# OFFICIAL TRANSCRIPT
# PROCEEDINGS BEFORE

# THE SUPREME COURT
# OF THE
# UNITED STATES

**CAPTION:** INDEPENDENT FEDERATION OF FLIGHT ATTENDANTS, Petitioner V. ANNE B. ZIPES, ET AL.

**CASE NO:** 88-608

**PLACE:** WASHINGTON, D.C.

**DATE:** April 25, 1989

**PAGES:** 1 thru 55

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IN THE SUPREME COURT OF THE UNITED STATES

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INDEPENDENT FEDERATION OF FLIGHT ATTENDANTS,

Petitioner,

v. No. 88-608

ANNE B. ZIPES, ET AL.

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Washington, D.C.

Tuesday, April 25, 1989

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:58 a.m.

APPEARANCES:

STEVEN A. FEHR, Kansas City, Missouri; on behalf of Petitioner.

ARAM A. HARTUNIAN, Chicago, Illinois; on behalf of Respondents.



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C O N T E N T S

P R O C E E D I N G S

10:58 a.m.

CHIEF JUSTICE REHNQUIST: We'll hear argument next in No. 88-608, Independent Federation of of Flight Attendants v. Anne B. Zipes.

ORAL ARGUMENT OF STEVEN A. FEHR

ON BEHALF OF PETITIONER

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

This case involves an award of attorney's fees pursuant to Section 706(k) of Title VII in favor of the settling plaintiffs and against a union when that union was not a defendant and intervened only because the settlement agreement would override the union's contract and impair the seniority rights and job security of its members.

Petitioner IFFA is the labor union which represents TWA's flight attendants. In 1970, the union which formerly represented TWA's flight attendants filed charges in this class action suit challenging TWA's practice of terminating all flight attendants who became mothers.

The class was defined as all flight attendants so terminated from 1965 forward. Two months later, the union successfully negotiated the elimination of the

"no-mothers" policy pursuant to a new collective bargaining agreement.

The case was settled in 1971, but the Seventh Circuit reversed the district court's approval of that settlement because of a conflict of interest it perceived between the union's obligations to the class members on one hand and its duties to represent the incumbent employees on the other. And it was those same duties, of course, which brought about IFFA's intervention years later.

But, at that point, in 1973, the union and union counsel were replaced as class representative and class counsel by the parties and counsel who had brought that appeal.

In 1976, the district court held that TWA's policy was indeed illegal and that all plaintiffs had timely claims for the reason that TWA had engaged in the so-called continuing violation.

The Seventh Circuit reversed again in 1978, holding that while the policy was illegal, TWA had not engaged in a continuing violation, and that the claims of 92 percent of the plaintiffs were therefore time-barred.

In response to a secondary argument made by plaintiffs to the effect that TWA had waived its

timeliness defense, the Seventh Circuit said that it need not address that issue because the Title VII time limit was a jurisdictional prerequisite which could not be waived.

The plaintiff sought certiorari on the jurisdictional issue only. TWA cross-petitioned, but consideration of those petitions was deferred when the parties announced yet another settlement.

Pursuant to this new settlement, the class was divided into two subclasses; Subclass A consisting of the approximately 30 women with timely claims, and Subclass B consisting of the approximately 400 women with untimely claims.

TWA was to pay $3 million, one half to each subclass. Counsel fees were to be deducted from the settlement fund. Plaintiffs were to be able to regain their jobs and obtain a grant of retroactive competitive seniority from original date of hire through the date the settlement agreement was signed in 1979. And, last but not least, the settlement agreement specifically purported to supersede prior, current, and future collective bargaining agreements.

At that point, in 1979, IFFA, which had come into existence in 1977, intervened to contest the grant of seniority to the class members because of the effect

we believed that seniority would have upon the incumbents.

As part of our arguments, we contended that if in fact there was no subject matter jurisdiction over the claims of Subclass B, as the Seventh Circuit had already held, then the district court had no power to grant seniority to those individuals and override the collective bargaining agreement on behalf of those plaintiffs with jurisdictionally defective claims.

The district court overruled that argument, saying that it need not heed the opinion of the Seventh Circuit finding a lack of jurisdiction for the reason that it was not final. The Seventh Circuit overruled us for an entirely different reason, holding that a district court need not have subject matter jurisdiction to issue orders pursuant to a settlement agreement.

IFFA petitioned for certiorari, and in March of 1981 our petition was granted on two issues, including the question of whether a district court had power to issue orders pursuant to a settlement agreement in the face of a holding by its court of appeals that jurisdiction was lacking.

At the same time, however, the court granted the petitions of TWA and plaintiffs which had been held in abeyance since 1978.

In the Zipes opinion in 1982, the Court chose not to decide the jurisdictional issue we had framed in No. 80-951 but, instead, decided that the Seventh Circuit had been wrong when it had previously held that the Title VII time limit was a jurisdictional prerequisite which could not under any circumstances be waived.

The Court went on to affirm the orders approving the settlement and granting seniority to the plaintiffs.

Now, the primary reason IFFA had fought the grant of seniority was that it feared that the TWA flight attendant work force was about to enter a period where it would not only not expand but actually significantly shrink.

As it happened, from mid-1979 when the settlement was announced, until mid-1983, TWA furloughed several hundred flight attendants and hired none. When expansion finally came, those openings went not to the incumbent furloughees, but to the plaintiffs because of the seniority granted to them.

The reentry of hundreds of plaintiffs into the work force blocked the recall of 159 furloughees who eventually dropped off the employment rolls due to a five-year contractual limitation on furlough status.

And, finally, we get to the subject of attorney's fees. In 1982 plaintiff's counsel sought and were awarded nearly $1.4 million from the $3 million settlement fund. Of that amount, $1,250,000 was paid for pre-settlement work at a multiplier of two. Meanwhile, the typical Subclass B member who had been away from her job as a flight attendant for 13 to 18 years, received approximately $2,000 in back pay.

Counsel also sought fees against TWA and IFFA for the litigation in regard to the settlement, and in 1986 the district court denied the request for further fees against TWA, holding that plaintiffs had waived any further fees from TWA in the settlement agreement.

However, the district court assessed fees against IFFA in an amount exceeding $180,000 because, in the view of the district court, prevailing plaintiffs are almost automatically entitled to an award of attorney's fees. Last year, a divided Seventh Circuit panel affirmed.

All of this Court's decisions regarding civil rights attorney's fees from Piggie Park, to Christiansburg, to Garland last month, make it clear that equitable considerations are paramount.

As Justice Stewart said in Christiansburg, 706(k) does not even invite, much less require, a

mechanical construction. Accordingly, we believe it appropriate to consider the very difficult, perhaps nearly impossible, quandary which IFFA faced when it intervened in 1979.

And that dilemma was brought about not just by the facts I've outlined, but also by the changing state of the law, as best demonstrated by the then very recent decisions of this Court in the Franks case in 1976 and the Teamsters case in 1977.

In Franks, the Court held that successful Title VII plaintiffs are ordinarily entitled to a grant of retroactive competitive seniority unless that seniority will have unusual adverse impact upon the incumbents. Now, Franks gave us some problems.

First, Franks was decided against the background of a final determination of liability. The timeliness and violation issues had been finally determined in favor of plaintiff's, as emphasized in Justice Steven's opinion in the Evans case the next year.

So, arguably, the Franks standard did not even apply to our situation.

Second problem. What is unusual adverse impact? Well, we thought the seniority would affect peoples' ability to hold their jobs. Surely, that is adverse. Arguably, it is the most adverse affect an

employee can feel in a Title VII case.

Is it unusual? We would certainly hope so. And, thus, we thought we could meet the Franks standard even if it applied.

But our third problem was the most difficult. How do you prove it? The standard requires the union or the incumbent employees to present evidence looking forward, evidence which is necessarily speculative and conjectural.

And, in retrospect, I must say that no one took our speculation seriously. In fact, the Seventh Circuit, one year after IFFA's intervention, despite the fact that during that year TWA had furloughed hundreds of flight attendants and hired none -- a fact of which the court was aware -- overruled our arguments in significant part in reliance upon previous testimony before the district court to the effect that this settlement is no problem, it will not affect the incumbents, as a result of normal expansion and attrition, we can absorb all of these class members in less than one-half year.

Unfortunately, it did not happen.

Looking back, obviously, our arguments have more force than they had looking forward. To use the language in Christiansburg, although we may have

presented facts that appeared questionable or unfavorable at the outset, clearly IFFA had an entirely reasonable ground for bringing its claims. This, alone, provides a strong equitable reason for denying fees.

QUESTION: Mr. Fehr, does it make any difference under your equitable theory if an intervenor comes in and substantially, by virtue of the intervention, prolongs the litigation and delays relief to the plaintiffs in the case? Should that be a consideration in the ultimate award of fees?

MR. FEHR: I don't think so. I think the more appropriate consideration is why is the party there, what are its interests, and does it have a legally cognizable right that is being affected.

QUESTION: But I thought you were urging some equitable discretion on the part of the trial court in awarding fees.

MR. FEHR: Well, I think --

QUESTION: Even if you're asserting the intervenor's own rights, are there circumstances which might justify the award of fees?

Suppose the intervenor has a legitimate claim but, nonetheless, deliberately prolongs and extends the litigation and deprives the plaintiff of early relief.

MR. FEHR: Well, if the intervenor is extending

-- I don't what you mean by deliberately -- but if the intervenor is only extending the litigation in order to have its claim litigated, I don't think that's an equitable basis upon which to subject that intervenor to an almost automatic award of attorney's fees.

If, on the other hand, there is some bad faith involved or the intervenor does not have a legally cognizable claim that it's asserting, such as in the Sixth Circuit case in the Haycraft decision, I think it might be very different.

I would also point out --

QUESTION: Well, maybe it's a weak claim but not frivolous.

MR. FEHR: It's an awfully difficult judgment to draw, as the government indicated in its amicus brief.

QUESTION: Should there be discretion in the district court to consider those factors?

MR. FEHR: Perhaps there should be some discretion, but I don't think any such discretion was exercised here.

QUESTION: They --

QUESTION: What if --

QUESTION: Excuse me. Go ahead.

QUESTION: What if the intervenor intervenes not to assert its own right but, rather, as is sometimes

the case, for instance, in a challenge to a state criminal statute -- intervenes on the state's side to defend the statute, for example, but not in its own right.

MR. FEHR: Well, that's --

QUESTION: Do you think that that intervenor could be treated like a defendant for attorney's fees?

MR. FEHR: In essence, I think you're posing the facts of the Charles case which is pending on certiorari. And I'm not sure I feel competent to answer it.

I think a starting point for this analysis might be Rule 24 regarding whether a party has a right to intervene, and perhaps Rule 19, whether the party must be in the litigation so that full relief may be accorded.

Whether in the situation you pose, individuals actually have a cognizable interest and rights that are being affected, I do not feel qualified to make that judgment.

QUESTION: Well, but you must have a position, I assume, on my proposition, which is that the intervenor is permitted lawfully to intervene but not to assert any right of its own as such.

MR. FEHR: I can see drawing a distinction

between individuals that have a right to intervene and permissive intervention where an individual is just assisting the state, though that person's rights are not affected.

If that's what you're asking, I think that would be a valid ground on which to perhaps draw a distinction.

In the Teamsters case, the Court said that the union will remain in the litigation, though innocent of wrongdoing, to participate in remedial proceedings. This was a proposition restated in the Zipes opinion itself. And, indeed, both opinions seemed to make it clear that had IFFA not intervened, it should have enjoined as a Rule 19 defendant here.

And I'd like to consider what the Court said in Teamsters about Title VII remedial --

QUESTION: Opposing -- you are opposing in this case the plaintiffs in a lawsuit?

MR. FEHR: We were opposing only the grant of seniority to the plaintiffs because of the effect we believe that would have upon our members.

QUESTION: So you sought to defeat a claim that the plaintiffs had been making throughout the lawsuit.

MR. FEHR: We sought to defeat their attempt to get seniority through the settlement.

QUESTION: And up -- up to a point, TWA was making the same claim, wasn't it?

MR. FEHR: Certainly. TWA --

QUESTION: Until they settled.

MR. FEHR: -- was saying that the plaintiffs were entitled to no relief. And then TWA --

QUESTION: And so --

MR. FEHR: -- settled --

QUESTION: -- why shouldn't we treat you as a defendant?

MR. FEHR: Because --

QUESTION: Like the TWA?

MR. FEHR: Because we didn't do anything wrong, Justice White.

QUESTION: Uh-huh.

MR. FEHR: And -- there's something --

QUESTION: Well, that may -- that may be so, but you sought to defeat these plaintiffs' claim and you lost.

MR. FEHR: But there's something fundamentally wrong here where both back pay and seniority --

QUESTION: Right.

MR. FEHR: -- are ordinarily awarded to successful plaintiffs absent compelling equitable reasons to the contrary.

Now, TWA got to take full advantage of the weakness of the plaintiffs' claims by settling for two cents on the dollar, while the incumbent employees, who did nothing wrong, are paying full fare, and now the court wants them to pay attorney's fees to boot. I just don't think that's very accurate.

QUESTION: IFFA took no position on the claim of the female flight attendants against TWA that they'd been unlawfully discriminated against?

MR. FEHR: No, we did not. And, of course, the former union filed the lawsuit, and we said time and time again that our only concern was the seniority. Just look at --

QUESTION: If the remedy of discrimination were found?

MR. FEHR: Right. And -- but for the seniority, we would have had no interest, and we said that over and over again.

QUESTION: Now, presumably you weren't bound by the settlement agreement? The union wasn't? The union could have sat back, let the settlement agreement be entered, and then challenged it in a separate suit.

MR. FEHR: Well, I think that's arguable, depending upon the Martin decision that's pending, if I understand what's going on there.

QUESTION: Would it be your position that you could do that?

MR. FEHR: I haven't really studied that question, and there was really --

QUESTION: But what if that were the situation and you then -- the union filed a separate suit? Presumably, under those circumstances, the union would not have attorney's fees assessed against it even if it lost.

MR. FEHR: Only because the union was a plaintiff in this --

QUESTION: Right.

MR. FEHR: -- instance, it is different for plaintiffs?

QUESTION: Right.

MR. FEHR: I suppose that is arguably true, and we pointed that out in our briefs. But it doesn't seem to make sense to me and it doesn't seem to be very consistent with any notion of judicial economy when we were invited to come into this lawsuit, give a notice of it, and the settlement agreement specifically contemplates our intervention, for us to sit back and then try and do something later.

And, obviously, there is a danger, depending upon the state of the law, which may be clarified soon,

that we would not have even been able to do that.

QUESTION: We would certainly rather, you would think, favor a rule that would induce you to come in as soon as possible and get the whole thing resolved in one fell swoop, right?

MR. FEHR: I would certainly agree with that.

QUESTION: Yeah.

MR. FEHR: In Teamsters, the Court talked about remedial proceedings which involve imprecision and approximation, and the delicate task of adjusting the interest between the discriminatees and the legitimate expectations of the incumbents.

The district court must draw upon qualities of mercy and practicality. And, especially when immediate implementation of an equitable remedy threatens to impinge upon the expectations of innocent parties, the court must look to the realities and necessities inescapably involved in reconciling competing interests in order to determine the special blend of what is fair, necessary, and workable.

And, perhaps most interestingly, the Court in Teamsters said, that until evidentiary hearings were held, it was not possible to evaluate abstract claims concerning the equitable balance that should be struck in these proceedings.

Now, I must confess that I do not know what all that means. And with respect -- I'm not sure that anyone does know what that means, except that the plaintiffs and the incumbent employees, nearly always represented by their unions, are going to have to slug it out in complex remedial proceedings and let the district courts carve out the law on a case-by-case basis.

And we believe that to say that the union must participate in this extremely difficult process, where it cannot possibly be predicted what claims will bring about what results, and yet to say the union shall be subjected to an almost automatic award of attorney's fees if it should not prevail, is simply unjust. And it would also -- it will also unquestionably cause a severe chilling effect upon the rights of innocent incumbent employees affected as a collateral consequence of Title VII litigation.

We should also discuss why it is the Court said in Teamsters that the union will remain for the remedy phase. It is, I believe, because in most instances it is only the union which is capable of raising the rights of the incumbent employees, for those claims, most often, are based on a collective bargaining agreement. It is the duty of the union to enforce that agreement.

And the issue is whether the contract can be overridden. Which brings us straight to the union's duty of fair representation.

Now, if I may, I would like to talk about how, if IFFA had not intervened, a claim for the duty of fair representation against it might have been structured to simply establish the following.

One, the Plaintiffs and Defendant obviously thought it necessary to override the collective bargaining agreement in the settlement to obtain the relief they sought.

Two, the union was invited to participate.

Three, part of the duty of fair representation is a duty to enforce rights contained in a collective bargaining agreement.

Four, the Seventh Circuit was already on record in this case in 1973 lecturing the union about its obligations to the incumbents.

Fifth, you establish that there are damages generally throughout the bargaining unit from the relief granted. And Justice O'Connor's recent opinion in Case 87-548 establishes that with its discussion of how seniority simply dominates the working lives of these flight attendants.

And, also, that the very job security of the

junior incumbents was at stake. And with hindsight, in this case, it would have been very easy to do.

And, Sixth, that the Seventh Circuit had held that 92 percent of these plaintiffs had untimely claims which were, for that reason, lacking in merit and also lacking in subject matter jurisdiction.

And then the next question is: where did the union's lawyers go to law school? Don't they know that a federal district court lacking subject matter jurisdiction has no power to do anything but dismiss those claims? Why did you not even try to save these peoples' jobs?

Would it have been successful? What would the damages have been? I can't say that, of course. But I do know that a compelling argument could have been made that the union abused whatever discretionary powers it had and arbitrarily refused to process the seemingly meritorious claims which involved the very job security of its members.

But, of course, the duty of fair representation is not just a question of can the union be successfully sued? The union has an affirmative obligation to exercise its best efforts to serve its members' interests. A union's raison d'etre -- excuse the pronunciation -- is to represent, after all.

And if a union has the legal obligation to ensure that its members' interests and rights are asserted, and if the courts are to consider the interests of affected innocent incumbents, again, we believe it is manifestly unjust to punish a union by assessing an automatic award of attorney's fees against the union should it not prevail.

It would, as the Ninth Circuit said in Richardson, simply punish the union for performing an act which it was under a legal duty to do.

Plaintiffs will argue, of course, that fee awards are compensatory and not punitive, but that argument bears a closer analysis, for where innocent bystanders are deprived of legitimate rights though they did no wrong, and where the courts compound that injury by saying that if you dare to raise your voice, you will be socked with an additional award of attorney's fees to boot, that award certainly seems punitive in nature. And, I would add, that there is no legal basis for the punishment.

Indeed, the entire concept of fee-shifting is rooted in the principle of shifting fees to the party who violated the law. Even the private attorney's general concept is based upon the notion that those private attorneys generally will prosecute those who

violate the law.

We believe the fact that the party against whom fees are sought did not violate the law, by itself constitutes a special circumstance which should dismantle the presumption of a fee award in favor of prevailing plaintiffs, and at least three circuits have specifically so held.

Our position is also very much in harmony with, and supported, by this Court's decision in the General Building Contractors case. I will not repeat here the language from Chief Justice Rehnquist which we quoted and discussed in our brief.

But, in that opinion, the Court also said that there are fundamental limitations on the remedial power of the federal courts, that those powers can be exercised only on the basis of a violation, and extend no farther than required by that violation.

This principle is not limited to civil rights, but is a controlling principle governing the scope of federal judicial power. The Court -- the Court there held that treating an innocent party, for the purposes of injunctive relief, as if that party had been found liable on the merits was beyond the traditional equitable limitations upon the authority of federal courts.

Similarly, here, the Court should not -- we believe cannot -- for attorney's fees purposes treat innocent parties in the same fashion as defendants found guilty of violating the federal law.

I'd like to reserve the rest of my time.

QUESTION: Thank you, Mr. Fehr.

Mr. Hartunian.

ORAL ARGUMENT OF ARAM A. HARTUNIAN

ON BEHALF OF RESPONDENTS

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

The union and the government seek from this Court the announcement of a rule forbidding district courts from imposing attorney's fees under 706(k) against intervenors. Or, to put it another way, as they do in some instances, against an intervenor who is innocent of the violation out of which the lawsuit arose.

And the union and the government present certain views that they think justify that result and that rule because they think that these matters are matters of sound fairness and considerations of policy.

They're wrong about that. But, what is more important, the question is what does the statute say because the issue here is what did Congress intend. And we must start by examining the statute to answer the

question what did Congress intend.

There are three explicit matters contained in 706(k) which bear on this question, each of which shows that Congress had no intention to exempt intervenors from the fee-shifting provision, irrespective of whether the intervenor was guilty of a violation of the law or not.

The first of those is the provision of prevailing party. Congress said that fees are authorized to be awarded to the prevailing party. There is no question that in this case -- nobody disputes that in this case the plaintiffs were the prevailing party. Not only in the liability phase of the case against TWA, but against the union. There is no dispute about that.

QUESTION: But, Mr. Hartunian, certainly the Christiansburg decision suggests that the term "prevailing party" may be read one way in one case and another way in another, depending on the circumstances.

MR. HARTUNIAN: Indeed. It has two different -- the word "prevailing party" doesn't have any different meaning whether you're a plaintiff or a defendant. It's the implications of that --

QUESTION: Whether you will get -- the standard for awarding --

MR. HARTUNIAN: Yes.

QUESTION: -- an attorney's fee.

MR. HARTUNIAN: Yes. The second significance of the phrase "prevailing party" has to do with what one has in mind when one contemplates that there be a prevailing party.

You can prevail only -- in a lawsuit only when you prevail against somebody else. So, for every time there's a prevailing party, there's somebody who lost. And Congress knew that.

And that image of there being a party opposite the prevailing party is very important because the obvious and logical suggestion is that the person who has to pay the fees of the prevailing party is the person against whom the prevailing party prevailed against.

QUESTION: That's reasonable enough. But maybe that's why -- that may be why Congress said "may allow" instead of shall allow.

MR. HARTUNIAN: Indeed. And that is the second of the matters which are -- or, the third of the three matters which I think are important.

Congress did not make this fee-shifting mandatory, nor did it prevent it. It left it up to the discretion of the court.

But I would like to proceed to the next of the

three items and then come back to the discretion, which I think is very important.

The second is -- the second part of the statute that we think is very relevant and bears on this point is, the language of the statute that says that the court may allow the prevailing party a reasonable attorney's fee as part of the costs.

The reason why that's so important is because costs are awarded to the winning party irrespective of whether the losing party did something wrong. In fact -- indeed -- the statute that governs the costs in this case, 28 U.S.C. 1911 and 1912, deals with the subject of costs that are awarded in proceedings in this Court.

QUESTION: Yeah, but, of course, this Court has read a limitation into that statute as far as limiting the award of attorney's fees to prevailing defendants.

MR. HARTUNIAN: That's correct, Justice O'Connor.

QUESTION: So, you can't just rely on the literal language of the statute, it seems to me.

MR. HARTUNIAN: There -- we're relying on the literal language of the statute to the extent of really a different point. And that is the question whether an intervenor should be carved out as an exemption. Did Congress intend such a thing?

QUESTION: Let me ask you this. Suppose the union here had brought a separate suit against the plaintiff class in TWA rather than intervening in the ongoing suit -- brought its own separate suit and eventually lost -- there wouldn't have been attorney's fees, would there?

MR. HARTUNIAN: There would -- there would be attorney's fees to the same extent, as far as I'm concerned.

QUESTION: Assuming it's not frivolous.

MR. HARTUNIAN: Yes, assuming it's not frivolous, I would say that the result ought to be not whether a party is named as a plaintiff under the federal rules or a defendant or --

QUESTION: But the result, in fact, under existing precedence would be no attorney's fees in that situation?

MR. HARTUNIAN: I don't think that the union could even bring a case like that because I think it would be unfounded.

QUESTION: Well, let's assume it could. And it seems to me if it could, it would be very strange to say that because they intervened in the ongoing suit to get an earlier resolution of the claim, that they wouldn't be treated the same way.

MR. HARTUNIAN: I have to picture such a case as involving exactly the same issues in exactly the same kind of proceeding that we had in this case.

The only difference being that it was initiated by them. Everything else was the same. In that case, they should be imposed with fees in exactly the same way as in this case because of the fact that the parties that they were suing in this hypothetical second lawsuit are my clients, the class members, who are really the plaintiffs because they're the ones upon whom --

QUESTION: Can you cite any case that would have so determined?

MR. HARTUNIAN: The statute says that in any proceeding --

QUESTION: Can you cite any case that has interpreted the statute that way?

MR. HARTUNIAN: I don't believe that any case has ever occurred in which a union became a plaintiff under the federal rules and sued some victim of Title VII, asserting that the benefits about to be given to them exceeded what the statute authorized.

But the importance of the phrase as part of the costs is that costs are never awarded on the basis of a violation of law. Costs are awarded based upon who won and who lost. And attorneys' fees being part of the

cost, it's not determined by that.

And let's take this case as an example. Suppose the union were to win this case. If the union won this case, we would have to pay the costs as a matter of course. We didn't violate any law. So, it's not the violation of law that imposes costs.

QUESTION: But you wouldn't have to pay the fees.

MR. HARTUNIAN: We wouldn't have to pay fees. That's because there is no provision that authorizes the imposition of fees upon us under these circumstances, absolute groundlessness. But the union --

QUESTION: Well, then we're back to where we started. You say costs plus fees can be conjoined if it's to your advantage, but not if it isn't.

I just don't see that as a helpful statutory construction of principle.

MR. HARTUNIAN: Well, what -- Justice Kennedy, what I'm saying is that the statute says that attorney's fees are awarded as part of the costs. Historically the -- since the beginning of this nation -- at first, attorney's fees were in some small measure awarded as part of the costs. And then the statute eroded to where costs no longer included attorney's fees, and that's what the American rule -- that's how the American rule

came about.

And, by this statute, Congress has stuck fees back into costs. So, we're back to a position in which we no longer have the American rule to that extent. And since costs are imposed not on somebody who violated the law but, rather, on somebody who simply should pay the costs because he lost, that means that whether there was a violation of law is absolutely irrelevant to the question of whether these costs should be imposed upon the union.

QUESTION: But isn't -- Mr. Hartunian, isn't there a provision even in the standard cost statute that costs shall be awarded as a matter of course to the prevailing party unless the court otherwise directs?

MR. HARTUNIAN: That's correct, Mr. Chief Justice.

QUESTION: So there's discretion even in that area.

MR. HARTUNIAN: Absolutely there is discretion, and we don't say there is not discretion. As a matter of fact, our argument in this case is that there is discretion, which is the third thing in the statute that we find militates against the idea of having a blunderbuss exemption for intervenors.

Indeed, the statute says the court in its

discretion may allow the prevailing party a reasonable attorney's fee, which means that it's up to the court's discretion that every district court should take into account those factors which should militate one way or another. And, of course, the discretion is somewhat constrained by -- by the legislative history as recognized in Christiansburg.

QUESTION: Do you -- Do you feel that the Seventh Circuit recognized this as a matter where the district court had discretion to award or not award fees against the union? And do you feel that the district court thought it had discretion?

MR. HARTUNIAN: Oh, the district court not only thought it had discretion, but the district court exercised it. And I think, Mr. Chief Justice, you can find the district court's findings in the appendix to the certiorari petition at page 35(a).

The district court did indeed take up the questions of how much delay was occasioned, what the matters were, whether they were relatively meritorious, and so on, and did indeed exercise his discretion. He did not simply say, whenever the plaintiff wins against an intervenor you get attorney's fees. But the --

QUESTION: But did he take -- did the district court take into consideration, as a special factor, that

this was an intervenor and not a defendant?

MR. HARTUNIAN: He -- no. He regarded the fact that the union is an intervenor as being no different and worthy of no special consideration. And in that --

QUESTION: So then you say, oh, sure, the court has discretion, but it should not make any special allowance for the fact that the intervenor -- that it was an intervenor here rather than a defendant, or that the intervenor had not violated the law?

MR. HARTUNIAN: That's right. He should not. But there may be circumstances where because somebody is an intervenor that may put him in a different position than if he were a defendant. That's not this case.

As a matter of fact, this case is as far as one can get from the best case an intervenor can present in order to show the special circumstances in which discretion should that into account, because here, the intervenor acted like a defendant in that it interposed the very same defense which had been the touchstone of TWA's defense. Namely, the failure to file timely charges and the assertion that that was jurisdictional.

And so the union took as its main point of defense in this case the very thing which not only the TWA had used as its defense, but that argument which would have destroyed the entire case of the plaintiffs,

not just going to the question of remedy.

The important thing here is that the government and the union seek a rule that would forbid district courts everywnere, for all time, from imposing a plaintiff's attorney's fees upon an intervenor, and that sort of rule simply cannot be squared with Congress' use of the word discretion.

QUESTION: I don't think they go quite that far. They say upon an intervenor who is not guilty of the wrongdoing that was the subject of the suit.

MR. HARTUNIAN: Yes, that's -- Justice Scalia, that's right. But they do say that that rule should be that whenever an intervenor is not guilty of the underlying violation, that there should never be imposed fees. And, of course, there's no support for that in the statute and each of the provisions of the statute goes in the opposite direction.

And, the question of the legislative history now, if we need to go into that, also stands for the proposition that there is no justification for an exemption like that.

QUESTION: Is there any support for the proposition that you cannot impose fees upon an intervenor whose intervention has in no way prolonged the suit or caused any additional expenses?

MR. HARTUNIAN: Well, of course, this case is on in which they did prolong it.

QUESTION: I understand it. But -- but it seems to me that -- that one might adopt under this statute an absolute rule that where an intervenor -- as opposed to the defendant -- hasn't prolonged the suit at all -- he just happens to be another party, he hasn't caused any additional expense -- no costs can be asserted against an individual -- against an intervenor.

I think you could adopt that absolute control of the district court's discretion, couldn't you?

MR. HARTUNIAN: I don't even think you need to. It's inherent in the very nature --

QUESTION: Okay.

MR. HARTUNIAN: -- of the fee-shifting statute that it's only when fees are incurred that there be anything awarded --

QUESTION: Oh, expenses have been incurred in the suit. I'm not saying that the plaintiff didn't have any expenses. But they were no greater expenses because of the intervenor than they would have been had the intervenor not been in the case.

MR. HARTUNIAN: Well, then I don't see how a plaintiff could complain or could -- could ask for any fee award under those circumstances.

QUESTION: He could -- well --

MR. HARTUNIAN: And I think the answer is, yes, I agree entirely.

QUESTION: Can a court split the fee award between the defendant and the intervenor? Say, the defendant pays half and the intervenor pays half.

MR. HARTUNIAN: I'm trying to imagine a set of -- I understand the concept. I'm trying to imagine a set of circumstances --

QUESTION: Well, you'd say no, I think. I think anybody would say no. And I think we would reverse, as an abusive discretion, any award because of the word "may" here -- it does say may -- but it would be abusive discretion to allow an award against an intervenor in that situation.

MR. HARTUNIAN: Right.

QUESTION: So, you have to acknowledge that there is room under this statute to have some absolutes. Even though it says discretion, it means reasonable discretion.

MR. HARTUNIAN: I -- I think the answer to the question whether the marginal costs imposed by an intervenor should be taken into account, or where the marginal extra costs imposed by the intervenor are zero, namely that it would have been the same amount of effort

and work by the plaintiff irrespective of the intervenor's presence, I think that the answer is clearly that there should be no fees awarded against the intervenor because the intervenor did not cause any work or expense to the plaintiff.

QUESTION: But why is that? You come here and you say the statute says against the -- the prevailing party is entitled to award. You say it's treated like costs. Costs are paid by parties, whether the party is blameworthy or not.

Why -- why wouldn't you split it between the intervenor and the defendant? You've told us that blame doesn't make any difference.

MR. HARTUNIAN: Because in that instance, Justice Scalia, in the hypothetical we just talked about, the plaintiff did not prevail against the intervenor. There was no battle between the plaintiff and the intervenor in which the plaintiff could say, I prevailed against the intervenor and, therefore, shift my fees.

QUESTION: Why not? The intervenor made the same argument the defendant did. It just didn't cause the litigation to drag on any longer. That's all.

MR. HARTUNIAN: The -- the intervenor made the same argument that the defendant did?

QUESTION: The same argument. Yes.

MR. HARTUNIAN: So he just uttered redundant things?

QUESTION: Yes. Absolutely.

MR. HARTUNIAN: Well, if they literally both occupied the same position --

QUESTION: You'd award the fee against both of them? Is that right?

MR. HARTUNIAN: I might very well. Yes. Because in that case you can't blame one -- it's not a question of blame. You can't attribute to the one any more than you can to the other the work that was imposed upon the plaintiff. Because, the important thing about this statute is, that the Congress wanted to make sure that the plaintiff would be equipped with a lawyer. And in order to do that, it wanted to make sure that the fees be shifted from the plaintiff's shoulders to the side which caused those fees to become necessary.

Where you create a hypothetical in which you cannot distinguish between two parties to the case, as to which caused --

QUESTION: One of them was guilty of a violation of law --

MR. HARTUNIAN: Yes.

QUESTION: -- and the other one wasn't. You're

just unwilling to take that distinction into account. That's --

MR. HARTUNIAN: Because Congress made no such distinction. That distinction is completely inapposite.

QUESTION: The question is whether Congress meant to exclude the courts from taking that distinction into account within the word may, whether that's one of the discretionary factors the courts can consider.

MR. HARTUNIAN: Well, since the court -- since Congress used the language it did, without bringing about any special exemptions, I think it follows from that that Congress cannot be taken to have intended any blunderbuss categorical exemption.

It is true that the -- that Congress' choice of the expression "In its discretion" allows quite a bit of room for a district court to take into account the very kinds of things that should go into the question, a la Christiansburg, whether the costs should be shifted and how much.

But I don't think it's ever a question of turning a plaintiff away simply because a person is an intervenor. And that's exactly what the union and the government seek in this case.

QUESTION: Well, certainly, in Newman v. Piggy Park, the Court interpreted the statute somewhat

differently than it was written. It said ordinarily -- in spite of the fact the statute says "may in its discretion," ordinarily an award goes to the prevailing plaintiff.

Now, that is putting a gloss on the literal language of the statute. It's controlling the court's discretion in some way.

MR. HARTUNIAN: In so doing, this Court was being faithful to Congress' expressed intentions.

QUESTION: Well, it certainly wasn't necessarily being faithful to the statutory language.

MR. HARTUNIAN: In a sense it was because the question of discretion is always one in which this Court sets standards.

QUESTION: Well, then -- okay, then if the question of discretion is always one in which this Court sets standards, why the standard in Piggy Park but not the standard in this case?

MR. HARTUNIAN: The standard being sought in this case is hardly a standard, but rather a categorical exemption. That's the --

QUESTION: It certainly -- it's no more categorical than the rule in Newman v. Piggy Park.

MR. HARTUNIAN: Yes, it is. Mr. Chief Justice, the rule being sought by the union and the government

here says, if you identify the party against whom fees are sought as an intervenor who wasn't guilty of a violation of the law, then you may never grant fees to the plaintiff for the work made necessary by that party.

They -- in other words, they describe -- attributes, once described, exempt that party from consideration --

QUESTION: Well, what -- what if we tailor that a little bit and said, just like in Newman v. Piggy Park, that ordinarily in a situation like that you would not award a fee against the defendant? Does that meet with your approval?

MR. HARTUNIAN: Not at all because that doesn't meet with with Congress' approval. Congress never said any such thing.

QUESTION: Well, Congress never said what we said in Piggy Park.

MR. HARTUNIAN: Yes, they did. Congress did.

QUESTION: Congress in this statute did not say it.

MR. HARTUNIAN: Not in the statute. That's correct.

QUESTION: No.

MR. HARTUNIAN: But, Mr. Chief Justice, what Congress intended was very clear, as was gleaned from --

as Piggy Park gleaned from the Congressional expression, that under ordinary circumstances a plaintiff should get its fees because of the underlying Congressional purpose.

That's clear. And Piggy Park did not torture the words of the statute in order to arrive at that conclusion.

QUESTION: -- simply read something into the statute that was not on the face of the statute?

MR. HARTUNIAN: I agree with that. Yes, Mr. Chief Justice. But there is no call -- no cause to read into this statute what the union and the government seek to read into it, like there was in the case of Piggy Park. Because Piggy --

QUESTION: Well, Mr. Hartunian, there is only one wrongdoer here, isn't there?

MR. HARTUNIAN: That's correct, Justice O'Connor. Yes. TWA.

QUESTION: And the problem wouldn't have existed but for the rules that TWA adopted here.

MR. HARTUNIAN: Yes, that's correct.

QUESTION: And, surely, the discretion of the district court should extend, and ordinarily would extend to take that into account, I would think.

MR. HARTUNIAN: In order to take into account the fact that the entire lawsuit was made necessary only

because of the wrong of TWA, and laying the blame at TWA's feet for everything that happened thereafter, has some logical appeal to it.

However, any rule which caused the shifting of fees only to the original wrongdoing defendant would have some very untoward effects, which we describe in Part Four of our brief.

QUESTION: Well, if you -- if you reserved, perhaps, some room for discretion nonetheless. But -- but to think that ordinarily that would be the concept, it seems to me not to stray particularly from the language in the statute or from ordinary concepts of jurisprudence.

MR. HARTUNIAN: Justice O'Connor, it makes sense to require a defendant to pay a plaintiff's fees for all of the litigation that a defendant can reasonably anticipate at the moment it commits the wrong. And so, in the case in this setting -- the typical Title VII case -- you might easily attribute to the defendant the reasonable anticipation that there will be not only litigation about liability but about relief.

But the only kind of litigation that you can attribute to a defendant in this case would be that over unusual adverse impact a la Franks v. Bowman. And

although the union would have you believe that's what the litigation was about here, this --

QUESTION: Well, but I would -- I would think it would be completely foreseeable by the employer that a union would want to, or feel it had to, defend the seniority rights of -- of the non-class plaintiffs here. I mean, that -- it just seems to me that that --

MR. HARTUNIAN: I agree with that.

QUESTION: -- was completely foreseeable at the outset.

MR. HARTUNIAN: I agree with that. But I don't think you can expect that TWA would have looked forward to and expect that the union would come in and make arguments about the question of jurisdiction, or that the union would make arguments that had become declasse six years earlier in Franks v. Bowman.

What the union came and argued in this case -- and what they argued is clear from the Zipes opinion -- It's not what the union says they argued. They did not argue unusual adverse impact. They spent two minutes on that.

What they argued, and the two things clear from Zipes, are the jurisdictional question -- and you can't expect TWA to look forward to that once TWA dropped that cudgel. And, second, it argued as though Franks v.

Bowman had never been decided. Argued that, gee, this is going to have an impact on us. Well, of course, it will.

It's an unusual adverse impact that counts. Not just some impact. Seniority is important, and it's as important to the incumbents as it was -- and to the victims -- as it was to the incumbents.

So, when the union argues that what it did was reasonable under these circumstances, they're really missing the point. And the question whether the defendant should be imposed -- whether the fee should be imposed on the defendant I think should go to the question of foreseeability, which is inapposite to this case because of the particular facts of this case.

And the particular facts of this case are important with respect to this question of discretion and forseeability to the defendant.

The union filed this case originally in 1970 at a time when the union contract was about to expire, and one of the things the union wanted for its incumbents was to end TWA's no-mothers policy.

They filed this lawsuit to bring pressure on TWA, but filed it not only on behalf of the incumbents in order to try and stop a practice from continuing -- which, of course, the incumbents had an interest in --

but filed it as the purported class representative on behalf of all previously fired stewardesses, stewardesses who were no longer members of the union. And, the complaint prayed -- among its prayers for relief was back pay.

The way the union settled the case with TWA was they eliminated the policy for the future and got virtually nothing for the class members whose claims they had used in the bargaining process. So, they brought the threat of back pay claims and the other kinds of equitable relief that the prior stewardesses might have enjoyed, used that as a threat.

Once they got what they wanted, virtually abandoned the class members in a settlement in which the class members would -- the previous stewardesses would have gotten no back pay, would not even have had a right to get their jobs back except as openings occurred, and would get not only no retroactive competitive seniority, but, to the delight of TWA, no retroactive company seniority.

And it was with that, and the fact that, as the Seventh Circuit noted, that they didn't -- they being TWA and the union -- did not even give the right to opt out to the previously-fired stewardesses. They wanted to run this settlement through in a way so that there

wasn't even any opt-out provision.

That's why the Seventh Circuit vacated the order approving that settlement and remanded with instructions to remove the union as a class representative.

And then the union was not heard from again until five or six years later, 1979, when after we had obtained summary judgment and we had brought TWA to the bargaining table while cross-petitions for certiorari were --

QUESTION: Have -- could you have brought the union in the case?

MR. HARTUNIAN: Could we have?

QUESTION: Yes.

MR. HARTUNIAN: We had no -- we had no complaint against the union, Justice White.

QUESTION: Well, you knew that -- you certainly knew -- I thought said a while ago that the union would probably defend the seniority.

MR. HARTUNIAN: Oh, we -- oh, Justice White, when the settlement was entered into -- and, by the way, the settlement did not purport to give any retroactive seniority --

QUESTION: Yes. Yes.

MR. HARTUNIAN: -- we invited -- we went before

the court and said as we --

QUESTION: How do you invite? You invited them.

MR. HARTUNIAN: Yes.

QUESTION: But could you have made them a party?

MR. HARTUNIAN: Well, I don't see where the distinction is important. The important thing was to get them the opportunity to be heard on the question of unusual adverse impact because that's what this Court said is required in Franks v. Bowman.

So, whether we made them a party -- we simply went before the court --

QUESTION: Well, what if you -- what if you had tried? What if you had thought, well, we don't want them attacking this settlement later, let's get them now? So you -- I assume you'd have tried to make them a party.

What would you have done with them? Made them a defendant or a --

MR. HARTUNIAN: If we had thought it necessary -- and we didn't -- we would have served them with a summons and made them a defendant. Yes.

As it was, it didn't become necessary because we invited them. The court -- we suggested that the court invite them, and they were invited, and they declined the invitation. Instead, filed a full-blown

petition to intervene so that they could get the rights, I suppose, of the intervenor. I don't see what distinction they obtained.

In any event, with that record, with that history of the litigation, the union can hardly complain that it was mistreated in the case or take credit for anything that it did for the plaintiffs.

I do also want to mention that the settlement agreement did not, as the union would have you believe, give away the rights of retroactive seniority. The settlement agreement was absolutely neutral on it. The settlement agreement said that TWA would take no position on it, that whatever the plaintiffs' petitioned for, it would be up to the court, and if any interested party comes before the court, that TWA will stand aside.

All of that is in the Joint Appendix at pages 13 and 27 to 28.

This Court announced in Alyeska that it is not up to this Court to reallocate the burdens of litigation in the absence of legislative guidance. Here, there has been legislative guidance. And, the same thing that was said in Alyeska can be said here with a corollary to it, being that where Congress has allocated the burdens of litigation, it is not for this Court to take into account so-called policy or equitable matters to change

what Congress has clearly done or to insert things that Congress left out.

QUESTION: Thank you, Mr. Hartunian.

Mr. Fehr, do you have rebuttal?

REBUTTAL ARGUMENT OF STEVEN A. FEHR

ON BEHALF OF PETITIONER

MR. FEHR: I do. In Christiansburg the defendant argued that under the so-called plain language of the statute it was entitled to fees as a prevailing defendant under the same standard accorded to prevailing plaintiffs.

The Court rejected that argument. Justice Stewart noted that 706(k) is more flexible than other fee-shifting statutes and said that decisions under 706(k) must be decided under traditional considerations of equity and that Congress entrusted the courts to do so.

And accordingly, the Court in Christiansburg set forth standards which apply to plaintiffs and which apply to defendants, and this case calls upon the Court to set forth standards which apply to innocent third parties.

We believe the Christiansburg standard which is applied to unsuccessful plaintiffs should apply to IFFA.

QUESTION: Mr. Fehr, how does -- I'm not sure

this -- this works, but I think it works.

Suppose the stewardesses bring -- bring suit here and -- and TWA comes in and says, "You got us, we're guilty," but your union intervenes and says, "no, you're not. We don't think you're guilty. We think everything's all right." Okay? And it's only because of -- of your union that the suit goes forward at all. Then, what happens? The plaintiff in that case just doesn't get any fees?

MR. FEHR: I'm not sure I totally understand the question --

QUESTION: Or does it --

MR. FEHR: -- but I would think --

QUESTION: -- get all the fees against TWA who wanted to get out of this -

MR. FEHR: I think --

QUESTION: -- thing by pleading guilty?

MR. FEHR: -- wherever possible, it is appropriate to shift the requirement for fees to the wrongdoer, which is the party who injured the plaintiffs and the party who injured the innocent third parties only slightly less directly.

QUESTION: Yeah, but TWA says, "I'm guilty." You know, "enter the judgment against me."

MR. FEHR: Well, I think --

QUESTION: But the union says, "No, don't do that. We don't think you're guilty." And three years worth of litigation ensues.

MR. FEHR: But TWA could certainly stipulate to facts which would demonstrate its guilt, and the union would be limited into objecting to whatever its legally cognizable interests were. The union could not object, and did not object here, to TWA paying money to the plaintiffs.

QUESTION: But, yet, the union could argue, even if TWA decides not to, that there's no violation of the statute.

MR. FEHR: I suppose so.

QUESTION: And there -- there, certainly their equitable position is regarding an award of fee -- in that situation -- would be somewhat less appealing than one where -- which has not prolonged the litigation on -- on the merit.

MR. FEHR: Sure. We just think that where there is some question as to the validity of the claims that it's the wrongdoing party that should bear the burden for fees, and, to the extent possible, for the relief encompassed in the settlement agreement.

There is nothing in the legislative history that requires the result here. The only thing in the

legislative history about 706(k) is the brief statement by Senator Humphrey that we want to make it easier for plaintiffs of limited means to bring suit.

That has certainly happened here. That certainly cannot be a basis for finding that intervenors whose rights are abridged, even though they did not violate the law, should be automatically assessed attorney's fees.

And, of course, as you indicated, Mr. Chief Justice, there is a problem with saying the Court exercised discretion because in case after case, from Christiansburg to Piggy Park to Garland to Bergeron, the Court has told the district courts how they are to exercise their discretion. And if the fact that the party did not violate the law is to be a factor to be considered, there has to be a reversal because I think it is clear from both lower court opinions that that was not considered to be an appropriate factor here.

As to whether the union was a plaintiff or defendant, look at Rule 24 which says a party who intervenes shall present a short pleading presenting either its claim or defense, and then look at our petition for intervention in the Joint Appendix, and see whether it represents a claim or a defense.

I think it clearly is a claim. We were setting

forth the fact that we believed the incumbent employees were being victimized and that that should not happen.

As to our opposing complete relief, the only sense in which we did that is in an effort to save the junior incumbents' jobs. We pointed out to the district court that there had been a finding that there was no jurisdiction.

It was the duty of the court, I always understood, to inquire into whether he had subject matter jurisdiction and the duties of officers of the court to insist in that endeavor.

I take it Mr. Hartunian is not grateful to the former union for setting events in motion which eventually allowed plaintiffs' counsel to receive the $1.4 million in fees, but I do disagree as to whether the parties were better off under the second settlement than they would have if the first settlement had been consummated.

And I have no quarrel with the 1973 Seventh Circuit opinion, but the fact is that the parties waited an additional 12 years to regain their jobs and the average Subclass B, you'll remember, received the grand sum of $2,000 in back pay. The average class member received just about the same seniority she would have had if the first settlement had been consummated because

of the limitation upon the accrual of seniority in the settlement agreement.

It is true that the first settlement required that the plaintiffs only be reemployed when openings occurred, as did the second settlement. However, the difference is that settlements were plentiful in 1971 and nonexistent in 1979.

As to the settlement agreement -- or, the district court granting the seniority, but for the settlement agreement, obviously the district court could not have granted the seniority because the law of the case was and is that there was a finding that Subclass B members had untimely claims. And, but for the settlement agreement, he would not possibly have been empowered to issue that grant of seniority.

I think that's all I have. I thank you.

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Fehr.

The case is submitted.

(Whereupon, at 11:57 p.m., the case in the above-entitled matter was submitted.)

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ANNE B. ZIPES, ET AL.

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BY Judy Freilicher

(REPORTER)