

# SUPREME COURT OF THE UNITED STATES

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IN THE SUPREME COURT OF THE UNITED STATES

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BNSF RAILWAY COMPANY, )  
 )  
 ) Petitioner, )  
 )  
 ) v. ) No. 17-1042  
 )  
MICHAEL D. LOOS, )  
 )  
 ) Respondent. )  
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Pages: 1 through 58

Place: Washington, D.C.

Date: November 6, 2018

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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.

1           So what -- what is the stake that you  
2     have in this?

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

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

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

20           First --

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

23           MS. BLATT:  Sure.  Sorry.

24           JUSTICE SOTOMAYOR:  There's no  
25    personal interest in the sense of, if we say

1 that it's not, then the railroad doesn't  
2 withhold and pay the state.

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

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

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

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

25 And, third, taxing a payment for lost

1 wages under FELA furthers the RRTA's purpose to  
2 fund benefits under the Railroad Retirement  
3 Act, or RRA.

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

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

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

25 MS. BLATT: Sure. Respondent argues

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

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

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

22 JUSTICE KAVANAUGH: That's their  
23 argument.

24 MS. BLATT: I think that's their  
25 argument and I think it's certainly wrong. We



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

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

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

16 MS. BLATT: I doubt it.

17 (Laughter.)

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

25 I think of a judgment of a court for

1 negligence get -- awarded involuntarily against  
2 the employer's consent is something very  
3 different. What's wrong with that?

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

6 JUSTICE GORSUCH: Go ahead.

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

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

17 MS. BLATT: Right. And you can have a  
18 disability payment that comes in the form of  
19 judgment. He concedes that workers'  
20 compensation is covered. The judgment or back  
21 pay award in Nierotko was a judgment based on a  
22 wrongful discharge by violation of a statute.  
23 But there's just nothing in the -- in the sense  
24 of the payment that it says it has to be either  
25 from -- I think he concedes settlements count.

1 So I don't know why it's different that a court  
2 ordered the payment. I mean, there's --  
3 there's really no basis --

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

10 MS. BLATT: Sure.

11 JUSTICE GORSUCH: What about --

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

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

25 JUSTICE SOTOMAYOR: Can --

1 MS. BLATT: -- you had injury. So I  
2 think what you're saying is, if you have to  
3 sue, you can't be paid for services rendered,  
4 but if the employer pays it voluntarily, that  
5 definitely is atextual.

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

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

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

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

25 MS. BLATT: No, because under the

1 Railroad Retirement Act in Section 231h(2) --  
2 this has been around since 1946 -- there's a  
3 presumption that a personal injury award, the  
4 entire amount, is treated for lost time.

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

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

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

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

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

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

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

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

1 the service of the employer if they were forced  
2 into idleness because of the employer's  
3 wrongdoing.

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

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

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

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

18 MS. BLATT: No.

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

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

1 the salary for services rendered. And the pain  
2 and suffering amount has nothing to do with  
3 your salary, your employment, or anything else  
4 about the employment relationship.

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

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

19 So -- a question?

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

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



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

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

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

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

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

1 know that Congress continued to think that time  
2 lost payments were covered.

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

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

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

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

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

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

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

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

18           CHIEF JUSTICE ROBERTS: Thank you,  
19 counsel.

20           Ms. Kovner.

21           ORAL ARGUMENT OF RACHEL P. KOVNER  
22 FOR THE UNITED STATES, AS AMICUS CURIAE,  
23 SUPPORTING THE PETITIONER

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

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

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

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

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

23           And, Justice Kavanaugh, to your  
24 question about whether that continues to be  
25 good law, this Court reaffirmed that precedent.

1 It applied it in Quality Stores just in 2014.

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

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

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

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

1 JUSTICE GORSUCH: That's where I get  
2 stuck too. I've got some questions about that  
3 for your friend on the other side. What's your  
4 other one?

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

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

15 MS. KOVNER: We don't think that's  
16 exactly correct, Justice Sotomayor. So I  
17 think, to understand the IRS's position, the  
18 most relevant indicators are, first, the  
19 regulations, which have continuously said, you  
20 know, time lost payments are covered, since  
21 1937, and continues to the present.

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

24 MS. KOVNER: So I don't think that's  
25 the case. I mean, whenever we've been asked,

1 there's a Technical Advice Memorandum from 1980  
2 dealing specifically with FELA judgments  
3 saying, again, they have to be paid.

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

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

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

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

1 withhold from the employee's pay the employee's  
2 share, and then it pays both shares.

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

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

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

24 I think the RRB says, nonetheless, the  
25 employer and the employee are allowed to come



1 in even after the judgment and allocate it  
2 between time lost and -- and other sources.

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

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

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

23 In contrast, a pain and suffering  
24 judgment is essentially putting you in the  
25 place you would be if you hadn't lost some sort

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

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

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

22 MS. KOVNER: Yeah.

23 JUSTICE KAGAN: So what about that?

24 MS. KOVNER: Well, I think there are a  
25 number of forms of compensation that operate

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

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

15 And even setting aside all these, you  
16 know, textual and -- and precedential  
17 indicators, you know, we would note that this  
18 has been the position of the agency since the  
19 statute was enacted in 1937. Congress amend --  
20 has amended this statute many times against  
21 that backdrop, and it hasn't chosen to change  
22 that agency interpretation. So we think this  
23 is a -- you know, an interpretation that's  
24 informed what Congress has done. It's added  
25 exclusions that don't really make sense unless

1 time lost is covered without changing the  
2 agency's interpretation.

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

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

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

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

13 CHIEF JUSTICE ROBERTS: Thank you,  
14 counsel.

15 Mr. Frederick.

16 ORAL ARGUMENT OF DAVID C. FREDERICK

17 ON BEHALF OF THE RESPONDENT

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

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

24 Our position is that the plain  
25 language controls and that the statute now in

1 effect does not contain all the words and extra  
2 provisions that get you to a place where  
3 "services rendered" means not services  
4 rendered, which is the core of the other side's  
5 position.

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

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

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

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

25 MR. FREDERICK: Right. But he hadn't

1 rendered the services. That's the whole point.  
2 He was unable to render the services because he  
3 was hurt.

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

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

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

1 the coal company employee suffered by the  
2 railroad's negligence was "for services  
3 rendered." You wouldn't say that at all.  
4 There would be no basis for saying that.

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

9 JUSTICE KAVANAUGH: But a lot of these  
10 --

11 MR. FREDERICK: -- any differently.

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

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

23 JUSTICE KAVANAUGH: The Cleveland  
24 Indians was about the allocation time period.  
25 It wasn't about the main holding of Nierotko in

1 terms of how it departed from Nierotko. Is  
2 that --

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

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

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

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



1 MR. FREDERICK: Yes.

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

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

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

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

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

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

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

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

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

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

1 employee.

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

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

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

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

23 So, if you look at these textual  
24 differences, the line-drawing, I think, Justice  
25 Gorsuch, is actually pretty straightforward.

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

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

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

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

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

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

1           They never thought you didn't get it  
2           at all. And their argument about the two  
3           statutes is it's a plus. We're not saying it's  
4           necessary, but it's a plus to treat the taxing  
5           statutes symmetrical with. And their final  
6           argument is that, hey, 80 years is a long time.

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

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

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

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

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

25           Now surely, if this had been the way

1 the taxing service had been construing this  
2 statute, there would be at least \$1 deposited  
3 from the Treasury as a result of an FELA  
4 judgment and a deficiency notice for a failure  
5 to do that.

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

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

16 MR. FREDERICK: Sure.

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

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

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

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

9           MR. FREDERICK: No, it doesn't,  
10          actually. There -- there, I don't understand  
11          their textual argument for that at all because  
12          what they're asking for you to do is to accept  
13          the idea that the Railroad Retirement Board  
14          somehow has the administrative authority to  
15          construe a taxing statute.

16          And that's never been the case where  
17          you have a benefit agency construing the taxing  
18          statute. The taxing statute is construed by  
19          the IRS.

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

1 subject to income tax.

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

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

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

24 And, Justice Kavanaugh, you're  
25 correct, at that time, that's when the time



1 lost language was taken out of the statute.  
2 That 1980 TAM was construing the previous  
3 version of the statute that doesn't exist  
4 anymore.

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

11 JUSTICE GINSBURG: Why -- why do you  
12 think the language was taken out?

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

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

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

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

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

16           Now the issue in that 1980 technical  
17 advice memo --

18           JUSTICE KAVANAUGH: Well, it's because  
19 the time allocation was changed.

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

24           JUSTICE KAVANAUGH: Yes.

25           MR. FREDERICK: -- distinction?

1 JUSTICE KAVANAUGH: Yes.

2 MR. FREDERICK: But that -- whether  
3 the timing thing had happened as a change,  
4 didn't affect what was being taxed, which was  
5 services rendered. So whether you tax --

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

11 MR. FREDERICK: Well --

12 JUSTICE KAVANAUGH: At least that's  
13 the argument.

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

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

1 where the situs requirement is imposed on the  
2 navigable waters, including piers.

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

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

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

24 It was the same panel that handled  
25 both issues. And this Court cited with

1 approval the Union Pacific decision. Now we --

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

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

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

18 JUSTICE KAVANAUGH: That's not what  
19 they were relying on.

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

1           If you're a rail worker and you work  
2     for four years and 11 months, you paid your  
3     RRTA taxes, you do not qualify for benefits  
4     under the Railroad Retirement Act because you  
5     haven't hit the first five-year threshold. So  
6     it is clear from that example that there's an  
7     asymmetry between the taxing provision on the  
8     one hand and the benefits provision on the  
9     other hand.

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

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

25           Now, if I could talk for a moment,

1 Justice Sotomayor, about your administrability  
2 problem. There absolutely is a problem with a  
3 general verdict because, in many states, there  
4 are general verdict forms and this award would  
5 be for all manner of things.

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

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

24 So this instruction is given in every  
25 -- in most every FELA case that I'm aware of.

1 And it was given in this one. It's in the  
2 Joint Appendix at page 91.

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

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

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

25 Tier 2 are more like private pensions,



1 and the rate of tax changes on that every year  
2 based on the assets that have accumulated under  
3 the control of the Railroad Retirement Board.

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

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

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

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

1 part of it's going to be subject to tax, and  
2 ask for an instruction that the jury give the  
3 after-tax amount that would equate to the lost  
4 earnings portion of the judgment.

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

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

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

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

1 an issue.

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

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

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

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

24 JUSTICE BREYER: No, I understand  
25 that. But you also understand the asymmetry

1 argument. And there are other asymmetries, of  
2 course.

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

8 MR. FREDERICK: I think that --

9 JUSTICE BREYER: In your view.

10 MR. FREDERICK: In my view, the  
11 reason --

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

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

22 In most instances the only time when  
23 the benefit side actually matters for these  
24 awards is when you can allocate dollars for a  
25 few months in order to get beyond the 20-year

1 threshold or the 30-year threshold. It doesn't  
2 happen very often.

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

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

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

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

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

25 And if you do not allocate the

1 back-pay award to particular months, then the  
2 Railroad Retirement Board doesn't have a basis  
3 for saying how you count it up toward the --  
4 the creditable service.

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

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

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

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

24 If the Court has nothing further,  
25 we'll submit.

1 CHIEF JUSTICE ROBERTS: Thank you,  
2 counsel.

3 Five minutes, Ms. Blatt.

4 REBUTTAL ARGUMENT OF LISA S. BLATT  
5 ON BEHALF OF THE PETITIONER

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

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

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

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

1 MS. BLATT: Right, and --

2 JUSTICE GORSUCH: Isn't what's good  
3 for the goose, good for the gander on that?

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

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

12 But just remember there are jury  
13 verdicts every day that are subject to both  
14 income taxes and FICA taxes. And I just have  
15 never seen a case where you are entitled to --

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

25 MS. BLATT: Right. I -- I mean, I --



1 I told you why we're here. It's not to gain  
2 leverage.

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

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

15 Now, if we prevail, whatever happens  
16 in terms of allocation on the taxing side, it  
17 is treated with parity on the benefit side.  
18 And that is to say, if employees are  
19 under-reporting their taxes, they're going to  
20 get an under-reporting in benefits.

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

1           If you're worried about settlement  
2 dynamics, I mean, that is because of the (h) --  
3 (h)(2), (h)(2), yes, in 231 allows employees to  
4 allocate.

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

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

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

1 and you -- that's for services rendered.

2 So the only thing, what his case comes  
3 down to is whether a negligence judgment is  
4 somehow different from the type of payments  
5 that he concedes.

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

11 Thank you.

12 CHIEF JUSTICE ROBERTS: Thank you, Ms.  
13 Blatt. Counsel, the case is submitted.

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

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