In the

Supreme Court of the United States

EARL A. LOVE,

Petitioner,

and

UNITED STATES EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

and

THE UNITED STATES OF AMERICA,

Intervenors,

v.

THE PULLMAN COMPANY,

Respondent.

No. 70-5033

and

No. 70-37

Washington, D. C.
November 16, 1971

Pages 1 thru 44

HOOVER REPORTING COMPANY, INC.
Official Reporters
Washington, D. C.
546-6666

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EARL A. LOVE, Petitioner, and UNITED STATES EQUAL EMPLOYMENT OPPORTUNITY COMMISSION and THE UNITED STATES OF AMERICA, Intervenors, v. THE PULLMAN COMPANY, Respondent	:	No. 70-5033 and No. 70-37

Washington, D. C.
Tuesday, November 16, 1971

The above-entitled matters came on for argument at 1:58 o'clock, p.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM O. DOUGLAS, Associate Justice
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice

APPEARANCES:

HUGH J. MCCLEARN, ESQ., 1310 Denver Club Building, Denver, Colorado 80202 for the Petitioner, Earl A. Love

LAWRENCE G. WALLACE, ESQ., Deputy Solicitor General Department of Justice, Washington, D. C. 20530 Counsel for the Petitioners, United States of America and Equal Employment Opportunity Commission

EDWARD C. EPPICH, ESQ., 1908 United Bank Center, 1700 Broadway, Denver, Colorado 80202 Counsel for Respondent, The Pullman Company

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C O N T E N T S

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P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments in No. 37, United States against the Pullman Company and Love against the Pullman Company.

Mr. McClearn, you may proceed whenever you're ready.

ORAL ARGUMENT OF HUGH J. McCLEARN, ESQ.,
ON BEHALF OF THE PETITIONER, EARL A. LOVE

MR. MCCLEARN: Mr. Chief Justice, and may it please the Court:

This case is before this Court on writ of certiorari to the United States Court of Appeals for the Tenth Circuit, which affirmed, and then affirmed on rehearing the order of the United States District Court for the District of Colorado, dismissing Mr. Love's complaint against the Pullman Company, Judge Fahy dissenting from both Court of Appeals judgments.

The issue before this Court involves the interpretation of Section 706 of Title VII of the 1964 Civil Rights Act. This section of the Statute deals with the mechanics of lodging a charge of discrimination with the Equal Employment Opportunity Commission.

More specifically, it deals with the mechanical steps that one must take to lodge such a charge in a state that has its own Fair Employment Practices Act, and Colorado

does have such an Act, which makes discrimination in the terms and conditions of employment on the basis of race improper.

Mr. Love is a black man. His complaint in the district court was that he had been discriminated against in the terms and conditions of his employment by the Pullman Company because he was given a job classification of "porter in charge" where he performed the same functions as were performed by white people that were called "conductors" and yet he received substantially less pay for doing so.

He alleges that the only basis for the differentiation was race, and that this constituted a violation of Title VII. His complaint is that this discrimination was perpetrated against him every day he was employed by the Pullman Company because of the continuing existence of the discriminatory job classification and pay differential.

He first sought relief for this discriminatory condition in 1963 by approaching the Colorado Civil Rights Commission and, of course, at that time, there was no 1964 Civil Rights Act. The records of that contact are lost. However, he did what was required by the Colorado statute to initiate a complaint.

He returned to the Colorado Civil Rights Commission in 1965 and verbally reiterated his complaint. The Colorado Civil Rights Commission investigated his complaint in 1965

and they discussed the matter with the Pullman Company, but the only relief that the Colorado Civil Rights Commission offered Mr. Love was the opportunity to be reclassified as a conductor. But if he were to do that, he would lose all of his job seniority and it would have actually have resulted in his being laid off and being put out of work.

This relief was offered to him in a letter from the Colorado Civil Rights Commission that is dated July 30th, 1965 and to which he did not respond. Instead, on May 19th, 1966, he wrote a letter directly to the Equal Employment Opportunity Commission, complaining about this discriminatory classification and pay system, and that letter appears to have been received by the Equal Employment Opportunity Commission on May 23rd, 1966.

The Colorado Civil Rights Commission was advised by the Equal Employment Opportunity Commission that Mr. Love had lodged a complaint with it. The Colorado Civil Rights Commission responded by writing a letter to the Equal Employment Opportunity Commission specifically saying that they did not want to investigate Mr. Love's complaint waiving the sixty-day deferment period provided for in the statute and --

Q When would that have started to run, Mr. McClearn?

MR. MCCLEARN: Excuse me, sir?

Q When would that sixty-day period have started

to run?

MR. MCCLEARN: The aaaah -- the sixty-day period could have run from, I suppose, either the time when they received the complaint, or the time when they were advised of it, which would have been somewhere between May 23rd and the first of June, which is the date of the letter from the Colorado Civil Rights Commission to the Equal Employment Opportunity Commission.

Q Did it establish or fix any time limit for the reference by the Federal Commission to the State Commission?

MR. MCCLEARN: The statute provides that the Equal Employment Opportunity Commission can do nothing for sixty days --

Q That's what I'm trying to get at. Sixty days from what?

MR. MCCLEARN: The term of the statute is after the filing of a -- excuse me, the indication is that the EEOC can do nothing from the time when a charge is initiated with a state agency, and the last section of -- or, the last sentence in Section 706(b) indicates that all that need be done, under the Federal statute, is to send a letter to the state statute.

Q Is that this, "Shall be deemed to have been commenced for the purpose of this subsection at the time such statement is sent by registered mail to the appropriate

State or local authority"?

MR. MCCLEARN: That's my reference.

Q So it's from that time -- let's see, "statement is sent," I gather that means, what, mailed by the -- not when received --

MR. MCCLEARN: It would indicate when it was sent.

Q -- mailed by the EEOC?

MR. MCCLEARN: Or by the individual complainant, I suppose.

Q Mr. McClearn, to enable me to get this into focus, has there been any attempt by the petitioner to -- oh, secure his rights through the collective bargaining agent?

MR. MCCLEARN: There was none here, Justice Blackmun.

Q Am I correct in my impression that there have, however, been attempts of this kind by other petitioners in this same predicament?

MR. MCCLEARN: I'm not prepared to -- in this case or in related cases?

Q Oh, generally. The reason I ask is that I have the distinct impression -- I haven't checked it -- that we had litigation of this kind on the Court of Appeals on which I sat before, brought by just such petitioners against, well, the System Board, and Brotherhoods, and so forth.

MR. MCCLEARN: Well, in answer to that question, I

think there has been litigation, the Norman case from your old circuit, and I think the conclusion reached in those and other cases has been that that is not an exclusive remedy and that the Federal rights created by Title VII of the 1964 Act can be exercised regardless of whether or not an attempt is made to seek redress under collective bargaining agreements.

In answer to your specific question, here in this case there is no record that Mr. Love made any formal attempt under the collective bargaining agreement that he was working under as a porter. But the EEOC, after having been told by the Colorado Commission that the Colorado Commission did not want to proceed, went forward and put Mr. Love's charge on an official form which was sworn to on July 23rd, served that on the Pullman Company, which under regulations then and now in effect, had the right at that time to respond to the charge of discrimination that had been lodged with EEOC.

During the course of the next two years, the EEOC investigated, found probable cause, attempted to conciliate and, being unable to do so, on May 28th, 1968, Mr. Love filed this litigation.

Six months thereafter, on December 3rd, 1968, the Pullman Company moved to dismiss, and it is that motion to dismiss which was granted. Now --

Q What was the relief sought?

MR. MCCLEARN: The relief sought in the complaint in this case at that time, and still, is for a declaratory judgment terminating the differentiation and for back pay on behalf of Mr. Love and all those similarly situated.

Q There is a -- I see. I was wondering because it appears from the brief that Mr. Love voluntarily resigned from his employment with the Pullman Company in November of 1968.

MR. MCCLEARN: That is correct.

Q And I wondered if by any chance the issues in this case have become moot because of that.

MR. MCCLEARN: We don't believe that they are, because of the class allegation as well as the back pay relief which has been sought.

Now, the Tenth Circuit's judgment on rehearing, quite properly in our judgment, determined that the complaints that Mr. Love had made about events that occurred prior to July 2nd, 1965, the effective date of this Act, were not properly considered in this case, and its judgment on rehearing therefore is quite different, and on quite different grounds than its original judgment in this case or the judgment of the district court in this case.

The Court of Appeals ruling on rehearing may be summarized as follows: Because Colorado statutes prohibit discrimination in employment, based on race, 706(b) says

that no charge may be filed with the EEOC until sixty days after a proceeding under the Colorado statute have been initiated or such earlier time as such proceeding is terminated.

Mr. Love did not go to the Colorado agency in 1966. He went directly to the Equal Employment Opportunity Commission, as many others do. The EEOC then referred his complaint to the Colorado agency and was specifically advised by it that Colorado wanted nothing further to do with it.

When Mr. Love's complaint was rejected by the EEOC -- excuse me, by the Colorado Civil Rights Commission, the EEOC then commenced to process the charge which it already physically had in its possession.

Q In the form of that prior complaint.

MR. MCCLEARN: The complaint which he -- the letter which he sent to it on May 19th.

Q Which they treated as a charge although it had been filed with it before going to the Colorado body.

MR. MCCLEARN: That's correct.

The opinion on rehearing says that the EEOC cannot consider the letter of May 19th as the basis of a charge, because it was physically received by the EEOC prior to the time when any approach had been made to the Colorado Civil Rights Commission. The --

Q It just ends up, in effect, saying "no complaint

is pending --"

MR. MCCLEARN: That's right.

Q -- with the EEOC.

MR. MCCLEARN: That's correct.

Q There must be a complaint before the EEOC can act, and that ends the case.

MR. MCCLEARN: That's correct.

Q And that the complaint must be by the aggrieved employee.

MR. MCCLEARN: Well, the opinion can be read to the effect that the referral of the complaint by the EEOC is not proper.

Q And that's tantamount to saying that the aggrieved employee must first invoke the state remedies, whatever the state commission is, before he may ever go to the Federal agency.

MR. MCCLEARN: That's right -- that's right, and there's -- the indication is that he, physically, personally, might do it.

Q Yes.

MR. MCCLEARN: The decision thus requires that one administrative agency, the EEOC, which is receiving complaints from the most unsophisticated of our citizens, must ascertain at the time the charge is received by it, either from the complainant or from a state administrative

agency, whether or not a complaint has been lodged with that state agency.

Q And, I suppose, what it is supposed to do then if it finds there has not been, and it has to return the complaint to the employee and say, "You have to go to the state agency before you can come to us."

MR. MCCLEARN: That's correct, and he also is then advised that he can come back, but he has to do so within very prescribed time limits.

Q And what's that? Is that sixty days?

MR. MCCLEARN: That's a -- would be thirty days. In other words, thirty days after the termination of the state proceeding is the time.

Q Well, now, state proceeding may go on indefinitely.

MR. MCLEARN: Interminably. Forgive me, Your Honor. The thirty days would be a minimum time, and sixty days after the state proceedings have commenced, he may then come back.

Q In other words, sixty days after the employee has gone to the state agency, if he has not had a determination, he goes to the EEOC.

MR. MCCLEARN: That is correct. The lower courts have had trouble with that. We point out two things, or I do: We are dealing with the mechanical steps that people who

believe they've been discriminated against must follow. We are dealing in a --

Q Mr. McClearn, what is your position? How do you think it should be constituted?

MR. MCCLEARN: Well, we feel that Title VII creates Federal rights which are to be enforced by a Federal agency in United States District Courts. The policy behind 706(b), the Congressional policy, is to give the states the first crack at resolving those problems. The --

Q Is your position that, it doesn't matter. Let them come to the Federal agency. The Federal agency shouldn't move, but invoke the state agencies.

MR. MCCLEARN: That's right. As long as --

Q And he ought not be denied it merely because he didn't go to the state agency first.

MR. MCCLEARN: As long as the state agency has an opportunity to rectify the claim of discrimination --

Q Is it your position that the Federal agency gives the state agency that opportunity?

MR. MCCLEARN: That's our position.

Q By transferring the matter to it.

MR. MCCLEARN: And the provision --

Q You also say that he -- and you must claim, must say that he doesn't, after he finishes with the state agency, have to file a new claim with the EEOC.

MR. MCCLEARN: We'd say that was a useless act. They already have the claim in their file.

Q Yes.

MR. MCCLEARN: That physical document.

Q Well, the Court of Appeals said the EEOC could not treat their prior claim as a current claim.

MR. MCCLEARN: We feel --

Q Are you saying that the traditional or conventional exhaustion standards cannot be applied to this kind of situation? Exhaustion of state remedies?

MR. MCCLEARN: Yes. We do not believe they -- the a -- Federal statute creates Federal rights. The policy is to give the state an opportunity to intercede, but regardless of whether they do or don't --

Q It's just a difference matter.

MR. MCCLEARN: That's right. The state -- aaah -- whether or not the state takes action affirmatively or not is just in --

Q This is more than a difference matter, though. The Federal agency has to give the state agency, if it's appropriate for the Federal agency to accept the employee's complaint, it may not act on it until it has given the state agency an opportunity to act on it, and there's a sixty-day period, and it's only if the state agency does nothing within sixty days that the Federal agency may then

move in that.

MR. MCCLEARN: That is correct, and for that period of time, you are quite right, that --

Q Well, that Congressionally required exhaustion of state remedy.

Q To that extent.

MR. MCCLEARN: Well, Mr. Justice White, the deferred period is built into the statute, but whether or not the state acts on the complaint is immaterial.

Q I know, but it's Congressionally required exhaustion for sixty days, anyway.

MR. MCCLEARN: Aaah -- to that extent, I'd agree with that statement.

MR. CHIEF JUSTICE BURGER: Mr. Wallace.

ORAL ARGUMENT OF LAWRENCE G. WALLACE, ESQ.,
ON BEHALF OF PETITIONERS UNITED STATES OF AMERICA
AND EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

MR. WALLACE: Thank you, Mr. Chief Justice, and may it please the Court:

Title VII of the 1964 Act was a product of legislative compromise and accommodation in which Congress stressed voluntary compliance by assigning the Equal Employment Opportunity Commission the role of attempting conciliation that also conferred a right on the complainant to sue in a Federal Court if the Commission's efforts were unsuccessful,

and this was layered over by another legislative compromise to give state and local employment commissions, where they exist, an opportunity to attempt first to resolve the complaint locally while preserving, with reasonable promptness, the complainant's Federal remedies. And one result of these compromises is the uncommonly complex procedural provisions of Section 706, set forth in our brief on pages 32 through 35, and the Act's intended beneficiaries, as has already been said, are lay working men and women, many of whom are unlettered and uncounseled in attempting to pursue these remedies.

Accordingly, the Equal Employment Opportunity Commission and most Federal courts have from the outset taken the view that the procedural requirements of Section 706 should be applied so as to accomplish in substance the various policies of the Federal statute, but not in a way that imposes unnecessary obstacles to the ultimate determination of the merits of complaints made in good faith.

The problem of this application has arisen in various contexts, discussed in our brief. Some of these arose because the Equal Employment Opportunity Commission which, under its appropriation, has never been generously staffed and still is not, quickly developed a sizeable backlog of cases which is still growing.

There have been imperfections and some inconsistencies

in the Commission's application of these procedural requirements, particularly in the early years. But we believe its basic approach has been a sound one. Indeed, the Act itself specifically authorizes the Commission to adopt procedural regulations. This is in Section 713(a), which is set forth on page 35 of our brief, and the adoption of such regulations is particularly appropriate with respect to the procedural matter involved here, the receipt of a complaint initially by the EEOC when there is a state agency to whom it must first be referred, because the Act, despite the detail of procedural complexity, does not speak to the question of what the EEOC should do when it receives the complaint initially in such a situation.

And so, bearing in mind all of the policies of the Act, especially the overall policy of preserving a Federal remedy on the merits, ultimately, in Federal Court, the EEOC has adopted this policy of referring such complaints to the appropriate state agency under regulations duly adopted.

The regulation that was in effect at the time of this complaint was a generally-worded regulation set forth on page 38 of our brief. The regulation has since been refined and elaborated, and the new regulation begins on page 36 of our brief. I think it's worthwhile to look for just a moment on page 36 at subsection (a) of that regulation, in which the Commission recites some of the reasoning behind

the regulation, particularly in the last two sentences of that subsection. The Commission stated:

> "It is the experience of the Commission that because of the complexities of the present procedures, persons who seek the aid of the Commission are often confused and even risk loss of protection of the Act. Accordingly, it is the intent of the Commission to simplify filing procedures for parties in deferral States and localities, and thereby avoid the accidental forfeiture of important Federal rights."

But in the previous part of the paragraph, the Commission also recites that its purpose is to encourage the maximum degree of effectiveness in State and local agencies, also in accordance with the Congressional intent under Section 706.

Now, we believe that this practice which the Commission has developed is a valid procedure under the Act and under the Commission's regulations, both those existing at the time, and the present regulations.

The Court of Appeals -- the majority of the Court of Appeals believed, in its words, "That the Commission could not manipulate the filing dates in this fashion." This meant that there were two possible defects, as the majority of the Court of Appeals saw it. I think this has already been brought out. One would be that, rather than have the

Commission refer the complaint to the Colorado agency, Mr. Love should have been told to file a complaint himself with the Colorado agency, when the Commission received the complaint.

We hardly see that this would make a substantial difference in the case. The Colorado agency quickly indicated that it was waiving its jurisdiction, having previously failed to satisfy Mr. Love.

The other possible defect, under the majority opinion of the Court of Appeals, was that after the Commission received word from the Colorado agency that it was waiving its jurisdiction, it should have asked Mr. Love to file another formal complaint within thirty days, even though he had just --

Q Mr. Wallace, what is the reference, "manipulate the filing date"?

MR. WALLACE: That was what the majority of the Court of Appeals complained of.

Q Well, what was the conduct? I don't quite understand.

MR. WALLACE: Well, we don't quite understand the opinion ourselves. As far as we can see, it's referring to one of these two possible defects, treating the letter previously received as having been filed after the waiver of jurisdiction apparently was a manipulation of the filing

date, in the view of the majority. That letter was received only a week prior to word from the Colorado Commission that it was waiving its jurisdiction, so that it hardly seems a very serious question whether Mr. Love still would want EEOC to proceed.

So we believe the procedure that was followed was a valid procedure, and honored all of the policies of the Act, including --

Q Excuse me, will you just bring me up to date? When is it that the employee, after EEOC finally has acted on his case, may go into Federal Court?

MR. WALLACE: Thirty days after he receives word from EEOC.

Q Thirty days.

MR. WALLACE: That's right. And we also specify in our brief that, even if the EEOC procedure is not valid, we still believe that under the policy of the Federal Act EEOC's mistake should not bar a relief for the employee, as we have elaborated, both in this brief and in the brief we filed last term in the Crosslin case at the invitation of the Court.

I'd like to reserve the balance of my time for rebuttal.

MR. CHIEF JUSTICE BURGER: Mr. Eppich.

ORAL ARGUMENT OF EDWARD C. EPPICH, ESQ.,

ON BEHALF OF THE PULLMAN COMPANY, RESPONDENT

MR. EPPICH: Mr. Chief Justice, and may it please the Court:

I think it's important, to begin with, to straighten out the sequence of filing requirements of Section 706 and the time requirements of Section 706.

The Act is quite clear, for it states that no charge may be filed with EEOC until the state proceeding has commenced. That's what the Act says, and there is, just in my humble opinion, no room for construction otherwise.

In this particular case, Mr. Love at no time filed a written charge with the Colorado State Commission, nor at any time was a written charge filed on Mr. Love's behalf.

Initially, and in the trial court, we, because the state did listen to Mr. Love's oral claim, and because the state did take some affirmative action, and did terminate the proceedings, the trial court decided yes, he had complied with commencing state proceedings as required by the Act, but we must then look at the timeliness requirements of Section 706(d) which state in equally unequivocal terms that the man must then file with EEOC within thirty days after the state has terminated proceedings, or within two hundred ten days after the alleged unlawful employment practice has occurred, whichever is earlier. It's just that simple, just that clear.

In that posture, it went up to the Tenth Circuit, and the Tenth Circuit affirmed on the timeliness issue. At that point, however, the Equal Employment Opportunities Commission interjected into the case their deferral regulation, which is set forth in their brief and also in our brief, and tried to justify their procedures utilized in this case based upon a 1968 regulation which, of course, wasn't in force at the time that this particular matter transpired.

It was at that point that Judge Sass? made the comments about the deferral regulations.

Then, on rehearing, it was pointed out to the court that Title VII of the Civil Rights Act did not become effective until July 2, 1965. Accordingly, the matters before the state in 1965 had to antedate the jurisdiction of the Equal Employment Opportunities Commission and, hence, they could not be the basis on determining the timeliness and hence the basis for the decision.

It was at this point that we got into the "manipulated filing dates," and the "manipulated procedures," because this record is very clear, and the trial court so found, that there is one filing date in this case, and that is May 23, 1966. It was not until the Appellant arguments that the Equal Employment Opportunities Commission decided to say, "Well, we'll use another filing date." This, the Tenth Circuit did not think was proper.

With that thought in mind, gentlemen, I would like to --

Q Mr. Eppich, somewhere along the line, you will tell us how Pullman is prejudiced, I take it.

MR. EPPICH: Aaaah -- at this time I cannot, Your Honor. There has been no hearing on the waiver. Now, as far as prejudice is concerned, we certainly have the lapse of time. But other than that, no, I can't really say the Pullman Company has been prejudiced. But I don't think we are talking about that. I think what we are talking about here is subject matter jurisdiction.

Granted, there is no question that racial discrimination is invidious, and we're not questioning that at all. What we are saying is that, prior to the Civil Rights Act of 1965, as wrongful as discrimination might have been, it was not an actionable wrong, at least not in the Federal courts.

Congress created a statutory right, and within that statuatory right, Congress imposed certain limitations and certain guidelines, and certain things that had to be done. And gentlemen, a reading of this Act, I implore upon you, can lead but to two conclusions. One is thou shalt go to the state first, and thou shalt thereafter go to the Equal Employment Opportunities Commission within the times therein prescribed. And failure to do that, sir, has been held each time, by each circuit court, to be a jurisdictional

deficiency.

Q Mr. Eppich, how long had the porters-in-charge been trying to get Pullman conductors' salaries?

MR. EPPICH: I can't answer the question, sir. I don't know.

Q World War I.

MR. EPPICH: I should imagine that far back, anyway.

Q At this time has the Pullman Company gotten around to it yet?

MR. EPPICH: The Pullman Company, sir, no longer has any porters or porters-in-charge, as the operations have been turned over to the government.

Q Maybe that's one way to solve it.

MR. EPPICH: Well, sir, I don't know why it was done, but -- aaah -- as far as I -- it sounds like a very technical situation, but it's not, gentlemen. Congress in the legislative history, albeit it is murky in some areas, is quite clear in one area, and that is that the states will have the initial opportunity to take care of these matters and resolve them at the local level. I don't think there can be any question about that.

Q Are you telling us that it's crystal clear, on the face of the statutes, that what Congress said was, "Employee, you go to the state agency if there is one. You

go within a certain time, and you get its determination within a certain time, or after a certain lapse of time. Then you start all over again before the Federal Commission. Unless you do those two things --"

MR. EPPICH: Yes, sir, I --

Q -- "then what happens in either agency, if they are adverse, is that you can't ever get any judicial relief."

MR. EPPICH: Uhhh -- yes, sir, that is what I am saying, that the Act is just that clear. Now, with one exception. As I understood Mr. Justice Brennan, the question was that, regardless of what the state did, you still could not go back to the Equal Opportunity Commission.

Q No, I didn't mean to put it that way.

MR. EPPICH: All right. That is not the case.

Q The way I meant to put it was, if you had to wait a certain length of time, I gather sixty days, after you go to the state agency.

MR. EPPICH: It can be either sixty days, or thirty days after the state has terminated its proceedings.

Q Well, in any event, whatever may be the time limit.

MR. EPPICH: Well, let me straighten this out for you. This is a little -- sorry --

Q Well, you tell me what you think, what you say

the statute says.

MR. EPPICH: All right. The statute says this, and I refer the Court to Section 706(b), where it says, "No charge may be filed." It's just that simple. "No charge may be filed" with the Equal Employment Opportunities Commission until the state proceeding has been commenced.

All right. Then it provides that -- for a sixty day --

Q That is commenced by the employee?

MR. EPPICH: Aaah -- this is an interesting question, sir. If it's not entirely clear, I would suggest this to you: when the Bill initially came out of the House and to the Senate, it contained the language, the express language that the charge could be filed by or on behalf of the person aggrieved. Now, the Senate, in the Dirksen-Mansfield Amendment to it, which eventually became the law, removed those words "on the individual's behalf," and just left in the words "filed by the individual."

Now, I'm not going to sit here and tell this Court that a lawyer couldn't file a charge with the Equal Employment Opportunity Commission or with the state. But, nevertheless, the Act does state that you will go to the state first. And then, there are very specific --

Q Well, certainly you say, though, that if he goes to the Federal Commission first, the Federal Commission

can't send it to the state.

MR. EPPICH: I do not say that, sir.

Q Oh, you do not.

MR. EPPICH: No, sir. I say that the Federal body cannot accept the charge for filing unless the man has been to the state first, because that's what the Act says.

Q Well, may the Federal body send it to the state body?

MR. EPPICH: I've no objection to that, sir. I certainly think they can, if they are acting solely in the capacity of a conduit. In other words, here's a misdirected complaint. It was sent to the wrong place. We're going to forward it on to the proper body. I have no question with that, no problem with that at all.

Q So now, at least it has to be before the state body first?

MR. EPPICH: No question about it, sir.

Q Now, how long do you say it has to be there before --

MR. EPPICH: Sixty days or thirty days, depending. It could be yearly.

Q And whatever that time is, then he has to file all over again with the Federal body. Is that right?

MR. EPPICH: Yes, sir.

Q Brand new, even though it's the identical

complaint.

MR. EPPICH: Or some further direction. Something from him to revive that which he previously -- prematurely did.

Q Well, according to you, he's never filed before. He doesn't need to file again because he's never filed.

MR. EPPICH: Sure, if he's never filed with the state, Mr. Justice White --

Q No, but I mean he's never filed a proper charge with the Federal authority because he filed it before he went to the state, actually.

MR. EPPICH: That is correct. However, I do not believe that he has to file an identical charge. I think that all that is required is that some direction be given by him to revive that charge. In other words, "Refer to my complaint, and let's get on it."

Q Now, Mr. Eppich, in this case, when he came back from the state, well, he didn't come back from the state --

MR. EPPICH: But I think, Your Honor --

Q He didn't come back from the state, but the Federal people revived the old charge, I take it. Is that right?

MR. EPPICH: It's not in the record that they did, sir.

Q Well, they started moving, anyway, didn't they?

MR. EPPICH: Yes, and as a matter of fact --

Q Well, that was something.

MR. EPPICH: Yes.

Q Now, let's assume for the moment they moved on the old charge that had been filed. And you say that would be wrong, under the plain words of the statute?

MR. EPPICH: Yes, sir.

Q Now, in the alternative, however, if they had sat down and thought about it, they wouldn't need to have moved on the old charge at all. A member of the Commission could have filed the charge.

MR. EPPICH: Yes, sir.

Q At that point, without hearing a word from the employee.

MR. EPPICH: No, sir. I think the Commission, too, is required to go to the state.

Q Well, he's already been to the state.

MR. EPPICH: I'm lost now. Pardon me, Mr. Justice White.

Q Well, do you think if a member of the Commission had wanted to sit down after the state had disposed of this claim, and file a charge himself, even though it were the identical charge, he would have to take

it to the state first?

MR. EPPICH: Are we presupposing the matter has been before the state?

Q Just like it was there.

MR. EPPICH: Sir, it wasn't before the state. It never did get before the state. This is --

Let me try this through again. The matter was never before the state because at the time that Mr. Love proceeded before the state, Title VII of the Civil Rights Act of 1964 had not become effective.

Q Yes.

MR. EPPICH: Therefore, the jurisdictional arm of Title VII was not in play. Therefore, his acts before the state cannot be considered for any purpose. However, if you're going to consider them for --

Q Well, when they referred it to the state, though, when they did refer it to the state, the state came back and said, "We don't want anything to do with it." Now, was the state proceeding terminated?

MR. EPPICH: Aaah, in that regard, let's find out how they referred it to the state. The only evidence in the record is a "shop-talk type of discussion" between a representative of the Equal Employment Opportunity Commission and the Director of the Colorado Civil Rights Commission.

Q Well, now, let's assume there had been an

exchange of formal letters. We refer to you a claim, and if Colorado says, we don't want anything to do with it, would that have been an adequate going to the state?

MR. EPPICH: I think it would be a much more difficult case from my standpoint, sir, for the very simple reason that both the state and the Federal Act require the filing of a written complaint to start a state proceeding, and I don't believe that this is a meaningless procedural requirement. I do not know of any proceeding to be commenced without something in writing, and this is a simple condition.

Q Well, if I get your position, even if, whatever it is that it takes to get the thing to the state had been complied with, after the state finished with it, nevertheless, EEOC cannot move on it until the employee then brings something within thirty days after the state's finished, back to the EEOC. Is that right?

MR. EPPICH: Well, that's what their interpretation at the time said, yes, sir.

Q What's your position?

MR. EPPICH: I don't think we get to that point here, because it was never before the state, sir. Now, in answer --

Q You mean, there's never been a state -- after the enactment of the Civil Rights Act -- there's never been a state proceedings?

MR. EPPICH: There's never been a written charge filed with the State of Colorado, no, sir.

Q By --

MR. EPPICH: By anybody.

Q What was it they responded to, then, when they said, "We want no part of it."

MR. EPPICH: Apparently the "shop-talk type discussion" went over all policies of the EEOC and the Colorado Commission during discussion.

Q You mean nothing ever has been referred to the state in writing?

MR. EPPICH: That is correct, sir.

Q And it's because there's been a failure to submit anything to the state agency in writing, the state has never, for purposes of the statute, had anything to act on?

MR. EPPICH: Precisely, and having not satisfied the state, the requirement that they first go to the state, the EEOC has never gotten to it.

Well, let's assume that this oral advise method is proper, is a proper referral and, realizing that matters such as notice, and matters such as preserving a record, and matters such as some sort of an orderly proceeding which generally follow the filing of a written complaint, we then get back to the situation that, well -- it's referral

procedure that the EEOC is trying to establish here, is it proper? I don't think it is. If it's only, if it's only to misdirect these misguided complaints, that's one thing. And if it is designed to get the complaint and to get the man before the state so that the state can take some meaningfull action, then I have no quarrel with it. I think that's proper. I think that's in keeping with the statute, and I think that's in keeping with the Congressional intent, that the state have first whack.

But the regulation that the EEOC is asking this Court to uphold does more than that. What in effect it does, is says this, that when these charges come in -- and let's bear in mind we're talking about filing dates, because we're talking about limitations period -- when the EEOC says they'll date and time stack them, that they'll send a copy of it to the state. And then, without further word or act from the complaining party, unless we've heard to the contrary, we will, on our own hook, undertake and resolve this matter for you. Gentlemen, I submit that that does nothing but pay lipservice to the requirement that the states have the first opportunity to do this thing because what happens?

The charges go into the Federal government first, or the Federal agency first and, for all practical purposes, the mechanics of the statute are complied with, but the states don't get a meaningful whack at it. They certainly don't if

it's an oral reference, and that's what they're asking this Court to do, to affirm an oral reference, and, secondly, to say that you can have a proceeding without a written complaint.

I just can't see that that regulation accomplishes the Congressional purpose.

Q Hypothetically, if this Court refers to the Tenth Circuit, what would next happen? I would like to see how this would unfold in a normal case.

MR. EPPICH: Well, sir, first off, I think they'd probably get in the National Railway Arbitration Act because, of course they -- aaah -- labor agreements with both the Porters Union and the Conductors Union are, as I understand it, entered into under the auspices of the National Railway Arbitration Act.

Whether or not he has an arbitration --- aaah -- if you reversed, whether or not we would raise that as the defense when -- I don't know -- probably not.

Q What? The National Arbitration? You mean the Adjustment Board?

MR. EPPICH: The National Railway Labor Act, I'm advised by the Pullman Company, is under the auspices of whom these labor agreements are entered into, sir.

Q Yes, I know. I just wondered what you were talking about. I never heard of a National Railway Arbitration Board.

MR. EPPICH: So you get the Pullman Company in this situation. They enter into an agreement under the auspices of one Federal Act. This is their labor agreement. They are paying conductors X. They are paying porters Y.

Then another piece of Federal legislation comes along and says that -- at least Mr. Love says that this is discriminatory against him. Now, where this fits, gentlemen, I frankly don't know, and I haven't studied it out, but I do believe that it's going to be a problem, and I do believe that eventually it'll be raised. And then, just simply -- the jurisdictional matters are disposed of contrary to the Pullman Company's position, so it's trial on merits.

Q Trial where?

MR. EPPICH: In the United States District Court for the District of Colorado.

Q Mr. Eppich, straighten me out a little bit. Title VII of the 1964 Act became effective on July 2, 1965?

MR. EPPICH: Yes, sir.

Q Was it after that date that the Federal Commission referred, or made a reference to the Colorado --

MR. EPPICH: Yes, sir. Yes, sir, it is. In May 20th -- or May of 1966. It is someplace between May 23 and June 1. It has to be. It has to be.

Q The government brief says May 19, 1966, but you say that this is not the proper filing with the State

Commission?

MR. EPPICH: No, sir.

Q Subsequent to the adoption of Title VII.

MR. EPPICH: Yes, sir. To say that it is a proper filing, one must first disregard the clear statutory language that a written complaint be filed, because at best this was an oral communication, the exact nature of which we do not know. And this I say you cannot do.

Q But wasn't it more than an oral communication?

MR. EPPICH: No, sir. Not to the state.

Q Well, Mr. Love, however, wrote to the EEOC?

MR. EPPICH: Yes, sir.

Q And did not the EEOC refer that writing to the Colorado Commission?

MR. EPPICH: No, sir, at no time.

Q What did it do, just telephone?

MR. EPPICH: Apparently, it came up when a representative of the Equal Employment Opportunity Commission was in Denver, talking with Mr. Reynolds about overall policies. In other words, what are we going to do with -- how are we going to set this thing up to make it work? And Mr. Love came up as kind of an aside, a collateral matter. This is what they are urging upon this Court, to have the dignity of commencing a state proceeding in courts with the Federal legislation, when the Federal Act itself specifically

states that you will file a written complaint. I'm aware of no proceeding that can be started in this manner.

Q Of course, the Colorado Commission knew what it was all about. They'd had it before.

MR. EPPICH: This is questionable, sir, whether they did, in fact, know what it was all about, and this gets us back to this problem with the labor-management agreements. The -- at least according to Mr. Love's letter to the Equal Employment Opportunity Commission, he just flat says, "The Colorado Commission doesn't understand my complaint." So let's take Mr. Love's word. I think there is even more to it than that.

Mr. Reynolds testified in his deposition that when the matter was initially before them in 1965, the Colorado Commission was not recognizing discrimination through labor agreements as such. In other words, this was not a discriminatory practice. However, he testified in 1966 that the Colorado Commission's views on this had changed, and that they were now recognizing that a man could be discriminated against through this particular collective bargaining agreement. So that I cannot tell this Court, nor would the Tenth Circuit say, and as a matter of fact, they specifically said that a referral in 1966, they would not say would have been totally futile, and based upon this record, they couldn't.

I suggest to this Court that it may well have been

that, had Mr. Love, or someone on behalf of him, submitted this written charge to the Colorado Commission, the Colorado Commission would have considered it, and considered in view of their enlightened views on discrimination.

This discrimination is a changing thing. I think we all recognize that. Colorado is no different. What they recognized in 1966 as being discriminatory, they didn't recognize in 1965; and what they recognized in 1965, they didn't recognize in 1960, and so on down the line.

Q This began back in 1963, as I understand it.

MR. EPPICH: That is correct, sir, yes.

Q That he went to the state Commission.

MR. EPPICH: Yes, sir, and at that time, although the record is not entirely clear, apparently a finding of no discrimination was made. But here again, Mr. Love, you see, is tied in through his Union to these management agreements.

Q And then he came back to them in 1965.

MR. EPPICH: Came back to 1965 -- at which point they could make him a conductor but, because of the seniority rules in force, and the fact that trains just -- well, let's face it, passenger service has had it. There just wasn't work available.

Q Well, and that had never been his claim. He didn't want to be a conductor.

MR. EPPICH: He just wanted their pay level.

Q He just wanted a conductor's pay.

MR. EPPICH: Sure.

Q As porter-in-charge. Isn't that it?

MR. EPPICH: Sure. Yes, sir. That's as I understand it. But he just didn't comply with the Act.

And I think we also have to bear in mind one other thing. He was advised, at least, judging from Mr. Reynolds' so-called "waiver" letter of June, 1966, he was advised to return to the Colorado Commission and file a written complaint. We don't have a situation here of a man being totally misled or led down the garden path. He was told by the director to do it. He chose not to. That is certainly his decision. But I believe that Congress gave him a right that he didn't have previously, and I think it is up to that man to comply with what Congress says he will do to obtain the remedies under that Act.

Now, there's one other danger here, gentlemen, I think, that should be called to your attention, and it's getting back again to this "manipulated filing date." A filing date, to me, can have but one time, and that is, when it is received, it is filed. The EEOC would seem to say, "Well, we can file them at this time when we receive them, or we can sit on them and wait on them for awhile, and then fit it into the scheme of things so that nobody is out of court."

I suggest that this practice, that they do not file things when they receive it, could well deprive a man of his day in court, and man who has complied with the Act.

Let's bear in mind that he must go to the state first and thereafter, he has only thirty days within which to file with the EEOC.

Let's assume that the man has gone to the state. Let's assume on the twenty-ninth day, he sends his charge in to the Equal Employment Opportunity Commission and, instead of filing it, they refer it back to the state. Gentlemen, the man is out of court, and yet he's done everything that the law requires of him, because the EEOC didn't file it. There can only be one filing date and he shouldn't give them the opportunity to manipulate these things because a man who has done what he was supposed to do is liable not to be in court.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Eppich.

Mr. Wallace, you have four minutes for rebuttal.

REBUTTAL ARGUMENT OF LAWRENCE G. WALLACE, ESQ.,
ON BEHALF OF PETITIONERS UNITED STATES OF AMERICA
AND EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

MR. WALLACE: Thank you, Mr. Chief Justice. I would like to respond to two points that have arisen in the questioning. First, this record does not show the manner in which the referral was made by EEOC to the Colorado

Commission in 1966. This referral was made during the first year of the administration of Title VII and the procedures at that time were not as regularized as they are now. But what the record does show, on page 8 of the Appendix, is the Colorado Commission's response to that referral. That response says specifically that the case of Mr. Love has come to the Commission's attention, the Colorado Commission's attention, and in the last paragraph of that letter, it seems quite clear that the Colorado Commission treated the referral, whatever manner it was made in, as adequate to invoke its jurisdiction.

The Colorado Commission said, "Under the circumstances, we could not, in good conscience, accept the sixty day deferment period, and, accordingly, waive it. Will you proceed ....." speaking to EEOC, ".....under the provisions of Title VII, to give any relief that you can to Mr. Love?"

Now, I see nothing in the Federal Act that prohibits the state from treating a referral, or an oral complaint of any kind and in whatever manner made, as adquate to invoke the state's jurisdiction. This is a matter for the state agency to decide. It's a matter of state law, whether its jurisdiction was invoked.

Q It's that first sentence, "It has come to my attention that Mr. Love has filed a complaint against the Pullman Company through your office." That, you say,

evidences that something got to the State of Colorado in writing or orally or not, it doesn't say, just that a complaint has --

MR. WALLACE: The record doesn't show it, but this letter shows --

Q Was it an irregularity, or something?

MR. WALLACE: Well, I think this letter shows that whatever it -- however it was done, and the testimony is that it was a referral from the EEOC, but the testimony doesn't say in what manner. I think that the letter shows that however it was done, the Colorado Commission treated this referral as adequate to invoke this response that it was waiving its sixty-day jurisdiction under the statutory deferral period.

Q It says more than "jurisdiction." It says "sixty day deferral period."

MR. WALLACE: That's right, well, that's what it has, under Title VII. It has sixty days before EEOC can then accept jurisdiction, and it's waiving that period. It treated its jurisdiction as invoked, and it waived its jurisdiction, and there's nothing in the Federal Act that prevents the state from treating that referral as adequate to invoke its jurisdiction. What 706(b) says is that if the state agency requires more than just a simple, written complaint --

Q Even if it was written, it can be written and taken off.

MR. WALLACE: -- that is our position. Now --

Q You're saying, really, that it's the state's privilege to determine how its jurisdiction is invoked.

MR. WALLACE: That is our position, Your Honor. We don't believe the Federal statute presumes to say that the state could not have treated this as adequate invocation of its jurisdiction. It does, in 706(b) say that if the state requires too much, then merely a written complaint stating the facts will be treated as having been adequate for purposes of then invoking the Federal remedy.

The other point I wish to respond to is Mr. Justice Blackmun's question about whether the Pullman Company has been prejudiced. In Judge Sef?'s own opinion on rehearing, he states:

> "The record shows that the Colorado Commission in the 1965 proceeding discussed the complaint with the Pullman Company. They have had notice, at least since shortly before the Federal Act became effective, of Mr. Love's complaint, and any lapse of time that occurred thereafter is attributable to the fact that the Company was unwilling to give redress, and so we ask the Court to remand this case for a hearing on the merits of this longstanding complaint of Mr. Love."

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Wallace.

MR. WALLACE: Thank you.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen.

The case is submitted.

(Whereupon, at 2:46 p.m., the case was submitted.)