

1983 WL 651

United States District Court; W.D. Washington.

Frank Atonio et al., Plaintiffs

v.

Wards Cove Packing Company, Inc., et al.,
Defendants.

Civil Action No. C-74-145-JLQ

November 4, 1983, as Amended December 6, 1983

Opinion

QUACKENBUSH, D.J.

*1 This class action challenges various employment practices of three Alaska salmon canning companies under Title VII of the Civil Rights Act of 1964, 78 Stat. 253, as amended, 42 U.S.C. § 2000e *et seq.* (1970 ed. and Supp. V), and the Civil Rights Act of 1866, 42 U.S.C. § 1981 (1970 ed.). Early during the pendency of this lengthy action, the Title VII claims against two of the defendant companies, Ward Cove Packing Company and Columbia Wards Fisheries were dismissed. Since then, the Ninth Circuit, in an amended decision, reinstated the Title VII claims against Ward Cove Packing Company. *Atonio, et al. v. Ward Cove Packing Co., et al.*, Slip Op. No. 81-3181 (Oct. 21, 1982) (unpublished Order Amending *Atonio, et al. v. Ward Cove Packing Co., et al.*, [32 EPD P 33,691] 703 F.2d 329 (9th Cir. 1983)). Plaintiffs are present and former employees alleging defendants discriminate on the basis of race in hiring, firing, paying, promoting, housing and messing at the canneries.

The class certified is all nonwhites who are, will be, or have been since March 20, 1971, employed by defendants Ward Cove Packing Company (WCP), Bumble Bee Seafoods division of Castle & Cooke, Inc. (BBS), or by Columbia Wards Fisheries (CWF) at its Alitak or Ekuk cannery facilities. See Amended Certification Order of Chief Judge Walter T. McGovern at Ct. Rec. 138.

After a lengthy nonjury trial this court makes these

Findings of Fact

1. Plaintiff Frank Atonio is of Samoan descent. Plaintiffs Alan Lew and Curtis Lew are of Chinese descent. Plaintiffs Eugene Baclig, Joaquin Arruiza and Randy del Fierro are of Filipino descent. Plaintiff Gene Allen Viernes was of Filipino descent. He died on June 1, 1981. Barbara Viernes, his personal representative, was substituted as a plaintiff for him. Plaintiffs Clarke Kido and Lester Kuramoto are of Japanese descent. Robert Morris is of Japanese and Native American descent. All plaintiffs except Frank Atonio are United States citizens.

2. Defendant WCP is an Alaska corporation. It has had over twenty-five (25) employees for each working day in at least twenty (20) weeks of each year from 1970 onward. It has been engaged in an industry affecting commerce at least since 1970.

3. Defendant Castle & Cooke, Inc. (BBS) is a Hawaii corporation, of which Bumble Bee Seafoods is a division. It has had over twenty-five (25) employees for each working day in at least twenty (20) weeks of each year from 1970 onward. It has been engaged in an industry affecting commerce at least since 1970.

4. Defendant CWF is a joint venture. It has had over twenty-five (25) employees for each working day in at least twenty (20) weeks of each year from 1970 onward. It has been engaged in an industry affecting commerce at least since 1970.

5. The joint venturers or operators of defendant CWF are defendants WCP and BBS. At least since 1970, WCP and BBS have operated the venture jointly and equally.

6. In operating the CWF joint venture, WCP and BBS have each acted as the agent of CWF.

*2 7. At least since 1970, WCP has owned and operated two (2) Alaska salmon canneries: Red Salmon Cannery and Wards Cove Cannery.

8. At least since 1970, BBS has owned and operated one Alaska Salmon Cannery: Bumble Bee Cannery.

9. At least since 1970, WCP and BBS have operated five (5) Alaska salmon canneries as part of the CWF joint venture: Alitak cannery and Ekuk cannery; Kenai cannery; Port Bailly cannery; and Ice Cape cannery. They have also jointly and equally operated four (4) Alaska fish camps as

part of the venture: Egegik, Craig, Chignik Lagoon and Moser Bay, Alaska. The canneries having practices at issue in this case are Bumble Bee (at South Nahnek on Bristol Bay), Red Salmon (at Nahnek on Bristol Bay), Wards Cove (at Ketchikan in southeast Alaska), Ekuk (on the Nashugak River in Bristol Bay), and Alitak (on Kodiak Island).

10. The CWF facilities are owned by CWC Fisheries, Inc. It is a dormant corporation. Its only function is ownership of those facilities. Defendants WCP and BBS each own 50% of CWC Fisheries, Inc. The managers of CWF are the president and vice president of CWC Fisheries, Inc. The remaining officers and the directors of CWC Fisheries, Inc., are officers of WCP and BBS.

11. At least since 1970, WCP and BBS have each owned 50% of Lake Union Terminals, Inc. Lake Union Terminals, Inc., owns a boat yard in Seattle, Washington which is known as LUT Yard. LUT Yard is a division of defendant CWF, which services assets such as tenders and fishing boats owned by CWC Fisheries, Inc., and WCP. CWC Fisheries, Inc., owns the defendant CWF tenders.

12. Plaintiff Arruiza was employed by defendant BBS during the 1971-73 salmon canning seasons.

13. Plaintiffs Kido and Karamoto were employed by defendant BBS during the 1971 salmon canning season. They were also employed by defendant WCP during the 1970 and 1972-73 salmon canning seasons.

14. Plaintiff Viernes was employed by WCP during the 1969-73 salmon canning seasons.

15. Plaintiffs Alan Lew and Curtis Lew were employed by WCP during the 1972-73 salmon canning seasons.

16. Plaintiff Frank Atonio was employed by WCP during the 1972-75 salmon canning seasons. He was also employed by defendant CWF during the 1980 season.

17. Plaintiff Randy del Fierro was employed by WCP during the 1970 and 1972-73 salmon canning seasons. He was also employed by defendant CWF during the 1971 season.

18. Plaintiff Robert Morris was employed by WCP during the 1973 season.

19. Plaintiff Eugene Baclig was employed by WCP during the 1969-73 seasons.

20. No representative plaintiff has worked at the CWF

cannery at Ekuk.

21. On October 31, 1973 plaintiffs Frank Atonio, Lester Kuramoto, Clarke Kido and Eugene Baclig filed with the Equal Employment Opportunity Commission ("EEOC") the charges marked Exhibits 1-4. On November 16, 1973 plaintiffs Randy del Fierro and Joaquin Arruiza filed with the EEOC the charges marked Exhibits 5-6. On January 2, 1974, plaintiffs Alan Lew and Curtis Lew filed with the EEOC the charges marked Exhibits 7-8. On January 31, 1974 Robert Morris filed with the EEOC the charge marked Exhibit 9. On February 14, 1974 plaintiff Gene Allen Viernes filed with the EEOC the charge marked Exhibit 10.

*3 22. On November 13, 1973 the EEOC deferred the Atonio, Kuramoto, Kido, Arruiza and del Fierro charges to the Washington State Human Rights Commission. On January 23, 1974 the EEOC assumed jurisdiction over these charges. The EEOC served the statutory notices of the charges.

23. On January 9, 1974 the EEOC deferred the Lew charges to the Washington State Human Rights Commission. On January 18, 1974 the EEOC assumed jurisdiction over these charges. The EEOC served the statutory notice of the charges.

24. On February 1, 1974, the EEOC deferred the Morris charge to the Washington State Human Rights Commission. On March 7, 1974 the EEOC assumed jurisdiction over the charge. The EEOC served the statutory notice of the charge.

25. On March 4, 1974 the EEOC deferred the Viernes charge to the Washington State Human Rights Commission. On May 6, 1974 the EEOC assumed jurisdiction over the charge. The EEOC served the statutory notice of the charge.

26. On March 13, 1974 the EEOC deferred the Viernes charge to the Washington State Human Rights Commission. On May 13, 1975 the EEOC assumed jurisdiction over the charge. The EEOC served the statutory notice of the charge.

27. On March 11-12, 1974, the EEOC mailed plaintiffs Clarke Kido, Lester Kuramoto, Alan Lew, Curtis Lew, Frank Atonio, Joaquin Arruiza and Randy del Fierro—as well as Robert Morris—the letter and right-to-sue notices marked Exhibits 11-18, 20-27. This action was filed within 90 days of receipt of those notices.

28. On May 24, 1974 the EEOC mailed plaintiff Baclig

the letter and right-to-sue notice marked Exhibits 19 and 28.

29. On July 18, 1974 the EEOC mailed plaintiffs Alan Lew and Lester Kuramoto filed with the EEOC the originals of Exhibits 29-30. On August 5, 1974 plaintiff Eugene Baclig filed with the EEOC the original of Exhibit 31. On August 5, 1974 plaintiff Curtis Lew and Robert Morris filed with the EEOC the originals of Exhibits 32-33. On August 21, 1974 plaintiff Clarke Kido filed with the EEOC the original of Exhibit 34. On September 24, 1974 plaintiffs Frank Atonio and Gene Allen Viernes filed with the EEOC the originals of Exhibits 35 and 37. In mid-October, 1974 plaintiff Randy del Fierro filed with the EEOC the original of Exhibit 527.

30. On November 13, 1974, the EEOC mailed plaintiffs Alan Lew, Curtis Lew, Eugene Baclig, Clarke Kido, Gene Allen Viernes, Frank Atonio and Lester Kuramoto—as well as Gene Allen Viernes and Robert Morris—the originals of Exhibits 38-53.

31. On June 27, 1972, Commissioner's charges were filed with the EEOC against WCP. They are marked Exhibits 54-55.

32. In February 1974 the EEOC entered into a conciliation agreement with defendants WCP and CWF based on the Commissioner's charge.

33. No plaintiff or member of the aggrieved classes described in the Commissioner's charges marked Exhibits 54-55 was a party to the conciliation agreement settling those charges.

34. The EEOC has not filed a civil action against either defendant WCP or defendant CWF on the basis of the Commissioner's charges.

*4 35. On March 27, 1975 plaintiffs requested that the EEOC issue right-to-sue letters based on the Commissioner's charge against defendant Wards Cove Packing Company, Inc.

36. On April 15, 1975 the EEOC's Seattle District Office wrote plaintiffs' attorneys, declining to issue these right-to-sue letters.

37. On March 1, 1976 the EEOC's General Counsel overruled the Seattle District Office's decision not to issue right-to-sue letters based on a Commissioner's charge.

38. On March 19, 1976 the EEOC issued Frank Atonio, Eugene Baclig, Randy del Fierro, Clarke Kido, Lester Kuramoto, Alan Lew, Curtis Lew, Robert Morris and Gene Allen Viernes a letter and right-to-sue notices based on the Commissioner's charges against Wards Cove Packing Company and Columbia Wards Fisheries. They are marked Exhibits 56-57.

39. On April 22, 1976 plaintiffs moved for an Order indicating that the court would permit them to amend their complaint so as to allege receipt of the right-to-sue notices.

40. On July 21, 1975 plaintiff Clarke Kido filed the EEOC charge marked Exhibit 58.

41. On July 25, 1975 the EEOC deferred the charge to the Washington State Human Rights Commission. On August 7, 1975 the EEOC assumed jurisdiction over the charge. The EEOC served the statutory notice of the charge.

42. On March 11, 1980 the EEOC mailed plaintiff Clarke Kido the right-to-sue notice marked Exhibit 428.

43. On May 1, 1980 plaintiffs moved to amend their complaint so as to allege receipt of the letter and right-to-sue notice.

44. On June 20, 1977 plaintiff Gene Allen Viernes filed with the EEOC the charge marked Exhibit 528, and filed with the Washington State Human Rights Commission the charge marked Exhibit 429.

45. On or prior to September 1, 1977 the EEOC assumed jurisdiction over the charge filed with it. The EEOC served the statutory notice of the charge.

46. On August 3, 1977 plaintiff Gene Allen Viernes filed with the EEOC the charged marked Exhibit 430.

47. On August 5, 1977 the EEOC deferred the charge to the Washington State Human Rights Commission. On August 26, 1977 the EEOC assumed jurisdiction over the charge. The EEOC served statutory notice of the charge.

48. On May 31, 1978 the EEOC mailed plaintiff Viernes the right-to-sue notices marked Exhibits 431-32.

49. The defendants are engaged in the salmon processing business in various Alaska locations. Most of the processing has been done by canning although in recent years some has also been done by freezing.

50. Defendants' facilities are generally located in remote,

widely separated areas of Alaska. Thus, the canneries and fish camps are self-supporting installations where the crews are housed and fed by the company.

51. Since summer salmon runs are very short, it is essential that the canneries operate at peak production as much of the time as possible.

52. Most of the jobs at the canneries are seasonal and of short duration. Only the cannery superintendent, the assistant cannery superintendent, and certain office personnel are employed by the company on a permanent year-around basis with the exception of Ward Cove's small winter maintenance crew and certain machinists, carpenters, beachmen and tendermen who may be employed in the shipyard in the offseason. Each facility also has a winter watchman.

*5 53. In some years, a cannery may not operate at all. Some facilities are abandoned canneries which operate as fish camps. A fish camp is a support facility for fishermen which does not process salmon by canning or freezing.

54. Wards Cove cannery canned salmon in 1970 and 1972-80, and operated as a fish camp in 1971. Red Salmon Cannery canned salmon in 1970-72 and 1977-80, and operated as a fish camp in 1973-76. Bumble Bee cannery canned salmon in 1970-73 and 1975-80, and operated as a fish camp in 1974. Ekuk cannery canned salmon in 1970-80. Alitak canned salmon in 1970-80.

55. Readyng the canneries and fish camps for operations is done during May or June of each year.

56. Preseason work is intense, involving extensive overtime, and must be done in a short period of time.

57. The intense period of preseason work allows no time for training unskilled workers for skilled jobs.

58. When the cannery is open and running, the cannery workers arrive just before the start of fishing operations. If they are idle prior to canning, they are often given unskilled work as called for by their contract, such as grass cutting and cannery cleanup. The grass is cut by knives and hand sickles. Use of lawn mowers is impractical due to the length of the grass and steep hilliness of much of the terrain.

59. In addition to estimates made by the Alaska Department of Fish and Game and the Fisheries Research Institute at the University of Washington, management makes its own estimate for each run at each facility. Accordingly, the decision is made as to how many

canning lines to operate and the number of employees to be hired.

60. Frequently, the predicted run varies considerably from the actual run, and during the season the actual catch may vary tremendously on a daily basis. Also, the Alaska Department of Fish and Game will open or close fishing by emergency order depending upon the amount of escapement.

61. All fishermen are now "independent", on their own boats and are not employees. They are paid by the pound for fish and each crew divides the profits on a share basis. Prior to 1974, "company" fishermen were paid by the fish or on a piecework basis.

62. Bristol Bay gillnet fishing boats and some seine boats on Kodiak Island are stored in the offseason in the cannery. Due to the remoteness of those locations, repairs to those fleets are performed by such cannery employees as the caulkers, shipwrights, carpenters, and port engineers.

63. Salmon are extremely perishable and must be processed within 48 hours of capture. Most salmon is transferred from the fishing grounds to the canneries aboard "dry" or unrefrigerated tenders; refrigerated or "brine" tenders can hold fish for several days and can transfer them to other areas for processing.

64. Tenders carry equipment and supplies to the cannery location in time for use and storage well in advance of operations. During the season, the tenders will also count fish by species. In Bristol Bay, fishermen were often fed on the tenders during unloading until 1981.

*6 65. After arrival at the cannery, the fish are conveyed to a "fish house" where the salmon are eviscerated, the eggs pulled, and they are cleaned. In the fish house is located the salmon butchering machine. This eviscerating machine is patented under the name of "Iron Chink" machine.

66. Salmon eggs are processed under the supervision of Japanese nationals who are not employees of the defendants. The processed eggs are marketed in Japan as a specialty product known as "suyiko".

67. The canning is done under regulation of the Food and Drug Administration. The major cleanup, which is performed every 24 hours and which lasts approximately 3-1/2 to 4 hours, is mandatory. The canning lines run at a rate of 235-260 cans per minute or four cans per second.

68. After filling, the canned salmon are cooked in steam pressure retorts. The precise time/temperature requirements are established by the FDA. Failure to keep accurate records can result in FDA seizure and impoundment of all lots for which there are no records verifying that a "proper cook" was made. The cannery could be forced to recan and recook all "suspect" lots, an expensive procedure.

69. It is important that the machinists ensure that proper seals on can bottom (can shop machinist) and top (seamer machinist) are made, the side seams are secure, and that the salmon are properly cooked (salmon cook) to avoid botulism and to provide a wholesome, quality product for sale.

70. During the canning operation, various machinists are engaged in ensuring the continued smooth operation of the equipment. There are several who specialize in certain equipment; that is, the "filler man", "seamer man", "salmon cook", and "can shop" are typical of these specialties. In case of a breakdown of the machine, an entire line will be out of production until repair is effected.

71. CWF also maintains and operates a shipyard in Seattle, Washington, under the name "Lake Union's Terminals". BBS also has a resident vice president with a small support staff at 88 East Hamlin in Seattle. The home office of its Bumble Bee Seafoods division is Astoria, Oregon where the Bumble Bee cannery superintendent and his staff is located.

72. At least since 1970 John R. Gilbert has been defendant BBS's vice president in charge of Alaska operations and one of two managers of the CWF's joint venture.

73. From at least 1970 through 1977, A.W. Brindle was president of defendant WCP and a manager of the defendant CWF joint venture. After his death in 1977, A.W. Brindle was succeeded in these roles by Alec W. Brindle.

74. The overall management of CWF is vested in Alec W. Brindle and John R. Gilbert. They communicate directly with each operations' superintendent.

75. Exhibit 60 is the only document generally governing the terms of the defendant CWF joint venture. It was executed by defendant WCP and the predecessor of defendant BBS in the venture.

76. Employees at 88 East Hamlin, Seattle, Washington

perform duties for both defendants WCP and defendant CWF regardless of which defendant's payroll they are on.

*7 77. At least since 1970 defendant CWF has not had an independent representative at collective bargaining negotiations. Instead, it has relied on the representative of defendants WCP and BBS.

78. At least since 1970 the president of defendant WCP has been primarily responsible for setting its hiring policies, firing policies, promotion policies and employee regulations. He has also been responsible for hiring its cannery superintendents and office managers. The vice president in charge of Alaska operations for defendant Castle & Cooke, Inc., has had similar responsibilities for that defendant's cannery. These two individuals have jointly and equally had the same responsibilities for the defendant Columbia Wards Fisheries' facilities.

79. Decisions on whether a plant will operate, the size of its crew, salaries of its non-union personnel, the basic amounts of its supplies, the equipment it will have, whether a capital expenditure should be made and other major decisions are made jointly for CWF by the venture's managers. Such decisions are made for defendant WCP's facilities by its president. Those decisions are made for the BBS facility by its vice president in charge of Alaska operations.

80. Except as described elsewhere, the superintendent of each facility is ultimately responsible for recruiting, screening, hiring, promoting and terminating employees for that facility. He is also ultimately responsible for assigning employees to bunkhouses, assigning crews to dining areas and making improvements which do not require capital expenditures.

81. At least since 1970 the superintendent of defendant BBS's facility has reported directly to that defendant's vice president in charge of Alaska operations. During 1970-77 the president of WCP was also superintendent of Red Salmon Cannery. The superintendent of Wards Cove Cannery reported directly to him. Since 1977 superintendents of both canneries have reported directly to Alec W. Brindle, who is the current president of defendant WCP.

Hiring Policies and Practices

82. Preliminarily, it must be noted there are two (2)

general categories of cannery jobs. The first category includes the "cannery" workers and "laborer" jobs. The second category includes all other departments and are designated "noncannery" jobs. It is the "noncannery" jobs which are at issue in this lawsuit.

83. None of the five class canneries has advertised for jobs at least since 1970, although the Alaska State Employment Service has been called. Generally, vacancy notices have not been posted at the Bumble Bee, Red Salmon, Ward Cove or Ekuk canneries since 1970 and at least from 1970 through 1975 midseason vacancies have not been posted at Alitak except for two positions for cook and one for "laundressbedmaker".

Many of the jobs at defendants' facilities are covered by union contracts which have rehire preference clauses.

85. Defendants' policy and practice is to adhere to the union rehire preference clauses and to offer employment in the same jobs to past satisfactory employees for the new season. Employees, including nonresident cannery workers, take advantage of these clauses to secure employment. Nonresident cannery workers are those whose off-season residence is the Lower 48. Resident cannery workers are those whose off-season residence is Alaska.

*8 86. Hiring for all jobs except resident cannery workers and spring and fall laborers takes place at defendants' home offices in Seattle and Astoria during the first three months of the year. Most employees, particularly in the skilled jobs, are hired before April 1 each year for the upcoming season. Most noncannery jobs also require availability by the end of April for that year.

87. The rehire preference rights of past employees are respected in determining the number of vacancies to be filled for the new season. The remaining vacancies are filled from among those who seek employment with defendants during the fall and winter preceding the upcoming season. Defendants do not generally look to applications for the preceding season in filling openings for the upcoming season.

88. Defendants generally do not treat general oral inquiries about jobs made during the preceding season as an application for a position in the upcoming season a year away. This is particularly true when the employee fails to follow up the inquiry with an application. Defendants do not treat white or nonwhite persons differently in this respect.

89. Defendants receive far more applications than there

are vacancies for the upcoming season. The majority of the applications for non-cannery worker positions are by whites or by persons who are not identifiable as racial minorities. Defendants have received relatively few applications from nonwhite employees for noncannery worker positions.

90. Resident cannery workers and spring and fall laborers are usually hired from the general labor force in the areas closest to each cannery. Except for Wards Cove, this labor force is small. The 1970 Census for the City of South Naknek, Exhibit A-35, illustrates this. The entire population of Bristol Bay Census Division, which covers thousands of square miles, was only 3,500 people in 1970. It is not a reasonable business practice to scour such sparsely populated, remote regions for skilled and experienced workers.

91. Except at Ekuk, non-resident cannery worker jobs which are not filled by employees with rehire preferences are filled through the dispatch procedure of Local 37.

92. Local 37 male members have refused to work in the egg department without overtime and by special agreement with the union workers outside the Local 37 source are hired although they must join the union.

93. Management does not direct any of its cannery worker forement to hire or line up members of any particular race for his crew.

94. Employees and non-employees are free to apply for any job for which they feel qualified. Similarly situated applicants are treated equally.

Promotions

95. Most people hired at defendants' facilities are persons entitled to a rehire preference or are hired from the external labor market rather than through promotions or transfers from another position or department within the cannery.

96. There are very few midseason vacancies in jobs. There is not time during the season to fill such vacancies through a posting, application, interview and training procedure.

*9 97. Most higher paying positions within a department are not filled from the lower paying positions within the

same department at a cannery.

98. Midseason promotions or transfers across union and/or departmental lines are rare.

99. Promotions or transfers across departmental lines from one season to the next are rare.

100. Many of the spring and fall laborers hired by defendants are not available for employment during the summer season because they choose to fish instead.

Reasonable Business Practices and Business Necessity

101. The job preference clause operates like a seniority system.

102. Because of the intensity of the salmon run, the high cost of error, and demands placed upon the cannery, experienced applicants are given priority over inexperienced applicants even though both possess the same general skills.

103. Local 37 provides an oversupply of nonwhite cannery workers for all defendants' canneries except Ekuk.

Labor Market

104. The employees in the various job classifications are not fungible. Each job or job department requires differing qualifications, primarily skill and/or experience. Preseason availability is often an important qualification. Defendants must look to the labor market providing individuals with the skills and experience required by each job. Many noncannery workers' jobs require skills and qualifications not possessed by nor readily acquirable within a reasonable time by unskilled, inexperienced persons at the canneries.

105. The racial composition of cannery workers and laborers at defendants' facilities is predominantly nonwhite. This is so because Local 37 is the primary source of non-resident cannery workers for all but one of defendants' facilities, and the membership and leadership of Local 37 is predominantly Filipino.

106. Filipinos constitute about one percent (1%) of the population and approximately one percent (1%) of the labor force (over age eighteen) in the geographical region from which defendants draw their employees, that is, Alaska, the Pacific Northwest, and California.

107. The available labor supply in this relevant geographical area for cannery worker, laborer, and other nonskilled jobs is approximately ninety percent (90%) white. Nonwhites, particularly Filipinos and Alaska Natives, are thus greatly overrepresented in these jobs at the defendants' canneries.

108. Local 37, ILWU, has not asserted jurisdiction rights over non-resident cannery workers at Ekuk. Starting in 1971, Ekuk hired non-resident cannery workers without utilizing a Local 37 cannery worker foreman or the union in any way. The percentage of Filipino nonresident cannery workers hired by Ekuk is significantly less than the percentage of Filipinos hired as nonresident cannery workers at Red Salmon, Bumble Bee, Wards Cove, and Alitak - all four of which have a contract with Local 37 to supply *nonresident* cannery workers.

109. Alaska Natives constitute only a small portion of the overall *general* population in the section of Alaska where canneries are located. However in those remote, sparsely populated areas which are immediately adjacent to the canneries at Naknek, South Naknek, Alitak, and Ekuk, the native population is a significantly greater percentage than it is compared to the general Alaskan population which includes the predominately white city populations. Consequently, Alaska Natives comprise a high percentage of the local labor market for *resident* cannery workers and laborers at the canneries located at Naknek, South Naknek, Alitak, and Ekuk. For the same reason, that is, because of its Ketchikan location, the percentage of Alaska Natives hired at Wards Cove is significantly less than the percentage of Alaska Natives hired as resident cannery workers at the other four facilities. This is so because the area immediately adjacent the Ward Cove Cannery is not sparsely populated.

*10 110. Persons filling cannery worker and laborer jobs are not part of the labor supply for jobs requiring differing qualifications at defendants' facilities. Defendants' cannery workers and laborers do not form a labor pool for other jobs at defendants' facilities.

111. A Local 37 cannery worker who is transferred during the season to a job under another union's jurisdiction can claim both his season guarantee as a cannery worker in addition to his earnings in the new position.

112. Company policy has been to hire workers from without rather than to transfer or promote from within.

113. Most cannery worker and laborer jobs do not provide training for other work in the cannery. The skills acquired in most cannery worker and laborer jobs are not a substitute for the experience and skill requirements of the skilled noncannery worker jobs.

114. The end of each canning season terminates the employment of cannery workers.

115. The older Filipinos tend to dominate the other cannery workers in requests covering matters such as housing and messing.

116. There has been a general lack of interest by cannery workers in applying for noncannery workers jobs.

117. Most cannery worker jobs do not require that the employees be able to communicate effectively, or be literate, in the English language and none of them require early season availability. Most other jobs at the canneries require both of these qualifications.

118. Most students are not available for preseason work required in most noncannery worker jobs.

119. Most of the jobs at the canneries entail migrant, seasonal labor. While as a general proposition, most people prefer full-year, fixed location employment near their homes, seasonal employment in the unique salmon industry is not comparable to most other types of migrant work, such as fruit and vegetable harvesting which, for example, may or may not involve a guaranteed wage.

120. Thus, while census data is dominated by people who prefer full-year, fixed location employment, such data is nevertheless appropriate in defining labor supplies for migrant, seasonal work.

121. Based on a sample of almost one-half of the industry, 48% of the individuals employed in the Alaska salmon canning industry during 1970-78 were nonwhite. This is so primarily because nearly all employed in the "cannery worker" department are non-white. The institutional factor of Local 37's over-representation of non-whites accounts for this statistic. Accordingly, the court does not assign considerable weight to this statistic.

122. The percentge of nonwhites employed in the Alaska salmon canning industry during 1906-39 and 1941-55 has historically been from about 47% to 70%. Toward the end

of this period it has stabilized at about 47% to 50%.

123. Eighty-eight percent (88%) of the class members are Alaska Natives or of Filipino descent. Defendants' labor market data proved that the percentage of whites hired in the following jobs in the aggregate by facility or by combination of facilities is either less than the percent of whites in the labor supply or does not exceed the percentage of whites in the relevant labor supply by a statistically significant amount. In only a few instances does the percentage of whites hired in these jobs aggregated by department exceed the percentage of whites available in the relevant labor supply; in some instances, nonwhites are over represented in the jobs taken on a department-by-department basis.

**11 Administration:* All jobs.

Beachgang: crane operator, gas man, net boss, net man, oil dock, outside foreman, pile buck foreman, setnet pickup, truck driver.

Carpenter: All jobs.

Culinary: baker, cook, cook/baker, steward/baker, steward/cook, steward.

Machinists: diesel operator, electrician, first machinist, machinist foreman, mechanic, port engineer, refrigeration machinist, shop machinist, shop machinist, welder, machinist helper/electrician, refrigeration machinist/can shop machinist, salmon cook/shop machinist, shop machinist/can shop machinist, shop machinist/pipe fitter, shop machinist/port engineer, shop machinist/fireman.

Tender: captain.

Miscellaneous: all jobs except quality control, janitor, and laundry/cannery worker.

All Year-Round Jobs:

Stock/Stockroom: Naknek Trading Company.

Office: Administrative assistant.

Beachgang: beach boss, beachman, pile buck, beachman/truck driver.

Culinary: kitchen help, laundry, waiter/waitress.

Machinists: cold storage machinist, can shop machinist, casing machinist, filler machinist, fireman, iron chink machinist, machinist, machinist helper, machinist helper/oil cook, pipefitter/fireman, pipefitter, salmon

cook/pipefitter, salmon cook, seamer machinist, brite stack machinist/pipe fitter, iron chink machinist/casing machinist, pipe fitter/oil cook.

Fisherman: company fisherman (captain and partner).

Miscellaneous: quality control, janitor, laundry/cannery worker.

Office: (except for a few instances where they were seasonal, these jobs are year round), accountant, assistant bookkeeper, bookkeeper, office help, office manager, secretary.

Store/stockroom: stockroom help, stockman, storehelp, storekeeper, Naknek Trading Co. manager.

Tenders: deckhand, mate, mate/deckhand, talleyman, tender engineer, tenderman, tendercook/deckhand.

Job Qualifications

124. At the canneries, defendants do not provide on-the-job training of unskilled, inexperienced persons for jobs requiring skill and experience.

125. Because of the lack of time and personnel available for training at a salmon cannery, skills or qualifications cannot be considered "readily acquirable" unless they can be acquired within a matter of days with a minimal amount of training time required of supervisory and other skilled personnel.

To maximize production and minimize the amount of training which must be done at the canneries, defendants attempt to hire experienced persons in all job categories.

126. Qualifications required for any individual position depend to a certain extent on the cannery involved, the age and condition of equipment, skill level of other incumbents and supervisors, and other such factors. It is not practical or realistic, in terms of running a safe, efficient, and profitable operation to staff each position with people meeting only the stated minimum requirements.

127. Many lower paying jobs (e.g., carpenter apprentice-helper, deckhand, machinist helper, kitchen help) within departments are not "entry level" positions

for vacancies in higher paying positions within the same department at defendants' canneries.

*12 128. The skills acquired in most cannery worker and laborer jobs are not a substitute for the experience and skill requirements of the skilled noncannery worker jobs.

129. Below is a composite list by department of all job titles which have been filled at any time, at any of defendants' facilities between 1970-80: (No individual cannery would fill this many job titles in any given season.)

Administration:

Assistant Manager

Assistant Superintendent

Double Star Coordinator

Manager

Purchasing Agent

President

Roe Operations Manager

Sales Manager

Superintendent

Beachgang:

Beach Boss

Beachman

Beachman/Truck Driver

Crane Operator

Dock Manager

Gas Man

Net Boss

Net Man

Oil Dock (including Standard Oil dock crew)

Outside Foreman

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Pilebuck

Pilebuck Foreman

Setnet Pickup

Truck Driver

Carpenter:

Carpenter

Carpenter Apprentice

Carpenter/Shipwright

Carpenter Foreman

Caulker

Contract Carpenter

Painter

Culinary:

Baker

Cook

Cook/Baker

Kitchen Help (includes bull cook)

Laundry

Steward/Baker

Steward/Cook

Steward

Waiter/Waitress

Cannery Worker:

Cannery Worker (includes crab and freezer processing workers)

Fisherman:

Company Fisherman (Bumble Bee, Red Salmon and Egegik only)

Machinist:

Brite Stack Machinist/Pipefitter

Cold Storage Machinist

Can Shop Machinist

Casing Machinist

Diesel Operator

Electrician

Filler Machinist

Fireman

First Machinist

Salmon Butchering Machinist

Salmon Butchering Machinist/Cashing

Machinist

Machinist Foreman

Mechanic

Machinist Helper/Trainee

Machinist Helper/Electrician

Machinist Helper-Oil Cook

Pipe Fitter/Fireman

Pipe Fitter/Oil Cook

Pipe Fitter

Plant Engineer

Port Engineer

Refrigeration Machinist

Refrigeration Machinist/Can Shop Machinist

Salmon Cook

Salmon Cook/Fireman

Salmon Cook/Pipe Fitter	Storehelp
Salmon Cook/Shop Machinist	Storekeeper
Seamer Machinist	
Shop Machinist	<i>Tenders:</i> Captain
Shop Machinist/Can Shop Machinist	Deckhand
Shop Machinist/Pipe Fitter	Mate
Shop Machinist/Port Engineer	Mate/Deckhand
Shop Machinist/Fireman	Tallyman
Welder	Tender Engineer
	Tenderman
<i>Laborer:</i> General Laborer	Tender Cook/Deckhand (includes Tender Cook)
Spring/Fall Workers	
	<i>Miscellaneous:</i> Affirmative Action Representative
<i>Office:</i> Accountant	Beachman/Store Helper
Administrative Assistant	Consultant
Assistant Accountant	Double Star Captain
Assistant Bookkeeper	Double Star Carpenter
Bookkeeper	Double Star Cook
Office Help	Double Star Cannery Worker
Office Manager	Double Star Deckhand
Purchasing/Bookkeeper	Double Star Engineer
Sales Clerk	Double Star Foreman
Secretary	Double Star Mate
	Foreman (Unspecified)
<i>Store and Stockroom:</i> Naknek Trading Co. Manager	Inventory Control
Stockman	Janitor
Stockroom Help	Maintenance

Miscellaneous

Monkey Boat Operator

Nurse

Office Helper/Store Helper

Quality Control

Radio Operator

*13 Recruiter

Roustabout

Store Helper/Kitchen Helper

Traffic Manager

Night Watchman

Winter Laborers and Assistants to Winter Watchman
Winter Watchman

(Employees with no job title are included in this department)

L.U.T. Yard:
Yardworker

Yard Foreman

Certain persons who have appeared on cannery payrolls, but are either not employees (independent fishermen) or who worked on special construction projects and were hired by the constructions project manager are not included in a department.

Virtually all of the jobs in the administration and office job departments are filled by year-round employees who work at company headquarters. As part of their regular job duties, most of them work at company headquarters in the offseason but at the defendants' facilities in Alaska during the salmon processing season. There are also many individuals, primarily in the machinist, carpenter, and tender departments, who are for all practical purposes year-round employees. They work at defendants' shipyards in the offseason and, as part of their regular job duties, work at defendants' Alaska facilities during the season.

130. The following jobs are supervisory, require management abilities, and extensive experience to successfully perform:

- (a) superintendent (manager)
- (b) cannery (machinist) foreman
- (c) assistant superintendent (assistant manager)
- (d) first machinist
- (e) office manager
- (f) carpenter foreman
- (g) beach boss
- (h) net boss
- (i) setnet pickup boss
- (j) tender captain
- (k) steward
- (l) first cook (if no steward at facility)
- (m) outside foreman (Ekuk)
- (n) skipper of Double Star
- (o) Manager of Naknek Trading Co.
- (p) pilebuck foreman

131. The following jobs require substantial prior skill and experience to successfully perform:

- (a) port engineer
- (b) wet tender (briner) engineer
- (c) carpenter
- (d) carpenter/shipwright
- (e) caulker
- (f) shop machinist
- (g) refrigeration man
- (h) electrician

- (i) steward
- (j) baker
- (k) cook
- (l) radioman
- (m) doctor
- (n) nurse
- (o) accountant
- (p) company fisherman
- (q) welder
- (r) pipe fitter
- (s) pilebuck
- (t) netman
- (u) crane operator
- (v) cold storage machinist
- (w) Double Star engineer
- (x) Standard Oil distributorship manager
- (y) traffic manager
- (z) sales manager
- (aa) purchasing agent

132. Qualifications reasonably required for successful performance of the jobs listed below are as follows:

Salmon Butchering Machinist. Requires two seasons experience as a helper-trainee in the fish house with one winter of offseason training or one year of mechanical experience of a similar nature. This job also requires an ability to work with minimum supervision and without the aid of shop manuals, a knowledge of and ability to use mechanic's hand tools for adjustments and repair of equipment, early season availability, and ability to understand and communicate effectively in English. Must be capable of training a machinist helper-trainee in the fish house if one is employed.

*14 *Reformer-Can Shop Machinist.* Requires two seasons

as machinist helpertrainer in cannery or six months mechanical experience of a similar nature. Job requires the ability to work without close supervision, knowledge of and ability to use seam micrometers, gauges and mechanic's hand tools to comprehend, and communicate effectively in English, understand mechanical drawings, and possess leadership skills. Early season availability is also required.

Fillerman. Requires two seasons as machinist helper-trainer on the canning line with one winter of offseason training, or one year of mechanical experience of a similar nature. Knowledge of and ability to use mechanic's hand tools to make adjustments and repairs to equipment is required. Ability to read, comprehend, and communicate effectively and availability are required. Leadership skills may also be required.

Filler Operator. See machinist helpertrainee.

Seamerman. Requires two seasons experience as a machinist helper-trainee in the cannery or six months mechanical experience of a similar nature. Ability to read, comprehend, and communicate effectively in English is required. Knowledge of and ability to use mechanic's hand tools to make adjustments and repairs to equipment is required. Early season availability is also required.

Seamer Operator. See machinist helpertrainee.

Salmon Cook-Pipefitter. Requires one year of plumbing and/or pipefitting experience, less depending on amount and type of experience with boilers or pressure vessels. Job requires proficiency in basic mathematics, ability to read gauges and thermometers, and ability to handle the strain, responsibility, and pressure of "cooking" as many as nine retort loads of salmon simultaneously. Must have knowledge of and ability to use mechanic's and pipefitter's tools to make adjustments and repairs. Must be able to understand and accurately complete required inspection and report forms required by governmental agencies and industry associations. Early season availability is also required.

Machinist Helper-Trainee. Requires mechanical ability, knowledge of and ability to use mechanic's tools. Must be flexible, willing to learn, and to follow directions. Must be able to communicate effectively in English and have the ability to read and comprehend English if placed in canning line or can shop. Early season availability is required.

Fireman. Requires mechanical ability, ability to use mechanic's and some pipefitting tools, and early season

availability. (In addition, for the above machinist crew jobs, possession of at least one of the following additional skills is highly desirable and preferred in hiring: welding, pipefitting, electrician, and machine shop; requires willingness and ability to work independently or with other crew members in performing a wide variety of maintenance and repair tasks on cannery buildings, grounds, fixtures, and equipment).

Quality Control. Requires ability to read, comprehend, and communicate effectively in English, ability to check weights, record temperatures, and use basic mathematics through decimals. Must have ability to handle detail, be able to handle reports and paperwork, be reliable, and be honest. One season of general cannery experience or other relevant experience or education, such as food technology, is required.

***15 Beachman.** Requires good health, and the capacity for and ability to perform heavy work out-of-doors. Requires familiarity with wide range of hand tools (both mechanical and carpentry), small power tools, and operation of forklifts and other equipment. Minimum qualification requirements vary depending on size of beachgang: the larger the beachgang, the greater the ability to take on less skilled personnel. Minimum qualifications for a new beachman joining a crew of three or more beachmen (not including beach boss) would be three to six months prior heavy work experience, preferably out-of-doors and construction or shipyard related.

Dry Tender Engineer. Requires one year of related boat experience or six months engine mechanical experience and one season of tender experience, knowledge of and ability to use mechanic's and some pipefitting tools to make adjustments and repairs to shipboard machinery and equipment, ability to live in small quarters and function as an effective member of a small group. Willingness and ability to work long hours on ocean-going vessel is required. Ability to act as relief helmsman and back-up navigator may be required on some boats.

Accountant. For portion of job performed in Alaska, see Bookkeeper.

Bookkeeper. Requires two years formal bookkeeping education or comparable work experience, familiarity with use of computers in data processing depends on location, typing and ability to accurately operate ten-key calculator. Two seasons as assistant cannery bookkeeper would also satisfy requirements. English literacy and preseason availability are required.

Assistant Bookkeeper. Requires knowledge of basic bookkeeping, basic mathematics, familiarity with use of computers in data processing depends on location. Job also requires ability to use typewriter and accurately operate ten-key calculator. English literacy is required. Preseason availability required.

Office Assistant/Bookkeeper-Helper. Requires knowledge such as would be obtained from office practice training course or comparable work experience, knowledge of basic mathematics, ability to type, and ability to accurately use ten-key calculator. Preseason availability may be required. English literacy required.

For those of the above jobs which may be year-round, the stated qualifications do not necessarily deal with the off-season requirements of their jobs.

133. The qualifications necessary to successfully perform the remaining jobs are as follows:

Deckhand: Aptitude for marine work, early season availability, willingness to work long, irregular hours on ocean-going vessel. Marine experience preferred. English language required.

Tender Cook/Deckhand: Cooking experience, amount and type depends on location, aptitude for marine work, willingness to work long irregular hours in cramped quarters on ocean-going vessel, early season availability, English language required, marine cooking experience preferred.

Company Fishing Boat Partner: Determined by captain, but generally fishing experience and aptitude for marine work, willingness to work long hours on very cramped ocean-going vessel, and willingness to work on a "share" basis (that is, without any guaranteed wage, wage rate, or salary).

***16 Carpenter Apprentice:** Aptitude for carpentry work. Early season availability. Carpentry work experience preferred. English language required.

Truck Driver and Setnet Pickup. Driving experience, amount and type depends on truck involved. Driver's license. English language required.

Stockman. English literacy; record keeping ability; knowledge of hardware, machinery, and parts.

Storekeeper. Requires knowledge of and ability to perform record keeping and basic bookkeeping, maintain credit records, manage inventory records, ordering of

supplies. Must be physically able and willing to stock shelves. Early season availability required. At larger stores (Ekuk, Chignik, Bumble Bee) must have considerable retail experience. At smaller stores (Alitak, Port Bailey, Keni) must have some retail experience. English literacy.

Storekeeper At Wards Cove. Must have driver's license, physical strength, and English literacy.

Winter Watchman and Caretaker. Must be responsible individual willing to spend several months in winter weather at very isolated locations. Qualifications depend somewhat on location, but generally person must have the skill and ability to diagnose, maintain, and effect repairs on various cannery equipment and buildings.

134. The parties agree that no prior special skills are necessary to perform the following miscellaneous jobs: gasman or oilman, apprentice carpenter, carpenter's helper, winter watchman, night watchman, AFU waiter, and AFU dishwasher. The court finds that all at-issue (noncannery and non-laborer) jobs are skilled positions except for the following titles:

[1. deleted]

2. Kitchen help

3. Waiter/Waitress

4. Janitor

5. Oildock Crew

6. Night Watchman

7. Tallyman

8. Laundry

9. Gasman

10. Roustabout

11. Store Help

12. Stockroom Help

13. Assistant Caretaker (winter watchman and watchman's assistant)

14. Machinist Helper/Trainee

15. Deckhand

16. Apprentice Carpenter/Carpenter's Helper

Incidents of Race-Labeling and Racial Comments

135. Various memos written by agents of defendants during the period of 1970 to 1973 and occasionally later included the following references: "Filipino cannery workers", "Native cannery workers", "Native Galley Cook", "Filipino Mess", "Eskimos", "Filipino, Eskimo, Women", "Young native boys", "the Filipino Union", "white boys", "Native crew", and "Phillipine Bunkhouse". See e.g., Exh. 245, 254, 300, 322-26, 330-37, 397, 452, 721.

136. A memo dated May 15, 1976, from John Korzan states, "In 1975 we ordered 175 badges numbering one thru 175 for use in our cannery for purposes of identifying our Eskimo cannery workers". Exh. 458.

137. BBS's company personnel records listed employee number badge assignments as follows:

TABULAR OR GRAPHIC MATERIAL SET AT THIS POINT IS NOT DISPLAYABLE

Exh. 467.

138. Laundry for nonresident cannery workers at Wards Cove was stored in bags marked "Oriental Bunkhouse", and the mail slot where the nonresident cannery workers received their mail was similarly marked.

*17 139. A letter from A.W. Brindle dated December 15, 1970 states:

There is one more thing I want to tell you that probably will happen. We built a new bunkhouse. We expected to move all the carpenters and all the machinists into it. Apparently this is not working out due to the beachmen coming in and out. I have considered now taking the room that Vern used to have and the two rooms that Ned had and making those rooms into a room for the beachmen and putting a shower in so they would be away from the fishermen. The (sic) come in

and out at night and it would be quieter for them. I would then use the new bunkhouse for women. The reason for this is these Eskimos are completely impossible. We have nothing but trouble and we probably had less trouble than the majority. Nelbro for instance had 43 quit one morning. We had all of ours refuse to go to work on July 2nd at 8 o'clock until I agreed to give them additional pay over and above the contract.

Exh. 452.

140. A memo from Winn F. Brindle dated December 29, 1972 states:
This letter from Frank B. Peterson is to give Salvador a bit of status in the community.

As you well know, the Filipinos both at home and abroad are difficult to deal with.

Exh. 253.

141. A May 25, 1970 memo from Don Ballard to the Seattle office of WCP states in part:

Hardy, could you check with Mayflower press about those little square pre-printed 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.

Exh. 454.

Messing

142. As stated earlier, Filipino and Asians are overrepresented in Local 37.

143. The bargaining representatives for nonresident cannery workers have traditionally asked for Oriental and Filipino food, and a separate menu for its members.

Management has acceded to these wishes. The older persons in the Local 37 crews prefer this arrangement.

144. The Local 37 contract provides for a separate culinary crew for the Local 37 crew.

145. The quality and quantity of food served in mess halls is the responsibility of the cook in the mess hall. Most complaints about the food can be traced to matters of personal taste or competence of the cook.

146. Defendants have ordered special food for the nonresident cannery worker mess halls in accordance with the Local 37 union leaders' or cooks' desires without unreasonable budgetary restrictions.

147. The few whites in Local 37 ate with the Filipinos in the Local 37 mess. See testimony of David Yoshizumi.

Housing

148. In response to a written inquiry about employment, Hardy Parrish in a letter dated January 25, 1971, wrote:

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. Another thing is the time element, most of the college boys do not get out of school early enough to fit in with our requirements.

*18 Exh. 251. At the time of writing this letter, Mr. Parrish was employed at WCP (Red Salmon) but did not have a specific title.

149. While defendants have made significant improvements in all worker housing, from 1970 to 1973, and while most of defendants' employees live in integrated bunkhouses, housing where non-whites predominate has generally been poorer than housing where whites predominate. However, any differences in housing quality are not attributable to the race of the occupants. Instead, differences are attributable to the following industrial circumstances:

A. Workers are generally housed according to job department and time of arrival. The larger cannery worker bunkhouses are not opened up during the preseason, but rather, are prepared within a few days of the anticipated beginning of the salmon run at each location which is when the cannery crews arrive. By this time, most other employees have already begun working, are housed, and there are few, if any, spaces available except in the cannery worker bunkhouses.

B. Since cannery workers are housed for the shortest period of time (during the summer), they do not need the better insulated buildings required for the noncannery worker employees who arrive at the cannery earlier and stay later.

C. Generally, persons working in different departments do not work the same shifts.

Individual Instances

150. In May of 1977, Moses Friendly, who is of Alaska Native descent, applied to defendants in writing for a summer clerical job, but was not hired.

151. In May of 1976, Jimmie Akanakyak, who is of Alaska Native descent, applied to defendants in writing for a storekeeper job in 1976, but was not hired in that job that year.

152. In February of 1977, Kim Tsijui, who is of Japanese descent, applied in writing for a waitress or clerical summer job, but was not hired in any job.

153. Ed Daba, who is of Filipino descent, applied on April 30, 1976, in writing for a job as tender deckhand, as a machinist trainee or in another noncannery worker job, but was not hired. At the time of his application, all noncannery jobs had been filled.

154. Orlando Bucsit, who is of Filipino descent, applied orally to Ward Cove Cannery superintendent Joseph Brindle and at 88 East Hamlin for a job on a tender in 1980, but was not hired in that job.

155. Richard Gurtiza, who is of Filipino descent, applied orally to Ward Cove Cannery superintendent Joseph Brindle for a job which was about to open up on a tender part way into the 1977 season. He was not hired in that job. However, after the season was over Joseph Brindle

allowed Richard Gurtiza to work on a tender for the seven-day trip south to Seattle.

156. In May of 1971, Clark Kido, who is of Japanese descent and was a student, applied at East Hamlin for a carpenter job, machinist job or other noncannery worker job orally and in writing, stating he could be available in mid-May, by arranging to complete his final exams early. In late April or early May of 1975, Mr. Kido similarly applied for interim employment. At that time Mr. Kido had been laid off as a fulltime structural engineer at Boeing. Both times he was instructed no openings existed. Mr. Kido previously worked for defendants as a cannery worker. The jobs for which he applied, however, required pre-season availability and were filled in early spring.

*19 157. Carlos Garces, who is of Mexican descent, applied in writing and orally in March of 1976, asking for any job at Ekuk or at any other cannery. Mr. Garces had no experience, had an educational background in mechanical engineering but did not so state on his application. However, Mr. Ekern, with whom Mr. Garces spoke at the time he applied, did not ask Mr. Garces his qualifications. His status at the time of application was that of student.

158. Charles Tangalan, who is of Filipino descent, felt uncomfortable applying for a noncannery job because he thought Filipinos who worked in the cannery were supposed to be on the cannery crew. In addition, he felt he would be unable to get a job outside the cannery because he was not related to other company employees. Thus, he did not apply for other jobs.

159. Frank Atonio, who is of Samoan descent, inquired orally of Wards Cove cannery foreman Ray Landry regarding machinist jobs on a Sunday in 1973. He inquired orally at the end of the 1973 season of Wards Cove Cannery superintendent Joseph Brindle for a machinist, carpenter or tender job; and orally at the end of the 1973 season to the Ward Cove bookkeeper Jerry Steele concerning a tender or clerical job but was not hired at that time. Mr. Atonio did not disclose any qualifications, and he was not asked about qualifications. He did not follow through with a written application, and his inquiries came at a time when the jobs had been filled for the season. Mr. Atonio was employed in noncannery jobs (beachgang and tender deckhand) in 1979 and 1980. His applications for these jobs were made preseason. He was rehired for the 1981 season for a job as a tender deckhand at the Kenai facility but quit before the boat departed.

160. In 1966 or 1967, during the canning season, Mike

Eddie Antonio, who is of Filipino descent, orally inquired of the Red Salmon beach boss, Vern Jones, about how one went about getting a beach gang job. In 1966 or 1967, Mr. Antonio orally asked the Red Salmon head machinist how one goes about getting a machinist's job.

161. In 1973, Ronald Barber, who is of Filipino descent, was a student, and worked seasonally for various canneries, orally asked Ward Cove (cannery worker) foreman Salvador del Fierro for a quality control, clerical, storekeeper or machinist helper job, but was not hired for these jobs. Mr. Barber's requests were directed at an employee without hiring authority for those jobs. The inquiries were made during the season when those positions were already filled.

162. Andy Pascua, who is of Filipino descent, worked at Red Salmon in 1970 and 1971 but did not apply for a machinist's job during those years. Mr. Pascua did inquire of a Red Salmon employee as to how one would go about getting such a job. Mr. Pascua's inquiry, however, was directed at an employee with no hiring power.

163. Lester Kuramoto, who is of Japanese descent, worked as a cannery worker at Ward Cove Cannery during the summers of 1970, 1971, 1972 and 1973 and worked as a cannery worker at Bumble Bee cannery during the summer of 1971. He applied orally in 1971 at 88 East Hamlin for any job.

*20 164. Gene Viernes, who was of Filipino descent, worked at Red Salmon during the summers of 1969, 1971, and 1972 and at Ward Cove during the summers of 1966, 1969 and 1973. In 1973, Mr. Viernes was fired for dropping and driving over canned fish he was transporting with the fork lift. In 1977, he orally inquired of Alec Brindle about getting hired as a cannery worker for that season, but was not hired.

165. William T. Pascua, who is of Filipino descent, worked for Ward Cove Packing at Red Salmon during the 1971-1972 seasons. While at Red Salmon, Mr. Pascua wanted a clerical or quality control job, but did not ask for one because he believed that Andy Pascua and Gene Viernes had unsuccessfully inquired about such jobs.

166. Benjamin Tabayoyon, who is of Filipino descent, worked for Ward Cove Packing at Red Salmon during the 1969-1971 seasons. During those seasons he inquired of the machinists and fishermen how they got their jobs.

167. Eugene Baclig, who is of Filipino descent, worked at Red Salmon during the 1969-72 seasons and at Ward Cove Cannery during the 1973 season. He did not apply

for jobs other than a cannery job because the upper level jobs appeared to him to be all white.

168. Phillip Fujii, who is of Japanese descent, worked at Wards Cove Cannery during the summer of 1972. He was interested in a machinist job, but did not apply because he did not know what qualifications were necessary and what openings existed. Also, he did not see any Japanese or other non-whites working at Wards Cove, and overheard other employees say that one had to have connections or past experience to receive a high paying position.

169. Randy del Fierro, who is of Filipino descent, worked as a cannery worker for Wards Cove Packing at Wards Cove Cannery in the 1970, 1972 and 1973 seasons; he worked at Alitak in the summer of 1971. Mr. del Fierro's grandfather, Salvador del Fierro, was foreman at Wards Cove Cannery in 1970, 1972 and 1973. Mr. del Fierro did not apply for an upper level job because he was told by members of his crew that job segregation was "just the way it was". Ct. Rec. 710 at 2, 11. 30-31. In addition, he saw few minorities occupying positions other than cannery worker positions.

170. Curtis Lew, who is of Chinese descent, worked at Wards Cove Cannery during the 1972 and 1973 seasons. He felt he was qualified for jobs other than as a cannery worker, but never told anyone about his qualifications because he did not believe there was any way he could advance due to the lack of posted openings and racial imbalance among the jobs.

171. Joaquin Arruiza, who is of Filipino descent, worked at Bumble Bee Cannery during the 1971, 1972 and 1973 seasons, and was interested in jobs outside the cannery crew. However, he never saw a written announcement, and no one informed him of promotional opportunities.

172. Allen Lew, who is of Chinese descent, worked at Wards Cove Cannery during the summers of 1972 and 1973. At that time, he was a full-time student at the University of Washington and not available for preseason work. Mr. Lew did not know how the defendants employed persons in the upper level jobs. It was Mr. Lew's impression that he would have been qualified for quality control, tenderman, and bookkeeper positions, but he remained a cannery worker.

Discussion

Jurisdiction

*21 As stated earlier, this action challenges employment practices by WCP, BBS, and CWF under Title VII and under Sec. 1981. Except for CWF, exhaustion requirements have been met or waived, *Zipes v. Trans World Airlines*, [28 EPD P 32,432] – U.S. –, 50 U.S.L.W. 4238 (Feb. 23, 1982), and jurisdiction exists in this court. With respect to the Title VII claims against CWF at Alitak and Ekuk, Judge McGovern dismissed all such claims, and the Ninth Circuit affirmed the dismissal because the claims were time barred. *Atonio v. Ward Cove Packing Co., Inc.*, [32 EPD P 33,691] 703 F.2d 329, 331 (9th Cir. 1983). Plaintiffs urge in their Supplemental Final Argument that since WCP and BBS are essentially joint venturers, the two should be liable for any Title VII claims against CWF. However, this court is bound by the Ninth Circuit's ruling affirming the dismissal of the claims in question. Accordingly, the court may not now utilize the joint venture theory to find liability on claims which no longer exist.

Burden of Proof

At the outset, it should be noted that Section 1981 “does not embody the same broad, prophylactic purpose as does Title VII”. *Gay v. Waiters’ and Dairy Lunchmen’s Union, Local No. 30*, [30 EPD P 33,026] 694 F.2d 531, 537 (9th Cir. 1982). Therefore, a plaintiff suing under Sec. 1981 must show intentional discrimination to establish a *prima facie* case. *Id.* Under Title VII, however, there are two theories of liability, the “disparate treatment” model and the “disparate impact” approach. A *prima facie* “disparate impact” case may be established without any proof of intentional discrimination. Instead, where a business practice, which is neutral on its face, is shown to have a significant, adverse impact upon a class protected by Title VII, the plaintiff has made out a *prima facie* case, and the burden of proof shifts to the defendant to show that the practice is justified by “business necessity”. *Conteras v. City of Los Angeles*, [25 EPD P 31,728] 656 F.2d 1267, 1275-80 (9th Cir. 1981). Thus, good intent is not a defense in “impact” cases. *Gay*, 694 F.2d at 537. Under the “disparate treatment” mode, certain individuals are singled out, and treated less favorably than others based upon race, religion, sex or national origin. *International Brotherhood of Teamsters v. United States*, [14 EPD P

7579] 431 U.S. 324, 335-36 n.15 (1977).

Treatment cases, like Sec. 1981 claims, require proof of intentional racial discrimination. *Gay*, 694 F.2d at 537. While the “burden of proof” shifts in “impact” cases, in “treatment” actions the burden which shifts to defendant after establishment of a *prima facie* case is only a burden of “production”. It is clear the burden of persuasion remains with the plaintiff. *Texas Dept of Community Affairs v. Burdine*, [25 EPD P 31,544] 450 U.S. 248, 257 (1981); *Gay*, 694 F.2d at 537, n.4. *Prima facie* disparate treatment (and Sec. 1981) is established by proof of facts sufficient to support an inference of intentional discrimination. *Furnco Construction Corp. v. Waters*, [17 EPD P 8401] 438 U.S. 567 (1978). But see, *United States Postal Service v. Aikens*, [31 EPD P 33,477] – U.S. –, 103 S. Ct. 1478, 1482 (1983) (when a defendant fails to persuade the district court to dismiss for lack of a *prima facie* case, the factfinder must decide whether defendants’ conduct was intentionally discriminatory regardless of whether plaintiff really made out a *prima facie* case).

*22 It must be decided whether the disparate treatment or the disparate impact theory, or both, applies to plaintiffs’ Title VII claims in this action. If both apply, it must be decided whether both apply to all aspects of the action. Plaintiffs argue that both models of liability are applicable. Defendants counter that only the treatment theory is appropriate here since the allegations are of wideranging discrimination. Until recently, the answer to this question was relatively easy. In *Heagney v. University of Washington*, [25 EPD P 31,685] 642 F.2d 1157, 1163 (9th Cir. 1981) the court found that the impact model only applied to “objective” employment practices:

It is apparent, however, that the creation of jobs that are exempt from the Washington personnel law cannot be equated with such well-defined objective employment practices as personnel tests or minimal physical requirements. Classification of certain jobs as “exempt” only meant that the University had wider discretion to establish the employee salaries. Subjective employment decisions may result in discrimination, but the use of subjective criteria is not per se illegal. [Citation omitted.] The gravamen of Heagney’s complaint is that the lack of well-defined employment criteria allowed a pattern or practice of discrimination to exist. We therefore conclude that “impact” analysis is inappropriate and that

Heagney was required to prove disparate treatment.

Accord, *O'Brien v. Sky Chefs, Inc.*, [28 EPD P 32,549] 670 F.2d 864 (9th Cir. 1982). As recently discussed in *Moore v. Hughes Helicopters, Inc.*, [32 EPD P 33,688] 708 F.2d 475, 481 & n.4 (9th Cir. 1983), there is a split among the courts of appeal on the applicability of the impact model to subjective employee selection practices, and the *Heagney* approach is consistent with holdings in the Fourth, Fifth, Eighth, and Tenth Circuits. See, e.g., *Pope v. City of Hickory, N.C.*, [29 EPD P 32,752] 679 F.2d 20, 22 (4th Cir. 1982); *Pouncey v. Prudential Insurance Co. of America*, [28 EPD P 32,451] 668 F.2d 795, 800-01 (5th Cir. 1982); *Harris v. Ford Motor Co.*, [26 EPD P 31,906] 651 F.2d 609, 611 (8th Cir. 1981); *Mortensen v. Callaway*, [28 EPD P 32,528] 672 F.2d 822, 824 (10th Cir. 1982). However, after *Heagney* was decided, in *Wang v. Hoffman*, [30 EPD P 33,174] 694 F.2d 1146, 1147 (9th Cir. 1982), the court of appeals took a contrary position to *Heagney* without citation to that case. The *Wang* majority concluded that “to prevail on his [impact] theory, Wang need only demonstrate the lack of objective criteria and a disparity in job promotions.” *Id.* at 1148. The *Moore* court, *supra*, 708 F. 2d at 481-82 recognized that the law in this circuit is unsettled, but did not find it necessary to resolve the rule at that time. While the *Wang* approach may find support from the Sixth Circuit, *Rowe v. Cleveland Pneumatic Co.*, [30 EPD P 33,107] 690 F.2d 88, 95 (6th Cir. 1982), until the Ninth Circuit by *en banc* opinion specifically overrules *Heagney* and its progeny, this court is bound by its rule since it predates *Wang*.

[Language Requirement]

*23 The conclusion that subjective decisionmaking is not susceptible to the impact approach does not dispose of the impact model for all areas of this case. Rather, there are aspects of the *Wang* case which survive the *Heagney* rule and bear upon issues before this court. That is, to the extent there is a language skills requirement (speaking English) for the at-issue jobs, such a requirement arguably should be deemed “objective” and is therefore properly addressed by impact analysis, since on its face, it would have a disparate impact on minorities. While this issue is not squarely addressed by the parties, it is the conclusion of this court that given the nature of the cannery business, defendants met their burden of proof in demonstrating

business necessity for a language requirement in upper level jobs. Specifically, the industry labors under the scrutiny of strict health regulations. The slightest mistake in calibrating can size or in retort management, for example, could result in a threat of widespread botulism, a disease fatal to humans. Fishermen who are unable to quickly communicate with one another may place themselves and others in great peril during stormy ocean weather. There is insufficient time and personnel for exhaustive training in this unique seasonal industry which deals with highly perishable food products.

[Nepotism]

Another area which must be analyzed separately from the intentional discrimination model concerns the pervasive incidence of nepotism at the canneries. Recently, the Ninth Circuit Court of Appeals held that a shareholder preference plan in which shareholder ownership was concededly limited to persons of Italian ancestry and were either members of the family or close friends of a current shareholder was susceptible to impact analysis. *Bonilla v. Oakland Scavenger Co.*, [30 EPD P 33,128] 697 F.2d 1297, (9th Cir. 1982). Particularly, this was so because the company in *Bonilla* tied preferential wages and job assignments to ownership of its stock. Consequently, the undisputed nepotistic preference plan was a condition of employment. *Id.* See, also, *Gibson v. Local 40, Supercargoes & Checkers, Etc.*, [12 EPD P 11,215] 543 F.2d 1259, 1268 (9th Cir. 1976)(evidence of purpose to discriminate is unnecessary where employee is hired solely because of his relationship to other employees). Relatives of whites and particularly nonwhites appear in high incidence at the canneries. However, defendants have established that the relatives hired in at-issue jobs were highly qualified for the positions in which they were hired and were chosen because of their qualifications. In addition, plaintiffs’ nepotism figures failed to differentiate those persons who became related through marriage *after* starting work at the canneries. Consequently, the nepotism which is present in the at-issue jobs does not exist because of a “preference” for relatives. *Id.*¹

*24 Having concluded that the language requirement and incidence of nepotism do not separately constitute impact violations of Title VII under the circumstances presented by this action, both must nevertheless be considered singly and collectively together with plaintiffs’ evidence of defendants’ failure to post openings, general lack of objective job qualifications, lack of a formal promotion

procedure, and the practice of rehiring past employees in their old jobs to determine whether an inference of intentional discrimination has been raised. The court would further note that should plaintiffs prove that they were prevented from obtaining seniority because of defendants' discriminatory hiring practices, the rehire practice must then be separately evaluated to determine whether the effects of the past discriminatory hiring practices (if established) was perpetuated through the rehire practice. Presumably, in such a case, the rehire practice could constitute a separate Title VII violation, regardless of whether defendants acted with a discriminatory purpose. See *Gibson*, 543 F.2d at 1268. Accord, *Bonilla v. Oakland Scavenger Co.*, [30 EPD P 33,128] 697 F.2d 1297 (9th Cir. 1982). For reasons to be discussed, *infra*, such an analysis is inapplicable here.

Skills

As earlier stated, all at-issue (non-cannery and non-laborer) jobs are skilled positions except for the following titles:

1. Piledriver
2. Kitchen help
3. Waiter/Waitress
4. Janitor
5. Oildock Crew
6. Night Watchman
7. Tallyman
8. Laundry
9. Gasman
10. Roustabout
11. Store Help
12. Stockroom Help
13. Assistant Caretaker (winter watchman and watchman's assistant)
14. Machinist Helper/Trainee

15. Deckhand

16. Apprentice Carpenter/Carpenter's Helper

It may be that under a different factual setting, some of the positions which this court finds to be skilled, e.g., truckdriving on the beach, fit into the category of jobs which require skills that are readily acquirable by persons in the general public under *Hazelwood School District v. United States*, [14 EPD P 7633] 433 U.S. 299, 308 & n.13 (1977). However, what is readily acquirable under the circumstance of a full-year operation such as the setting in *Teamsters*, *supra*, is not readily acquirable in the salmon cannery industry.

With respect to the machinist helper/trainee; apprentice carpenter, and carpenter's helper; and deckhand positions, although such positions are essentially unskilled, preseason availability is a necessary qualification.

Statistics

Plaintiffs rely upon two types of statistics, ones which allegedly show that non-whites were under-represented in the upper-level jobs when compared with the percentage of non-whites in the available labor supply claimed by plaintiffs and "comparative" statistics which show a pattern of job segregation throughout the cannery work forces.

When full-year, fixed location employment is at issue, the population of some portion of the surrounding community is normally taken as the labor supply. *Hazelwood School District v. United States*, [14 EPD P 7633] 433 U.S. 299 (1977). However, defining an employer's labor supply is a question of fact, *Williams v. Owens-Illinois, Inc.*, [28 EPD P 32,404] 665 F.2d 918, 927 (9th Cir. 1982), and courts "must be flexible in defining the relevant labor market". *Domingo v. New England Fish Co.*, 445 F. Supp. 421, 433 (W.D. Wash. 1977).

*25 Here, as in *Domingo*, plaintiffs incorrectly assume that the historical general hiring percentages in the industry as a whole mean that defendants hired nonwhites in the same percentage as their availability in the labor market. *Id.* However, the evidence does not support such a conclusion because of institutional factors which greatly distort the racial composition of the workforce. *Id.* The

most significant example is the circumstance that Local 37, which dispatches non-resident cannery workers, is almost entirely Filipino. *Id.*

Stated differently, this court is unable to assign significant probative value to plaintiffs labor supply statistics because the plaintiffs' data base premise does not reflect the important factor that Alaskan Natives and Filipinos, combined, represent only about one percent of the population of Alaska, Washington, and Oregon from which state defendants draw their workforce.

Plaintiffs' statistical evidence showed significant disparities between the at-issue jobs and the total workforce at the canneries. Such comparative statistics are highly probative of discrimination pattern or practice where, as here, the positions enumerated at page 63 are essentially unskilled or involve skills that many persons possess or can easily learn. *Piva v. Xerox Corp.*, [27 EPD P 32,147] 654 F.2d 591 (9th Cir. 1981). See, also, *Moore v. Hughes Helicopters, Inc.*, *supra*, 708 F.2d at 483. Thus, the court concludes that plaintiffs established a *prima facie* case of intentional discrimination with respect to the positions enumerated at page 63. Nevertheless, defendants satisfied their burden of production and plaintiffs failed in their ultimate burden of persuasion for the reasons earlier stated and for the reasons discussed *infra*. Of particular significance to the court in making this finding, was the lack of evidence of early and formal applications, to be distinguished from oral inquiries. I have excluded from my consideration the positions of winter watchman and winter watchman's assistant since those positions are not seasonal. Consequently, the latter two positions would not be available to students, and evidence of other class interest was not presented.

Relying upon *O'Brien v. Sky Chefs, Inc.*, [28 EPD P 32,549] 670 F.2d 865, 867 (9th Cir. 1982), plaintiffs argue that their evidence was also sufficient for a *prima facie* showing with respect to the at-issue positions which this court has found to be skilled. This is so, it is asserted, because subjective decisionmaking strengthens an inference of discrimination, and requiring a *prima facie* showing of class qualifications when qualifications are unknown would be an insurmountable burden. However, the *Sky Chefs* case did not involve skilled positions. If special skills are required for a job, as here, "the proxy pool must be that of the local labor force possessing the requisite skills." *Moore v. Hughes Helicopters, Inc.*, *supra*, 708 F.2d at 482 & n.5. In addition, the experts agreed that many at-issue jobs in the present case require the rather unique and necessary "qualification" (to be distinguished from a "skill") of preseason availability. Plaintiff's own evidence establishes that plaintiffs were generally aware

of this important qualification. Finally, for the reasons previously stated, this is not a promotion-from-within case.

*26 Having concluded that plaintiffs' statistics have little probative value with respect to the skilled positions, it must be determined whether the strength of the nepotism evidence, absent defendants' rebuttal evidence, together with plaintiffs' evidence of racial comments and individual instances is sufficient to establish, *prima facie*, a pattern or practice of discriminatory treatment in hiring, promoting, paying, and/or firing. Without the strength of highly probative statistics, plaintiffs' case must largely rise or fall upon the strength of the inference from the evidence of individual instances. The elements are set forth in *McDonnell-Douglas v. Green*, [5 EPD P 8607] 411 U.S. 792, 802 (1973). To establish individual instances of discriminatory treatment, when statistics are insufficient for a *prima facie* case, generally an individual should show that he belongs to a racial minority, that he applied and was qualified for the position sought, he was rejected, and after the rejection, the employer continues to seek applications. *Id.* While the *McDonnell Douglas* elements are not an "inflexible formulation", *Teamsters*, 431 U.S. at 358, for determining the elements of a *prima facie* case or the inference weight to be assigned the collective individual instances, it nevertheless provides some guidance. Here, it is clear that plaintiffs belong to various racial minorities. At this juncture, however, the only evidence of *preseason* application, other than oral inquiries, was the February, 1977, written application by Kim Tsuji, a student. She was seeking a summer position. One of the two jobs about which she inquired was generally year around (clerical); the other was unskilled. Ms. Tsuji did not disclose any qualifications on her application.

Oral inquiries to a foreman by anyone interested in a job are not treated as applications in the cannery industry. Plaintiffs appeared to have understood this. Gene Viernes, in his deposition at 18, stated in response to a question about Mr. Viernes' oral inquiries,

[The foreman] gets bored by hundreds of people everyday, I was treated as one such person.

Not only is it asserted that defendants discriminated in individual instances of filling vacancies, but plaintiffs also seek to buttress their *prima facie* case with evidence that various class members were "deterred" from applying for better jobs. Several plaintiffs testified they did not apply for "at-issue" jobs because they believed defendants discriminated. At the outset, it should be noted that the

test for purposeful discrimination is whether a defendant in fact discriminates, and not whether class members subjectively believe a defendant discriminates. *Lewis v. Tobacco Wkrs. Intern. Union*, [16 EPD P 8310] 577 F.2d 1135, 1143 (4th Cir. 1978). “Basing recovery on that fact is an improper consideration.” *Id.* Nevertheless, under *Teamsters*, 431 U.S. at 365,

The [“whites only”] message can be communicated to potential applicants more subtly but just as clearly by an employer’s actual practices—by his consistent discriminatory treatment of actual applicants, by the manner in which he publicizes vacancies, his recruitment techniques, his responses to casual or tentative inquiries, and even by the racial or ethnic composition of that part of his work force from which he has discriminatorily excluded members of minority groups.

*27 Plaintiff’s burden at the remedy stage of proving that he would have applied for the job had it not been for an employer’s practices is a difficult burden, *Id.* at 368, and at this juncture, the liability stage, the evidence is insufficient to meet that burden. However, plaintiffs’ evidence must nevertheless be considered at this point as a factor buttressing the inference of a pattern of discrimination in plaintiffs’ *prima facie* case.

Accordingly, while significant probative value may not separately be assigned to plaintiffs’ statistical evidence, or the testimony regarding individual instances including deterrence, and the evidence of other circumstances including nepotism, nevertheless if the presentation in these various areas is considered collectively, plaintiffs have raised a marginal inference of discriminatory treatment in hiring, promoting, paying, and firing with respect to the skilled jobs. This court is compelled to conclude, however, that defendants have met their burden of production in showing defendants’ motivation was not based upon discriminatory animus. Plaintiffs have not met their ultimate burden of persuasion, and have not established that defendants’ conduct was pretextual.

As earlier noted, this court finds defendants labor supply data to be significantly more probative. Under the circumstances of this case, the census data is the most comprehensive source of information correlating race, residence, and occupations in the geographical areas from which defendants draw their employees. Defendants’ statistics which do not utilize plaintiffs’ theory of

counting “re-hires” have greater probative value under the circumstances of this case. Plaintiffs not only count rehires during successive seasons, but at successive canneries within the same season. Thus, an employee who holds the same job for ten years could be counted twenty times. Relying upon *Grant v. Bethlehem Steel Corp.*, [24 EPD P 31,376] 635 F.2d 1007, 1018 (2d Cir. 1980), *cert. denied*, [26 EPD P 31,881] 452 U.S. 940 (1981), plaintiffs maintain that eliminating the rehires narrows the statistical base and allows defendants to perpetuate the results of earlier discrimination. However, in this circuit, as in the Second Circuit (*Bethlehem Steel Corp.*, *supra*), for the rehire evidence to be probative, it must be established that *past* discriminatory hiring practices existed. See *Gibson*, 543 F.2d at 1268. Indeed, the facts in *Grant v. Bethelhem Steel Corp.* differed dramatically from those in this case in a number of respects. Of fundamental importance, in *Grant* it was undisputed that the defendant had a long history of race discrimination in hiring. *Id.* at 1017. Second, in *Grant*, plaintiffs submitted evidence that persons who were automatically rehired possessed bad safety records which would have excluded them from rehiring in a merit-based hiring system. *Id.* at 1018. Such is not the case here. Courts have emphasized that statistics must be free from methodologic problems which undermine the reasonableness of any inference to be drawn from such statistics. *Teamsters*, 431 U.S. at 340, n.20.

*28 Finally, under the facts of this case, given the high perishability of the food product and susceptibility of the product to lethal disease, together with the shortness of the season, and the many other dangers of the industry, this court would be required, even if it could be said that the circumstances here were similar to those in *Bethlehem Steel*, to find business necessity for such a rehire practice. In addition, the very rehire practice which is statistically challenged, was demanded by plaintiffs’ representatives during the collective bargaining process.

Finally, as discussed earlier, defendants’ evidence established that regardless of the manner in which a prospective employee came to the attention of the hiring personnel, the person was evaluated according to job related criteria. The testimony showed that numerous white persons who “knew” someone were not hired due to inexperience, and whites hired were paid no more than nonwhites.

The evidence further showed that plaintiffs’ oral inquiries were not applications, and the inquiries were generally made of persons without hiring authority. Typically, applications were made too late in the season for the preseason jobs and the applicants were otherwise

unavailable due to school schedules or other personal references. At this juncture, the court is unable to find a practice of deterrence. The instances of “race labeling”, e.g., “Filipino Bunkhouse” were not unique to white speakers, but this terminology was also routinely used by the nonwhites. While such conduct is hardly to be applauded, under the circumstances, it is not persuasive evidence of discriminatory intent. This court is also unable to find that nonwhites were singled out because of race with respect to rules against fraternization with the women or with respect to “menial” jobs such as grasscutting.

In sum, defendants have met their burden of production, both with statistical and other evidence, and plaintiffs have failed in the burden of persuasion with respect to the skilled at-issue jobs.²

Housing

Plaintiffs’ evidence of segregated housing showed by a preponderance of evidence facts sufficient to establish a *prima facie* treatment case. Particularly persuasive was Exhibit 251, a letter dated January 25, 1971 by Hardy Parrish, which correspondence is set out in relevant part in Finding No. 148. Defendants’ evidence, however, sufficiently dispels the inference that defendants were motivated by discriminatory animus. At the outset, the court would note that while Parrish is presently a cannery superintendent for CWF at Kenai, at the time he wrote the offensive letter, he was a cannery foreman, and therefore, not responsible for company policy. Nor does the evidence otherwise support a finding that Parrish was articulating company policy. In addition, defendants established that workers arriving preseason and staying post-season required better insulated housing. Defendants’ further evidence showed that workers are housed departmentally because the various departments worked the same shifts. For example, fishermen necessarily come in and out of their bunkhouse during the nights. To arrange the housing nondepartmentally results in more workers awakening and preparing to leave for work while others are trying to sleep. Of course, for the reasons stated earlier, the department of cannery workers is predominantly non-white. Thus, the cannery worker housing was predominantly non-white. Defendants’ evidence of housing assignment by time of arrival and by crew sufficiently dispels the inference that defendants were motivated by discriminatory animus, and plaintiffs have failed in their ultimate burden of persuasion and of

showing pretext.

*29 Were this court to utilize the impact model rather than a treatment model, the same conclusion would be reached. It is not efficient or economically feasible to open all bunkhouses preseason to assign workers arriving preseason to different housing with a result of maintaining more housing than necessary for longer periods of time. Title VII does not require that a seasonal employer be put to the expense of winterizing summer housing when bunkhouse assignment by date of availability makes such an expense unnecessary. Having found an absence of discriminatory treatment or impact in housing, this court need not reach the question of whether an employer may legitimately “award” or entice with better housing skilled workers who must live on the employment location for a greater length of time than unskilled workers.

Messing

Plaintiffs evidence of segregated messing showed by a preponderance of evidence facts sufficient to establish a *prima facie* treatment case. Defendants’ evidence, however, sufficiently dispels the inference that defendants were motivated by discriminatory animus and plaintiffs have not proved pretext. Local 37 members eat in the Local 37 mess. The quality and quantity of food served in the mess halls is the responsibility of the cook in the mess hall. The complaints about the food generally are attributable to matters of personal taste.

Were this court to utilize the impact model rather than a treatment model, the same conclusion would be reached. Defendants operated under the Local 37 contract which provides for a separate culinary crew for the Local 37 crew. Filipino and Asian persons were “overrepresented” in local 37. Of course, an employer-union agreement which permits an employer to discriminate is not immune to race discrimination claims. *Williams v. Owens-Illinois, Inc.*, [28 EPD P 32,404] 665 F.2d 918, 926 (9th Cir. 1982). See, also, *General Building Contractors Assoc., Inc. v. Pennsylvania, et al.*, [29 EPD P 32,855] 102 S. Ct. 3141 73 L. Ed.2d 835 (1982). Nevertheless, as stated above, the testimony was that the few whites in Local 37 ate with the Filipinos in the Local 37 mess, and the culinary crew simply acceded to the wishes of the older workers who preferred the traditional food that was served. Consequently, it was the conduct of the union and not the conduct of defendants which caused the pattern of messing along essentially racial lines.

of race in housing its employees or in feeding these employees.

It is so Ordered. The Clerk is directed to enter this Order and forward copies to counsel.

Conclusion

Defendants have not discriminated on the basis of race in the allocation of at-issue unskilled jobs. In addition, defendants did not discriminate in the hiring, firing, promoting, or paying in the at-issue skilled positions. Similarly, defendants have not discriminated on the basis

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Footnotes

- 1 Plaintiffs' evidence established that some nonwhites were hired in cannery positions through Local 37 due to relationship with other union cannery workers. However, these positions are not in question, and this evidence has little, if any, bearing upon the at-issue jobs. The Union has not been named as a defendant and the named defendants may not held vicariously liable for union conduct. *General Building Contractors Association, Inc. v. Pennsylvania, et al.*, [29 EPD P 32,855] 102 S. Ct. 3141, 73 L. Ed.2d 835 (1982).
- 2 The 1974 conciliation agreement between the EEOC and CWF, Red Salmon Cannery, and WCP was a negotiated settlement, and not an admission by defendants of liability. The agreement is entitled to little weight. *Domingo v. New England Fish Co.*, [16 EPD P 8207] 445 F. Supp. 421 n.1 (W.D. WA 1977).