In the

Supreme Court of the United States

Harold Franks And Johnnie Lee,

Petitioners

V.

Bowman Transportation Company, Inc., Et Al

No. 74-728

Washington, D. C.
November 3, 1975

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HAROLD FRANKS AND JOHNNIE LEE, Petitioners	:	
v.	:	No. 74-728
BOWMAN TRANSPORTATION COMPANY, INC., ET AL	:	

Washington, D. C.

Monday, November 3, 1975

The above-entitled matter came on for argument at 1:10 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
LEWIS F. POWELL, JR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice

APPEARANCES:

MORRIS J. BALLER, ESQ., 10 Columbus Circle, New York, New York 10019 For the Petitioners

MICHAEL H. GOTTESMAN, ESQ., 1000 Connecticut Avenue, N.W., Washington, D. C. 20036 For the Respondents United Steelworkers of America

WILLIAM M. PATE, ESQ., Atlanta Federal Savings Building, Atlanta, Georgia 30303 For the Respondent Bowman Transportation Company

C O N T E N T S

C O N T E N T S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in No. 74-728, Franks and Lee against Bowman Transportation Company.

Mr. Baller, you may proceed whenever you are ready.

ORAL ARGUMENT OF MORRIS J. BALLER, ESQ.

ON BEHALF OF PETITIONERS

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

This Court granted certiorari to determine whether district courts have the power to restore victims of hiring discrimination based on race to the present seniority positions which they would have occupied but for the discriminatory practices.

The issue is presented both under Title VII of the Civil Rights Act of 1964 and under 42 U.S. Code Section 1981.

The Court of Appeals for the Fifth Circuit held an award of retroactive seniority beyond the power of the district courts because, in its view, such an award would violate Section 703H of Title VII. That section provides that an employer may lawfully use a bona fide seniority or merit system, provided that it is not the result of an intention to discriminate.

The Court of Appeals did not specifically address

the question under Section 1981.

The legal issue presented in this case arises in circumstances of unvarnished racial discrimination in employment. The district court found that Respondent, Bowman Transportation, had pursued a policy of excluding black employees and applicants from all but a few of the lowest-paying, most menial jobs in the company.

The enactment of Title VII had stimulated no change in Bowman's policies.

The company continued to discriminate in virtually every aspect of its operations for years after Title VII became effective and, indeed, was still engaged in most of its discriminatory practices at the time of trial in March, 1972.

The district court's findings as to Bowman's discriminatory practices reads like a virtual catalog of unlawful employment practices under Title VII -- maintenance of segregated jobs in segregated departments, a job seniority system, no transfer rules, illegal unvalidated testing, racial assignment and steering of new employees, word-of-mouth recruitment and retaliation against those few black employees who tried to better themselves despite this system.

The record presents no mitigating circumstances.

Before this court specifically are claims arising from Bowman's rejection of the application of qualified

black truck driver applicants.

This policy of exclusion remained absolute until the eve of filing the Petitioners' suit. Until September 1970, Bowman had never hired a single black over-the-road driver to fill its approximately 500 road driver jobs. In September 1970, Bowman began to hire a few black truck drivers at one of its terminals but continued to resist hiring black truck drivers at its other terminals.

At one of its major truck driver terminals in Charlotte, the first black truck driver was hired only a month before trial.

During the period 1969 to 1971, which is the focus of this claim, hundreds of black truck-driver applicants applied to Bowman. Many of these applicants were fully qualified under Bowman's usual standard for hiring.

During the same time, Bowman did hire in excess of 200 white truck drivers each year. Many of these white truck drivers lack adequate or even minimum qualifications and up to 150 of these whites were hired as trainees, even though they lacked the minimum truck driving experience supposedly required.

Bowman hired these white trainees upon the personal recommendation of members of his all-white or nearly all-white road driver work force.

When these unqualified whites were hired, along

with many other whites with many other whites who were no better qualified than dozens of unsuccessful black applicants, they began to accumulate employment date seniority.

At trial, the district court certified this case is a class action and designated several subclasses. One of them, denominated class three and represented by Petitioner Lee, consists of rejected black road driver applicants. Over 200 individuals were identified.

Those individuals were given notice and were invited to reapply for hiring by Bowman with priority consideration but without retroactive seniority.

Thereafter, a few Class III members reapplied and were hired, and began to drive trucks for Bowman. However, they took as their employment seniority date the date of their actual hiring, months or even years after they had initially filed their applications and months or even years later than the employment seniority date of many whites who had initially applied at the same time they did.

Under the ruling of the Fifth Circuit, these blacks, in their seniority standing, will never catch up with the whites who were hired ahead of them.

Today or tomorrow, when one of these black employees competes with a contemporary white applicant, he will lose out in bidding and he will have less security from lay-offs. Moreover, he will have lesser fringe benefits

than --

QUESTION: What if seniority was granted? That is at whose expense, in a sense? If the seniority is retroactively granted, what happens to the man who has the seniority now? This is not something that can be divided is it? It has to be taken away from one person in order to give it to another.

MR. BALLER: We don't seek to take seniority from any white driver. We simply insist that he compete using his full seniority with blacks using their full seniority. The competition would then be governed among qualified employees by the full measure of seniority for all of them.

QUESTION: But it would make it different in labor.

MR. BALLER: It would make a difference in competitive position, Mr. Justice Brennan.

QUESTION: It would mean, perhaps, that a black driver would retain a job when a white driver would have to be laid off, wouldn't it?

MR. BALLER: That is theoretically correct. In this case, it is quite clear --

QUESTION: Well, wouldn't that b e practically correct, if you have a --

MR. BALLER: As a practical matter in this case, Mr. Justice Brennan, we have a high turn-over situation. The

record shows that about half the road drivers turn over each year.

QUESTION: So this decision won't be for this case alone.

MR. BALLER: I am aware of that.

As a practical matter, the grant of retroactive seniority would subject whites to increased competition for all the things that seniority gives access to, including security and lay-offs.

QUESTION: Now, you suggest somewhere in your brief -- I got the impression that you -- at least, a hint that they took these jobs with a sort of lien on them, even though they might be innocent of any participation in the failure, on the conduct on which this action was based.

Is that the theory, that they do take it with some sort of lien or cloud on the title to the seniority?

MR. BALLER: The question is not the quality of behavior of the whites who were hired. It is the quality of behavior of the company in rejecting blacks and the remedy would --

QUESTION: Well, if you take something away from the driver hired earlier, you are depriving him of something that he thought he had, are you not?

MR. BALLER: Mr. Chief Justice, I would reiterate our position that we do not seek to take any seniority

away from whites. They will have to compete with blacks also enabled to use their seniority but we feel that is the essential thrust of the law.

QUESTION: But going to the specific, practical problem that Mr. Justice Brennan alluded to, on a lay-off -- and we must deal with the generality, not the idiosyncracies of this company, on a lay-off, someone is going to be laid off if retroactive seniority is accorded to the class that you represent. Is that not so?

MR. BALLER: If a lay-off comes and it cuts deep enough to involve the seniority dates we are talking about, that would be correct, yes, your Honor.

QUESTION: How do we justify -- how could we justify taking away, in effect, taking away from Peter to pay Paul, both of whom are innocent of any wrong-doing? Each of whom is innocent of any wrong-doing.

MR. BALLER: Mr. Chief Justice, the lay-off issue, I would suggest, is, in fact, not a single issue but a series of issues which may arise in different situations, none of which, of course, are presented in this case. But we submit that there will be -- it is lurking in this case.

QUESTION: It is lurking in this case, is it not?

MR. BALLER: We submit that there will be cases in which, as a result of restitution of seniority of rights to black employees, followed by lay-offs, there may

indeed be white employees unable under those circumstances to hold their jobs. We think that is what Congress had in mind when it opened up all jobs to fair competition between blacks and whites alike. We are not here suggesting, I repeat, bringing in black employees who have no previous relation with these jobs, no previous attempt to hold them.

We are simply asserting the right of individuals who, had they been white, would have had the seniority, would have been able to compete, among other things, for protection from lay-offs.

We do not think that a per se rule which says, although these blacks may have been discriminated against in the past, they cannot have their remedy if any whites' expectation would be diminished. We do not think that such a rule can be justified as a general matter.

QUESTION: Bowman's operations don't present the problem, either, do they, of where someone may have come in in one capacity and gradually moved up to more and more responsible positions where you might have some question of job qualification for what the person is shooting for.

MR. BALLER: This is a simple case involving, in regard to this issue, one job. There is no question of somebody being laid off who is less qualified than someone else. That would suggest different questions which, I submit, should be reserved for cases presenting a factual

record.

I'd like to address the Title VII issue primarily and the Section 1981 issue only briefly.

I would stress, in regard to Title VII, that this is basically a question of remedies and equity. Due to the vague and general terms of Section 703H [which] require a limitation on what this Court has found to be the sweeping provisions of Section 706G, the remedial section.

This Court has given a broad scope to the power and duty of federal equity courts in discrimination cases generally and in particular, in Albemarle Paper Company versus Moody, has construed Title VII and its remedial section as giving the district court sweeping and flexible powers to make the victims of discrimination whole.

QUESTION: Of course, in Albemarle, the statute specifically said, "including back pay." Here it doesn't specifically deal with seniority.

MR. BALLER: Mr. Justice Rehnquist, the section, remedial section, of course, is the same and it authorizes the award of any relief as may be appropriate. We think that would apply to injunctive remedies as well as back pay.

QUESTION: Well, would you think that seniority would follow as inexorably as back pay would in the typical case?

MR. BALLER: Mr. Justice Rehnquist, I would think

perhaps even more inexorably, since a job gives to its holder not merely pay but also other benefits and seniority in a situation like this is a key to the job.

QUESTION: Well, then, why did Congress single out back pay and mention it and not single out seniority?

MR. BALLER: Mr. Justice, that provision, Section 706G, was modeled on Section 10C of the NLRA, which was concerned primarily with jobs. I would have to assume that Congress had foremost in its mind that it was granting access to jobs and would have added the back pay provisions simply to clarify that that, too, was an available remedy.

The lower courts, in construing this provision, have invariably, from the beginning, granted remedial and seniority. In the job seniority/department seniority cases, there has never been any question that seniority rights can be modified where necessary to rectify discrimination.

QUESTION: Even at the expense of an innocent fellow employee.

MR. BALLER: Mr. Chief Justice, court after court has held that the expectation of white employees, even though innocent of wrongdoing, may be modified in order to grant full relief under the act.

QUESTION: Was that before we had some things to say about the expectations of employees, in the last two years I would place it?

MR. BALLER: Those --

QUESTION: Do you recall the teachers, school-teachers cases, for example?

MR. BALLER: Mr. Chief Justice, those decisions began to come down as soon as cases were decided on the merits in about 1968 and they have continued to the present so I think there has been no question as to the viability of that doctrine in the case of transferred seniority rights.

The only question here is whether there is any distinction between transfer seniority and retroactive hiring seniority and we submit that there is not. It would be anomalous to say that a black employee who was sent to a laborer job may not transfer to white jobs with his full seniority whereas a black applicant who applied for the white job in the first place and what turned down can get no remedy. That would be the effect of drawing a line between the well-settled job seniority cases and these new retroactive seniority cases.

QUESTION: Whom do you think is entitled to retroactive seniority? A class generally or is someone who proves he was discriminated against and he was qualified for a job and so on?

MR. BALLER: Mr. Justice White, in this case, our class, as defined by the district court, consists of individuals who applied and were rejected. Only those

individuals who were qualified or who proved that they are qualified would be reinstated and it is those individuals --

QUESTION: It would be an individual determination when you get to a matter of remedy.

MR. BALLER: In this case I have stated the class and in any case, it would be a matter for evidentiary determination by the district courts in light of the applicable principles of equity and the make hold purpose of Title VII.

I would not think that there could be a general formulation of who would or would not be entitled to consideration in any case for retroactive seniority but in this case, the individuals for whom relief is sought are clearly identified.

QUESTION: Well, they may be clearly identified, but on what grounds would they be -- assume you prevailed, would all of those automatically receive super seniority or would there still be proceedings in the individual cases?

MR. BALLER: Mr. Justice, the retroactive seniority, I assume, could only apply to individuals who are reinstated who actually work and that would depend on determinations as to their qualifications, et cetera.

Nobody would receive retroactive seniority who was not otherwise entitled to a job.

QUESTION: But isn't that pretty much the limits

of the class, what you have just described?

MR. BALLER: As defined by the district court, yes.

QUESTION: So that all members of the class, then, would receive retroactive seniority.

MR. BALLER: No, Mr. Justice Rehnquist. Retroactive seniority would only accrue upon reinstatement. The district court would not order anyone reinstated.

QUESTION: Well, what do you mean, reinstatement?

MR. BALLER: Hiring upon reapplication.

QUESTION: Hiring in the first instance, really.

MR. BALLER: Well, post-decree. The district court invited -- ordered Bowman to invite reapplications. Many individuals reapplied. Only a few were hired. The retroactive seniority claim is for those who were hired plus those whose rights we are now litigating in the district court on remand who may be adjudged entitled to reinstatement by the district court.

Retroactive seniority is meaningless for those individuals who don't any longer have any interest in working at Bowman or who are not qualified.

QUESTION: They may want to know if they can still collect some kind of damages.

MR. BALLER: They would have a right to back pay if they had worked at Bowman without their retroactive

seniority and we have several such individuals.

QUESTION: Mr. Baller, I am just speaking from memory now, but awhile back, didn't we have a similar kind of issue with respect to seniority under the Soldiers and Sailors Civil Relief Act when boys were coming back from service and they wanted in at the same time and at the same place as though they had worked continuously during their period of military service?

MR. BALLER: Mr. Justice Blackmun --

QUESTION: I find those cases not cited by either side here and I wonder if they are completely impertinent.

MR. BALLER: I am afraid, Mr. Justice Blackmun, that we simply overlooked those cases if they are pertinent.

We did note World War II cases in which returning veterans and individuals who were not employed at the time they were in the Army were allowed to secure retroactive seniority rights pursuant to a collective bargaining agreement.

QUESTION: Well, I have in mind specifically -- and I would be interested, for one, in post-argument comments from both sides on Tilton against Missouri Pacific at 376 U.S. as to whether it has any bearing on the case. I remember it very vividly because this Court reversed things, and probably properly so.

MR. BALLER: Thank you, Mr. Justice.

I'd like to turn just briefly to the Section 1981 issue. Our position is that whatever result the Court reaches under its analysis of Section 703H in Title VII, the Petitioners are entitled to retroactive seniority under Section 1981.

As this Court held in Johnson versus Railway Express Agency, Section 1981 remedies are independent and distinct from --

QUESTION: Mr. Baller, just getting back to the other issue, don't we have some of the issues we did not reach in DeFunis -- did not decide, at least? Don't we have some of those lurking in the background here?

MR. BALLER: Mr. Justice Brennan, I do not believe those are presented in the case.

QUESTION: Well, I gather you regard this as simply a rightful place kind of case and not a preference case?

MR. BALLER: That is correct.

QUESTION: Nevertheless, don't you think there may be some overtones of preference involved in this?

MR. BALLER: There is no preference sought here, Mr. Justice Brennan. We seek for these black employees to be in the position which the record makes clear they would be in had they been white or had --

QUESTION: Well, these, I gather, are employees who, in fact applied.

MR. BALLER: That is correct.

QUESTION: Who were refused appointment --

MR. BALLER: That is correct.

QUESTION: -- maybe a year or two ago and now they are getting -- they are being employed and they want to be employed where they would have been had they been employed when they first applied.

MR. BALLER: That is correct.

QUESTION: So you don't have here the maintenance of any racial structure or the like.

MR. BALLER: Mr. Justice, at the same time, we do not think that, based on the narrow record presented here, the Court can or should decide that only in the instance of a written application could an employee not be in a job which he otherwise would have been in. There may well --

QUESTION: Well, what do we have here?

MR. BALLER: That is what we have in this case.

QUESTION: Only those who, in fact, applied.

MR. BALLER: That is correct.

QUESTION: And were refused employment.

MR. BALLER: That is correct.

QUESTION: And if we stick to that narrow question, we don't reach any of these other ones.

MR. BALLER: That is correct but I would stress that the lower courts frequently find discrimination in

hiring in regard to people who did not apply who were deterred from applying by a word-of-mouth recruitment system or by a reputation well-known in a community that an employer would not hire blacks and so on.

Those claims, while not present in this case, should not be foreclosed.

QUESTION: But the reinstatement with retroactive seniority does -- could mean and would mean the displacement of people with lesser seniority.

MR. BALLER: It would not mean direct bumping out of jobs people presently hold. It would mean --

QUESTION: You mean, in this case? Or in cases generally?

MR. BALLER: In this case certainly we have not asked for that and I think generally the courts have been reluctant to grant --

QUESTION: Well, but suppose the employer says, "Well, I just don't need that many people"? "I have 50 people now and you say I must reinstate with super-seniority 50 others." Wouldn't the employer be entitled to release the people with lesser seniority?

MR. BALLER: Mr. Justice Blackmun, let me draw a distinction between cases in which a discriminitee is placed in a job held by a white employee who is immediately displaced and other situations --

QUESTION: Or any other employee, white or --

MR. BALLER: Or any employee and a situation such as this case and the typical seniority cases being litigated in the courts where what the discriminitees seek is a seniority right which they can exercise pursuant to the collective bargaining agreement. Usually that means when jobs become vacant or posted for bidding.

QUESTION: Well, anyway, Mr. Baller, as I understand you, the fact situation we have here is this: There is a work force. That work force has been added to by employing these people who had previously been refused employment. Isn't that it? They have, in fact, been employed.

MR. BALLER: Several of them have, yes, your Honor.

QUESTION: They have, in fact, been employed and their complaint is that they have not been given their rightful place on the seniority roster.

MR. BALLER: That is --

QUESTION: That they ought to have the place that they would have had, had they been employed a year ago or two years ago.

MR. BALLER: That is correct.

QUESTION: So we haven't reached any of the questions that involve lay-offs or other circumstances.

MR. BALLER: Those questions are not presented by the facts of the case.

QUESTION: But can you escape them? Some day Bowman is going to have to lay people off, isn't he?

MR. BALLER: Mr. Justice Brennan, I believe the emphasis and much of the controversy in the case has been over the theory which justifies the rightful place result we seek and, of course, the resolution of that theory will have implications for future cases. We don't -- far from trying to hide them, we would certainly urge that they be considered.

QUESTION: Well, these people certainly aren't trying to -- aren't fighting over any abstract right of seniority in order to get a 25-year pin. They want something tangible as a result of it, don't they?

MR. BALLER: That is correct, bidding rights, security from lay-offs and fringe benefits.

QUESTION: Mr. Baller, I'm -- I guess I don't understand why you are so concerned about confessing that in the background in the lay-off possibly of other people. What is wrong with that on your theory? They may be innocent, as the Chief Justice described them, but they attained a spot that they shouldn't have obtained, had the law been in effect and --

MR. BALLER: Mr. Justice Blackmun --

QUESTION: -- I wonder why you are so sensitive about it.

MR. BALLER: Mr. Justice Blackmun, I certainly don't want to suggest that the issue is not lurking. It is there and under our theory, if blacks have retroactive seniority and a lay-off comes and someone must be laid off, it would be according to seniority. There would be no preservation of expectations founded on past discrimination for whites. I certainly don't mean to suggest that we wouldn't advance that position.

It does, however, raise different issues.

I'd like to reserve the remainder of my time, if I may.

MR. CHIEF JUSTICE BURGER: Very well.

Mr. Gottesman.

ORAL ARGUMENT OF MICHAEL H. GOTTESMAN, ESQ.

ON BEHALF OF RESPONDENT UNITED STEELWORKERS OF AMERICA

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

The union agrees with the relief which the Petitioners seek in this case, though not in its entirety with the analysis by which they get there.

I'd like to begin by redefining, as it were, precisely who we are talking about here and precisely what they seek because I think that is important to the analysis.

We are talking about a group of people who did apply for employment and whom the district court found would

have been hired but for the fact that they were black and the relief which is sought is sought only for those people who, but for discrimination, would have been hired at an earlier date.

Now, what the district court said to this company was, you shall now, as vacancies arise -- no bumping -- but as vacancies arise, you shall now offer the next available vacancies to this group of people.

But, the district court said, when they finally get a job, their seniority date will only be from the date that you finally give them the job and what they say is, but for discrimination you would have hired us eight months ago or a year ago and but for discrimination, therefore, --

QUESTION: Mr. Gottesman, how many of them have been hired, in fact?

MR. GOTTESMAN: The number is very small. I don't have it. We are talking about a handful.

QUESTION: What is the size of the group?

MR. GOTTESMAN: Five, six, seven, something in that order.

QUESTION: Who have been hired.

What is the total group involved?

QUESTION: Mr. Baller, who was involved at the trial level, knows better. It is at least several dozen. But not all fo those will be eligible for the relief because

not all of them will prove to have been qualified at the time that they applied and thus it can't be said of all of them that they would have been hired but for the discrimination.

QUESTION: So at least a half-dozen who have been found qualified have been hired.

MR. GOTTESMAN: That is correct. That is my understanding.

QUESTION: And then they have been getting their seniority from the date they were hired.

MR. GOTTESMAN: That is right.

QUESTION: And they want it back from the date they first applied and were discriminatorily refused.

MR. GOTESMAN: Well, they want it back to the date they would have been hired. It might have been a few days or weeks after they first applied but they want, in effect, to be restored to the position that they would occupy, had they never been discriminated against and that relief, it seems to us -- and I'll get into a statutory analysis in a moment --

QUESTION: Well, would the same approach, Mr. Gottesman, or would your approach mean that the district court could have ordered them back to work right away, even though it meant bumping?

MR. GOTTESMAN: There has been a lot of discussion in the lower courts.

QUESTION: Well, that may be, but what is your position?

MR. GOTTESMAN: Our position is no, that in remedying discrimination generally under Title VII, the courts have adopted what is called the "rightful place approach," which includes not only giving people the right seniority, but rather than bumping people, saying, you shall begin to exercise this seniority the first time a vacancy is created.

Now, there is nothing in the statute that literally provides that, but from 1967, when the decisions first came down until today, the lower courts have unanimously endorsed that in the belief that that must surely have been what Congress intended.

QUESTION: And that is your position, too.

MR. GOTTESMAN: Yes, it is.

Now, as Mr. Baller said, in this case it makes no difference because vacancies arise every day. In another case it might make a difference but what everyone decided about that, one thing is unmistakeably clear, that once an employee does get to work, he uses his full seniority under this theory for all purposes in the future.

There is no question that if a lay-off comes, he will keep the job and the white who was hired earlier but after the black should have been hired will be laid off

first.

QUESTION: Mr. Gottesman, is it clear to you that Congress never intended a remedy which would require bumping?

MR. GOTTESMAN: I can only say that so far as I know, the legislative history is silent.

QUESTION: Well, why do you suggest that if the statute did not require that in the way of a remedy, nevertheless the statute requires rightful place seniority.

MR. GOTTESMAN: Well, if I may, I can argue why we think the statute requires rightful place, and I think it may become clear from that why it doesn't inevitably follow that it requires bumping, at least immediate bumping, because, of course, to give the people the seniority means that there will be inevitable bumping at the time of lay-offs and other opportunities.

QUESTION: But you have got to approach this on the theory that the original reinstatement as the result of the claim, followed by reinstatement with retroactive seniority, may result either, A) in the immediate bumping of X number of people or at some time in the future.

MR. GOTTESMAN: That's correct.

QUESTION: And then at some point, will you suggest whether it did not occur to Congress that this might create some rights for a remedy on the part of the innocent "purchaser"?

MR. GOTTESMAN: Well, let me address that because I think that is critical to the analysis here and it is obviously a source of some concern to the Court.

It is true that the whites who were hired during this intervening period are innocent. They have done no wrong. They have committed no violation of law and it is true that they will suffer a competitive disadvantage if these people are invested with their seniority but it doesn't follow, as Mr. Justice Blackmun said, that they are having anything taken away from them that should be a source of concern because they, too, are being put in their rightful place.

When the black employee is advanced ahead of them on the seniority roster, the white is simply being restored to the position he would have been in from the start.

QUESTION: Do you think that that employee recognizes that he is being put in his rightful place?

MR. GOTTESMAN: Absolutely not. I can tell you from experience that he does not.

But we deal with Congress' intentions, not the employee's.

QUESTION: Well, but what in the legislative history suggests that Congress was not concerned at all about whether some employees were going to be displaced, either from their seniority or from their actual employment?

MR. GOTTESMAN: Well, Congress was concerned about that in a wide variety of contexts other than the narrow one we are dealing with and if I can get into the statutory analysis, I think I can explain both the nature of that concern and its limits and why it doesn't extend to this case because there is no question that Congress was concerned about this.

Let me start by saying this. I think there is no question that the first sentence of Section 706G generally encompassed the Congressional intention to make people whole for the effects of discrimination visited against them, to make whole those who suffered the discrimination and what, in essence, the court below said is, that there is carved out of this make whole remedy a category of relief which you cannot give, even though it would make you whole, to wit, the retroactive seniority and so the focus of our question has to be, is that indeed why Section 703 H is in the statute?

Was it put there to put a limit on what would otherwise be legitimate make whole relief?

And I suggest that the answer to that can't come by looking first at Section 703H. The answer to that question has to come by looking at the history of the legislative debate because when Congress -- when this bill was first introduced -- and it was a bipartisan bill -- Section 706G at that time not only had the sentence, the

make whole provision, it also had a last sentence and the last sentence was what we have characterized as the anti-preference section.

It said, "You shall not give relief to people who were not the victims of discrimination."

So that on the one hand, you shall make whole those who are victims of discrimination. On the other, you shall not give preference to those who were not the victims of discrimination.

Now, the statutory language was very clear, or the language of the bill was very clear. That did not prevent its declaimers from going all over the countryside suggesting that that, indeed, was not what Title VII was going to mean and there was voiced both on the floor of Congress and throughout the land -- because the period of time we are talking about was during the Presidential primary of 1964 -- the impending Title VII was an issue of great debate during that primary and at least one candidate made the defeat of that bill one of his major issues and so we have the anomaly of millions appearing before Congress saying, enact this statute while Congressmen were being inundated by letters from presumably white workers saying, don't pass that statute. That statute is going to give all kinds of preferences to people because, indeed, the detractors were saying, this statute will give preferences.

And we were in the midst of a three-month filibuster over this bill and the floor managers of the bill, Senators Clark and Case, introduced, literally, an avalanche of written legislative history designed to reassure all of these concerns and the theme of that repeatedly was, this bill, though it is designed to end discrimination and make whole its victims, is not intended to give any preferences to anybody on account of race. It is not designed to, in one fell swoop, cure an entire national history of discrimination.

All it is designed to do is to make sure that from this day forward employers and unions shall not discriminate and that the victims of that discrimination which occurs from this day forward will be made whole.

There will be no quotas. There will be no special seniority rights, as they called it. We are just going to stop discrimination as of this date and give remedies to those who suffer any continued discrimination.

QUESTION: Is there not something mutually exclusive about those promises?

MR. GOTTESMAN: Well, yes, I think they are. Indeed, our brief suggests that they are mutually exclusive, that they define a rather clear line between that which may be done and that which may not and as we see that line, the line is that you may give to the victim of discrimination

that relief which will make him whole, that will restore him to the position that --

QUESTION: In this area, at least, Congress expressly rejected what DeFunis involved, in the way of preferential --

MR. GOTTESMAN: Well, it seems clear to us and the place where we disagree with the Petitioners is that they are unwilling to acknowledge that this statute clearly precludes preferences and by their unwillingness to acknowledge that, they make the legal argument hazier than we think it ought to be.

We think it is very clear that once you recognize that that was the whole purpose of these additional provisions being tucked into the back of the statute, then you can see that that is not the purpose of Section 706G in its first sentence, that what 703H does -- and it is part of a mosaic -- was that after the sponsors had literally grown hoarse resisting claims that this statute was a preference statute, they were still confronted with a filibuster and they were still confronted with people screaming that, indeed, it did create preferences and so there was a whole revision of the bill, the so-called "Dirksen-Mansfield Compromise Bill," which reincorporated the central provisions of the statute intact, the provisions that defined discrimination and the remedy provision, but added a whole series of provisos, of

which 703H was one and 703J, the section that literally talks about no preferences being another and it is those sections whose meaning is really the critical issue before the Court.

QUESTION: And yet can you find anything in these several sections, particularly 706G, which draws a distinction between pre-act discrimination and post-act?

MR. GOTTESMAN: No, and on that we are dependent upon the statements of Senators Clark and Case and the Department of Justice, all of which are clearly writ in the legislative history. And they made it clear, in essence, that that line was drawn because they said the act only forbids discrimination from this date forward so that it may be true, for example, that last week an employer refused to hire someone but that person is not the victim of discrimination within the meaning of this statute and therefore he is not entitled to a make whole remedy because he was discriminated against before this law was passed.

QUESTION: You don't mean -- I see, you mean last week, before the law was passed. It was passed last week.

MR. GOTTESMAN: I'm sorry, last week before the law was passed. I'm sorry. Forgive me. But they were saying, as of July 2, 1965, any one who from that date forward is discriminated against is the victime of discrimination within the meaning of this statute and he, therefore, shall

get a remedy.

QUESTION: And he generally is to be preferred, for post-act violations.

MR. GOTTESMAN: He is to be made whole. He is to be given the position that he would have occupied but for discrimination.

QUESTION: Well, he is going to be, in this case, as vacancies occur, he is to be preferred.

MR. GOTTESMAN: Well, in that sense, yes, but that is not what we mean by preference.

QUESTION: Well, I wasn't saying that. All right, but that is just he is being preferred.

MR. GOTTESMAN: Yes. Sure. In one sense of preferred, he is preferred.

QUESTION: Well, he is preferred in the sense that somebody else doesn't get the job.

MR. GOTTESMAN: That is right.

QUESTION: And the reason is that because he has been discriminated against.

MR. GOTTESMAN: That is right. Now, but what we think 703H means is that it is confirmation, as is 703J and as is so much of the written legislative history, that there is not to be a more general kind of preference.

There is not to be a judgment made, for example, this employer never hired blacks until 1972, therefore, we

ought to say that X percent of blacks hired in the future will be given in a range of seniority dates in order to slot them into some non-discriminatory and seemingly reasonable --

QUESTION: That is what the act affirmatively prohibits, is it not?

MR. GOTTESMAN: That is correct.

QUESTION: You say, in effect, Petitioners are entitled to what they ask for here but they are not entitled to anything broader than that.

MR. GOTTESMAN: Well, and they don't seek anything broader in this case.

QUESTION: Right.

MR. GOTTESMAN: But there are other cases where a broader relief is sought. We discuss some in our brief.

QUESTION: Which ones?

MR. GOTTESMAN: Watkins is the clearest one.

QUESTION: Yes.

MR. GOTTESMAN: But there are a range -- we are not suggesting that we have the answer all at one time for the entire range of facts. What, for example, of the employee who didn't apply for a job in 1970 because he knew this company did not hire blacks but who comes forward in 1972 and says, I should get two years of seniority. It would have been futile to apply.

That involves some of the fact-type questions the

court dealt with in Blue Chip Stamps in an entirely different context.

We are not suggesting the answer to that. I think that is something that has to be litigated in the future. But from that litigation will emerge an answer. That person either is or is not the victim of discrimination. If the ultimate determination is that he is a victim of discrimination, then he will be entitled to make whole. If the answer is that he is not because unless you apply for a job you are not a victim, then he will not be entitled to any seniority and so the line we see is a very clear one, but it is important to see both sides of the line because if you only try to look at one as Petitioners do, you slide into the problem that everybody says, but where does this line stop?

And to us the line is very clear. The two sides of it, at least in this case are clear and this case falls on the make whole side.

Petitioners seek nothing but that which they would have had, but for discrimination.

MR. CHIEF JUSTICE BURGER: Mr. Pate.

ORAL ARGUMENT OF WILLIAM M. PATE, ESQ.,

ON BEHALF OF BOWMAN TRANSPORTATION COMPANY, RESPONDENT

MR. PATE: Mr. Chief Justice and may it Please the Court:

We are not seeking to sustain the Court of Appeals'

interpretation of Section 703H.

We agree with the other parties that the interpretation is not correct. That is our view.

We don't agree with everything that the other parties are saying en route to that conclusion.

We think that it is clear from the legislative history and from the terms and words of the statute itself that this section was intended to have a definite effect. It was intended to place a limitation both on the substantive provisions of Title VII and on the remedies that are available under it.

Now, there has been discussion of the distinction between pre-act discrimination and post-act discrimination. That distinction, I would say as a starting point, I would consider valid. However, I would go further than that.

I think that Congress was drawing a distinction here between the discrimination which is the subject of the case that is specifically before the court in the case and for which it is framing a remedy as compared with general discrimination in the past which it is not seeking to remedy in the case.

For example, I think that Congress foresaw the concept which has developed under this statute, I might say different from anything under the National Labor Relations Act to which it has been compared, under which practices

which are racially neutral in themselves are held to be violative of the act because of their continuation of the effects of past discrimination including pre-act discrimination.

Now, Congress apparently saw that and the legislative history demonstrates that it was concerned that the statute would take in its sweep seniority rights under numerous seniority systems over the country, either under union contracts or under company policy where the system itself had been affected by race discrimination in the past and even those that might be affected by racial discrimination in the future.

So we think that is the important distinction in Section 703H.

Now, conceededly here, the discrimination that we are talking about occurred after Title VII. Consequently we are not talking about just a system that continues the effect of past discrimination.

Now, it is our view that in a case of this kind, that the court has the same kind of discretion that the National Labor Relations Board would have and has had for a number of years in framing remedies for discrimination cases under that statute. It has been noted that the remedial provisions of this act were, to some extent, modeled after the National Labor Relations Act.

It has always been considered under that statute

that the restoration of seniority for a discharged employee as a part of his reinstatement was an available remedy.

Usually the order reads, "Without prejudice to seniority or other rights and privileges previously enjoyed --" or some similar wording and a similar remedy has frequently been framed for employees who are discriminatorily rejected for employment.

Now, we think that those remedies were intended to be available at the discretion of the court that was framing the remedy under Title VII just as they were under the National Labor Relations Act.

Now, we think, though, that the discretion of the court still has an important role.

Now, I am aware, of course, of the decision of this Court in the Albemarle case. I am aware of the holding that the discretion calls for judgment and not just inclination and that it must be exercised consistently with the purposes of the statute.

We submit that there was support in this record for the action which the district court took and that he did act properly within his discretion.

Now, on appeal, the Court of Appeals, although making this interpretation of Section 703H, concluded with the holding that the District Court did not abuse its discretion in withholding this remedy.

Now, I want to refer particularly to the factual situation that was before the Court.

There has been exhaustive discovery before this case was tried. These people were identified clearly and full information had been provided to the other parties about all of them. There were some 200 of these applicants in this category.

They got all the documents relating to them and had a full information about the company's action on each case, including the reasons advanced by the company for the disqualification of different ones under the criteria that the company was applying.

They had full opportunity to interview these people. There was nothing to keep them from it and I might say that answers to subsequent interrogatories have indicated that they did, in fact, interview them, though I assume they did not interview all of them.

Two of them, in addition to the class representative himself, testified. Also, witnesses for the company testified about the way in which different individuals were disqualified that were in this group.

Now, the District Court, on the basis of this record, made the statement as part of the basis for his denial of this relief that there was no evidence in the record on which he could base the multiple conclusions

necessary for an award of retroactive seniority.

Also, I think the fact that it makes very little difference in this particular case under the facts. The seniority has such a small effect among the road drivers in view of the high rate of turnover and also in view of the fact that there is very little by way of job benefits that really depends on seniority. The main thing --

QUESTION: Couldn't you argue precisely the opposite if that is the fact, that there won't be much displacement or much defeat of expectations of people who are already there so why not go ahead and give it?

MR. PATE: I think you could make that argument, yes. I think that you could. It would not make much difference either way and perhaps the argument could be made either way, but I think it was a proper consideration for the District Court although he did not -- the court did not say that it was relying on that consideration in any event on this point.

QUESTION: Well, did the Court of Appeals address itself to what you are talking about?

MR. PATE: The Court of Appeals did not address itself to this other than to make the general holding that I am talking about.

QUESTION: Assume the Court of Appeals was wrong on its basic legal grounds. Shouldn't we just remand, then,

or what?

MR. PATE: Well, that's -- I could certainly understand --

QUESTION: You want to say that even if it was wrong, the District Court was right.

MR. PATE: The District Court was right and the holding of the Court of Appeals was that the District Court did not abuse its discretion, so that gives further support to the --

QUESTION: Mr. Pate, I don't fully understand. Right in what respect? That these people, in any event, were not qualified?

MR. PATE: I am not saying that the people were not qualified, but that there was a proper basis in the record for the District Court's withholding, in its discretion, of this remedy.

The Court of Appeals concluded that the District Court did not abuse its discretion in withholding the remedy. Consequently, I say that their interpretation of 703H may not have been the same as ours. It may have been incorrect but nevertheless they reached the right conclusion, sustained the District Court and therefore the factors which affected the District Court's discretion would be material now I think.

I might say also that I think that the discretion

under Rule 23CD to control the issues to be handled by the class action was an important factor here. There had been no certification of a class action until the conclusion of the evidence in the case and it was at that point that this class action was approved and certified in its final findings, conclusions and decree by the District Court and referred to another decision.

He referred to another decision as giving his reasons more fully in which he had stated that he wanted to avoid being inundated by this mass of individual claims so I would submit that he did have the discretion to control the class action by limiting the issues that he was handling on that basis.

QUESTION: How specifically is Bowman Transportation Company injured here?

MR. PATE: I beg your pardon. I couldn't hear.

QUESTION: How is Bowman injured by this action?

MR. PATE: By seniority? By the grant of this remedy?

QUESTION: Either way.

MR. PATE: It is not injured either way and the company, apart from the general interest of all of us in the importance of the question, has no specific tangible interest in it in this case as to whether seniority is granted to this group or not. That is correct.

I want to say, I have --

QUESTION: Is there lurking here the responsibility of a potential injury in the sense that a displaced employee -- displaced by virtue of retroactive seniority -- might bring a suit against Bowman? Not in the setting of this case, but in the overall picture.

MR. PATE: That may be lurking in the background, Mr. Chief Justice. I had never thought of it as a possibility.

You are thinking of a displaced white employee bringing suit because he is displaced as a result of a grant of retroactive seniority.

QUESTION: When you come to the day of a lay-off or when you come to the day when two men are competing for a job and one gets it because he has been granted retroactive seniority.

MR. PATE: I'll have to go back to the National Labor Relations Act. That kind of situation has repeated itself many times and it has never been urged that the employee displaced by the employer's compliance with the remedial order would himself have a claim because it is a sort of reverse discrimination under terms of that statute.

QUESTION: Well, of course, I suppose we have all got to bear in mind that a great many new causes of action that we didn't think about years ago are now suddenly emerging.

MR. PATE: I think that is correct, your Honor.

QUESTION: But as of now, you are not injured.

MR. PATE: As of now, the company would not be injured, right.

Now, we have contended and do contend that this part of the case is moot in any event because the class representative is out of the class now and he has no further stake in the outcome of this case since he lost his discharge case which followed his employment after he had originally been denied employment for a period of time.

This is leave, the intervenor. He attacked his -- refusal to hire him, the failure to hire him for a period of several months and his subsequent discharge as being racially discriminatory. He was sustained on the refusal to hire case but he was unsuccessful on the discharge case and he was unsuccessful on appeal in the discharge case.

Consequently, the only representative of the class to which this part of the case relates is the intervenor, who brought a separate intervenor's complaint and he now has no stake whatsoever in the outcome of this question and consequently, we say, under the tests enunciated by this [Iowa] Court in Sosna versus Utah and related cases, since this is not a question capable of repetition while evading review, that it does not come within that narrow exception which this Court carved out for certain class actions where that kind

of question was presented.

QUESTION: But these class members certainly have a substantial financial stake in the outcome of the litigation, don't they, Mr. Pate?

MR. PATE: The class members have a financial stake in the outcome of the litigation. They have a stake in the seniority question as well but looking to the main parties for a determination of this question of mootness or question of case of controversy under Article III, there is no named party in the case that has any stake in it.

MR. CHIEF JUSTICE BURGER: Thank you.

You have about four minutes left, Mr. Baller.

REBUTTAL ARGUMENT OF MORRIS J. BALLER, ESQ.

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

Just a couple of brief points in rebuttal.

As to mootness, our position is that because of the existence of class members with a live stake in the controversy and a certified class action, this case does fit within the Sosna rule and it is viable.

Moreover, Johnnie Lee had a live claim at the time the case was certified.

With respect to discretion, I submit that if the Court reviews what the District Court and the Court of Appeals actually held, it would see quite clearly that

this was not an exercise of discretion, nor was it affirmed as such by the Court of Appeals. Rather, they were erroneous rules of law.

With respect to the effect of this on presumably innocent white employees, I would simply note that as the Court has frequently held, seniority, being contractual, is subject to modification to conform with law and focusing on the innocence of affected employees would create the kind of subjective standard which this Court has abjured in Griggs and other employment discrimination cases.

Finally, with regard to the reliance by Mr. Gottesman on the Clark case materials to create a distinction between pre-act and post-act discrimination which he conceives is reflected nowhere in the statute itself, I would simply state to the Court our position that the lower courts have made it clear that the Clark case materials cannot be read literally to convey the Congressional intention on their face.

They are far broader than both the terms of the statute and broader than any construction the courts have been willing to give in stating that no pre-1965 seniority rights would ever be affected by any Title VII action.

That simply has not been an acceptable interpretation in the courts.

Finally, I would just call to the Court's

attention, all we seek here is the same as this Court has accorded all claims of employment discrimination brought under Title VII from Griggs through Albemarle Paper and that is, a construction which assures the victims of discrimination will have a chance to prove in court that they were wronged and upon proof of discrimination, that they are entitled to as complete relief as is possible in the circumstances.

We feel that these Petitioners deserve no less.

Thank you.

QUESTION: Mr. Baller, if you lose under Title VII could you still prevail under 1981?

MR. BALLER: Yes, Mr. Justice Blackmun, Section 1981 is a separate remedy. We feel that the interference with contractual rights in the nature of seniority benefits is -- violates the prohibition in Section 1981 on discrimination in making an enforcement of contracts and there should be a cause of action with a right to retroactive seniority to restore those contractual benefits.

Congress specifically rejected admendments that would have made Title VII the exclusive remedy for employment discrimination and as this Court held in Alexander, it did not mean in enacting Title VII to repeal pre-existing remedies.

Thank you.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen.

The case is submitted.

[Whereupon, at 2:11 o'clock p.m, the case was submitted.]