

SUPREME COURT OF THE UNITED STATES

IN THE SUPREME COURT OF THE UNITED STATES

BNSF RAILWAY COMPANY,)
)
Petitioner,)
)
v.) No. 17-1042
)
MICHAEL D. LOOS,)
)
Respondent.)

Pages: 1 through 58

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BNSF RAILWAY COMPANY,)
Petitioner,)
v.) No. 17-1042
MICHAEL D. LOOS,)
Respondent.)
- - - - -

Washington, D.C.
Tuesday, November 6, 2018

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 11:11 a.m.

APPEARANCES:

LISA S. BLATT, ESQ., Washington, D.C.; on behalf of the Petitioner.

RACHEL P. KOVNER, Assistant to the Solicitor General, Department of Justice, Washington, D.C.; for the United States, as amicus curiae, supporting the Petitioner.

DAVID C. FREDERICK, ESQ., Washington, D.C.; on behalf of the Respondent.

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P R O C E E D I N G S

(11:11 a.m.)

CHIEF JUSTICE ROBERTS: We'll hear argument next in Case 17-1042, BNSF Railway Company versus Loos.

Ms. Blatt.

MS. BLATT: Justice Breyer's --

CHIEF JUSTICE ROBERTS: He'll be back.

MS. BLATT: Okay.

CHIEF JUSTICE ROBERTS: Thank you, though.

(Laughter.)

ORAL ARGUMENT OF LISA S. BLATT

ON BEHALF OF THE PETITIONER

MS. BLATT: Thank you, Mr. Chief Justice, and may it please the Court:

For three reasons, payment by an employer to an employee for lost wages under FELA is compensation under Section 3231(e)(1) of the Railroad Retirement Tax Act, or RRTA.

JUSTICE GINSBURG: Ms. Blatt, before you launch into that, can you tell us why the railroad cares? I mean, if he doesn't -- if it's not -- he's not subject to the tax, neither is the employer. So what -- what is

1 the stake that you have in this?

2 MS. BLATT: Sure. I mean, although
3 the -- the Respondent argues that the employer
4 is subject on his fallback, but generally to
5 answer your question, the employer cares
6 because under a system that would credit all
7 lost wage FELA awards to retirement benefits
8 but without any -- any tax burden has a
9 long-term risk of insolvency or instability to
10 the system.

11 So there's a short-term savings to be
12 sure, and, generally, people don't like to pay
13 taxes for the sake of taxes, but the entire
14 purpose of this Tax Act is to fund the
15 retirement benefits for railroad employees, and
16 pensions are good for the railroads.

17 So that's the answer. If I could get
18 to the -- the three reasons.

19 First --

20 JUSTICE SOTOMAYOR: But there's no
21 personal --

22 MS. BLATT: Sure. Sorry.

23 JUSTICE SOTOMAYOR: There's no
24 personal interest in the sense of, if we say
25 that it's not, then the railroad doesn't

1 withhold and pay the state.

2 Did you in this case? You wanted a
3 credit against the award, but did you, in fact,
4 pay anything, any federal taxes beforehand?

5 MS. BLATT: Yes. So all \$9,000 has
6 been paid. The \$6,000 portion of the employer
7 share was paid, and \$3,000 was withheld from
8 the payment of the FELA award to account for
9 the employee's share. And the railroad -- and
10 the reason why the dispute came up is the
11 railroad wants an offset for the \$3,000 that
12 should have been withheld from the railroad
13 employee.

14 So -- get to the statutory text and
15 the first reason is the statutory text and
16 structure make clear that such a payment is for
17 services rendered and that employees need not
18 be in active service to pay for services
19 rendered.

20 Second, a payment for lost wages under
21 FELA is no different from the worker's
22 compensation, sickness, and disability pay that
23 Respondent agrees count as compensation.

24 And, third, taxing a payment for lost
25 wages under FELA furthers the RRTA's purpose to

1 fund benefits under the Railroad Retirement
2 Act, or RRA.

3 First, a payment for lost wages under
4 FELA is remuneration paid for services rendered
5 as an employee under subsection (e)-1. A
6 payment for lost wages under FELA compensates
7 the employee because he rendered services up
8 and until the time of injury. Indeed, by
9 definition, an employee cannot recover lost
10 wages under FELA unless he had been rendering
11 services at the time of injury.

12 Additionally, this Court in Nierotko
13 and Quality Stores interpreted virtually
14 identical language under the Social Security
15 Act and FICA. There, this Court interpreted
16 the phrase which defined wages for services
17 performed includes all compensation paid for
18 the employment relationship.

19 JUSTICE KAVANAUGH: Your opposing
20 counsel argues that Nierotko is discredited,
21 that that case didn't follow the text; we
22 shouldn't follow that methodology here. Can
23 you respond to that?

24 MS. BLATT: Sure. Respondent argues
25 that it's discredited under Cleveland Indians

1 for the very last portion of Nierotko, which
2 has nothing to do with the question here. So
3 the very last two paragraphs of Nierotko said
4 that you credit the amount of lost wages in the
5 -- in the period for which they're earned. And
6 then Cleveland Indians came along and the IRS
7 said, yeah, we know that, but we want to credit
8 FICA in the period paid.

9 And so, in the opinion for the Court,
10 Cleveland Indians said we recognize that the
11 two should go in tandem, but we're going to
12 defer to the IRS, IRS's allocation. And, here,
13 there's a much more substantive distinction
14 because the employee wants all the benefits
15 under the benefits statute but none of the
16 ability.

17 But I think your other question went
18 to the discreditedness. I think you mean
19 somehow in 1946 the Court wasn't reading the
20 text. I think that --

21 JUSTICE KAVANAUGH: That's their
22 argument.

23 MS. BLATT: I think that's their
24 argument and I think it's certainly wrong. We
25 fit the plain language because the employee

1 rendered services, and nothing in the text says
2 that you can't be paid for periods of time when
3 you're not in active services because you
4 rendered services.

5 But the Court purported to be
6 interpreting the phrase "services performed,"
7 and you can say pragmatically, but I think it's
8 also textually, that when you have an
9 employment relationship and you compensate the
10 employee, that's generally for services
11 performed.

12 JUSTICE GORSUCH: Well, counsel, when
13 I think of wages for services performed -- and
14 maybe it's too simplistic -- but I --

15 MS. BLATT: I doubt it.

16 (Laughter.)

17 JUSTICE GORSUCH: We'll see. I -- I
18 -- I think of it as the compensation that an --
19 an employer voluntarily gives the employee. So
20 not just the hourly wage, but the sick time,
21 the vacation time might be included as part of
22 the package. For the services when you are
23 present, I include that payment.

24 I think of a judgment of a court for
25 negligence get -- awarded involuntarily against

1 the employer's consent as something very
2 different. What's wrong with that?

3 MS. BLATT: Okay. I don't want to
4 call it simplistic, but I do think it's wrong.

5 JUSTICE GORSUCH: Go ahead.

6 MS. BLATT: Okay. Here's why. I
7 mean, there's absolutely nothing in the statute
8 that makes anything that you said relevant. It
9 just has to be a payment for services rendered.
10 And nothing in the statute distinguishes
11 between a legal obligation arising under your
12 contract --

13 JUSTICE GORSUCH: Well, but, see,
14 that's not services rendered, is it? It's
15 payment for a judgment of a court.

16 MS. BLATT: Right. And you can have a
17 disability payment that comes in the form of
18 judgment. He concedes that workers'
19 compensation is covered. The judgment or back
20 pay award in Nierotko was a judgment based on a
21 wrongful discharge by violation of a statute.
22 But there's just nothing in the -- in the sense
23 of the payment that it says it has to be either
24 from -- I think he concedes settlements count.
25 So I don't know why it's different that a court

1 ordered the payment. I mean, there's --
2 there's really no basis for --

3 JUSTICE GORSUCH: I -- I get that
4 there's a tough line-drawing problem here, and
5 I have some questions for the other side on
6 that, but if you just in isolation deal with
7 the FELA judgment compared with, say, sick and
8 vacation time.

9 MS. BLATT: Sure.

10 JUSTICE GORSUCH: What about --

11 MS. BLATT: I think maybe you're going
12 to fault versus a no fault scheme, and nothing
13 in the statute says there has to be fault or no
14 fault. It's just like worker's compensation is
15 --- he concedes is payment for services
16 rendered. You just don't have to prove
17 negligence.

18 But if you -- suing to get maternity
19 leave, you have to prove you're pregnant. If
20 you're suing to get disability leave, you have
21 to prove that you're disabled. If you're suing
22 for workers' compensation, you have to prove
23 that it was service-connected and that --

24 JUSTICE SOTOMAYOR: Can --

25 MS. BLATT: -- you had injury. So I

1 think what you're saying is, if you have to
2 sue, you can't be paid for services rendered,
3 but if the employer pays it voluntarily, that
4 definitely is atextual.

5 JUSTICE SOTOMAYOR: As a practical
6 matter, going back to a part of Justice
7 Gorsuch's question, in most state law verdicts,
8 there is just a payment. It's a general
9 verdict. How are you going to figure out which
10 part of the award is subject to the deduction?
11 And -- and Justice Gorsuch mentioned --
12 mentioned a negligence judgment. What are we
13 going to do with those?

14 Here, that's not at issue because
15 there's been a concession from the beginning
16 that this award had to do with past pay and
17 medical expenses. So we know the amounts under
18 FELA, but we may not know them in a general
19 verdict. So --

20 MS. BLATT: Of course. Let me --

21 JUSTICE SOTOMAYOR: -- does his
22 argument have more purchase in those
23 situations?

24 MS. BLATT: No, because, under the
25 Railroad Retirement Act in Section 231h(2) --

1 this has been around since 1946 -- there's a
2 presumption that a personal injury award, the
3 entire amount, is treated for lost time.

4 And let me just point you to the JA on
5 78a, the Railroad Retirement Board gives you
6 sort of the -- the current -- the way they
7 treat this. But let me go back to the statute.
8 The statute says all of it counts for lost
9 time. However, the parties can take out any
10 amount that they want to allocate for reasons
11 other than lost time. So the parties are free
12 to say whatever they want. They can say that
13 \$10 was lost time. They can say all of it was
14 lost time.

15 So, in a general verdict situation,
16 you know, I think what the RRB would say is
17 we're going to count it all as lost time unless
18 there's an allocation made.

19 Now what Respondent tries to say is,
20 well, somehow there are some shenanigans going
21 on because, you know, there might be a reason
22 to attribute it less to lost time on the taxing
23 side, but let me tell you what's going to
24 happen if we lose because of h(2).

25 If we lose, an employee can take an

1 entire judgment, no matter what was devoted to
2 lost time, and get full credit and pay zero
3 tax. And the incentive will be there's no
4 downside to doing that.

5 So you would take all of it and get
6 your credit, and pay absolutely no taxes. And
7 that's just h(2). In the statute, there's the
8 RRB guidance on it. The SG's office can -- can
9 vouch, you know, confirm all this, but that's
10 just the way this has been treated.

11 Now, in -- the state cases that have
12 addressed the issue have said that we'll use
13 the same allocation scheme on the taxing side.
14 So all three at least state supreme courts who
15 addressed it have decided that issue.

16 And, Justice Gorsuch, I do want to say
17 Nierotko involved a judgment, although it was
18 by the NLRB, so an agency judgment.

19 And, Justice Kavanaugh, let me just
20 say, although I think there's these textual and
21 the pragmatic definition the Court gave, I do
22 think it's worth just noting the concurrence of
23 Justice Frankfurter, who said sort of that, you
24 know, we're going to deem employees to be in
25 the service of the employer if they were forced

1 into idleness because of the employer's
2 wrongdoing.

3 I mean, that's just an alternative way
4 of looking at it. You don't have to look at it
5 that way, but --

6 JUSTICE KAGAN: If -- if you're right
7 about that theory, why wouldn't the pain and
8 suffering component also count?

9 MS. BLATT: Well, because the pain and
10 suffering is not payment for services rendered
11 in the same way a lost wage award is.

12 JUSTICE KAGAN: Well, if I understood
13 your theory, it was something like it happened
14 while he was on the job, and, therefore, what
15 follows is -- is -- is -- can be understood as
16 services rendered.

17 MS. BLATT: No.

18 JUSTICE KAGAN: And the pain and
19 suffering as well. It's like, well, you were
20 injured on the job and that's why you had this
21 pain and suffering.

22 MS. BLATT: Sure. It's not payment
23 for services rendered in the same way because
24 the amount of lost wages is directly tied to
25 the salary for services rendered. And the pain

1 and suffering amount has nothing to do with
2 your salary, your employment, or anything else
3 about the employment relationship.

4 Plus, there's a strong textual
5 argument. You don't have to take my analysis.
6 Congress has already distinguished between lost
7 time pay and other factors associated with a
8 personal injury award. So Congress has said
9 the parties are free to only count as a
10 personal injury award just the lost wages.

11 So Congress was debating this back in
12 1946, all these issues about what to do with
13 things that were associated with other lost
14 time, and they settled on this we're going to
15 presume it's all counted, but we'll let you
16 take out anything that's not related to lost
17 wages.

18 So -- a question?

19 JUSTICE KAVANAUGH: The court -- court
20 of appeals relied heavily on the fact that
21 Congress in '75 and '83 took out the reference
22 to payment for time lost.

23 MS. BLATT: Sure. So, I mean, let's
24 start again with -- with first principles.

25 Under that view, that takes out

1 everything, the vacation, the holiday,
2 everything. So that's fine. And I think that
3 Respondent doesn't -- concedes that away and
4 doesn't defend it for good reason.

5 And that's because the -- the rule
6 against superfluity has the provisions in
7 (e)(1) and (e)(4) that are time lost payments
8 for worker's compensation, sickness, and
9 disability. And those exceptions wouldn't be
10 in there unless they were otherwise included
11 within the operative definition.

12 But, Justice Kavanaugh, let's look at
13 the timing, and I think that this is pretty
14 dispositive as well.

15 Congress added the sickness, worker's
16 compensation, and disability payments in 1977
17 and then amended them in 1981. So that was
18 after Congress took out the including
19 remuneration paid for services rendered in '75.

20 And then when Congress took out in
21 1983 -- I'm sorry, in '75, when Congress took
22 out the phrase, then they added the exceptions
23 later, they also left in seven references to
24 time lost and personal injury in (e)(2). So we
25 know that Congress continued to think that time

1 lost payments were covered.

2 Now comes 1983 and Congress takes out
3 (e)(2), but it didn't change the operative
4 definition in (e)(1), and it left in all the
5 exceptions for worker's compensation, sickness
6 and disability, that presupposed time lost is
7 covered.

8 So I do think that, you know, the
9 including remuneration paid for time -- time
10 lost, you know, is fairly read as an
11 illustrative example of the broader definition.

12 I'm going to briefly go over the 104
13 argument if I could. Just putting -- this is
14 the argument that Respondent makes as a backup
15 that, because personal injury awards are
16 excluded from gross income under 104, and an
17 employee is taxed on his or her income, you
18 should take out gross income. And I'm not
19 going to be able to explain it past that point,
20 but that's the beginning of his argument.

21 The problem with it is, first of all,
22 3201, the tax -- the statute that taxes on
23 income does not use the word gross income. It
24 just says income.

25 And no matter what word it used, we

1 think it just describes the source of the tax.
2 And if you just look at the language, the
3 employee's income has no bearing on either the
4 tax base or the amount of tax owed. It's just
5 describing the source.

6 And that tax base is identically
7 defined for the employer in Section 3221, so as
8 a textual matter, it can't be different.

9 And, finally, Congress incorporated
10 nine express exclusions from gross income into
11 the definition of compensation, showing
12 Congress knew how to incorporate gross
13 exclusions when they wanted to, and Section 104
14 is not one of them.

15 And if I could reserve the remainder
16 of my time.

17 CHIEF JUSTICE ROBERTS: Thank you,
18 counsel.

19 Ms. Kovner.

20 ORAL ARGUMENT OF RACHEL P. KOVNER

21 FOR THE UNITED STATES, AS AMICUS CURIAE,

22 SUPPORTING THE PETITIONER

23 MS. KOVNER: Mr. Chief Justice, and
24 may it please the Court:

25 As Respondent now concedes, the Eighth

1 Circuit misconstrued the RRTA when it held that
2 compensation includes only payments for hours
3 when the employee is an active server to the
4 employer, a holding that would exclude sick
5 leave, vacation pay, and severance.

6 There are three main sources that each
7 establish that, instead, compensation includes
8 employer payments for hours when an employee is
9 absent from active service, including time
10 lost.

11 Starting with text, the RRTA contains
12 limited exclusions for worker's compensation
13 benefits and for certain types of sickness and
14 disability benefits. Those exclusions would be
15 superfluous if the term "compensation" only
16 reached payments for periods of active service.

17 As to precedent, since 1946, this
18 Court has construed parallel language in the
19 Social Security Act to reach all payments
20 arising out of the employer/employee
21 relationship, including time lost.

22 And, Justice Kavanaugh, to your
23 question about whether that continues to be
24 good law, this Court reaffirmed that precedent.
25 It applied it in Quality Stores just in 2014.

1 And those decisions support also
2 construing the RRTA to reach time lost.

3 And, third, this interpretation
4 appropriately reflects the interlocking
5 structure of the RRTA and the parallel benefits
6 statute known as the RRA. Time lost payments
7 count as compensation under the RRA, and are
8 credited towards an employee's retirement
9 benefits. Interpreting the RRTA's definition
10 to cover those payments creates symmetry
11 between interrelated tax and benefit
12 provisions.

13 And if I could start by just turning
14 to Justice Gorsuch's question about why it's
15 not different, that this payment is essentially
16 a statutorily-mandated payment that results
17 from a judgment at the end of the day.

18 We think there are two main sources
19 that show that the fact that it's a legal
20 obligation doesn't make a difference. The
21 first is in the statutory text, the worker's
22 compensation carveout is really appropriate --
23 is really important, because it shows that it
24 can be --

25 JUSTICE GORSUCH: That's where I get

1 stuck too. I've got some questions about that
2 for your friend on the other side. What's your
3 other one?

4 MS. KOVNER: The other one is
5 Nierotko, which also involves essentially a
6 judgment.

7 JUSTICE SOTOMAYOR: Could you tell me
8 what -- what we should make of the fact that
9 the IRS doesn't appear -- you might correct
10 me -- since 1980 at least, to bring enforcement
11 actions to assess penalties or back-taxes to a
12 railroad employee who has -- who did not
13 withhold a portion of the FELA judgment?

14 MS. KOVNER: So we don't think that's
15 exactly correct, Justice Sotomayor. So I
16 think, to understand the IRS's position, the
17 most relevant indicators are, first, the
18 regulations, which have continuously said, you
19 know, time lost payments are covered, since
20 1937, and continues to the present.

21 JUSTICE SOTOMAYOR: You said it, but
22 you haven't appeared to do much about it.

23 MS. KOVNER: So I don't think that's
24 the case. I mean, whenever we've been asked,
25 there's a Technical Advice Memorandum from 1980

1 dealing specifically with FELA judgments
2 saying, again, they have to be paid.

3 I think the difficulty that may arise
4 is these are suits that occur between not the
5 IRS but between a railroad employee and an
6 employer. And I think what the affidavit on
7 the other side is asserting is that railroads
8 may essentially not have been complying in some
9 cases, I don't know how many cases, with the
10 IRS's regulations.

11 And if that -- if that has happened,
12 it's contrary to our regulations. It's not
13 something we've necessarily known about because
14 it's a suit between a taxpayer and a railroad,
15 and if neither of them reports it, it may be
16 that there are cases where, you know, the IRS
17 hasn't been aware of, hasn't gone after that
18 money. But the IRS --

19 JUSTICE GINSBURG: The -- the -- the
20 railroad pays -- pays the full tax but charges
21 the -- the railroad worker for his or her
22 share? Is that how it works?

23 MS. KOVNER: That's right. The IRS --
24 the railroad is required to withhold both -- to
25 withhold from the employee's pay the employee's

1 share, and then it pays both shares.

2 JUSTICE GORSUCH: I would be curious,
3 your answer to Justice Sotomayor and Justice
4 Kagan's questions earlier. So what do we do
5 about a general verdict where there's no
6 allocation between what might be later thought
7 by some to be compensation for lost services
8 and other -- other things? What do we do about
9 pain and suffering, which might be classified
10 as compensation for lost time as well?

11 What's the government's view on those
12 complications?

13 MS. KOVNER: Yeah. So, I mean, taking
14 the -- the first question first, the what if
15 there's no allocation, I -- I agree with the
16 articulation by my friend on the railroad side
17 that if there's no allocation at all -- and
18 there's some material that is in the JA,
19 there's sort of detailed guidance on allocation
20 from the RRB -- but I think if there is no
21 allocation, the presumption is it's going to be
22 treated as time lost.

23 I think the RRB says, nonetheless, the
24 employer and the employee are allowed to come
25 in even after the judgment and allocate it

1 between time lost and -- and other sources.

2 And we think, you know, that's --
3 that's what's -- h(2), which is still in the
4 RRA, suggests is the appropriate way to handle
5 this.

6 And I think h(2) is also the part of
7 the answer on pain and suffering. h(2) clearly
8 contemplates that when you have a judgment,
9 it's going to contain in part taxable payments
10 for time lost and also other kinds of damages
11 and that you're going to need to divide these
12 two things up to figure out, you know, what's
13 compensation.

14 And we think there's a common-sense
15 reason for treating pain and suffering as
16 different, which is lost -- lost time payments
17 are a substitute for something that's taxable.
18 They're a substitute for wages that -- that the
19 employee would have been taxed on. And they're
20 getting credited to your benefits on the RRB
21 side.

22 In contrast, a pain and suffering
23 judgment is essentially putting you in the
24 place you would be if you hadn't lost some sort
25 of psychic or physical well-being that wouldn't

1 have been taxed. So we think it's
2 understandable that Congress, in making those
3 sort of changes that make clear that time lost
4 and pain and suffering are treated differently
5 in 1946, we think it's -- it makes sense that
6 Congress thought of these two things as
7 different as one is taxable and one is not.

8 And if you look at the history of
9 those 1946 changes, I think that's -- that's
10 sort of the -- the distinction that's being
11 reflected in the history too.

12 JUSTICE KAGAN: Ms. Kovner, one of the
13 things that strikes me as a little bit odd
14 about an award like this fitting into the
15 "services rendered" language is that, unlike
16 most kinds of compensation that you can think
17 of, you could get this if you were injured your
18 first hour on the job without having worked at
19 all, without having rendered any services at
20 all.

21 MS. KOVNER: Yeah.

22 JUSTICE KAGAN: So what about that?

23 MS. KOVNER: Well, I think there are a
24 number of forms of compensation that operate
25 like that. You know, so -- so one example that

1 Nierotko gave is something that would be
2 compensation in that it was thinking of is like
3 payment for when you're required to be paid for
4 jury service. I mean, that's a benefit you
5 would be entitled to on day one. It doesn't
6 necessarily correlate to hours you work, but
7 it's a benefit you get as an employee.

8 Another example would be like
9 maternity leave, sick leave in certain kinds of
10 circumstances. I think there are a whole bunch
11 of benefits that you get as part of your sort
12 of employee compensation that don't exactly
13 correlate to individual hours that you work.

14 And even setting aside all these, you
15 know, textual and -- and precedential
16 indicators, you know, we would note that this
17 has been the position of the agency since the
18 statute was enacted in 1937. Congress amend --
19 has amended this statute many times against
20 that backdrop, and it hasn't chosen to change
21 that agency interpretation.

22 So we think this is a -- you know, an
23 interpretation that's informed what Congress
24 has done. It's added exclusions that don't
25 really make sense unless time lost is covered

1 without changing the agency's interpretation.

2 So, under principles of acquiescence
3 and Chevron deference, if there were ambiguity,
4 we think the agency's interpretation would
5 control.

6 CHIEF JUSTICE ROBERTS: But you
7 actually don't think there's ambiguity?

8 MS. KOVNER: We don't. We think this
9 is a clear case.

10 If there are no further questions, we
11 would ask the judgment below be reversed.

12 CHIEF JUSTICE ROBERTS: Thank you,
13 counsel.

14 Mr. Frederick.

15 ORAL ARGUMENT OF DAVID C. FREDERICK
16 ON BEHALF OF THE RESPONDENT

17 MR. FREDERICK: Thank you, Mr. Chief
18 Justice, and may it please the Court:

19 At issue in this case is whether the
20 Court construes the statute as it's currently
21 written or whether you construe it the way the
22 other side would like it to read.

23 Our position is that the plain
24 language controls and that the statute now in
25 effect does not contain all the words and extra

1 provisions that get you to a place where
2 "services rendered" means not services
3 rendered, which is the core of the other side's
4 position.

5 "Services rendered" has a very plain
6 meaning. It is providing work under the
7 supervision of another person. When Mr. Loos
8 was injured here, he was unable to provide
9 services. That was the whole point of him
10 bringing his FELA claim.

11 CHIEF JUSTICE ROBERTS: Well, but he
12 had provide serve -- provided services, and
13 that is what entitled him to the payments that
14 he received.

15 MR. FREDERICK: Incorrect, Mr. Chief
16 Justice. What entitled him to the payments
17 that he received was that he couldn't work.
18 And it was the railroad's negligence --

19 CHIEF JUSTICE ROBERTS: Well, it's not
20 just somebody off the street who couldn't work.
21 It was an employee who couldn't work, and he
22 was an employee because he had rendered
23 services.

24 MR. FREDERICK: Right. But he hadn't
25 rendered the services. That's the whole point.

1 He was unable to render the services because he
2 was hurt.

3 So let me explain a little bit about
4 how day call works in a union hall. Here,
5 Mr. Loos was subject under the union terms to
6 be in a union hall, and if he's called in to a
7 crew, he makes money. He gets paid for that
8 day.

9 If he's unable to make it to the union
10 hall because he's injured, it's considered
11 nothing. He doesn't get paid for that, he
12 doesn't accrue any vacation pay for that. And
13 the whole point of the FELA judgment here was
14 that because he was injured, he wasn't able to
15 be in the union hall at the time the railroad
16 called for people to serve on their crews.

17 So, if you were to suppose that
18 Mr. Loos was walking along at the time he was
19 injured and he was with a non-railroad
20 employee, and suppose that non-railroad
21 employee was with a coal company and they both
22 fell into the drainage part -- pit because of
23 the negligence of the railroad, you wouldn't
24 say that the past wages or the lost wages that
25 the coal company employee suffered by the

1 railroad's negligence was "for services
2 rendered." You wouldn't say that at all.
3 There would be no basis for saying that.

4 And so it's odd to suppose that simply
5 because Mr. Loos is capable or subject to being
6 called into a duty status for the crew that you
7 would treat him --

8 JUSTICE KAVANAUGH: But a lot of these
9 --

10 MR. FREDERICK: -- any differently.

11 JUSTICE KAVANAUGH: -- a lot of these
12 kind of arguments were made in Nierotko, and
13 the Court rejected those in the -- admittedly,
14 in the context of the Social Security Act, but
15 why not follow the same interpretation here?

16 MR. FREDERICK: Well, what the Court
17 in Nierotko did was it construed the benefits
18 statute. And what Cleveland Indians says and
19 is absolutely clear is that you do not construe
20 the tax statute the same as the benefits
21 statute. The -- the case of Hisquierdo --

22 JUSTICE KAVANAUGH: The Cleveland
23 Indians was about the allocation time period.
24 It wasn't about the main holding of Nierotko in
25 terms of how it departed from Nierotko. Is

1 that --

2 MR. FREDERICK: Right. But the
3 interpretive method that the Court employed was
4 different in the sense --

5 JUSTICE KAVANAUGH: True. But the
6 precedent on point interprets -- says that time
7 lost is part of services rendered or services
8 performed in the context of the Social Security
9 Act. So why not adhere to that same
10 interpretation in this context at this point?

11 MR. FREDERICK: Because this Court, to
12 my knowledge, has not ever said that you
13 construe taxing statutes by looking at benefits
14 statutes. And that is what -- exactly what
15 Cleveland Indians holds. That's also what the
16 case of Hisquierdo holds. Hisquierdo is
17 directly on point for the Railroad Retirement
18 Tax Act. The other side has no discussion
19 about the language in that opinion, which says
20 that RRTA taxes are to be construed differently
21 than the Railroad Retirement Board benefits.

22 JUSTICE GINSBURG: Mr. Frederick, your
23 argument would go for the railroad as well as
24 the employee, right?

25 MR. FREDERICK: Yes.

1 JUSTICE GINSBURG: So this -- this
2 railroad paid a tax that it wasn't required to
3 pay, could it seek a refund?

4 MR. FREDERICK: Yes. And, in fact,
5 the railroad didn't pay the tax until the case
6 was on appeal in the Eighth Circuit. It did
7 not pay the tax, you know, at the time of the
8 judgment. It waited as a means, presumably, to
9 enhance the persuasiveness of its argument on
10 appeal.

11 Now, Justice Gorsuch, I do want to
12 address your workers' compensation issue.

13 JUSTICE GORSUCH: I was -- I was going
14 to ask you if you'd volunteer.

15 MR. FREDERICK: And -- yes. There --
16 there -- let me begin by giving a little bit of
17 history if I could. The FELA was enacted prior
18 to most states enacting workers' compensation
19 statutes, and it has been held by this Court to
20 preempt the FELA, to preempt workers'
21 compensation statutes.

22 So the only time where there's
23 actually an overlap is where you have a purely
24 -- purely intra-state railroad.

25 JUSTICE GORSUCH: No, I follow all of

1 that. And your Footnote 9 was excellent in
2 explaining that. But my question still
3 remains, if a judgment of an administrative
4 agency in a state setting, in an admittedly
5 intra-state accident is, you would concede, I
6 believe, compensation for wages, then why --
7 why wouldn't a federal inter-state FELA
8 judgment?

9 MR. FREDERICK: Worker's compensation
10 has always been treated differently in the
11 sense that insure -- the employee and the
12 employer contributes to an insurance fund.
13 It's no fault insurance.

14 And for that reason, it is more, I
15 think, appropriately deemed to be an additional
16 payment that is for services rendered, in the
17 same way that sick pay accumulates over time in
18 -- in the appropriate circumstances. It didn't
19 for Mr. Loos.

20 But, for vacation pay, if you're a
21 federal employee and you have a 40-hour pay
22 stub and it shows a certain number of hours
23 that you've accrued for vacation pay, those are
24 all for the services that you rendered as an
25 employee.

1 Now, with respect to worker's
2 compensation, because it's an insurance scheme
3 that is no fault, it operates in a very
4 different way in terms of how it is funded.
5 There's no pre-funding on the part of the
6 railroad for FELA damages.

7 The whole point of the FELA is to
8 impose a duty of due care on the industry so
9 that workers are not being injured as a result
10 of the railroad's negligence.

11 And that's why Justice Brandeis in the
12 Winfield case in the early 1920s made very
13 clear that an FELA judgment is a penalty for
14 the breach of a duty of due care.

15 And Justice Scalia, in his separate
16 writing in Cleveland Indians, said, in his
17 view, the question is different as to whether
18 or not it is a court-ordered judgment that is
19 not the way you ordinarily think of wages paid,
20 which is the way that the phrase is used under
21 FICA.

22 So, if you look at these textual
23 differences, the line-drawing, I think, Justice
24 Gorsuch, is actually pretty straightforward.
25 You ask the question: Is the work and the pay

1 here, the compensation, for services rendered?
2 And if it's not, which, clearly, it couldn't be
3 here because Mr. Loos was unable to render
4 services, then it is outside the realm of the
5 RRTA.

6 JUSTICE BREYER: Well, you put an
7 awful lot of weight on that, but I can easily
8 imagine an employer explaining how we work in
9 this company. We work in this company is that
10 we pay you for services rendered.

11 By the way, services rendered includes
12 Christmas Day, though you're not here.

13 By the way, it includes when you have
14 a cold or sick for a few days. That we -- that
15 we count all that as payment for services
16 rendered. That person is speaking English.

17 So their first argument is, at the
18 least, it's ambiguous. Their second argument
19 is go and look at all these changes that
20 happened in the statute over those years.

21 You know what they were arguing about?
22 They were arguing about whether you tax it at
23 the time you would have worked or you tax it
24 when you get it after the judgment now.

25 They never thought you didn't get it

1 at all. And their argument about the two
2 statutes is it's a plus. We're not saying it's
3 necessary, but it's a plus to treat the taxing
4 statute symmetrical with. And their final
5 argument is that, hey, 80 years is a long time.

6 Justice Blackmun used to complain
7 about all these changes. And, indeed, 80
8 years, Congress has done nothing, okay.

9 Now you've responded to some. I just
10 want to be sure you get a chance to respond to
11 all.

12 MR. FREDERICK: Well, if I don't get
13 them all in this response, Justice Breyer,
14 please feel free to interrupt me.

15 But, on the history point, the other
16 side, notwithstanding our challenge, cannot
17 give you one instance, not one, where the IRS
18 issued a deficiency notice because there had
19 been a failure to pay RRTA taxes for an FELA
20 judgment.

21 If you look at the Federal Judicial
22 Center's website, there have been something
23 like 71,000 FELA suits filed just since 1970.

24 Now, surely, if this had been the way
25 the taxing service had been construing this

1 statute, there would be at least \$1 deposited
2 from the Treasury as a result of an FEOLA
3 judgment and a deficiency notice for a failure
4 to do that.

5 This is all a new argument. And the
6 reason why the railroad has come up with this
7 new argument is simply to change the settlement
8 dynamics that are going on. And by changing
9 those settlement dynamics, they are seeking to
10 impose the in terrorem threat of a taxation on
11 the employee at the time when there's a
12 negotiation.

13 JUSTICE SOTOMAYOR: I'm sorry.
14 Explain that to me.

15 MR. FREDERICK: Sure.

16 JUSTICE SOTOMAYOR: What -- what are
17 they going to do?

18 MR. FREDERICK: What they -- when
19 there's a settlement negotiation, Justice
20 Sotomayor, the question is will you -- will we
21 pay you now for your range of damages or will
22 you run the risk of going to court. And as
23 part of that calculus, the question is whether
24 or not taxes would be owed and owing on that.

25 And if the taxes are not owed and

1 owing because it is a judgment, then that is
2 for the workers' favor in terms of considering
3 whether or not to settle the case.

4 JUSTICE SOTOMAYOR: I'm sorry.
5 There's a settlement under a FELA action, X
6 amount of money. It has to be attributed to
7 something, correct? Are you saying --

8 MR. FREDERICK: No, it doesn't,
9 actually. There -- there, I don't understand
10 their textual argument for that at all because
11 what they're asking for you to do is to accept
12 the idea that the Railroad Retirement Board
13 somehow has the administrative authority to
14 construe a taxing statute. And that's never
15 been the case where you have a benefit agency
16 construing the taxing statute. The taxing
17 statute is construed by the IRS.

18 Now, if you look at the sources in our
19 Footnotes 2, 3, and 4 in our brief, they make
20 very clear that the IRS in -- in -- in
21 interpretations that post-date the sources that
22 they're talking about here say that when
23 there's a personal injury award, it is not
24 subject to income tax.

25 And in the first one, the citation

1 that is on Footnote 2 of our brief, the IRS
2 specifically mentions that this would apply in
3 the Railroad Retirement Tax Act concept --
4 context as well. That, I think, is on page 13
5 or 14 of that particular reference.

6 They hang their hat on this 1980
7 advisory opinion -- memo, but I'd like -- the
8 -- the so-called TAM, but I'd like to point out
9 that the -- under the code, Section 6110(k)(3)
10 of Title 26, Congress has said, unless the
11 Secretary otherwise establishes by regulations,
12 a written determination may not be used or
13 cited as precedent, which is probably why that
14 Technical Advice Memorandum isn't cited in the
15 Solicitor General's brief, although counsel
16 today has invoked that as supposed authority.

17 But I would point out, secondly, that
18 this TAM, this 1980 reference, concerns a
19 version of the statute that no longer exists.
20 It was part of the statute -- it was construing
21 a statute that was in effect up until 1975.

22 And, Justice Kavanaugh, you're
23 correct, at that time, that's when the time
24 lost language was taken out of the statute.
25 That 1980 TAM was construing the previous

1 version of the statute that doesn't exist
2 anymore.

3 So, for purposes of understanding
4 where there has been consistency or
5 inconsistency, there's been rank inconsistency
6 because the IRS has -- has said different
7 things in different means that are entitled to
8 different levels of respect. And so --

9 JUSTICE GINSBURG: Why -- why do you
10 think the language was taken out?

11 MR. FREDERICK: I think it -- there --
12 it's actually a good question, Justice
13 Ginsburg.

14 The intimation in the railroad's brief
15 here is that the railroad thought it would be
16 easier to administer without having that
17 language.

18 But there is no -- there are no
19 statements of or legislative history that would
20 suggest exactly why. One theory could be that
21 the reason why the time lost language had been
22 added was to implement what was called the
23 Washington agreement in the late '30s.

24 And the Washington agreement was a
25 deal struck between rail labor and the

1 railroads with the idea of treating what was
2 going on at the time in the industry of a lot
3 of unsettle -- unsettlement, where workers who
4 had been working for one railroad were part of
5 -- got caught up in the mergers. They lost the
6 ability to maintain higher-paying jobs. And
7 the Washington agreement was to deal with what
8 were called displacement allowances.

9 These displacement allowances were
10 defined to be time lost in that era. And it
11 could very well have been that, by the 1970s,
12 this whole reason for that concept had -- was
13 no longer in effect.

14 Now the issue in that 1980 technical
15 advice memorandum --

16 JUSTICE KAVANAUGH: Well, it's because
17 the time allocation was changed.

18 MR. FREDERICK: Well, you're talking
19 about -- you're -- I think you're making
20 reference, Your Honor, to the paid versus
21 earned --

22 JUSTICE KAVANAUGH: Yes.

23 MR. FREDERICK: -- distinction?

24 JUSTICE KAVANAUGH: Yes.

25 MR. FREDERICK: But that -- whether

1 the timing thing had happened as a change
2 didn't affect what was being taxed, which was
3 services rendered. So whether you tax --

4 JUSTICE KAVANAUGH: I understand that.
5 But it changed -- you didn't need the language
6 anymore, is -- is the argument, right? The
7 "time lost" language anymore -- because the --
8 the allocation had changed?

9 MR. FREDERICK: Well --

10 JUSTICE KAVANAUGH: At least that's
11 the argument.

12 MR. FREDERICK: -- their argument goes
13 beyond that, Justice Kavanaugh, and that's when
14 they are saying that the words "including time
15 lost" somehow make "services rendered" mean not
16 services rendered because time lost is somehow
17 an example or an illustration of the concept of
18 services rendered.

19 As a matter of plain English, that
20 makes absolutely no sense. And we've given a
21 bunch of statutory examples in our brief of
22 where Congress would use the word "including"
23 to be additive, like in the Longshore Act,
24 where the situs requirement is imposed on the
25 navigable waters, including piers.

1 Now I don't think anybody in this room
2 today would think that a pier is a navigable
3 water, but yet that's how Congress chose to
4 express itself. And it -- and I would submit
5 that the idea of time lost under no reasonable
6 understanding of the English language would be
7 services rendered either.

8 So what you're left with here is what
9 the Eighth Circuit deemed to be a very clear
10 statute where the taxation that was sought to
11 be imposed here was on a -- an FELA judgment
12 rather than on what services were rendered.

13 And one other note about the Eighth
14 Circuit panel. This Court, in Wisconsin
15 Central just last term, construed the earlier
16 part of that provision, the money remuneration.
17 The Eighth Circuit panel that decided this case
18 also had decided a case called Union Pacific,
19 which handled the exact question at issue in
20 Wisconsin Central, and decided it correctly, as
21 this Court opined.

22 It was the same panel that handled
23 both issues. And this Court cited with
24 approval the Union Pacific decision. Now we --

25 JUSTICE KAVANAUGH: I thought a key

1 move in the Eighth Circuit decision was
2 interpreting Nierotko, and then it said we
3 recently determined that that definition can't
4 be imported into the RRTA because the FICA tax
5 is payment for employment, which is defined
6 broadly. But, in fact, Nierotko does go to
7 services performed, which is equivalent, the
8 argument is, to services rendered.

9 So how do you respond to that part
10 when you rely on the Eighth Circuit so
11 specifically? That sentence jumps out at me.

12 MR. FREDERICK: Well, again, it goes
13 to the difference between benefits and taxes
14 and the asymmetry there. If you were to
15 take --

16 JUSTICE KAVANAUGH: That's not what
17 they were relying on.

18 MR. FREDERICK: Well, no, but what
19 they were -- what -- I think that what -- they
20 were actually relying on the fact that there is
21 an asymmetry between benefits and taxation.
22 And if you take that asymmetry -- let's --
23 let's just play this out a little bit.

24 If you're a rail worker and you work
25 for four years and 11 months, you paid your

1 RRTA taxes, you do not qualify for benefits
2 under the Railroad Retirement Act because you
3 haven't hit the first five-year threshold. So
4 it is clear from that example that there's an
5 asymmetry between the taxing provision on the
6 one hand and the benefits provision on the
7 other hand.

8 Justice Kagan, you mentioned the idea
9 of just starting out. Imagine the system as it
10 was -- existed in 1937, where you had literally
11 thousands of railmen who were retiring or
12 unable to work and they were now all of a
13 sudden getting benefits, but there were no tax
14 revenues at that time that was sufficient to
15 pay the benefits.

16 So there's always been an asymmetry
17 between the taxing provision and the benefits
18 provision. And what they're seeking to do is
19 to bootstrap the words that are in the benefits
20 provision that no longer exist in the taxing
21 provision and to give those words meaning where
22 Congress intentionally deleted those words.

23 Now, if I could talk for a moment,
24 Justice Sotomayor, about your administrability
25 problem. There absolutely is a problem with a

1 general verdict because, in many states, there
2 are general verdict forms and this award would
3 be for all manner of things.

4 But the administrability problems
5 actually go a little bit further than that,
6 because, in the case of Norfolk and Western
7 versus Liepelt, which we cite in our brief but
8 the other side does not, this Court held that
9 juries are required to give -- be given
10 instructions that the awards that they give
11 under the FELA are not subject to income tax.

12 Why is that important? The railroad
13 asked for that instruction in the Liepelt case
14 because it didn't want juries inflating awards
15 because the jury would understand that if a --
16 a cache of money is being paid out to the
17 worker, it would be subject to tax. And that
18 was leading the railroad to assert that these
19 awards are being inflated improperly because
20 juries thought that these were going to be
21 taxable awards.

22 So this instruction is given in every
23 -- in most every FELA case that I'm aware of.
24 And it was given in this one. It's in the
25 Joint Appendix at page 91.

1 That instruction given to the jury is
2 that the FELA award here is not going to be
3 subject to income tax. So you want to talk
4 about administrability problems, not only do
5 you have a problem with the general verdict,
6 but you have a problem with what would be
7 colliding opinions of this Court if you were to
8 accept what the railroad is arguing for here.

9 On the one hand, the jury is told your
10 damages verdict is not going to be subject to
11 income tax, but if you award some part for past
12 earnings loss, that will be subject to the RRTA
13 tax. So the jury is somehow supposed to figure
14 out, on the basis of these conflicting
15 instructions, how much to inflate the award to
16 cover the retirement tax part of it.

17 But, wait, it gets more complicated
18 than that because there are two different tax
19 rates for the railroad retirement tax. There's
20 Tier 1, which are more or less equivalent to
21 the kind of Social Security taxes that we're
22 familiar with under FICA. But there's Tier 2.

23 Tier 2 are more like private pensions,
24 and the rate of tax changes on that every year
25 based on the assets that have accumulated under

1 the control of the Railroad Retirement Board.

2 So not only are you going to be asking
3 juries to try to figure out somehow what tax
4 rate to apply to cover this little sliver of
5 lost wage earnings, but you're going to have to
6 impose on courts the duty of keeping track
7 every year, as soon as the Railroad Retirement
8 Board resets the rate for the Tier 2 tax --

9 JUSTICE GINSBURG: You're speculating
10 that juries are aware of railroad retirement
11 benefits and taxation. The -- I think you're
12 quite right when you say you didn't want to
13 inflate verdicts to account for income tax.

14 But what is the likelihood that a jury
15 is going to think of railroad retirement
16 benefits?

17 MR. FREDERICK: The point, Justice
18 Ginsburg, and -- and this is where I think
19 looking again at this Court's decision in
20 Norfolk and Western versus Liepelt is
21 instructive, because, there, if the -- if this
22 is fair game, then why wouldn't it be possible
23 for the worker's lawyer to say, now this -- one
24 part of it's going to be subject to tax, and
25 ask for an instruction that the jury give the

1 after-tax amount that would equate to the lost
2 earnings portion of the judgment.

3 And therein lies the rub, Justice
4 Ginsburg, because, if the lawyers are going to
5 be debating about how the jury is instructed,
6 it surely is fair game for the jury to
7 understand exactly what the law is. And --

8 JUSTICE GINSBURG: And has any jury
9 ever been instructed -- has any railroad
10 attorney asked for a jury instruction about
11 railroad retirement tax?

12 MR. FREDERICK: No, because it's never
13 been taxed before. That's the whole point.
14 This whole idea came up five years ago when the
15 BNSF Railroad asked the Railroad Retirement
16 Board for gratuitous advice about whether or
17 not these awards could be taxed. And then they
18 started up a process of litigating this issue.

19 If you look at all the reported
20 decisions, they all arise in the last couple of
21 years, notwithstanding the fact that, for 75
22 years, from the inception of the railroad
23 retirement system, there were -- this was not
24 an issue.

25 JUSTICE BREYER: Well, because it

1 wasn't a -- look, the way I'm thinking about
2 it, and perhaps you'll tell me my -- that I'm
3 wrong, but very -- very simply, Congress has
4 loads of statutes spending money. And I sort
5 of think, a lot of people think, what they
6 spend money on has to be paid for. And many
7 people think that taxes is a good way to do it.

8 So, other things being equal -- and
9 there are a lot of other things -- to make
10 these statutes work in harmony, so you tax what
11 you're going to get later paid for is a virtue.

12 Now Congress suddenly changed the
13 practice, in your view, because it had been
14 there since 1937, by amending these statutes.
15 So we have a slight virtue on one side which
16 raises a question. Why?

17 MR. FREDERICK: Justice Breyer, let me
18 answer your question in this way: We're not
19 here saying that Mr. Loos is entitled to
20 benefits that he hasn't paid for. He doesn't
21 want the --

22 JUSTICE BREYER: No, I understand
23 that. But you also understand the asymmetry
24 argument. And there are other asymmetries, of
25 course.

1 I'm just saying -- I don't want to
2 repeat myself. I'm just saying my real
3 question here -- and I -- I wanted you to get
4 narrow on it and that's why I asked it -- why?
5 Why would -- did Congress want to change it?

6 MR. FREDERICK: I think that --

7 JUSTICE BREYER: In your view.

8 MR. FREDERICK: In my view, the
9 reason --

10 JUSTICE BREYER: We've been quiet
11 about it, by the way, nobody saying a word, but
12 -- and it being nearly years and years and
13 years of the other thing, and then they
14 suddenly changed it, and in your view, why?

15 MR. FREDERICK: I think the reason is
16 that it had very little practical effect
17 because taxes were not being generated on these
18 awards, and there was no real question about
19 the benefits that were -- that were accruing.

20 In most instances, the only time when
21 the benefits side actually matters for these
22 awards is when you can allocate dollars for a
23 few months in order to get beyond the 20-year
24 threshold or the 30-year threshold. It doesn't
25 happen very often.

1 And it -- when it does happen, a
2 practice has developed where the worker
3 actually pays for those topped-up months.

4 So take, for instance, a worker who's
5 got 19 years and 10 months of service. He gets
6 hurt on the job. It's the railroad's fault.
7 He gets his FELA judgment.

8 What that 1980 tax memorandum was
9 talking about, the employee went forward and
10 said: I'm willing to pay my taxes. I'd like
11 to get credit for two months so that I can get
12 my 20 years for my service.

13 And the IRS said: That's okay. And
14 that had been the way the statute was worded
15 between 1946 and 1975.

16 Now I understand that, since 1975,
17 this informal practice has continued. It's not
18 used very often. But we're not talking about a
19 situation where you've got workers that are out
20 there getting benefits based on these judgments
21 because the judgments typically don't allocate
22 to particular months.

23 And if you do not allocate the
24 back-pay award to particular months, then the
25 Railroad Retirement Board doesn't have a basis

1 for saying how you count it up toward the --
2 the creditable service.

3 And because the way the benefits work,
4 it doesn't typically benefit you to have 18
5 years of service or 17 years of service.
6 You've got to get to 20 years now in order to
7 get to a new threshold.

8 This matter as a practical thing,
9 Justice Breyer, simply was not deemed to be so
10 significant as to affect things.

11 I would further point out, as the
12 Board, the Railroad Retirement Board's latest
13 annual report indicates, the retirement system
14 is going to be solvent for the next 29 years.

15 You've got to ask the question: What
16 difference does it make whether or not you
17 impose the tax, except as a means of altering
18 the bargaining leverage between the railroads
19 and their workers, when the railroads have
20 breached the duty of due care and caused injury
21 to their workers.

22 If the Court has nothing further,
23 we'll submit.

24 CHIEF JUSTICE ROBERTS: Thank you,
25 counsel.

1 Five minutes, Ms. Blatt.

2 REBUTTAL ARGUMENT OF LISA S. BLATT

3 ON BEHALF OF THE PETITIONER

4 MS. BLATT: Thank you, Mr. Chief

5 Justice, and may it please the Court:

6 Justice Ginsburg, on your jury
7 instruction point, I -- I don't think there's
8 anything in the history of American
9 jurisprudence that you get an instruction under
10 FICA that you get to tell the jury to gross-up.
11 So I just don't know where in law they think
12 you'd be even entitled to that instruction.

13 Second, Justice Kavanaugh, in terms of
14 the Nierotko, Quality Stores was a -- was the
15 FICA side. And, also, Justice -- Justice --
16 Justice Scalia signed Quality Stores. So I do
17 think that that relates to --

18 JUSTICE GORSUCH: Well, what do we do
19 -- you say that there's no basis for a jury
20 instruction to gross-up, but it -- it sounds
21 like there's for a long time been a jury
22 instruction requiring the jury to -- to
23 net-down.

24 MS. BLATT: Right, and --

25 JUSTICE GORSUCH: Isn't what's good

1 for the goose good for the gander on this?

2 MS. BLATT: Sure, if someone wants to
3 argue it. No court has bought it.

4 But I think the reason why in Liepelt
5 is because there was like a, I don't know,
6 500 percent increase for inflation because
7 taxes make up, like, 30, 40 percent, and so the
8 Court said you're entitled to this instruction.

9 But just remember there are jury
10 verdicts every day that are subject to both
11 income taxes and FICA taxes. And I just have
12 never seen a case where you're entitled to --

13 JUSTICE GORSUCH: What -- what do you
14 say to Mr. Frederick's point that the reason
15 why the railroad's so interested in this is to
16 increase its leverage in settlement
17 negotiations, where the parties can allocate
18 awards, and -- and here you're arguing pretty
19 strenuously that they shouldn't be able to --
20 to -- to -- to be -- to take into cognizance
21 the tax issue on -- in -- in a jury judgment?

22 MS. BLATT: Right. I -- I mean, I --
23 I told you why we're here. It is not to gain
24 leverage.

25 The one thing I didn't say, or I

1 thought I said, but apparently I didn't, was
2 that the railroads are very concerned that the
3 rates are going to go up. If there's a
4 mismatch, they're directly -- you know, they
5 pay two-thirds of any rate increase.

6 But, on the settlement leverage,
7 whatever you think happens about allocation --
8 and this goes to you, Justice Sotomayor --
9 regardless of what you do in this case, 231 for
10 the benefits side requires allocation in every
11 case for personal injury judgment.

12 Now, if we prevail, whatever happens
13 in terms of allocation on the taxing side, it
14 is treated with parity on the benefits side.
15 And that is to say, if employees are
16 underreporting their taxes, they're going to
17 get an underreporting in benefits.

18 If they win, there is no downside, and
19 the law allows them to allocate an entire award
20 to the benefits side, without any tax burden.
21 So I think we win in terms of the dynamic to
22 the net benefit on Treasury.

23 If you're worried about settlement
24 dynamics, I mean, that is because of the h --
25 h(2), h(2), yes, in 231 allows employees to

1 allocate.

2 The third thing, I do want to defend
3 the government here, because -- about this 1981
4 TAM. The reason probably the government didn't
5 cite it is because it wasn't until the red
6 brief that made all this huge thing about, oh,
7 80 years and 80 years, so, I mean, the
8 government wasn't aware it was going to be
9 accused of any of this when they had a
10 regulation on point that said any amounts paid
11 for time lost. So we cited it in our brief.

12 And also, on the time lost, the bottom
13 line of where I want to end, I mean, the
14 problem for the other side, whatever he wants
15 to say about the language, he concedes time
16 lost payments are covered.

17 I mean, in one part of his argument,
18 he fought it. In another part of the argument,
19 he has to concede it because he concedes that
20 vacation pay, sickness, I mean, whether or not
21 he wants to admit it, you don't work on
22 Christmas Day, and that's considered time lost,
23 and you -- that's for services rendered.

24 So the only thing, what his case comes
25 down to is whether a negligence judgment is

1 somehow different from the type of payments
2 that he concedes.

3 And we don't think there's any textual
4 or purposeful and, you know, in any event, I
5 hate to cite it, but I will end with Chevron.
6 I mean, he has to win under the plain language
7 for you to affirm.

8 Thank you.

9 CHIEF JUSTICE ROBERTS: Thank you, Ms.
10 Blatt. Counsel, the case is submitted.

11 (Whereupon, at 12:07 p.m., the case
12 was submitted.)

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