1972 WL 3011
United States Court of Appeals
Eighth Circuit

United States of America, Appellant
v.
St. Louis-San Francisco Railway Company et al., Appellees.

No. 71-1247.
|
February 22, 1972.

Before VAN OOSTERHOUT, Senior Circuit Judge, ROSS and STEPHENSON, Circuit Judges.

Opinion

STEPHENSON, Circuit Judge

***1** The United States appeals from an order dismissing its action in the district court and giving judgment to appellees (Frisco). The Government charged Frisco with having engaged in a policy and practice of discrimination on account of race against its negro train porters, in violation of Title VII of the Civil Rights Act of 1964 (42 U. S. C. § 2000e *et seq.*), and sought to have these employees reclassified as freight brakemen, carrying with them their accumulated seniority as train porters. Jurisdiction is founded on § 2000e-5(f) of the Act. See *Norman v. Missouri Pacific Railroad*, [2 EPD ¶10,040] 414 F. 2d 73 (CA 8 1969). We affirm on the basis of Judge Harper's well-considered opinion which is reported at [3 EPD ¶8263] 52 F. R. D. 276 (E. D. Mo. 1971). We are satisfied that the trial court's findings of fact are supported by substantial evidence and that the law has been correctly applied.

Neither the anti-preference section (§ 2000e-2(j)) nor the provision safeguarding seniority systems (§ 2000e-2(h)) operate to prevent courts from eliminating present discriminatory effects of past discrimination which is preserved through the use of neutral employment policies. *Griggs v. Duke Power Co.*, [3 EPD ¶8137] 401 U. S. 424 (1971); *United States v. Bethlehem Steel Corp.*, [3 EPD ¶8257] 446 F. 2d 652 (CA 2 1971); *Parham v. Southwestern Bell Telephone Co.*, [3 EPD ¶8021] 433 F. 2d 421 (CA 8 1970); *United States v. Sheet Metal Workers Int'l Ass'n, Local 36*, [2 EPD ¶10,083] 416 F. 2d 123 (CA 8 1969) and *Local 189, United Papermakers and Paperworkers, AFL-CIO, CLC v. United States* [2 EPD ¶10,047] 416 F. 2d 980 (CA 5 1969). See Note, Title VII, Seniority Discrimination And The Incumbent Negro, 80 Harv. L. Rev. 1260 (1967). It is equally clear, however, that courts, with their broad authority to fashion remedies under the Act, should not emasculate valid seniority systems so long as they are conceived out of *business necessity* and not out of racial discrimination. *Local 189, supra*, at 989, 993-994; *Whitfield v. United Steelworkers of America, Local 2708*, [1 EPD ¶9659] 263 F. 2d 546 (CA 5 1959) and *United States v. H. K. Porter Co.*, [1 EPD ¶9961] 296 F. Supp. 40, 66-68 (N. D. Ala. 1968). See Note, Employment Discrimination and Title VII of the Civil Rights Act of 1964, 84 Harv. L. Rev. 1109 (1971); Kovarsky, Current Remedies for the Discriminatory Effects of Seniority Agreements, 24 Vand. L. Rev. 683 (1971) and Yeager, The 'Unqualified' Minority Worker, 59 Geo. L. J. 1265 (1971). *Cf. Griggs, supra*.

A careful review of the record convinces us the findings of the district court preclude reclassification of the train porters as freight brakemen with carry-over seniority. Not only is there a functional difference between the crafts of train porters and brakemen, but Frisco's seniority system is based on a recognition that a brakeman's job is complex and hazardous, requiring related experience in safety and repair work at the various levels of job progression. Reclassification with carry-over seniority, under these circumstances, could occur only at the expense of safety and efficiency.[1]

***2** Litigation involving the train porters and their economic status has been before this Court almost continuously since 1946.[2] A review of this litigation discloses that although these blacks and their predecessors were originally locked into the train porter craft by joint Frisco-Union discriminatory practices, their plight in the last two decades has been predominantly economic in origin. The advent of the diesel engine, the dramatic decline of the railroad industry and the elimination of passenger service in 1967 all have combined to wreck havoc upon train porters, rendering them virtually an extinct occupational species. Under these circumstances, we believe the remedy sought would be clearly improvident.[3]

Affirmed.

Ross, Circuit Judge, Dissenting

***2** I respectfully dissent. I agree with the majority and with Judge Harper that there are some functional differences between the duties of the crafts of train porter and brakeman; that a brakeman's job is complex and hazardous, requiring related experience in safety and repair work; and that a complete merger of the seniority lists of the two crafts could occur only at the expense of safety and efficiency. I do not agree, however, that a complete merger of the two lists was the *only* possible remedy and believe the case should be remanded with directions to the trial court to fashion an appropriate remedy as permitted by Title VII.

Past discrimination is evident from the fact that from 1928 until 1949 an agreement existed between Frisco and the Brotherhood of Railroad Trainmen which provided that 'in the future hiring of employees in train, engine, and yard service but not including Train Porters, only white men shall be employed.' And from the statistics received from Frisco in answer to an interrogatory, it is apparent that, with one possible exception, no black was hired as a brakeman between 1928 and 1966. On oral argument, counsel for the Union conceded that there was past discrimination, but claimed that there was no discrimination in the present employment practices. When the position of train porter was discontinued in 1967, Frisco offered the porters positions as brakemen but without any carry-over seniority.

The effect of discrimination of the past, however, carried over under the craft seniority system after the use of train porters was discontinued. 'Every time a Negro worker hired under the old segregated system bids against a white worker in his job slot, the old racial classification reasserts itself, and the Negro suffers anew for his employer's previous bias.' *Local 189, United Papermakers and Paperworkers v. United States*, [2 EPD ¶10,047] 416 F. 2d 980, 988 (5th Cir. 1969), *cert. denied*, [2 EPD ¶10,177] 397 U. S. 919 (1970). Thus, where an employer's current policy serves to perpetuate the effects of past discrimination, 'although neutral on its face, it rejuvenates the past discrimination in both fact and law regardless of the present good faith.' *Marquez v. Omaha District Sales Office, Ford Division*, [3 EPD ¶ 8156] 440 F. 2d 1157, 1160 (8th Cir. 1971).

***3** Admittedly, much of the plight of train porters has been precipitated by the declining economic conditions of the railroad industry, but the results are the same as if they were caused solely by racial discrimination. *See United States v. Jacksonville Terminal Co.*, [3 EPD ¶8324] 451 F. 2d 418, 445 (5th Cir. 1971). Because that result, even though in a current neutral environment, is tainted with the effects of past discrimination, it is remediable.

A neutral policy, which is inherently discriminatory, may, of course, be valid if it has business justification. *Jones v. Lee Way Motor Freight, Inc.*, [2 EPD ¶10,283] 431 F. 2d 245, 249 (10th Cir. 1970), *cert. denied*, [3 EPD ¶ 8139] 401 U. S. 954 (1971). However, this doctrine of business necessity, which has arisen as an exception to the amenability of discriminatory practices, connotes an irresistible demand. The system in question must not only foster safety and efficiency, but must be essential to that goal. *United States v. Bethlehem Steel Corp.*, [3 EPD ¶8257] 446 F. 2d 652, 662 (2d Cir. 1971). In other words, there must be no acceptable alternative that will accomplish that goal 'equally well with a lesser differential racial impact.' *Robinson v. Lorillard Corp.*, [3 EPD ¶8267] 444 F. 2d 791, 798 (4th Cir. 1971); *accord*, *United States v. Bethlehem Steel Corp., supra*, 446 F. 2d at 662. I am confident the district court in this case is capable of fashioning a remedy that would not frustrate this basic goal, by making sure that train porters would not be promoted into brakeman functions they are unqualified to perform. Therefore, in my opinion, an acceptable alternative does exist.

Regardless of what was considered the train porters' primary function, the crucial factor is that they served as train porters, rather than brakemen, because of past discriminatory practices. It is indisputable that train porters were qualified for and did perform many braking functions, and a remedy could be fashioned wherein both abilities and disabilities of the train porters would be taken into account.

The district court has wide discretion in fashioning decrees to insure compliance with Title VII. *Parham v. Southwestern Bell Telephone Co.*, [3 EPD ¶ 8021] 433 F. 2d 421, 428 (8th Cir. 1970). *See e.g.* this Court's recent en banc decision in *Carter v. Gallagher*, [4 EPD ¶7616] No. 71-1181 (8th Cir. Jan. 7, 1972). The court could 'carefully tailor' a remedy that would accord the displaced train porters their 'rightful place,'[1] taking into consideration their past braking experience and their ability to perform braking functions, and yet accord management supervision over the qualifications of personnel bidding for vacancies. I, therefore, would reverse and remand this case to the district court in order that a remedy can be fashioned in accordance with the basic principles expressed herein.

All Citations

Not Reported in F.2d, 1972 WL 3011, 4 Fair Empl.Prac.Cas. (BNA) 397, 4 Empl. Prac. Dec. P 7688

Footnotes

[1] See *United States v. Jacksonville Terminal Co.*, [3 EPD ¶8324] 451 F. 2d 418, 443-448 (CA-5 1971).

[2] See *United States v. St. Louis-San Francisco Railway Co.*, [3 EPD ¶ 8263] 52 F. R. D. 276 (E. D. Mo. 1971) (cases cited at 277-278).

[3] We do note that Frisco prior to the trial herein had already offered the train porters positions in other crafts including that of brakeman but without carry-over seniority.

The only remedy requested herein was complete merger of the brakemen and train porter crafts with carry-over seniority. Upon inquiry by the court during the oral argument as to whether there was a middle ground that could be applied in fashioning a remedy, counsel for the Government declined to suggest any.

[1] See, *e. g., United States v. Jacksonville Terminal Co., supra*, 451 F. 2d at 452-453; *United States v. Bethlehem Steel Corp., supra*, 446 F. 2d at 661; *Robinson v. Lorillard Corp.*, [3 EPD ¶8267] 444 F. 2d 791, 800 (4th Cir. 1971), *petition for cert. filed*, 40 U. S. L. W. 3251 (U. S. Sept. 24, 1971) (No. 71-427); *Griggs v. Duke Power Co.*, [2 EPD ¶ 10,143] 420 F. 2d 1225, 1236-1237 (4th Cir. 1970), *rev'd on other ground*, [3 EPD ¶8137] 401 U. S. 424 (1971); *Local 189, United Papermakers and Paperworkers v. United States, supra*, 416 F. 2d at 988; *Quarles v. Philip Morris, Inc.*, [1 EPD ¶ 9843] 279 F. Supp. 505, 520 (E. D. Va. 1968); Note, *Employment Discrimination and Title VII of the Civil Rights Act of 1964*, 84 Harv. L. Rev. 1109, 1163-1164 (1971); Cooper & Sobol, *Seniority and Testing under Fair Employment Laws: A General Approach to Objective Criteria of Hiring and Promotion*, 82 Harv. L. Rev. 1598, 1632-1636 (1969); Note, *Title VII, Seniority Discrimination, and the Incumbent Negro*, 80 Harv. L. Rev. 1260, 1268-1269 (1967).