10-1979

California Brewers Assn. v. Bryant

Lewis F. Powell Jr.

Conf 3 (?)

CA 9 ruled that a "permanent employee" (one with a Co. for 45 weeks) under the collective bargaining agt. is not within a "seniority system" under §703(h) of Title VII.

In Teamsters (P.S.'s op) we held that where an employer action affects a seniority system, the employee complaining must prove intentional discrimination. Then CA 9's holding enabler "permanent employee" to charge discrimination under VII with. not proving invidious intent. Timely

PRELIMINARY MEMORANDUM

May 31, 1979 Conference
List 1, Sheet 3

No. 78-1548

CALIFORNIA BREWERS ASSOC., et al.
v.
BRYANT

Cert to CA 9 (Hufstedler, Pregerson (DJ); Trask, dissenting)

Federal/Civil

1. SUMMARY: Petrs challenge a CA ruling that a provision in a collective bargaining agreement affording "permanent employee" status only upon 45 weeks of employment within a calendar year is not part of a "seniority system" within the meaning of § 703(h) of Title VII.

2. FACTS & DECISIONS BELOW: The seniority arrangement at issue in this case is embodied in a collective bargaining agreement forged in

Please see p. 7.

negotiations between petr California Brewers Assoc., on behalf of several brewers, and the Teamster Brewers and Soft Drink Workers Joint Board of California. The agreement establishes five classes of employees: (1) new employees; (2) apprentices; (3) temporary bottlers; (4) temporary employees (other than bottlers); and (5) "permanent employees." "Permanent employee" status requires 45 weeks of employment within a calendar year in the brewing industry in the State of California. Temporary employee status requires at least 60 working days within a calendar year, and new employees are individuals who do not fall into any of the other categories. Apprentices are covered by separate provisions not at issue here.

The above system operates as follows. When a permanent employee has been laid off by one employer in the Association, he has a right to be dispatched to another Association member and replace the temporary or new employee there with the lowest plant seniority. Plant seniority governs within each class of employees, and dates from the first day of employment in a seniority tier within the establishment. When seniority of several employees dates from the same date, relative seniority is established based upon the length of service in California breweries.

Resp is a black who in 1968 got his first brewery worker's job in California with the Falstaff Brewing Co. and in 1973 he moved over to Hamm's. The CA described the situation giving rise to this litigation as follows:

> "In 1974 when this action was filed, despite 6 years of brewery experience, Bryant was still

> classified as a temporary employee because of his inability to satisfy the 45-week provision in the collective bargaining agreement between all major California breweries and brewery unions. . . . On its face the requirement appears innocuous. The rub is that changed circumstances in the brewery industry, including greater automation, improved brewing methods, and consolidation of breweries, have lessened the demand for labor, so that now it is virtually impossible for any temporary employee, Black or White, to work 45 weeks in one calendar year.
>
> The effect of the 45-week requirement has been to deny Bryant and other similarly-situated Black brewery workers the opportunity to be classified as permanent employees: no Black has ever attained permanent employment status in a California brewery." Petn App. at 2-3.

Bryant attacks the 45 week requirement as a violation of Title VII and 42 U.S.C. § 1981. The DC dismissed the complaint for failure to state a claim upon which relief can be granted.

The CA reversed, holding that the 45-week requirement lacked the fundamental component of a "seniority system" within the meaning of § 703(h) of Title VII.[1] That fundamental component is "the concept that employment rights should increase as the length of an employee's service increases." App. at 9.

> "In contrast, the brewery industry's 45-week requirement does not involve an increase in employment rights or benefits based upon the length of the employee's accumulated service. Under this requirement, employees junior in service to the employer may acquire greater benefits than senior

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1/ Section 703(h) provides that "it shall not be an unlawful employment practice for an employer to apply different standards of compensation or different terms, conditions, or privileges of employment pursuant to a bona fide seniority system, provided that such differences are not the result of an intention to discrimination because of race, color, religion, sex or national origin. . . ."

> employees. Although an employee must work at least 45 weeks before becoming a permanent employee, the acquisition of permanent status may be independent both of the total time worked and the overall length of employment. Some employees could acquire permanent status after only 45-weeks of work, if the 45 weeks were served in one calendar year. Other employees could work for many years and never obtain permanent status because they were always terminated a few days before completing 45 weeks of work in any one year. This feature distinguishes the challenged system from the seniority system considered in Teamsters [Teamsters v. United States, 431 U.S. 324 (1977)]. In Teamsters, the use of different measures of seniority for different purposes meant that employees might have greater seniority rights for some purposes than for others. But employees with fewer weeks of service in a particular area (company or bargaining unit) could never acquire greater benefits within that area than employees with longer service there. Under the 45-week requirement, less senior employees could acquire greater rights regardless of whether one measures seniority by length of employment in a bargaining unit, plant, company, or industry." App. at 9-10.

Since the 45-week requirement was "not part of a seniority system," resp was not required to prove any form of intentional discrimination to make out a Title VII violation. It reversed the DC's judgment and remanded so that resp could prove that the 45-week provision had a discriminatory impact. Also the DC was to consider resp's 42 U.S.C. § 1981 and 29 U.S.C. §§ 159(a), 185(a) claims.

Judge Trask dissented, concluding that under Teamsters resp could not make out a claim and that the DC had properly dismissed the action.

3. CONTENTIONS: Petrs first suggest that there is a conflict with the CA 6's opinion in Alexander v. Machinists, Aero Lodge No. 735, 565

an absolute preference in filling a vacancy to employees with prior, satisfactory service in a particular occupation, even though other worker may have more plant-wide seniority. Petr perceives a conflict in the CA 9's failure to recognize the diversity of seniority systems that come within § 703(h) under Teamsters. Moreover, the CA 9 here has effectively barred the parties from ever developing a factual record regarding the role of the 45-week rule within the brewery seniority system, despite the admissions of all parties that the requirement was part of the seniority system. Petrs contend that at the very least this case should be remanded for reconsideration in light of Teamsters.

Petrs call particular attention to footnote 41 of this Court's Teamsters decision.

> "There is no reason to suppose that Congress intended in 1964 to extend less protection to legitimate departmental seniority systems than to plant-wide seniority systems. Then, as now, seniority was measured in a number of ways, including length of time with the employer, in a particular plant, in a department, in a job or in a line of progression. The legislative history contains no suggestion that any one system was preferred." Teamsters v. United States, 431 U.S. 324, 355 n. 41.

They contend that the 45-week provision is virtually indistinguishable from numerous seniority devices commonly employed in American industry. Probation periods like the 45-week rule are quite common. "Businesses, with seasonal changes, such as department stores or delivery companies, often provide that seniority cannot be accumulated during those periods when the work force swells due to part-time or seasonal hires." Petn at 14.

A response has been filed. Resp characterizes the 45-week rule as merely a classification device that determines who enters the permanen employee seniority line. This function does not make it part of the seniority system. Otherwise any classification device, such as the requirement that an applicant have an academic degree, would be considered part of the seniority system. The CA 6's Alexander opinion simply addressed a system where "job seniority" took preference over "plant seniority" under certain circumstances. Resp suggests that the 45-week rule is peculiar to the brewery industry in California and does not present a significant issue requiring decision by this Court.

4. DISCUSSION: The CA 9 has here adopted a rigid notion of the proper components of a seniority system that is arguably not consonant with this Court's Teamsters decision. The 45-week requirement is neutral on its face and not so illogical that one can conclude, without taking any evidence, that it has no place in a bona fide seniority system. It seems that in any increasingly automated industry any seniority system will perpetuate the effects of past discrimination. There is nothing particularly invidious about the 45-week requirement. The CA majority appeared influenced by the argument that the 45-week rule was particularly susceptible to abuse, "since employers and unions can manipulate their manpower requirements and employment patterns to prevent individuals who are disfavored from ever achieving permanent status. Because seniority rights under a true seniority system usually accumulate automatically over time, it is difficult to manipulate them in a discriminator

manner." Petn at 11. But that inquiry does not appear to go properly to the question whether the 45-week rule is part of a bona fide seniority system. Rather the relevant question would be the operational rationale for the seniority plan or any purported part of it. If a provision is part of a bona fide seniority system, under § 703(h) any discriminatory impact violates Title VII only if coupled with discriminatory intent. Despite the interlocutory posture of the proceedings below, I think the question here is substantial and if the Court is inclined to explicate its Teamsters holding, this is a manageable opportunity to do so.

There is a response.

5/23/79 Haar CA op in petn.
CMS

I believe this case may be worth discussion. Although there is yet no conflict, the issue is important and not fact-specific. The definition of a "seniority" system is a vital issue to American industry.

E.A.

Eric - talk to me about this today

May 31, 1979

Court .... Voted on ...., 19...
Argued ...., 19... Assigned ...., 19... No. 78-1548
Submitted ...., 19... Announced ...., 19...

CA BREWERS ASSOC., ET AL.

vs.

BRYANT

P.S. said this is second case we have had that is contract to Teamsters - but he thinks it is not worth taking. Bryant disagrees.

Grant (Possibly of 4-4

	HOLD FOR	CERT. G	CERT. D	JURISDICTIONAL STATEMENT N	POST	DIS	AFF	MERITS REV	AFF	MOTION G	D	ABSENT	NOT VOTING
Burger, Ch. J.		✓											
Brennan, J.			✓										
Stewart, J.			✓										
White, J.		✓											
Marshall, J.			✓										
Blackmun, J.			✓										
Powell, J.					Join 3								
Rehnquist, J.		✓											
Stevens, J.							Out						

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

November 19, 1979

Re: 78-1548 - California Brewers Assn. v. Bryant

Dear Chief:

As you may recall, I am disqualified in this case.

Respectfully,

The Chief Justice

Copies to the Conference

er 11/20/79

BENCH MEMORANDUM

TO: Mr. Justice Powell

FROM: Ellen

DATE: November 20, 1979

RE: No. 78-1546 California Brewers Association v. Bryant

The basic issue is whether the 45-week rule for obtaining "permanent employee" status under the collective bargaining agreement is protected by Section 703(h) of Title VII of the Civil Rights Act of 1964, immunizing the use of "bona fide" seniority systems to the extent they are free from intentional discrimination. For analytical purposes, the parties have broken the issue into three parts:

1. Is the 45-week rule protected as an "integral part" of a seniority system?

2. Is the 45-week rule protected as a seniority system in and of itself?

3. Can either issue be decided on the present factual record, which includes the terms of the contract but contains no evidence as to the effect of the rule in operation?

I. Authority and governing principles

The underlying problem is that neither the statute, the legislative history, nor this Court's precedents provide any kind of definition of "seniority system." Resp Bryant and several of the amici have proposed definitions, none of which is particularly successful. The authority cited by the parties is distinctly unhelpful. Nothing in the cited courts of appeals decisions has much persuasive force either way. Nor does the analogy to this Court's cases under the Military Selective Service Act add to the analysis. The issue arises in those cases in such a different context that the cited discussions can be read to mean almost anything, as the parties have demonstrated (although I find the SG's reading of these cases grievously misleading). At best, they show only that the Court has recognized the wide variety of devices appropriate for incorporation in a seniority system. Finally, reference to general principles of statutory construction in this area are not enlightening. Resp contends that exceptions to remedial legislation like Title VII should be construed narrowly. Petr replies that the national labor policy favors allowing flexibility to employers and unions to design appropriate seniority systems. Neither point is much more than a makeweight.

I believe the starting point for analysis should be two basic principles as to which there is really no dispute: (i) First, the core component of a seniority system is some criterion based on length of service; and (ii) second, a seniority system incorporates rules not based on that criterion, including at a

minimum those that define the units in which seniority will accrue and the methods for computing its accrual, loss, and reinstatement.

Further elaboration of point (i) leads into a morass. I do not believe that the core concept is as narrow as resp and the SG would have us believe; that is, that seniority systems must require that benefits be awarded on a graduated scale based on increments in cumulative length of service in whatever unit the employer and union deem relevant. In fact, footnotes in both the SG's and resp's brief belie their ostensible adherence to this narrow principle, as petr's reply brief points out. The SG admits that a seniority system may give "reasonable recognition to continuity of satisfactory service." (36) And resp admits that seasonal businesses may require some system that creates a pool of trained and available temporary employees who do not receive the same benefits as full-time employees.

Although I am fairly certain that the "core" principle proposed by resp and the SG is too narrow, I am not certain what to replace it with. This will be a very difficult case to write in a way that gives some guidance without establishing broad dicta that may lead to unintended results. I would need to give it a great deal more thought before proposing any standard. But the parties have correctly identified some general considerations that should inform the result.

Resp is correct in insisting that every seniority system must result in an "ordinal ranking of employees" based on an "objective, non-manipulable standard," and that that standard must

be based in some sense on length of service. At the least, this "seniority principle" means that incumbents are advantaged, and that certain job benefits are obtained simply by working, without regard to evaluations or discretionary judgments by employers. In protecting systems based on these principles, Congress intended to protect the legitimate expectations of incumbent employees. Although the benefits accruing under the system need not be "automatic," they must be "reasonably certain" of attainment with the passage of time in service to the employer. Resp's contention that the system should not be subject to manipulation is somewhat more questionable - as one of the amici points out, the problem of manipulation of the system goes more to its bona fides than to its qualification as a seniority system in the first instance. I would thus not require that the system be completely free from potential for manipulation. But the concept of seniority does include some notion that benefits are not subject to employer or union whim, and this factor is relevant in identifying "true" seniority systems.

Turning to point (ii), there is agreement among the parties that the seniority system must include a large number of ancillary rules not based directly on the "core concept" defined by point (i), including those which define units and events triggering losses or reinstatements of seniority. Moreover, the parties agree that certain rules should never be deemed part of the system: For example, criteria for promotion based on performance evaluation, tests, height and weight standards, and so on. No one has suggested a principled way to draw the line between these two

sets of rules, and the parties disagree as to several intermediate cases, principally probationary periods, "superseniority" for union officials, and of course this case.

Petr suggests a "realistic" approach in which the system is scrutinized "as an integrated whole" and compared to known patterns of seniority prevailing elsewhere in industry. Resp would simply draw the line at definitions of units and methods for gaining and losing seniority - a superficially attractive solution but not one that accords with generally accepted notions of what is and is not part of the system. I'm not sure what the SG would do. His disappointing brief suggests that cumulative length of service must be the key, but goes on to recognize that seniority may be allocated on some sort of stage or step system (thus perhaps endorsing probationary periods) and that continuity may be a factor if it is reasonable. The footnotes and hypotheticals in the SG's brief strongly evoke the dangers the courts are running in this area, that is, finding themselves evaluating the reasonableness of particular clauses without any criteria to guide them. I would agree with petr that if such a task is to be undertaken, it should only be under the substantive guidance of Title VII - that is, we should acknowledge that the clauses are part of the system and then ask whether they are intentionally discriminatory.

The Court may not need to resolve this intractable problem in this case, because the rule at issue here does not seem all that questionable. There really is no "mix" of discretionary and seniority factors, despite resp's and the SG's attempt to paint

the system as resting on fortuities and possible manipulations. I think the case may be resolved, as resp proposes, principally by reference to the "core principle" that seniority accrues according to time worked.

II. The 45 week rule

Resp and the SG propose a number of hypotheticals designed to show that the 45 week rule has no foundation in "time served." I think petr has rather convincingly shown that this is wrong - because of the seniority basis for work assignments, it must certainly be true that the more senior temporaries have a better chance of achieving permanent status than their juniors. The fact that economic setbacks of particular employers and illness or vacation by particular employees may result in inconsistencies in the ordinary scenario does not detract from this conclusion. Every seniority system is subject to those fortuities, particularly when it is a combination of plant and industry seniority. And the contention that employers (or the union itself) may use the system to manipulate on racial grounds is absolute speculation. I see no greater potential for manipulation here than in any "hiring hall" system in which employees are dispatched by the union according to seniority and accepted or rejected by the employer subject to a fee for "show-up time." Yet surely no one would contend that such a system was not based on seniority.

It may also be noteworthy that the 45 week rule is in a section of the contract dealing directly with seniority, and that

the definition of "temporary" and "permanent" employees are explicitly stated to be for purposes of seniority only. Resp is probably correct in asserting that the 45 week rule by itself is not a seniority system. It is only when it is placed in the context of the entire system, particularly the seniority rules for dispatching employees to work assignments and the role of plant seniority in determining layoffs and bumping, that its real basis in the "time served" concept becomes clear. Although there is no graduated scale of benefits according to increments of time served in the usual sense, there is increasing likelihood of attaining a single benefit as time goes by. The common understanding that all of this is part of the normal operation of this rather complex seniority system is illustrated by resp's original position couching his complaint explicitly in terms of a challenge to the "seniority system" and his adherence to that position right up to the decision in Teamsters.

The fact that adverse economic conditions have resulted in stagnation for all temporary employees in recent years should not change the result (just as in the last-hired first-fired cases such as Teamsters). Indeed, as amicus EEAC points out, resp's theory of relief itself is premised on the classic problem with seniority systems from the point of view of minorities - that is, that they tend to perpetuate the effects of past discrimination by favoring those employees who have been in the business the longest. I am not sure that that principle can be elevated into a test for determining whether a particular rule is one of seniority or not.

But it is rather telling that resp alleges no present discrimination. His only complaint is that a facially neutral system combined with an economic downturn have "locked him in" to the subordinate role resulting from past discrimination. Ultimately either conditions will change or permanent employees will leave the ranks to such an extent that "promotions" to that status will again be necessary and the system will resume normal operation. All of this is symptomatic of the real ill resp challenges - that is, the seniority principle itself.

III. Conclusion

The factual analysis in Part II suggests that the Court need wrestle with the theoretical problems discussed in Part I only to a limited extent. It will be necessary to outline principles or come up with a test defining to some extent the "core concept" of a seniority system, but it should not be necessary to wrestle with the problem of the incorporation of "non-seniority based" rules in that system. I would conclude that the 45 week rule is not by itself a seniority system. But When viewed in the context of the other seniority provisions of the collective bargaining agreement, however, it clearly derives from and operates to further the principle that benefits are to be allocated on the basis of time served. The case does not raise the difficult problem of "mixed" rules looking to both seniority and other factors in allocating benefits. It is instead a "pure" seniority case, like those involving unit definitions or plant and department seniority.

Therefore, I would reverse the decision of the Court of Appeals and remand for further proceedings in which resp will have the opportunity to prove intentional discrimination.

Although I believe this decision can be reached on the present record, it would also be defensible to contend that the factual conclusions reached as to the likelihood of attaining permanent status at different levels of seniority are speculative. This position would require the Court to remand for additional findings as to the actual operation of the system. Before the economic downturn, did the more senior temporaries in general achieve permanent status before their juniors? Even now, are more senior temporaries likelier overall to accumulate more work time in a given year than juniors? If a record could be built demonstrating these facts, the case would of course be stronger. And since the case will have to be remanded anyway, this course might be the safer one.

I would prefer not to take this way out.

November 20, 1979

78-1548 Calif. Brewers v. Bryant

Dear Chief:

It has just come to my attention that I am "out" of the above case.

Sincerely,

The Chief Justice

lfp/ss

cc: The Conference
Mr. Michael Rodak, Jr.

There are a substantial number of parties in this case. When I commenced work on the briefs for the first time I discovered that Miller Brewing Company, a subsidiary of Philip Morris, is a party. I therefore will not participate in the case.

L.F.P., Jr.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

January 7, 1980

Re: 78-1548 - California Brewers Association
v. Bryant

Dear Potter:

Please show that I took no part in the consideration or decision of this case.

Respectfully,

Mr. Justice Stewart

Copies to the Conference

January 7, 1980

78-1548 California Brewers v. Bryant

Dear Potter:

Please show on the next draft of your opinion that I took no part in the consideration or decision of this case.

Sincerely,

Mr. Justice Stewart

lfp/ss

cc: The Conference

THE C. J.	W. J. B.	P. S.	B. R. W.	T. M.	H. A. B.	L. F. P.	W. H. R.	J. P. S.
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Join PS ~1/80	~~Join~~ Join TH ~1/12/80	1st Draft 1-4-80 2nd Draft 1/9/80 3rd Draft ~1/14/80	Join PS 1/7/80	Will dissent in due course 1-4-80 Typed Dissent ~1/12/80 1st Draft ~1/13/80 2nd Draft ~1/15/80	await dissent 1/14/80 Join TH ~1/13/80	out 1/7/80	Join PS 1/7/80	out 1/7/80
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