degree it does, it also strays from the expressed will of Congress. *Washington* was not a Title VII case. While it might have applied “standards similar to those obtaining under Title VII” (*Washington*, 426 U.S. 229, 249), it apparently did not apply Title VII standards *per se*.

necessity” or an “overriding reason why [the] tests [with disparate impact] were necessary.” H. Rep. No. 92-238 p. 21-22 (1971).

The district court never expressly ruled on the business necessity of separate hiring channels. Nor would the observations it made support a finding of business necessity.⁵⁸ Literally without a whisper of evidence, the district court said it “would be required”—if faced with a *prima facie* case—“to find business necessity for . . . rehire” preferences. (App. Cert. I:121-33.) But when—as here—an employer “produce[s] no evidence correlating” a criterion with “good job performance” or otherwise “fail[s] to offer evidence . . . in specific justification of it,” there is no basis for such a finding. *Dothard*, 433 U.S. 321, 331; *Satty*, 434 U.S. 136, 143. Here, in fact, there is evidence showing the rehire preferences actually undermine “best qualified” hiring.⁵⁹ The failure of WCP and BBS to identify criteria

⁵⁸The district court wrote “[i]t is not a reasonable business practice to scour . . . sparsely populated, remote regions [in Alaska] for skilled and experienced workers.” (App. Cert. I:32.) But it took the observation verbatim from testimony of WCP’s president (Tr. 1125), who offered it “without meaningful study of [the practice’s] relationship to job-performance ability” (*Griggs*, 401 U.S. 424, 431). The observation is not cast in business necessity terms. It does not explain the failure to recruit non-whites from the Lower 48 for upper-level jobs or in Alaska Native villages for unskilled or low-skill jobs in largely white departments. Nor does it say why—without “scouring” remote areas—it is impractical to give Alaska Natives already recruited for menial jobs a chance to bid on desirable jobs.

⁵⁹The preferences require WCP and BBS to re-hire past incumbents, even when better candidates surface. WCP and BBS hired whites who could not meet minimum qualifications the district court endorsed. (See p. 13 n.15, *supra*.) They also gave preference to relatives without regard to merit. (See p. 38, *supra*.) Under these circumstances, re-hire preferences simply perpetuate past mistakes. *Grant*, 635 F.2d 1007, 1018-19.

Both courts below applied the disparate impact analysis, since the re-hire preferences do not comprise a seniority system. WCP and BBS conceded in no fewer than twenty-one interrogatory answers they had no seniority system. (Ex. 113-132; R.P.O. 132, 138-40.) The essence of a seniority system is the “allot[ment] to employees of ever improving employment rights and benefits as their relative lengths of pertinent employment increase.” *California Brewers Ass’n. v. Bryant*, 444 U.S. 598, 606 (1980). But the re-hire preferences here are not based on length of service, only the fact of service, for they give any two employees who worked in a job the preceeding season precisely the same right to return—even though one worked a single day and the other worked twenty years. (See Ex. A-1 through A-11; Tr. 2345-46.)

actually applied precludes a finding their qualifications were justified by a business necessity. *Rath*, 787 F.2d 318, 328. DeFrance openly admitted he did not validate even his hypothetical qualifications under EEOC Guidelines. (J.A. 470.) No business necessity justification was offered for nepotism. (See p. 38, *supra*.) Nor did WCP and BBS offer a particularized showing which would justify a finding of business necessity for their housing practices.⁶⁰ See *Domingo v. Nefco*, 445 F. Supp. 421, 439-40. The only justification they provided for their messing practices was legally insufficient. (See p. 36 n.36, *supra*.)

7. THE COURT SHOULD ALSO AFFIRM ON ALTERNATE GROUNDS OF DISPARATE TREATMENT

The district court ruled the employees made a prima facie case of disparate treatment in skilled jobs, unskilled jobs, housing and messing (App. Cert. I:114, I:118-19), so the sufficiency of the prima facie case is no longer at issue. *Aikens*, 460 U.S. 711, 714-15; *Bazemore*, 440 U.S. 385, 398. Since the challenged practices—including segregated hiring channels coupled with express race-labelling of jobs and bunkhouses—are facially discriminatory (*Domingo*, 727 F.2d 1429, 1436), the shifting burden analysis doesn't apply. *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 121 (1981). But even if it did, Dr. Rees—the labor economist for WCP and BBS—drew the inference of discrimination in certain upper-level jobs, even after adjusting for defense contentions on skills, labor market and the propriety of separate hiring channels. For these jobs, WCP and BBS failed to rebut the prima facie case. See *Burdine*, 450 U.S. 248, 254. The labor market showing WCP and BBS offered for other jobs was legally insufficient, since under *Teamsters*, hiring area statistics will not rebut a disparate treatment showing based on job segregation statistics. *Teamsters*, 431 U.S. 324, 342 n.23. Even so, the reasons WCP and BBS offered for statistical disparities were clear pretext, for they were based on qualifications prepared for litigation and misreadings of their labor contracts. See *Domingo*, 727 F.2d 1429,

⁶⁰Nearly every cannery superintendent who testified on the issue said workers housed in the same bunkhouse had different call-out times. (J.A. 8-12, 227-28, 230-35.) Employees who arrived for pre-season work often changed bunkhouses when the season started. (J.A. 235.)

1436. Finally, since the same individuals were responsible for hiring, housing and messing practices (App. Cert. I:37), a reversal on disparate treatment claims in hiring would necessitate a reversal on such claims in housing and messing.⁶¹ *Lilly v. Harris-Teeter Supermarket*, 720 F.2d 326, 338 (4th Cir. 1983), cert. denied, 466 U.S. 951 (1984).

CONCLUSION

The Court should affirm on all disparate impact claims, except re-hire preferences, as to which it should reverse the finding of business necessity. Alternatively, the Court should affirm claims of discrimination in jobs, housing and messing on disparate treatment grounds.

Respectfully submitted,

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⁶¹ Affirming on disparate treatment grounds under 42 U.S.C. § 1981 would affect claims involving Ekuk and Alitak canneries. (See p. 1 n. 1 and p. 8 n. 10.)

APPENDIX A-1

TABLE F*

HIRING IN JOB DEPARTMENTS BY RACE
AT BUMBLE BEE CANNERY 1971-80

Job Department	Number of Positions By Race		Percentage By Race	
	W	NW	%W	%NW
Administrative	3	1	75%	25%
Machinist	144	0	100%	0%
Company Fishing Boat	160	0	100%	0%
Tender	136	3	98%	2%
Carpenter	86	2	98%	2%
Beach Gang	49	3	94%	6%
Clerical	39	4	91%	9%
Quality Control	8	4	67%	33%
Miscellaneous	107	8	93%	7%
Culinary	112	56	67%	33%
Laborer	72	38	65%	35%
Cannery Worker	501	719	41%	59%
TOTAL	1417	838	63%	37%

This chart shows hires by race. Each year-round employee is counted once. Each seasonal employee is counted once for each season he or she was hired, regardless of whether he or she had been hired in that department in previous years. When a person worked in more than one job in a given season, he or she was counted once for each job he or she held.

*This table is a verbatim reproduction of Exhibit 588 (E.R. 35), which was offered at trial by the employees. (Tr. 2231, 2261.)

APPENDIX A-2

TABLE G*

**HIRING IN JOB DEPARTMENTS BY RACE
AT RED SALMON CANNERY 1971-80**

<u>Job Department</u>	<u>Number of Positions By Race</u>		<u>Percentage By Race</u>	
	<u>W</u>	<u>NW</u>	<u>%W</u>	<u>%NW</u>
Administrative	4	0	100%	0%
Machinist	117	7	94%	6%
Company Fishing Boat	152	33	82%	18%
Tender	219	2	99%	1%
Carpenter	32	0	100%	0%
Beach Gang	60	16	79%	21%
Clerical	30	4	88%	12%
Quality Control	3	0	100%	0%
Miscellaneous	107	42	72%	28%
Culinary	131	35	79%	21%
Laborer	68	154	31%	69%
Cannery Worker	180	413	30%	70%
TOTAL	1103	707	61%	39%

This chart shows hires by race. Each year-round employee is counted once. Each seasonal employee is counted once for each season he or she was hired, regardless of whether he or she had been hired in that department in previous years. When a person worked in more than one job in a given season, he or she was counted once for each job he or she held.

*This table is a verbatim reproduction of Exhibit 589 (E.R. 36), which was offered at trial by the employees. (Tr. 2231, 2261.)

APPENDIX A-3

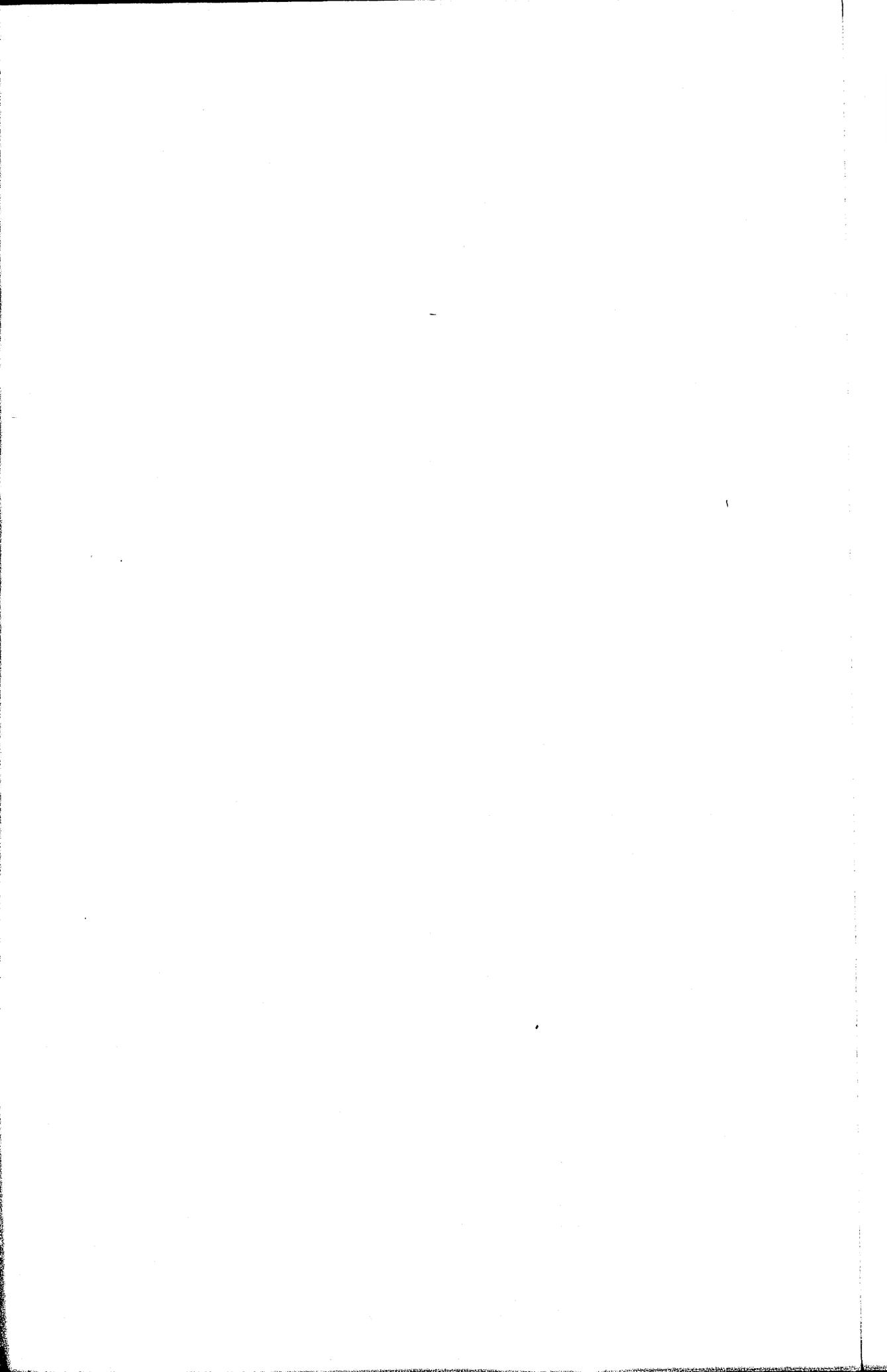
TABLE H*

**HIRING IN JOB DEPARTMENTS BY RACE
AT WARDS COVE CANNERY 1971-80**

<u>Job Department</u>	<u>Number of Positions By Race</u>		<u>Percentage By Race</u>	
	<u>W</u>	<u>NW</u>	<u>%W</u>	<u>%NW</u>
Administrative	2	0	100%	0%
Machinist	102	1	99%	1%
Tender	403	13	97%	3%
Clerical	25	1	93%	7%
Quality Control	9	0	100%	0%
Miscellaneous	54	1	98%	2%
Beach Gang	0	1	0%	100%
Culinary	40	41	49%	51%
Laborer	3	0	100%	0%
Cannery Worker	874	517	63%	37%
TOTAL	1512	576	72%	28%

This chart shows hires by race. Each year-round employee is counted once. Each seasonal employee is counted once for each season he or she was hired, regardless of whether he or she had been hired in that department in previous years. When a person worked in more than one job in a given season, he or she was counted once for each job he or she held.

*This table is a verbatim reproduction of Exhibit 590 (E.R. 37), which was offered at trial by the employees. (Tr. 2231, 2261.)



B-1

APPENDIX B-1

SUMMARY OF STATISTICAL TESTS FOR CASE
 NEW SEASONAL HIRES, 1971-80
 SOUTH NAKNEK [BUMBLE BEE] ONLY

<u>JOB</u>	<u>HIRES</u>	<u>ACT[UAL] % WHITE</u>
ADMIN.	0	0.000
BEACH GANG	52	90.385
CARPENTER	53	98.113
CULINARY	28	85.714
FISHERMAN	70	100.000
MACHINIST	76	100.000
MEDICAL	6	83.333
OFFICE	7	85.714
RADIO	1	0.000
STOR/STCK	6	100.000
TENDER	78	94.872
CANNERY	767	47.718
LABORER	77	70.130
CANRY/LAB	844	49.763
AT ISSUE	536	84.142
GEN. SKILL	159	57.233
ALL JOBS	1380	63.116

*This table is an extract of Exhibit A-278 Table 4 SN (E.R. 4), which was offered at trial by the employers. (Tr. 2646-47.)

APPENDIX B-2

SUMMARY OF STATISTICAL TESTS FOR CASE
NEW SEASONAL HIRES, 1971-80
RED SALMON ONLY

<u>JOB</u>	<u>HIRES</u>	<u>ACT[UAL] % WHITE</u>
ADMIN.	0	0.000
BEACH GANG	41	78.049
CARPENTER	3	100.000
CULINARY	24	79.167
FISHERMAN	35	94.286
MACHINIST	29	79.310
MEDICAL	3	100.000
OFFICE	5	80.000
RADIO	3	100.000
STOR/STCK	0	0.000
TENDER	108	96.296
CANNERY	338	35.799
LABORER	163	34.356
CANRY/LAB	501	35.329
AT ISSUE	391	81.841
GEN. SKILL	140	68.571
ALL JOBS	892	55.717

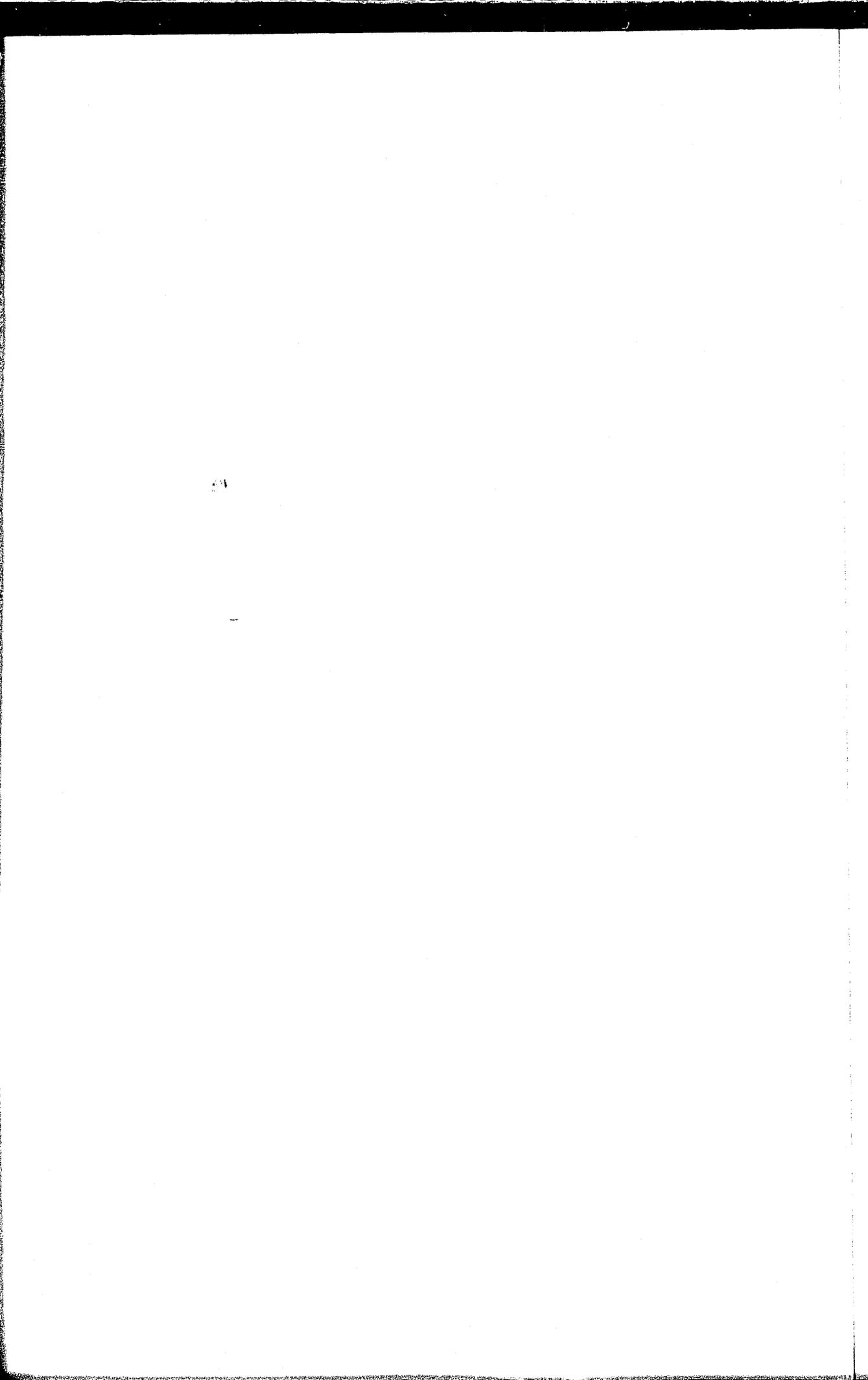
*This table is an extract of Exhibit A-278 Table 4 RS (E.R. 3), which was offered at trial by the employers. (Tr. 2646-47.)

APPENDIX B-3

SUMMARY OF STATISTICAL TESTS FOR CASE
NEW SEASONAL HIRES, 1971-80
WARDS COVE ONLY

<u>JOB</u>	<u>HIRES</u>	<u>ACT[UAL] % WHITE</u>
ADMIN.	0	0.000
BEACH GANG	1	0.000
CARPENTER	0	0.000
CULINARY	19	47.368
FISHERMAN	4	100.000
MACHINIST	28	100.000
MEDICAL	0	0.000
OFFICE	7	100.000
RADIO	0	0.000
STOR/STCK	0	0.000
TENDER	188	94.681
CANNERY	834	68.585
LABORER	3	100.000
CANRY/LAB	837	68.698
AT ISSUE	318	89.623
GEN. SKILL	71	83.099
ALL JOBS	1155	74.459

*This table is an extract of Exhibit A-278 Table 4 WC (E.R. 2), which was offered at trial by the employers. (Tr. 2646-47.)



APPENDIX C

John Connor, office manager at Bumble Bee, referred to non-resident cannery workers as "the filipinos" and suggested a bookkeeping entry of "150-3 Filipinos adv." (Ex. 341; R.P.O. 15, 132, 150.) John Lum, who succeeded him, identified certain employees as "Japanese" and "Local 46 (natives.))" (Ex. 338; R.P.O. 15, 132, 150; J.A. 614.) Myrtle Hjorten, secretary at Bumble Bee, referred to non-resident cannery workers as "the Filipinos" and "10 Filipinos." (Ex. 400, 408; R.P.O. 15, 132, 154-55; Tr. 939.) Bumble Bee records refer to employees as "Filipinos," "Philipinos," "Natives" and "Eskimos" (Ex. 358, 736-37, 740; R.P.O. 132, 151; Tr. 2034-35, 2279); and classify employees as "Native Cook," "Native Galley," "Native Galley Cook," "Natives," "Filipinos," "Filipino," "Cannery Workers-Filipino," "Cannery Workers-Native," "Native cannery workers," "Filipino cannery crew," "Filipino, Eskimo, Women," "Egg Department-Girls, [Egg Department] Fils, [Egg Department] Eskimos," "Women cannery workers," "Filipino [cannery workers], Native cannery [workers]," "Cannery workers: Women, Other, Native, Filipino." (Ex. 342-53, 358, 483, 737, 750; R.P.O. 132, 150-57; Tr. 2034-35, 2279.)

The storekeeper at Bumble Bee referred to cannery worker bunkhouses as "Philippino Bunk H," "Phelipino Bunk House" and "Native Bunk House." (Ex. 330-37; R.P.O. 132, 150.) Bumble Bee records mention the "Filipino bunkhouse," "Native bunkhouse" and "Native Bunk H." (Ex. 339, 735; R.P.O. 132, 150; Tr. 2279.) Supervisors at Bumble Bee referred to bunkhouses as "Native bunkhouse" and "Filipino bunkhouse," terms which are in common usage around the cannery. (J.A. 31-34.)

Hardy Parrish, who worked in the WCP home office, referred to resident cannery workers as "the native boys," "24 Eskimos," "the natives" and "the Eskimo cannery workers" (Ex. 368, 370-71, 413, 416, 543; R.P.O. 132, 152, 155; J.A. 105-108); hiring resident cannery workers as the "Native cannery worker situation" and "the Native situation" (Ex. 367, 369; R.P.O. 132, 152); non-resident cannery workers as "9 Fils," "34 fils," "72 Fils," "20 Filipinos," "the Filipinoes," "our group of Fils," "two Filipinos," "13 Filipino," "68 Filipinos," "29 Filipinos," "the filipinos," "the Filipinos," "Fils," "the Phils," "Fil-

ipinoes," "your Filipino crew" and "four Filipinos" (Ex. 355-357, 362, 378, 384, 386, 409, 410, 421A, 494, 500, 511, 513, 515, 518, 519; R.P.O. 132, 151-53, 155-56; Tr. 2279); cooks for the non-resident cannery workers as "your Fil cook" and the "Filipino cook" (Ex. 403, 424, 741; R.P.O. 132, 154, 156; Tr. 2279); and other employees as "the colored fellow," "the 2 Samoans," "the 4 natives for Verns crew," "4 of the natives" and "the 4 Eskimo fellows" (Ex. 373, 374, 377, 398, 415; R.P.O. 132, 152-55).

Don Ballard, office manager at Red Salmon, referred to non-resident cannery workers as "the Fils" and "the Phils" (Ex. 354, 363, 396, 417, 498; R.P.O. 15, 132, 151, 154-55); and Local 37, ILWU as "the Fil union" (Ex. 499; Tr. 2279); resident cannery workers as "24 Eskimos" and "the 24 natives Cannery Workers" (Ex. 418, 454; R.P.O. 132, 155; Tr. 2022-23); and certain employees as "four of the natives" and the "natives" (Ex. 372, 374; R.P.O. 132, 152-54). Similarly, Ballard wrote to the home office,

Hardy, could you check with Mayflower press about those little square preprinted cards for the buttons. We should have had them up here before now, we got 24 Eskimos in yesterday and I would like to get these things made up so I know who they are and also to keep the other bums out of the Mess Hall.

(App. Cert. I:80; R.P.O. 15.)

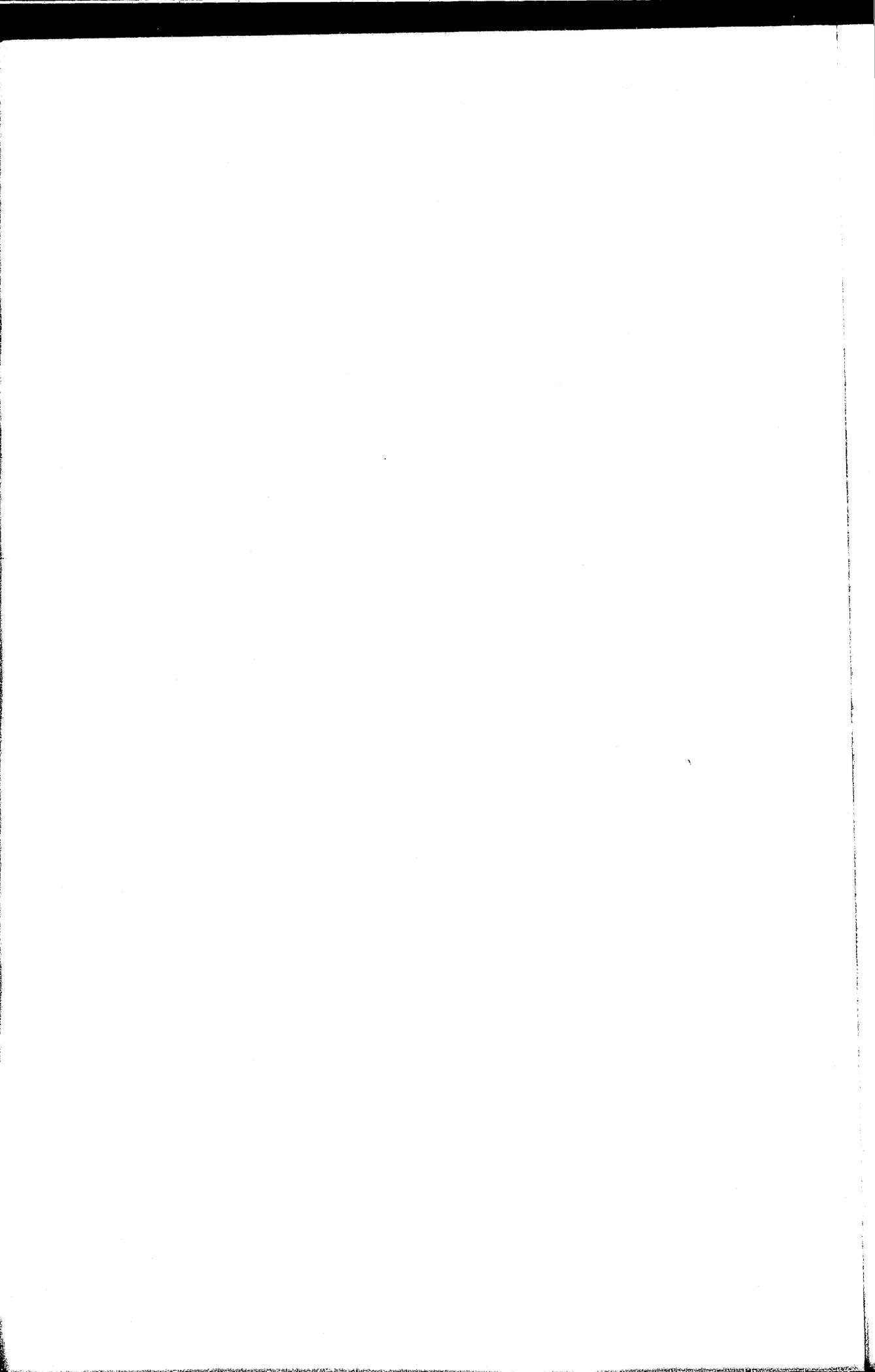
Forms at Red Salmon cannery contain a blank for the race of each employee, which is often recorded. (Ex. 520, 523-25; Tr. 2279.)

Management at Red Salmon referred to the "Eskimo bunkhouse," "Native bunkhouse," "Filipino bunkhouse" and "Filipino messhall and bunkhouse." (Ex. 84; Dep. Lessley p. 12-15.) Don Ballard, office manager at Red Salmon, referred to the "Fils bathhouse." (Ex. 354.)

Joseph Brindle, superintendent at Wards Cove, referred to non-resident cannery workers as "the Filipino[s]." (Ex. 422; R.P.O. 16, 132, 156.) Harold Brindle, an officer of WCP, referred to labor agreements for resident cannery workers as "the Eskimo agreements." (Ex. 487; Tr. 2279, 2765.) Personnel at the WCP home office spoke of the "Filipino crews," "native crews" and "Eskimo crew." (Dep. Parrish p. 65.)

Joseph Brindle, superintendent at Wards Cove, referred to the "Filipino [bunkhouse roof] ridge" and "the Japanese bedroom." (Ex. 405; R.P.O. 16, 132, 154.) Gerald Steele, office manager at Wards Cove, referred to "the Filipino house." (Ex. 404; R.P.O. 132, 154; Tr. 81.) Other cannery records referred to the "Filipino house," "Japanese Apts," "Filipino Bunk House," "White Bunkhouse," "Japanese Bunkhouse" and "Filipino Bunkhouse." (Ex. 379, 401, 402, 450; R.P.O. 132, 153-54.)

Personnel records at Wards Cove refer to the "Native Crew of 1971" (Ex. 375; R.P.O. 132, 153); classify the egg crew workers as "Supervisor," "Orientals," "Girls," "Egg Department-Girls," "Egg Department-Fils," and "Egg Department-Eskimos" (Ex. 358, 509; R.P.O. 132, 151; Tr. 2279); and categorize cannery workers as "Misc. cannery workers," "Philippino's," "Eskimo's" and "Female" (Ex. 358; R.P.O. 132, 151).



APPENDIX D

DeFrance's "ability to" criteria include:

"[A]bility to use mechanic's hand tools," "ability to use seam micrometers [and] gauges," "ability to understand mechanical drawings," "ability to use . . . pipefitter's tools," "[m]ust be able to understand and accurately complete required inspection and report forms," "ability to check weights, record temperatures, and use basic mathematics through decimals" and "ability to accurately operate ten-key calculator." (J.A. 500-07.)

DeFrance's subjective qualifications include:

"[A]bility to work with minimum supervision," "[m]ust possess leadership skills," "[a]bility . . . to communicate effectively in English," "ability to handle the strain, responsibility and pressure," "capable of training a machinist helper-trainee," "mechanical ability," "[m]ust be flexible, willing to learn, and [able] to follow directions," "[m]ust have ability to handle details," "be reliable," "[r]equires good health," "ability to perform heavy work out of doors," "be honest," "ability to live in small quarters and function as an effective member of a small group" and "ability to work long hours on ocean-going vessel." (J.A. 500-07.)

Subjective qualifications cited by lay witnesses include:

"[A] good worker," "somebody that's sober," "somebody that's reliable," "good people," "[people who] want to work," "[a]bility plus hands, head," "family background," "good guy," "gets along with everybody," "motivated to do this kind of work," "people that we were sure you could depend on to stay on the job," "[people who are] capable," "we tried to stay away from drinkers," "not a dirty person" and "personality." (Dep. of A.W. Brindle-1975 29; Dep. Leonardo-1975 22; Dep. Leonardo-1978 47; Dep. W.F. Brindle-1978 68-69; Dep. H. Parrish 18; Dep. Rohrer 43; Dep. Mullis 12.)