Supreme Court of the United States

In the Matter of:

Docket No. 38

JAMES G. GLOVER, et al.,

Petitioners

vs.

ST. LOUIS-SAN FRANCISCO RAILWAY COMPANY, et al.

Respondents.

Place Washington, D. C.

Date November 14, 1968

ALDERSON REPORTING COMPANY, INC.

300 Seventh Street, S. W.

Washington, D. C.

NA 8-2345

C O N T E N T S

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1968

James G. Glover, et al.,

Petitioners,

v. No. 38

St. Louis-San Francisco Railway Company, et al.,

Respondents.

Washington, D. C.
Thursday, November 14, 1968

The above-entitled matter came on for argument at 11:25 a.m.

BEFORE:

EARL WARREN, Chief Justice
HUGO L. BLACK, Associate Justice
WILLIAM O. DOUGLAS, Associate Justice
JOHN M. HARLAN, Associate Justice
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice

APPEARANCES:

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P R O C E E D I N G S

MR. CHIEF JUSTICE WARREN: No. 38, James G. Glover, et al, Petitioners, versus St. Louis-San Francisco Railway Company, et al., Respondents.

ORAL ARGUMENT OF WILLIAM M. ACKER, R., ESQ.

ON BEHALF OF PETITIONERS

MR. ACKER: Mr. Chief Justice, may it please the Court, the Petitioners, Glover and Otis were the plaintiffs below. This case comes here purely and simply on the pleadings.

The plaintiffs were 14 railroad carmen helpers. Their complaint in the District Court charged a cooperative scheme by the St. Louis-San Francisco Railway Company and their Brotherhood, the Brotherhood of Railway Carmen of America, to perpetuate a long-existing racial discrimination in the area of seniority by the device of using what they call apprentices to do the traditional work of carmen helpers; that is, white apprentices, so that the Negro carmen helpers will continue not to get promoted to the classification of carmen.

This device has caused a bottleneck in seniority which affects not only the Negro carmen helpers but the White carmen helpers unfortunately behind them on the seniority roster.

The District Court dismissed the case on the grounds that the plaintiffs had not alleged an exhaustion of one of

their remedies before the National Railway Adjustment Board.

Two, their remedy within the union itself, and,

Three, their remedy provided by the Collective Bargaining Agreement.

There were no specific allegations in the complaint as to the character of these two supposed contractual remedies or even if they existed, but the District Court nevertheless concluded that they both were, as he said, "available" and must be employed.

The Fifth Circuit affirmed, and this Court has granted certiorari.

Let me say that some people do not like the concept of seniority as a criterion for job assignment and promotion. I don't think it is for me to be for or against this concept. It is just a fact of labor life, and racial discrimination in the application of this concept is where discrimination hurts the most. It hurts the pocketbook.

I submit that to eliminate invidious discrimination in this area can lead ultimately to its elimination in other sectors of our national life.

While I was on the airplane coming up from Birmingham, with the plane jumping up and down, I grabbed something to get my mind off of that, and I picked up the "Look" Magazine for this week. I was surprised to see the first article in that magazine entitled, "What Unions Do To Blacks."

As I turned through the pages, I was even more surprised to see a picture of one of my clients. I mention this for two reasons: (1) I don't want the Court to think I had anything to do with the preparation of, or the publication of, this article just before this case is set for oral argument. It was absolutely news to me.

(2) Despite that disclaimer, there are a couple of things in this article that I would like to read and that I think have particular bearing.

The sub headline says, "For nearly a century, most unions have forced Negroes into Jim Crow locals, giving them dirty jobs or refused to admit them at all. New laws and repeated union promises are not stopping prejudice."

Then, down in the body, it says this:

"Union controlled apprenticeship programs" -- it fits this particular one like a glove -- "admit far less than token numbers of Negroes. Unions are doggedly battling civil rights complaints that are before the Courts and Government agencies. Despite landmark court decisions in 1967 and 1968, the unions seem determined to fight a rearguard holding action reminiscent of the one by the Southern School District after the Supreme Court's 1964 desegregation decision."

Now, if we may, let's see where the lower court's reasoning in this case would lead these plaintiffs.

First, what about the internal union complaint

procedures?

The Trial Court said that such procedures were there. For the sake or argument, therefore, we will have to assume, I suppose, that they are there. It would be unbecoming of me to go outside the record to describe these intra-union procedures. There are no allegations as to what they are, no allegations by the plaintiff, no allegation by the defendants.

However, I think it is not unsophisticated for this Court, just as I know it knows that the plaintiffs could not get damages -- damages -- that is one of the things they are suing for -- money damages -- for past discrimination from the union. If they go through the union constitution, such as it is, are they going to be able to get what they are asking for here -- damages?

It is just as easy, I think, to know that they cannot get promotion from the union. The Union does not promote people.

The decision that they theoretically could hope for with the union alone would be an admission by the union, by some top decision-making body or some policy-making body of the union that the union was wrong in failing to take their grievance to the company. That is all they could hope for with the union procedures.

Q Don't you allege a conspiracy, so to speak, between the union and the employer here in your complaint?

A Yes, we do.

Q I don't know that you use the word "conspiracy" or joint action by these co-defendants in depriving your clients of promotion and the pay that goes with promotion.

A Exactly.

Q Then, why couldn't they get damages from the union if you are right?

A I don't think they could get damages from the union within the union constitutional procedures.

We are discussing constitutional procedures within the union that are not plead and the court does not have any way to know what those procedures are.

I will say that the union constitution does not provide a method for the union to compensate someone monetarily for some wrongdoing and that is all I am discussing at this point -- what they could get there theoretically.

Now, what could they expect from the company if they processed a grievance without the union's blessing and in the face of its active opposition?

The actual grievance machinery here again is not spelled out in the complaint, but in these matters it is easy to know that they would get nowhere. If they sought redress with the company in the face and in the teeth of their own union's opposition and collusion, then, according to the Fifth Circuit, the Court from which this case comes in

Haynes against U. S. Pipe, a case that was cited by the District Court in its Memorandum Opinion, then there would be no judicial review.

The Fifth Circuit is not saying that you exhaust your administrative remedies within the company and if you are not satisfied you then to go Court. They are saying in Haynes, you exhaust your administrative remedy within the company even if the last and ultimate method that the employee employees is to get his union to strike. If that does not work, he is finished.

This is what the Fifth Circuit Says:

"At this point, the decision denying him relief was final.Under the terms of the Collective Bargaining Agreement, are the processes of the Court now vailable to him for contesting or voiding that final decision?"

We are talking about intra-company procedures. In that case, the Fifth Circuit says that the appellant does not contend that the union did not faithfully represent him. That may be a distinction. He does not charge fraud on either the part of the company or of the union. This is a case where the grievance procedure was final and the Court's opinion was against the appellant.

This means the Fifth Circuit in Haynes would say that unless the plaintiffs here would bite off the tremendous burden after having exhausted this machinery that the District Court and the Fifth Circuit say we must exhaust, unless we want

bite off the burden and take on the burden of proving fraud on the part of the union and the company -- fraud -- then we have no judicial review. Then we have reached the end of the road by referring this matter to the grievance machine.

Now what could the plaintiffs reasonable expect from the National Railroad Adjustment Board?

The 1966 revisions of the Railway Labor Act came too late for Mr. Glover and his friends. They filed this case in 1965. The carmen in their brief admit to an average of three years for processing a claim before the NARB, Second Division. The railroad admits to less, but this court in Walker v. Southern Railway was not only impressed by the unreasonable delayes before the NARB, before the 1966 revisions, which would make the NARA proceedings applicable here just as in Walker, but by the absence of any judicial review in the event of a decision adverse to the individual employee.

The Court says, "The Congress also found if an employee receives an award in his favor by the Board, the railroad affected may obtain justicial relief from that award by declining to recognize that award. If, however, an employee fails to receive an award in his favor, there is no means by which judicial review may be obtained."

That point is argued in our brief at some length, but this particular case was not erferred to, the most recent on that point. We think that as constituted, as created, as

conceived by the Congress, the NARB is not able or designed for handling this kind of grievance.

Q I take it there is no question that the individual employee as distinguished from the union may energize the grievance procedure in the railroad business?

A Mr. Justice White, you are certainly correct because on behalf of an individual I have invoked that NARA statute procedure.

Q Doesn't the statute require the grievance procedure?

A You mean the grievance procedure within the company before the NARB?

Q Let us assume that a collective bargaining contract between the union and the railroad does not say anything about grievances. Doesn't the Act still require that minor disputes go to the Board?

A I think it does.

Q Wholly independent of the contract?

A By its terms.

Q Wholl independent of the contract?

A Wholly independent of the contract.

Q How do you get around that?

A We do not have the contract before us here, but I don't think it says anything about the National Railroad Adjustment Board.

Q It does not have to. You are just saying if you claim racial discrimination, the statutory requirement to take that sort of a claim to the Board is ---

A Under the Steele, Tunstall, Conley rationale, we say that does control to avoid the exclusive jurisdiction. Now the literal words require it.

Q You mean those cases may bypass it?

A As I interpret them, and as I hope to demonstrate, they do say particularly in this context, particularly where you are suing the union, and this court in several cases has said that a remedy ---

Q Let me put it this way: May Congress say in a claim of this kind you must first follow the administrative procedure before you go to court?

A My own personal view, Mr. Justice Brennan, would be that this particular tribunal as constituted, with an absence of judicial review from an adverse decision to an employee, if the Congress required it and attempted to overrule by legislation the Steele and Tunstall cases as I interpret them, I think the Congress would have enacted unconstitutional legislation. That is my personal view.

I obviously do not have time to comment on all of the important cases bearing on the exhaustion of remedies, but I would like to discuss these: Republic Steel against Maddox, Vaca against Sipes, NRLB against Shipbuilding Local 22, recently denied by the Third Circuit.

If I have any time, I would like to mention Conley v. Gibson and Walker against Southern Railway.

In Republic Steel against Maddox, the Maddox case first off did not involve a claim against a man's union as well as the company for which he worked. The majority of the Court in that case considered it a run-of-the-mill discharge case and simply held that Mr. Maddox should have employed the grievance machinery which there was clearly provided by the collective bargaining agreement under the evidence. The collective bargaining agreement was there for the Court to examine and to determine that it was available.

In this case, it is not there. It has not been declared by us, and it has not been declared by the defendants.

The Court said, "In a general rule to which Federal law applies, Federal labor policy requires that individual employees wishing to to assert contract grievances must attempt use of the contract grievance procedure agreed upon by employer and union as the mode of redress."

It continued: "If the union refuses to press or only perfunctorily presses the individual's claim, differences may arise as to the forms of redress then available. But unless the contract provides otherwise, there can be no doubt that the employee must afford the union the opportunity to act on his behalf."

Now, we ammended this complaint after Judge Lynn

Threw us out. I don't know that we added anything to the complaint by our amendment because in the original complaint it clearly appeared that the opportunity for the union to process this grievance had been afforded. They had been called on, and they had not done it.

So, without the frustrating responses, short of actual operation of the grievance machinery, the Maddox rationale here, as I have read it here, seems to me to clearly apply.

More recently, the Court spoke in Vaca against Sipes ---

Q In the Maddox Case, as I remember it, the only reason it could be asserted that he was wrongly discharge was because of rights conferred to him by the collective bargaining agreement itself. Otherwise it would have been employment at will.

Therefore, the Court held that if he is going to rely on the rights which are conferred upon him as a beneficiary of the collective bargaining contract. He had to go through the other provisions provided by that contract.

Are you in your case relying on rights that are conferred under the collective bargaining agreement?

A I would have to say we are. We admit to asking the Court for a decision which very definitely will involve, and we admit it, an interpretation application of the collective bargaining agreement.

Q May I ask you when this case was begun?

A It was filed in June or July of 1965, Mr. Justice Black. It was in the works prior to the enactment of the Civil Rights Act. There is invocation of the 1964 Civil Rights Act.

Q I notice Mr. Cooper's firm had something to do with it.

A Mr. Cooper's firm is counsel for the carmen locally there and did participate in the lower levels of the court.

Q Was that begun while my son was there with you?

A No, Your Honor, it was not. He had gone before that time.

Q There is no question about that?

A No, sir, no question whatsoever.

Q What is the basis for your claim that you don't really have a remedy before the Board? Is it just that it is inadequate, or did you say the Board can't handle a claim by a union member against a union?

A That is right. There is no statute that constitutes that.

Q That is what the Court said in Steele, wasn't it?

A In Steele and Conley it said there was nothing mechanical.

Q That doesn't go for a suit against the employer based on the collective bargaining contract that he signed.

A That is right. I think if the plaintiffs for one had been willing to forego any claims against their union which had wronged them, and which we say wronged them, if he had been willing to forego that and had also been willing to submit themselves to a tribunal composed of "representatives" from the ---

Q I am suggesting Steele and Tungstall did not hold that the employee may go to court on a breach of a collective bargaining contract in a suit against the employer

A I don't know whether ---

Q Those cases may get you into court on a claim of fair representation against the union.

A I can't remember whether Mr. Justice White was on the Court when Conley against Gibson was decided, but the respondents here never answered and never attempted an answer as to the significance of footnote four in Conley against Gibson.

It is conceivable, I suppose, that some of the members of the Court who signed that unanimous o opinion might not have seen what that footnote was clearly was saying. I don't think that is true. That footnote overrules the case of Hayes against Union Pacific Railroad. It says it was decided incorrectly.

There was only one question in Hayes against the Union Pacific and that was a case against the union and the

Q Let us get Steele and Tunstall clear first. Neither of those would get you into court against the employer; is that right?

A I think they would, based on their language. They are certainly distinguishable on their facts as far as the union being present.

Q They said there wasn't any remedy before the Board because it was a suit againt the union.

A That is one thing they said.

Q It is very critical, isn't it?

A I think it is one critical point of those decisions, but I do think that they are both not just susceptible by a sweeping argument to conclude from it that in cases where invidious discrimination such as racial discrimination is involved, then the doors of the Court are opened. I think they are susceptable to that without stretching it beyond the opinion, beyond what they say.

Of course, those cases preceded the Conley Case and Hayes Case against the Union Pacific. That was purely and simply a case wherethe employees were asking for an interpretation of the collective bargaining agreement which we conced we are asking for, and the company was the prime defendant, and it was named Union Pacific Railroad Company.

This court held in that case where the charge was collusive discrimination, it was just like this one, unanimously,

that that case was decided wrong.

Now, if the Court meant that as I think they did, then they were saying as I read that case that in all cases -- now, I may not be able to prove this. I am asking for the opportunity to prove it -- just the opportunity to prove that this union representing them and this company got together at their expense, and if I can prove that, and if any plaintiff similarly situated can make a charge like this and make it stick, then I submit under the footenote four, Conley against Gibson, then they should have that right and the doors of the Court should be open.

In Vaca against Sipes, there were three separate viewpoints expressed. Mr. Justice Black adhered to his dissent in Maddox and while I might personally agree with Mr. Justice Black's position in that case, the case should be reversed, I think, on the reasoning of the majority as expressed by Mr. Justice White.

I don't believe that the concurring opinion of Mr. Justice Fortas, which was joined in by Mr. Justice Harlan -- and I have forgotten which other of the Court joined in him -- doesn't deal with the issues in this case, but the majority said the following things in Vaca.

Q Which case?

A Vaca against Sipes. I have the lawyers' Edition 17, Law Edition 2nd 842.

Q 386 U.S.

A "The Preemption Doctrine, however, has never been rigidly applied to cases where it could not be inferred that Congress intended exclusive jurisdiction to lie with the NLRB."

This lies with the NLRB, but I think that case fits the NARB. While these exceptions in no way underline the preemption rule where applicable, theydemonstrate the presumption over a given class of cases must depend upon the particular interests being asserted and the effect upon the administration of national labor policies of current judicial and administrative remedies.

"It is not applicable to cases involving alleged breaches of the union's duty of fair representation," which I think applies here.

"It can be doubted whether the Board brings substantially greater expertise on these problems than do the courts which have been engaged in this type of review since the Steele decision.

"In addition to the above considerations, the unique interests served by the duty of fair representation doctrine have a profound effect, in our opinion, on the applicability of the presumption rule to this class of cases."

The Court recognized in Steele that the congressional grant of power to a union to act as exclusive collective

bargaining representative with its corresponding reduction in the individual rights of the employee so represented would raise grave constutional problems if unions were free to exercise this power to further racial discrimination."

Since that landmark duty, the decision has stood as a bulwark to prevent arbitrary union conduct against individuals stripped of redress of the provisions of Federal labor law.

"However, because these contractual remedies have been devised and often controlled by the employer, they may well prove unsatisfactory and unworkable for the individual grieving. An obvious situation in which the employee should not be limited is in the exclusive remedial procedures and when the document of the employer amounts to a repudiation of these contractual procedures." We say repudiation.

I reserve the balance of my time.

MR. CHIEF JUSTICE WARREN: Mr. Fisher.

ORAL ARGUMENT OF DONALD W. FISHER, ESQ.

ON BEHALF OF RESPONDENTS

MR. FISHER: Mr. Chief Justice, and may it please the Court, at the beginning of my address, I should like to point out first of all that this is not a Civil Rights Act suit and point out as the court below pointed out in the memorandum opinion that substantially the same plaintiffs have alleged a violation of their civil rights under Title 7 and that particular matter is being processed at the present time in the Dent

Case to which reference was made inthe Look article commented upon by Mr. Acker.

So any possible unfair employment practices which have been committed against these individuals, and I do not at all concede or intimate that any were committed, is in the process of litigation in the lower courts at the present time and has no real connection with the instant case. The instant case is a Railway Labor Act case.

Q Under Title 7 of the Civil Rights Act, can the union be made a defendant?

A The union was made a defendant in that proceeding, sir.

Q In addition to the employer?

A Yes, sir.

Q The group of the petitioners involved is a racially mixed group, as Mr. Ackerman pointed out. There are I believe, eight Negro members of the group and six white members of the group. So it is not on the surface a normal type of racial discrimination case where all of the members are members of a minority racial or religious group.

The Brotherhood and the Carrier, and I am speaking in this instance for both of them, holds no belief for racial discrimination in any form. The Brotherhood and the Carrier concede that no contract or arrangment which makes invidious discriminations or hostile discrimations based on race, color

creed, national origin should be or could be countenanced and that is not the issue in the case in its present posture.

The question involved is whether the plaintiffs pleaded a sufficient attempt to exhaust admistrative contractual remedies to allow them to remain in court. The case has an interesting parallel to the Court's decision in Vaca v. Sipes. In Vaca v. Sipes, the union alone, the Court will recall, was named in a law suit, but in the course of its opinion, the court indicated that perhaps the employer should have been joined in that particular action because, in fact, both the employer and the union had interests and could be adversely affected by the nature of the complaint.

Now, in Vaca v. Sipes, which was not a case arising under the Railway Labor Act, the claim against the employer for breach of a collective bargaining contract, for wrongful discharge, if youwill, was a legally cognizable claim. It was a judiciable claim and the claim against the union for duty of fair representation was a legally cognizable claim, so this court quite properly held the two could perhaps in future suits, subsequent to Vaca, should be joined together in one action.

But in the present case, the claim of the employee against the carrier for violation of his employment rights as embodied in a collective bargaining agreement and perhaps in customs and practices has been uniformally held by this

Cour for a number of years to be nonjudiciable. This claim under no stretch of the imagine can be combined with a claim against the union for alleged breach of the duty of fair representation because, as Mr. Justice White indicated in some of his questions, the matter must be submitted before the National Railroad Adjustment Board.

Q Mr. Fisher, is the Railway Adjustment Board still divided equally between railroad and Brotherhood?

A Yes, sir.

Q In this case, do they not allege that there has been cooperation between the Brotherhood and the railroads?

A Not at the level, Mr. Justice, at which the selections to the National Adjustment Board are made.

Q But they do allege they are working together against their best interests, do they not?

A Yes, the allegation is ---

Q Then I have three short questions. If Congress adopted an act which says if you and I have a dispute, you shall be the sole arbiter as to which one is right, would that be due process?

A I would not believe it would be, sir.

Q If Congress passed an act and said that if I had a dispute with you and somebody else, then the two of you would be the final arbiters as to which side was right; would that be due process?

A The two of us?

Q Yes.

A That is not as clear as the first answer. I think there would be some question of constitutionality.

Q What is the difference between that and this situation?

A The difference between that situation and this situation is at the highest level, the carrier group and the union groups appoint individuals who are designated by Federal statute to act as arbitrators.

This Court has said thatthe National Railroad Adjustment procedure is compulsory arbitration, and I believe it would be indeed presumptuous to assume that the arbitrators who are appointed -- it is true they are appointed by a carrier group a high level carrier group and a high level union group who would not discharge their duties under law the same as all citizens.

Perhaps I am getting mixed in my syntax. I think the presumptions certainly would be the carrier members and the labor members abide by the law. Do not hostile or invidious racial discrimination bring forth a correct constructive application of railroad bargaining agreements?

As a matter of fact, I think it has been recognized by this court that miscarriages of justice will probably result if judges who are not experts in railroad matters and are not familiar with railroad parlance should attempt to interpret

these agreements and customs and practices that also are embodied in the agreement.

Q How do you get around Steele? It seems to me this kind of remedy before the Board is not the kind of remedy that has to be exhausted because of the factors that Mr. Justice Marshall mentioned and others.

In Steele the defense was there. They had not exhausted the remedies and the Court has just said that that remedy is not much of a remedy when this great charge of racial discrimination is made. Has that case ever been modified so far as you know?

A No, sir. The Steele case was not a case involving a claim for an interpretation of rights under an agreement. That case deposited an illegal agreement. On its face, it was discriminatory against the Negro firemen who were classified as "non-promotable."

Therefore, there was not question for the Adjustment Board, no question of interpretation. The contract was simply nonmaintainable and the suit ---

Q Do you mean that the Court wasted its time talking about this remedy in ther terms that it did?

A No, sir, Mr. Justice White.

Q They took it seriously?

A The Court in the Steele case, I believe, said that this was not a matter that was to be heard before the

the Adjustment Board because the hostile discrimination against these individuals engaged in by the union could not be remedied before the Adjustment Board, and that was the suit which established, as I understand it, the so-called "Civil Action for Breach of the Duty of Fair Representation."

I concede on behalf of the Brotherhood that the Brotherhood is amenable to suit, not under the terms of this collective bargaining contract which is to be construed exclusively by the Adjustment Board, but is amenable to suit on the theory that it failed to accord the plaintiffs their right of fair representation, and I think this case raises the question whether a plaintiff who is a railroad employee and is represented by the Brotherhood and is also a member of the Brotherhood, as in the Steele case, the Negro firemen were not members of the Brotherhood nor were they eligible to be members of the Brotherhood.

But in this case the plaintiffs are and are conceded to be in the pleadings to be members of the Brotherhood. I think the question arises whether they do not have the same duty as other members of the Brotherhood to attempt to invoke the procedures under the union constitution to, in other words, require the Brotherhood to accord them their due rights of representation.

I think this is very similar to the problem in Conley versus Gibson but except in Conley versus Gibson the

question whether those particular employees who were in the clerks craft or class had any union remedies to exhaust, and I think, as a matter of fact, such as they are related in the Conley v. Gibson decision that those clerks were not members of the Brotherhood.

In any event, the question of their need to exhaust remedies under the union constituion was not discussed and not decided. I think that is the question for the Court to decide here.

Q In the internal constitutional remedy? You don't want to talk any more about the National Railway Adjustment Board?

A No, what I say about the Railway Adjustment Board is that for a vindication of their rights of seniority and their contract rights as railroad employees, their rights under the contract and customs and practices that tyhat is a matter solely and exclusively within the jurisdiction of the National Railroad Adjustment Board, and this has been held many, many times.

There are no exceptions to that rule except in the one instance when an employee accepts a discharge as final, the Moore v. Illinois Central exception, and then attempts to sue the carrier for damages only.

Q What does Hayes hold?

A I must say I am unable to give a description of

the Hayes case. I have prepared many, many cases, but I cannot at this time state exactly what Hayes held.

Q Well, Hayes was a suit that charged discrimination against Negro employees much as here, in the enforcement of a collective bargaining contract.

It was held by a Court of Appeals by reasons of provisions of the Railway Adjustment Board that the action did not lie in the District Court.

A Yes.

Q In this court, footnote four disapproved that holding in Conley v. Gibson?

A As I interpreted that, it means the union is amenable to suit as was the case in Conley v. Gibson to require the union to act on behalf of the employee because in Conley v. Gibson, the particular breach of the duty of fair representation was alleged to be that the Brotherhood would process grievances that were submitted by white members of the craft but refused simply because of race to process similar grievances, because of Negro members of the craft.

The Court's decision in Conley stated, that if this were proven at trial to be a breach of duty of fair representation, then the Brotherhood would be required to process grievances, and I think if there were no contrary information to the effect that that were wrong and that should have been overruled---

Q But Hayes actually was a suit against the railroad. There was a charge of discrimination by the railroad against these union members in the making of the union assignments for promotions. That is precisely the same sort of thing we have here, isn't it?

Here, as I understand it, this allegation is made in this case as a conclusive agreement between the railroad and the union, isn't it?

A Not as to the agreement.

Q Hayes, again, seems to only have been against the railroad and not also against the union. Does that make a difference?

A Again, Mr. Justice Brennan, I am sorry; I can't discuss the Hayes case in the detail I should.

Q It is only two paragraphs long. Do you think the significance of the footnote 4 only goes to the action there involved in Conley and would breach the fair representation against the union?

A Yes, Conley was limited to the claim that the union failed to accord these Negro members of the clerks craft with the carrier their fair representation, and the Court found on the basis of the allegations made that this would be true.

Q Well, my difficulty is that I have difficulty seeing why Hayes bore at all on an action for breach of the

obligation to accord fair representation only in an action against the railroad.

Q And I would suppose that Hayes should have been obviously reversed under Tunstall.

It may well have been if the contract was clearly discriminatory.

Q But Tunstall was clearly a claim in the contract but not a negotiation of it, and Tunstall said that there was -- you just can't get in court any time you want to enforce the contract, but if you also allege a breach in fair representation and racial discrimination that you can come to Court, and that was stated in Tunstall

A In the Convey v. Gibson case, ithas indicated that the breach of the duty that we are talking about, I think, in part, the fair representation is a breach of duty on the part of the union, a breach of contract, when you say interpretation of contact. If a carrier refuses to accord a group of its employees certain promotional rights, that is a breach of contract.

Q But Tunstall went on to say that in the remedy of the employer before the Railroad Adjustment Board, the remedy was not adequate because of the make-up of both of them.

A I am not aware that the Supreme Court in those cases held that the Board was not a fair tribunal or a proper

tribunal to bring a contract claim.

I state to the Court that it is clear that if the contract is illegal and there is no real debate or there is no doubt that the contract is an illegal and discriminatory contract. Then there is in fact nothing for the Adjustment Board to interpret or to construe.

Q As I read Hayes, and I know you have not seen it yet---

A I have seen the case.

Q That was an action charging the railroads with the discriminatory application in this matter of seniority and promotion which stemmed from the collective bargaining agreement, and the Court of Appeals in that case said there is an adequate remedy before the Board and the Court, as I read footnote 4, disapproved that holding.

In your case, I do not see that it happens to involve allegation of discrimination between the railroad and the union, but I don't see that footnote 4 makes that inapplicable in your case.

A In the Conley v. Gibson case, that dealt with the duty of the railroad to press the grievance when they were asked to press a grievance. When the grievance was filed, the Brotherhood refused to press it, and they did it because of race, and this Court held that that was a duty, a violation of duty of fair representation. We don't dispute

that. We say the question raised here, even though there may arguably be an allegation that the Brotherhood refused to act on behalf of these plaintiffs in a proper manner, since they were members of the union, since they didn't have the duty which by analogy we can find in Section 101(A)(4) or 411(A)(4) of the Landrum-Griffin Act, the duty to attempt to get action without suing the union, by the same token, we say when the contract is admitted to be a proper contract, the contract is not discriminatory, the contract is not being attacked, but the railroad is breaching the contract and the union is concluding with the railroad in the breach of this agreement; that, however, it is not at all clear that this contract gives them the rights as helpers to be promoted to carmen as against the claim of apprentices to bepromoted to carmen, and this is a matter which involves the expertise of the National Railroad Adjustment Board.

Q What expertise does the Railroad Adjustment Board have to find to determine whether a man is being discriminated against because of his race?

A That is the issue which I think is justiciable in the courts. We concede that is a legal justiciable claim whether he is legally being discriminated against because of his race.

To the extent that he is suing the union for discriminating against him and is a member of the union, he

should sttempt to exhaust his union remedy. That is our position. He made no attempt, and it is clear from the pleading that both in the original pleading and in the amended pleading---

Q Is there anything in the procedure that will give him compensation for what has been done to him in the past?

A Pardon?

Q There is no grievance procedure or internal Brotherhood procedures that would give him damages.

A Not damages but the Adjustment Board grants back pay.

Q I for one have difficulty in jumping from the union to the Adjustment Board.

A There is no such jumping. The claim against the union is not a claim destined for resolution by the Adjustment Board. We concede that.

Q My point is why most of your argument, as I get it, is the assumption of what they cannot prove but the point before us is whether they shall be given an opportunity to try to prove that there has b en collusion. That is all they are asking for here.

A Yes, but we say also as a member of an association before they attempt to sue the association for a possible act of misfeasance on the part of a local agent

that it is proper and it is so recognized under Federal law as mete and proper to attempt to get this matter resolved internally within the organization. If they had done this the first time they were aware of any discrimination, it is entirely possible that the discrimination would have been eliminated, but they never filed any grievance, any claim within the confines of the Brotherhood to the effect that officials at Birmingham were dicriminating against them. We say that that type of exhaustion and remedy under the union constitution is necessary under law and it is necessary in fairness to the union because the union can be held liable for the action of its agent, but it should have some opportunity to take corrective action.

Q Would you say if they had pursued those remedies and stopped there they would be properly here?

A Yes, if they had attempted, if they had made a fair, bone fide reasonable attempt which they did not make and which they cancede they did not make and found they were getting no relief, I think pursuant to the law as it exists today they might have then turned to the courts and sought relief, but they made no attempts.

Q Without going to the Board?

A The remedy I am talking about is the remedy against the union, the remedy that they sought in Conley vs. Gibson.

Q I asked if they would be proper in this case, not whatever they are asking for. Would they be proper here? Would you be out then so far as this case is concerned?

A Not in respect to their claim for application or interpretation of the collective bargaining agreement. That is a matter to the question of whether they were actually entitled to be upgraded to carmen or whether apprentices were improperly upgraded instead of them which is a question that, under all of the decisions of this Court, it seems to me, must be resolved by the National Railroad Adjustment Board.

Q Then your answer would be that even though they had gone through all of the grievance procedures, if they wanted the relief they are seeking in this case, they must also have gone to the arbitration board?

A Yes. The relief under the contract is available fore the adjustment board. The relief against the union and the relief for breach of the duty, the relief for racial discrimination, for breach of the duty of fair representation is a claim which is judicially cognizable for which recovery may be made after proper proof, but our position here, again, is that there is this duty, this preliminary duty which is, I think, well-embodied in Federal law to attempt to exhaust the remedies available to them, and they concede -- I do want to emphasize to the Court that they at no point ever denied that there are remedies. They refused in their pleading

to state that the contract remedies are and what the union constitutional remedies are, but they have taken a rather cavalier attitude toward these remedies and say there is no need for us to attempt to exhaust them because this is a racial case. I presume we are immune from that requirement which is presumably imposed upon all other persons.

Q How long would it normally take them to go through the grievance procedure?

A Not very long.

Q How long?

A Are you talking about the railroad agreement?

Q I am talking about the grievance in this case.

A The grievance is two-fold.

Q Let's take both of them together.

A Both of them together, I believe they could have processed the grievances fully in less than two years.

Q Less than two years?

A Less than two years, yes, sir.

Q If they had to go to the arbitration board after that to get the relief sought, how long would it take to go through there?

A I was assuming the arbitration board decision would also be handed down, Mr. Chief Justice. I think the entire matter could have been processed on the property to the dadjustment board and also the claim within the union's

tribunals to make the union do what they say the union wouldn't do in less than two years.

Q I thought counsel said something about three years before the board, that there was a concession to that effect.

A I said less than three years but my co-counsel for the carrier pointed out a report which I then read and the backlog is less than a year on the second division. I am of the opinion---

Q You say three years.

A I say now two years or less the entire matter could have been processed through all of the tribunals involved.

Q Through the courts, after the board to the court?

A Decision of the Board is final and binding except certain limited grounds of review, so unless those grounds are available---

Q If they are available?

A If they are available, I would hate to say what the stateof the docket in Birmingham would be. They would be longer.

MR. CHIEF JUSTICE WARREN: The Court is in recess until 12:30.

[Whereppon, at 12:00 the Court was recessed, to reconvene at 12:30 of the same date.]

AFTERNOON SESSION

12:30 p.m.

MR. CHIEF JUSTICE WARREN: Mr. Fisher, you may continue your argument.

ORAL ARGUMENT OF DONALD W. FISHER (resumed)

ON BEHALF OF RESPONDENTS

MR. FISHER: Mr. Chief Justice, and may it please the court.

To go back to the point which I left at the noon recess, in talking about the Tunstall case and the Steele case, it seems to me that the carrier and the Brotherhood again say that regardless of who the parties were in these cases, the cases involve the duty of a labor union to accord to minority members of a craft or class fair representation.

I think that is put in sharp outline by the opening statement of Chief Justice Stone, who said that the question of whether the Railway Labor Act imposes on a labor organization acting by authority of the statute as the exclusive bargaining representative of a craft or class of railway employees , the duty to represent all the employees of the craft without discrimination because of their race, and if so, whether the courts have jurisdiction to protect the minority of the craft or class from the violation of such obligation.

And to point out further, regardless of who the parties were, that the court also noted that there no differences

between the parties in the Field case or in the Tunstall case, for that matter, as to the interpretation of the contract on page 205 of the court's opinion, nor are there any differences as to the interpretation of contract which, by the act are committed to the jurisdiction of the Railroad Adjustment Board.

Now in the Tunstall case, it is true that it was a discriminatory application, that the union was the guilty party, the most guilty party that violated the duty of fair representation.

Now, again in Conley versus Gibson the thrust was against the union for refusing to process these grievances, and and we concede in this case that the union cannot discriminate. There is no problem in my mind about that -- this union cannot discriminate. I see my time is up.

MR. CHIEF JUSTICE WARREN: You may finish your statement, if you wish.

MR. FISHER: Thank you, Your Honor. I merely want to say this case prevents the question when you are suing the union for violation of that duty, and the plaintiff is a member, even though he is a Negro, he is a member of the union, doesn't he have the same obligation that other union members of the union have, of attempting to utilize his internal remedy, and the question of the interpretation of this contract. There is no conceded --

Q Why did the court say that the administrative remedy

was inadequate in Steele and in Tunstall -- they said that part of the reason was that it was not an unbiased tribunal, that both parties who were accused of discriminating against the plaintiff were sitting there deciding this dispute. That was part of the reason, was it not?

A. I think they did make that observation.

Q. If the union who was sitting on one side was so biased and so unreliable as not to furnish a decent administrative remedy, why would you suggest that the union would be unbiased and would furnish a suitable remedy inside the union?

A. Well, may I answer the question this way, Mr. Justice. The court observed in those days that the adjustment board would not permit individual plaintiffs to go before it. It said in over 400 cases --

Q. I understand that.

A. Let me attempt to answer it directly, then, if I may, and if I have not been direct.

In that case they were talking about the brief of the union, of its duty of fair representation. They said this is not the claim that should go to the adjustment board. I concede they perhaps said it would not be a fair tribunal in weighing the union's duty because it was a union appointed representative on the tribunal.

I am saying, and I hope I have been clear in this, that the question of contract interpretation, pure and simple,

is the only question that I believe is properly referable to the adjustment board. And I am conceding, with Justice Marshall and the other Justices on the court that the claim for breach of the duty to treat members of a craft or class fairly is a claim that is cognizable in the courts.

I think on that claim, which is a judicially cognizable claim, since he is a member of the union, suing his union,he should make some attempt to exhaust his remedies. If he had done that years ago he might have had immediate and instantaneous relief. He made no attempt and admits that he made no attempt to exhaust his remedies.

MR. CHIEF JUSTICE WARREN: Thank you.

MR. FISHER: Thank you.

MR. ACKER: Mr. Chief Justice and may it please the court, just a couple of remarks. As I understand Mr. Fisher, he is saying that these plaintiffs must have gone three separate routes and that they must fragment their claim. They must take their union claim to the union, and their claim against the company to the company grievance machinery and thereafter to the Railroad Adjustment Board.

I do not think that could be done in two years. Whether you did it simultaneously or not, at any rate he is requiring a fragmentation. He is saying there is no right at any time anywhere to sue the union and the company together before one tribunal.

That ground was not in the motion to dismiss. They do not say in the motion to dismiss that you have no right in this court to sue these two entities together. They say that here, as to footnote 4 of Conley against Gibson I think what Mr. Fisher is saying is that footnote 4 went further than the court needed to go to decide that particular case and therefore it is dictum, and he might be right there.

But I do think that what the court said in that footnote 4 was carefully reasoned and was correct and should become the law in a case where very clearly that question that appeared in Hayes against Union Pacific is presented. There is no question about that in this case.

One other thing --

MR. CHIEF JUSTICE WARREN: Make it brief.

MR. ACKER: One other thing. The remark was made and was made in brief that Mr. Dent had availed himself of the remedy provided him -- or attempted to because he has been unsuccessful thus far -- remedy under the Civil Rights Act, section 64, in which I am not involved.

I will say only one thing more. This case here certainly should not rise or fall on what one of the petitioners here is doing in another case outside of the control of counsel in this case. But if Mr. Dent is successful there ultimately, after having been thrown out there as he was here, he will not be entitled under the Civil Rights Act to damages which is what

we are talking about when we talk about loss of seniority and job rights. We are talking about money.

Thank you.