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WASHINGTON, D. C. 20543

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Supreme Court of the United States

EARL R. FOSTER,

Petitioner,

v.

DRAVO CORPORATION,

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No. 73-1773

Washington, D.C.
January 20, 1975

Pages 1 thru 48

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IN THE SUPREME COURT OF THE UNITED STATES

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EARL R. FOSTER, :
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Petitioner :
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v. : No. 73-1773
:
DRAVO CORPORATION :
:
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Washington, D. C.

Monday, January 20, 1975

The above-entitled matter came on for argument
at 2:06 o'clock p.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice
LEWIS F. POWELL, JR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice

APPEARANCES:

HARRY R. SACHSE, ESQ., Assistant to the Solicitor
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For Petitioner

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Pittsburgh, Pennsylvania 15219
For Respondent

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HARRY R. SACHSE, ESQ.,
For Petitioner

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ROBERT H. SHOOP, JR., ESQ.,
For Respondent

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P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in No. 73-1773, Foster against Dravo Corporation.

Mr. Sachse.

ORAL ARGUMENT OF HARRY R. SACHSE, ESQ.,

ON BEHALF OF PETITIONER

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

This case is here on writ of certiorari to the Court of Appeals for the Third Circuit.

The question presented by the case is whether a requirement of a collective bargaining agreement that an employee work not less than 25 weeks in the prior year to receive a vacation can be used to prevent a returning veteran from receiving a vacation in the year of his return and in the year after his return.

The Court of Appeals held that the company could deny vacations to veterans for failure to meet this 25 work-week requirement.

It is our position that this interpretation keeps a veteran from returning to his employment without loss of seniority, status or pay and is in contravention of 50 USC 459, the Selective Service Act.

I have had a chart passed around which I have also supplied to Opposing Counsel which I'll turn to in a minute

and I think will help clarify the -- what really happened in this case.

QUESTION: Well, I think this is illustrative only.

MR. SACHSE: It is only illustrative, that is correct. I decided to use it instead of a big display that seemed unwieldy.

QUESTION: It is a continuing escalator here.

MR. SACHSE: That is right.

QUESTION: It is a picture of a continuing escalator.

MR. SACHSE: Well, we argue that a continuing escalator principle should apply in this case.

The contract in question has a 25 work-week requirement but as to veterans, this is all the contract says -- this is on -- in the Appendix, page 48. It says, "An employee inducted into the Armed Forces of the United States shall be given the minimum reemployment rights granted him under the Selective Service Act as amended."

The question then is --

QUESTION: I am just curious, Mr. Sachse, I gather, this being the Selective Service Act is only for a conscripted army.

MR. SACHSE: No, that is not so.

QUESTION: Does it apply to the voluntary army?

MR. SACHSE: It applies to reserve units and it applies to volunteers --

QUESTION: Well, how about --

MR. SACHSE: -- in the Army.

QUESTION: It does?

MR. SACHSE: Yes, it does.

QUESTION: To the new Volunteer Army?

QUESTION: Oh, yes.

QUESTION: Volunteer, I suppose, inducted in the same sense that a draftee is inducted, isn't he?

MR. SACHSE: Well, they are different sections of the Act, but they apply the exact same rule.

QUESTION: Anybody can say to his boss, I am going to volunteer for the Army for two or three years but remember, I am coming back.

MR. SACHSE: That is right. And the Act was passed in 1941 with idea that a lot of people would be volunteering and not just drafted and to encourage people to do so.

QUESTION: Volunteering for a career in the Army? Now, what if he says to his boss --

MR. SACHSE: No, no, they are --

QUESTION: -- I am going to volunteer for 30 years.

MR. SACHSE: No, there are limits on how many years it applies. If he is drafted, I think two years. Volunteers -- something. I don't recall the details.

QUESTION: But there are short --

MR. SACHSE: There are limits there and there are also limits on how quickly you have to reapply within 90 days of being released, you have to reapply on the same --

QUESTION: Well, I must say, the Military Selective Service Act is a little misleading then, isn't it?

MR. SACHSE: Well, that -- it's in an Appendix to --

QUESTION: to that Act?

MR. SACHSE: Well, it is part of that Act but it -- but it covers more --

QUESTION: Now, right now, if you volunteer for a full hitch in the Army, which you now have to do if you are going to volunteer, this Act applies?

Does it?

MR. SACHSE: I don't want to make a definite statement on that. It -- the Act applies --

QUESTION: He is shaking his head that it does, yes.

MR. SACHSE: -- to more than just draft. I know it applies to reserve units.

QUESTION: If it didn't apply to the Volunteer Army, this would be just this case, wouldn't it?

If the statute -- if the decision here isn't to apply to volunteers.

MR. SACHSE: Well, it's really -- it's just that it, it's useless for me to speculate about whether it applies in

a pure volunteer situation.

There is no question in this case that it does apply to this employee.

Now, if you'll turn to the chart, I'll show you what happens with this employee and it is a fairly typical situation.

He went to work on August 5th at the extreme left of the chart. During the first 22 weeks he received no vacation. During the next year he received a vacation of approximately three days based on the amount of work in the prior year under a provision that is only there for initial employees.

During the next year, he had served enough so that he was a full-fledged employee getting regular vacation pay which is seven days is all they get, even in the third year.

But during that third year, he went into the Army -- into the Navy, actually, it was.

He begins almost two years of military service. He is paid when he goes into the Navy his vacation benefits earned up to that point so we have no quarrel about old -- about benefits prior to that date. When --

QUESTION: I am not sure I follow you.

MR. SACHSE: On March 6, 1967, he begins --

QUESTION: Yes.

MR. SACHSE: -- his military service and he is paid

56 hours of vacation benefit.

Now, let me just proceed and I think you will follow me.

He then is in the Navy for about a year and a half or almost two years. When he returns, he gets no vacation benefit, no vacation at all during that first 13-week period and he gets no vacation during the entire next year under this contract's full work year.

The result from that -- first, I want to put it in a sort of simplified way, but I think this is what the Act is really about. From his standpoint, because he went into the Service, he is having to go through the whole business of being a rookie again, of having a year and a half before he works up to getting a vacation again.

QUESTION: Well, he doesn't even get the benefit of a rookie because --

MR. SACHSE: That's right, less.

QUESTION: -- the rookie got the pro rata, 20 hours.

MR. SACHSE: That's right. He didn't even get the pro rata that a rookie would get.

QUESTION: Right.

MR. SACHSE: Now, the company said that this is just a straight application of the contract because in these 13 weeks when he came back, he hadn't served 25 weeks in the prior year. Then in the full year when he comes back, he

hadn't served 25 weeks at the plant in that year and so this is the way the contract works.

Now, our position is really, to just get to the heart of it right at the beginning -- our position is that where a company bases its vacation benefits on a work requirement such as 25 weeks in a year, which is just half of the year's work, that what they are really doing, the way the employees see it and the real effect of what they are doing, is saying that a person who is a steady employee of the company, who is there working every year, gets a vacation every year, after he has gone through his initial period and that under this Court's decisions on the Selective Service Act and under the language of the Act, this is part of seniority and status, of longevity in the company.

And when he comes back, he shouldn't be required to sit there and reearn his right to a vacation. He should start getting vacations the year he comes back to work for the company and certainly I can see problems in the first year where you can play around with the did-he-work-just-three-weeks that year? Did he work almost the whole year?

But here, even in the second year he received no vacation benefits.

QUESTION: Is the maximum vacation 56 hours?

MR. SACHSE: No, it goes up, depending on how many years he has been in employment.

QUESTION: I see.

MR. SACHSE: And the company does not dispute that the way of figuring the maximum vacation is continuous and he would get credit for his years in the Service for that.

They are just arguing about the --

QUESTION: About the maximum or the length of vacation.

MR. SACHSE: -- qualification for it, 25 weeks' qualification.

QUESTION: Your argument is one of essentially of linking vacation rights to seniority.

MR. SACHSE: That is correct.

QUESTION: On his return.

MR. SACHSE: Our argument makes a distinction in vacations and I think it has an advantage to it in that I think it can get the lower courts out of the kind of mess that they have been in, in trying to work out every detail of every contract.

Our argument is this and we think that it is what the Act calls for and what the decisions of this Court call for -- that where a company makes close correlation between hours worked and vacation pay so that for every 24 hours work you get three hours towards a vacation, something like that, then all the employees know it and they know they are not getting rewarded for being the continual employee but

just each hour they got this little amount of extra pay.

QUESTION: And that is compensation, really.

MR. SACHSE: And in that, we say it is compensation. It is not seniority. It is compensation.

But when there is not that kind of one-to-one ratio, when the real question is whether a man has been a steady employee and if he is, if he has put in, say 25 weeks where the average person probably put in 50, here he gets the same vacation, whether it is 25 weeks, 30 weeks, 35 weeks and so forth.

Then in that situation, what you are really looking at is seniority in the plant and a man should not lose his vacation because he has been in military service in that situation.

QUESTION: Does the record show, Mr. Sachse, what the typical number of weeks put in for a year was by a worker with, say, five years' seniority? Was it the kind of thing where you could expect to work 49 or 50 weeks of the year or was 25 or 30 more likely?

MR. SACHSE: I --there is data in the record on -- on work sheets of particular employees junior to him; 47 weeks, the week -- the year that he was there beforehand, I believe is typical. It was stipulated that he would have worked more than 25 weeks in each of the years that he was in the military service and that people junior to him had

worked more than 25 weeks in each of those years.

But there is sufficient data in the record to show -- it is also stipulated that he was not a temporary or part-time employee and there is sufficient data in the record to show that this was a steady job and he still works there.

QUESTION: What sort of leave did Petitioner receive while he was in the Service?

MR. SACHSE: I don't know. It is not in the record. I think we can all assume he received whatever it is that the military gives during that time.

QUESTION: You don't recall --

MR. SACHSE: It is our position that -- that it would be a can of worms to get into that because you then have to start dealing with employee's who have been in combat and what do you -- how you count the leave that a person gets when he is in Viet Nam or something like that.

QUESTION: Well, there is such a thing as terminal leave in the military. At least, there used to be, I think at the rate of two and a half days a month. Is that still true?

MR. SACHSE: I just don't know. I assume he did get some leave in the military. We certainly don't argue that he received no leave in the military.

And we don't ask that he be paid -- yes --

QUESTION: Let me interrupt just a minute, Mr. Sachse. I would assume that by the Government's own theory, it might make a difference whether the typical number of weeks worked was, say, 30 and or 50, that if the most a man could expect to work during the year was 30, 32 weeks and the company required 25, then it might be more analagous to kind of an earned credit type of thing.

MR. SACHSE: Well --

QUESTION: Yes.

MR. SACHSE: As I understand the point that you are making, that is not the Government's theory for this reason, that in the Accardi case, this Court pointed out that in a scheme for severance pay that was based on years of service -- and a year of service was so many months of service and month of service was a month in which there were so many days of service, that it could work out where a person had only had 10 or 12 days of service and it would still be counted as a year of service.

Now, the Court rejected arguments in that case that that was a very untypical sort of thing that a man would be fired if he was working that little and the Court concentrated on the proposition that -- that the scheme itself shows that there is not a one-to-one -- not a close ratio at all between the amount of vacation and the hours worked.

Now, I think the facts of this case -- and there are work sheets in the Appendix that will show this -- will show that the 25 weeks was nowhere a typical work year, that the 47 weeks or 50 weeks was much closer to it but we don't suggest that the Court should get into that in every case.

One of the problems in this kind of case is that the total amount of money that you are talking about is usually small in any individual case and that the companies need some fairly certain way of determining whether a vacation benefit is owed or not and so do the employees and it is better to seek a solution that can be easily applied.

QUESTION: Mr. Sachse, while you are pausing for a moment, let me see. Perhaps this is oversimplification.

Are you trying to tack the 82 weeks of military service onto the bar of the grey-marked bar that preceded it? Or are you just trying to tack your two grey-marked bars together for purposes of vacation?

MR. SACHSE: Let me put it a different way. This is the way I understand it. What I am trying to do is say that when the man returns that in that year he can count his military service for vacation entitlement, so that --

QUESTION: Even though he got a vacation from the Army.

MR. SACHSE: Even though he got a vacation from the Army. The military service is a separate thing. The purpose

of the Act is to, number one, encourage people to go into the military and number two, to prevent people who go into the military from being hurt when they come back and --

QUESTION: Well, if that is the theory, then he ought to be able to get the differential in pay, too, if that is your basic theory.

MR. SACHSE: No, we -- no, our theory is that -- that you can ignore what happened in the military, that the question is, when this man came back, when you start figuring his first vacation after he is back, you have the right to count his time in the military just as if it had been time at work.

QUESTION: He'd be entitled to the first month off.

MR. SACHSE: Sir?

QUESTION: Would he be entitled to the first month off for a vacation?

MR. SACHSE: Well --

QUESTION: You have got to get out of that one.

MR. SACHSE: There is a problem in this --

QUESTION: Right.

MR. SACHSE: -- that bothers me and that is, when a man comes back with only a week or two towards the end of the year -- and we have debated a bit about how this should be solved, should you do a pro rata in that year and then let it be the first full year?

The thing that shouldn't be allowed to happen is, he has been in the military, he has come back, he has started the year January 1st with everybody else, he shouldn't have to work through that whole year and not get a vacation.

Okay.

QUESTION: Well, then, going back to my question, your answer to my question, I should think, very simply would be, yes, you are trying to tack the number of days of military service onto the number of days of employment that preceded his military service.

MR. SACHSE: I think that is correct. I think that a fair answer to that question is, yes.

QUESTION: So he should have vacation for both 1967 and 1968?

MR. SACHSE: He would get -- I prefer to speak of the year in which he gets it because there is some confusion there. He would get a vacation benefit in the year 1968.

QUESTION: That's right. Of how much? What if he had been in continuous employment? He would have had, in 1967, a vacation of how long, a week? Two weeks?

MR. SACHSE: Seven days, I believe it is.

QUESTION: Seven days.

MR. SACHSE: Yes.

QUESTION: And in 1968, he would get --

MR. SACHSE: He would get a seven-day vacation in that year.

QUESTION: All right. So are you suggesting that he get 14-days' vacation in the remaining 13 weeks of 1968 or ?

MR. SACHSE: No. No, no, I am only saying that in the year he comes back --

QUESTION: Well, isn't that the year he came back, 1969? 1968?

MR. SACHSE: He came back in 1968, October 7th, '68. He came back October 7th, 1968.

QUESTION: All right. Now, how much vacation does he get? The vacation he didn't have in 1967 as well as the vacation he didn't have in 1968?

MR. SACHSE: No, no, we would only give him the same vacation that he would have gotten in 1968 --

QUESTION: All right --

MR. SACHSE: -- if he had been working steadily.

QUESTION: -- and we forget 1967 entirely.

MR. SACHSE: We forget 19 -- 1967 he got taken care of when he went in.

QUESTION: He got terminal leave, didn't he?

MR. SACHSE: That's right. He was taken care of when he went in.

QUESTION: Oh, I see.

MR. SACHSE: Yes.

QUESTION: I see.

MR. SACHSE: Now, we have an alternative position which is --

QUESTION: What do you mean "we"? I take it you are talking about Congress, aren't you?

MR. SACHSE: Well, when I said "we," what I mean is -- I really have to mean two things. One is that the Department of Justice represents the individual, Earl Foster, who is out there right now. And we argue the case for him.

When I say "we," we also mean the Department of Labor and the Justice Department support the position that we have taken in this brief.

I haven't gotten to talk much about the cases but there are two cases that it seems to me are controlling -- the language of the statute and two cases.

The language of the statute is that the veteran should be restored in such manner as to give him such status in his employment as he would have enjoyed if he had continued in such employment continuously from the time of his entering the Armed Forces until the time for his restoration to such employment.

That was an Act in 1948 really codifying this Court's decision or perhaps codifying and expanding this Court's decision in the case called Fishgold.

But the Court has had two cases on questions similar to this. The big issue for awhile prior to the Accardi case, among people who dealt with this problem, was whether vacation benefits, severance pay, pensions, counted as questions of seniority status or whether they, on the other hand, counted as insurance or other benefits, which would be governed by the contract provisions for people on leave of absence.

In Accardi, the Court for -- the Court defined the insurance or other benefits clause and it said that that was something in addition to the seniority clause, that it didn't keep severance pay from being seniority and that it applied to benefits that the serviceman might get while he is in the service.

In other words, that if an employee on leave of absence could still go to the railroad hospital or his wife could go to the railroad hospital, the insurance and other benefits clause would assure that his wife could still go there even if he was in the service.

And the Court very specifically ruled on or discussed that insurance and other benefits clause.

Then, prior to the Accardi decision, the Magma Copper case, you had this situation -- employees who had been denied both vacation pay and holiday pay. The vacation pay, they were denied it because they -- although

they had satisfied their work requirement of 75 percent of the available shifts, they were not present at the plant on the last day of the year because they were in the military.

As to holiday pays, when they would come back from the military -- just think about this for a minute -- but they would come back from the military -- these were in the Viet Nam War -- they were denied holiday pay for the 4th of July and for Indipendence Day, though everyone else got it, because they hadn't satisfied a three-month requirement. They had not been on the payroll three months when they came back.

Now, the Ninth Circuit upheld that. It said the company could do that. It could apply its contract.

Then the Accardi case was decided and the Ninth Circuit had the case back again on rehearing. They reaffirmed their prior decision with one judge dissenting, saying, we can't do this. This is not what "other benefits" means. It is part of seniority. See the Accardi case.

The veterans petitioned this Court and the Court granted the writ of certiorari and the Court summarily reversed the Ninth Circuit with an opinion that just said, "Reversed. See Accardi," with the citation.

There was a dissent in that case. Justice Stewart -- Justice Douglas wrote the dissent. Justice Stewart and Justice Harlan joined in the dissent. And in the dissent,

they would have made a distinction between the amount of vacation or holiday pay that a person could get and the entitlement to it and would have said that the question of the entitlement to it is not a question of seniority. It is something that would have to be governed by the contract.

But that is the position that the Court did not take and that is the "subversive opinion"-- as you said in an earlier case.

And as a result of that case, too, we think it is even clearer that in this situation that the entitlement should not be governed by the contract but should be a question of seniority that the serviceman has a right to.

Now, I want to answer one question raised by Respondents in their brief. They say that as a matter of sort of legal principle that a vacation -- that vacation pay is a part of -- of wages paid, of salary and that, therefore, it has to be something other than seniority, that you can't give a man a salary for the time that he didn't work and they cite a number of cases and arbitration decisions.

But those cases make a different point, as we read them. That is, that -- and the 1930's Court sometimes said that vacation is just a gratuity and that the management can do what it wants with it.

And in a number of cases, arbitrators and courts

held that vacations are not just questions of gratuity, that they are things bargained for and in that sense, they say that they are a function of wages but there certainly was no attempt in those cases to answer the kinds of questions that are set forth here and in --

QUESTION: Those holdings are that it is a form of deferred compensation, isn't it?

MR. SACHSE: That is correct.

QUESTION: So it is related directly to the wages he received at the time.

MR. SACHSE: It is related to the wages. It is related to his seniority in the plant. It clearly is not just --

QUESTION: It is the length of service -- the length of service plus the wages.

MR. SACHSE: That is right. It really -- the reason that people have had trouble with the vacation thing is that analytically it is somewhere in between a payment and a seniority right because it is not just wages. It is not tied that closely to it. It is for reasons other than wages, too. It keeps the employee happy and able to work.

It is an in-between sort of thing and the Court has ruled on it in Magma Copper to say that it is a function of seniority or -- or I take that decision as ruling that way, that it is protected by the Act.

There are -- I want to give you another citation which is United States versus Embassy Restaurant 359 US 29 which holds that payments into a union fund, though analytically part of wages, are not considered part of wages but Bankruptcy Act and it simply illustrates the point that you have to look at the particular Act in the particular context and there is no flat rule one way or the other, other than what the statute says and the cases the Court has decided ruling on.

Thank you.

QUESTION: What is the Government's position, Mr. Sachse, in the case of a contract that calls for a one-day vacation for each month worked the preceding year?

MR. SACHSE: Our position is that if it is clear in the contract -- one day vacation for each month's work?

QUESTION: Each month, each two weeks, whatever you want to call it.

MR. SACHSE: Well, if it is tied close enough to precise amount of work done, we then say that it is a pure function of wages and if the contract is clear, that the returning veteran does not have a right to it and the broadest example of that is a pooled vacation benefit where money is actually set aside in a pool for vacation.

We don't claim, with that kind of program, that a person would have this right.

But what we are talking about is the veteran's legitimate expectation when he returns to work. I don't think he would expect it in that kind of program but he would here.

QUESTION: Well, isn't it a legitimate expectation that he will not lose the benefit of that period from the time he began to work there until the time he went into the Service? If he gets his place in line, as of the date when he left, why isn't he restored fully under both the Act and the contract?

MR. SACHSE: Well, he is being made a new man again, a rookie again. He is having to go through a year and a half again before he gets his vacation.

QUESTION: Well, that is no --

MR. SACHSE: And the company has written it that way but we don't think that squares with the seniority and status provisions of the Act and particularly with this Court's prior cases on it.

This Court, in times, perhaps, when veterans were given a little more deference than they have been from the Viet Nam War, has interpreted this Act so as to really protect the veterans and we are trying to support those interpretations.

QUESTION: With no credit to the employer for whatever number of days' vacation were given in the military

service.

MR. SACHSE: No. No, your Honor.

QUESTION: On what theory do you just disregard that?

MR. SACHSE: That vacation was part of his military service. He may not have wanted to be in Viet Nam. He may not have been able to go anywhere but God knows where on that vacation.

Now, it could have been wonderful. It might have been two weeks in Paris, you know, but we just --

QUESTION: Well, it may have been terminal leave, as Justice Stewart suggested.

That the last -- that they -- and that is common with military personnel, is it not, that they are discharged as of March 30th but they leave active duty on April --

MR. SACHSE: There are a lot of vagaries in the military about how these things work. We are trying to keep out of that. You know, you can be discharged and have to go across the country and think that that is wonderful or you can be discharged and be in a terrible situation.

It can be from delight to horror. And --

QUESTION: But you want to treat them all the same.

MR. SACHSE: We want to apply the principles --

QUESTION: Whether it is Paris or Saigon.

MR. SACHSE: -- that their time in the military

counts as time in the plat in figuring their entitlement to vacation when they come back, but just when they come back.

QUESTION: Thank you.

MR. SACHSE: Thank you.

MR. CHIEF JUSTICE BURGER. Mr. Shoop.

ORAL ARGUMENT OF ROBERT H. SHOOP, JR., ESQ.

ON BEHALF OF RESPONDENT

MR. SHOOP: Mr. Chief Justice and may it please the Court:

Initially let me set forth to the Court the position of the Government, at least when they tried the case in the District Court, for I was there.

The Government is seeking vacation for the year 1967 and 1968 under this chart that they have set forth.

They are seeking 64 hours of vacation in 1967 and 72 hours of vacation in 1968 for Mr. Foster and as I have set forth in my brief --

QUESTION: They are not still seeking that much, are they?

MR. SHOOP: The complaint in the initial case sought that much. I think they misunderstand vacation benefits, as I have pointed out on page 4 of my brief, Mr. Justice.

A person earns their vacation in one year and they take it in their next year.

Mr. Foster earned his vacation in 1966. He received it in March of 1967 when he went into the military service.

He earned his vacation in 1969 and on January 1st of 1970 he is entitled to every cent of vacation that he would have earned in that last year. That is '69 vacation.

QUESTION: By "last year," you mean precisely what? What period?

You just used the phrase "last year."

MR. SHOOP: Okay. Between the year of 1966 -- between January 1st of 1966 and December 31st of 1966, Mr. Foster earned one week's vacation, 56 hours.

On January 1st of 1968, he was entitled to leave the employ of Dravo and do whatever was necessary and he would have gotten that vacation.

He could have gone on vacation that week -- as a lot of people do in the first week of January -- or he could have waited later on in the year.

Now, in the year 1969, when he returned from the military service, he worked that year and he earned his vacation, which he is entitled to in full on January 1st, 1970.

He again can take the pay and leave the employment of Dravo or he can take his vacation or he can take it sometime later on. And, provided during that year of 1969 and

provided during that year of 1966, he worked 26 work weeks. I mean, 25 work weeks, excuse me.

He has to earn -- have an earnings in those years before he can get the vacation the next year.

You earn it in '67, take it in '68; earn it in '69 and take it in '70.

QUESTION: Of course, one thing the Government contends, as I understand it, is that this is less like an earned vacation than it might be, since the man who works 25 weeks and the man who works 50 weeks get exactly the same amount of vacation.

MR. SHOOP: No.

QUESTION: That is not right?

MR. SHOOP: That is not correct. The man who works 25 weeks and the man who works 50 weeks are both entitled to a vacation. That is the difference.

The man who works -- has worked for Dravo for 20 years is entitled to five weeks' vacation under this contract in issue. The man who has worked for Dravo for five years is entitled to a different length of vacation.

QUESTION: Okay, but how about two guys who each work for Dravo five years, one who works 25 weeks and one who works 50 weeks?

MR. SHOOP: They both would get the same vacation the next year.

Now, Dravo, however, expects every employee to work regularly during the course of the year. We expect everybody to normally attend his work who is on the payroll 50, 49 weeks. This provision is negotiated into a collective bargaining agreement by the union to protect people who for some reason may be ill during the course of the year.

They say, gee, look, here is a guy who has been ill for a month. Why shouldn't he get a vacation?

Here is a man who may have left for a couple of months for a leave of absence because his wife is ill. Why shouldn't he get a vacation in the next year?

So therefore, the union comes to the company and says, let's make a man earn his vacation if he works 25 weeks.

The company expects anybody who is regularly on the payroll -- except for leaves of absence, except for illness -- to work 50 weeks, 49 weeks, what we all work during the course of the year and not examples like they try and bring out in these cases of the man could only work 25 hours or something like that. He'd be fired for failure to be a regular employee.

QUESTION: Well, then, Mr. Shoop, in your client's business, it is not seasonal, is it?

MR. SHOOP: No, sir. No.

QUESTION: It is not.

MR. SHOOP: Dravo is a shipbuilding corporation in Pittsburgh, Pennsylvania and business is pretty good right now.

QUESTION: And it is not a seasonal business.

MR. SHOOP: No, sir.

QUESTION: Good or bad.

MR. SHOOP: No.

Now, to answer some other questions that were raised in part of my argument, the question here is more than the \$377.92 involved, which are the vacation entitlements in 1967 and the vacation entitlements in 1968 which, by the way, your Honors, in 1967, he became entitled to another day's vacation. He would -- his vacation entitlement in '67 is 64 hours. His vacation entitlement in '68 is 72 hours.

We recognized that when he got his vacation in 1970 and we gave him credit for his military service as far as the length of his vacation goes.

That is not at issue here.

And we did recognize that. We are talking about the entitlement to a vacation.

Now, let me point out the economic significance of finding the benefit as the Government would argue here.

We are dealing with a statute that has no statute of limitations. We are dealing with a statute that its only detriment to filing suit is the doctrine of Lasches.

At least in Pennsylvania and as recognized by the Third Circuit, Lasches doesn't come into effect until a man has a known right.

This statute has not been significantly amended since its enactment in 1940, so theoretically, if you find for the Government, every employee at Dravo who has been in the military service can file suit to recover back vacation pay.

QUESTION: Whether he had returned or not returned?

MR. SHOOP: Well, if he returned. He would have to return.

Moreover --

QUESTION: And he has to return within a certain --

MR. SHOOP: 90 days. He has to return --

QUESTION: Within 90 days.

MR. SHOOP: -- within 90 days after his discharge from the Selective Service to be entitled to any reemployment benefits.

QUESTION: Right. And if there is a -- if he has been in the military longer than a certain number of years, it is not applicable at all. Is that right?

MR. SHOOP: Yes, let me point that out. That was my next question.

And the Act does, because of public policy to

encourage enlistments in the military service, also protect people who are enlisting. Therefore, your question as to whether this is moot, although I would contend it isn't anyway, because of the Lasches argument, it -- people who do enlist are protected.

They are protected, Mr. Justice Stewart, for a period of four years.

QUESTION: That is, if they have --

MR. SHOOP: If they enlist in the military service, they can stay in the military service for four years --

QUESTION: For up to four years.

MR. SHOOP: -- a fifth year, if they are requested by the Government to stay an extra year and this came up during the Cuban missile crisis, is when they asked some people to stay in the service and they amended the statute at that time to increase it to five years upon request of the service.

Now, let me give you an example of, under the Government's theory, what can happen.

An employee from Dravo can enlist in the military service on January 1st of 1975. He can continue in the military service --

QUESTION: What is the enlistment hitch now under the Volunteer Army, three years or what?

MR. SHOOP: I think it is still three years. It

was the last time I heard.

But he can continue in the military service until December -- in the middle of December, 1979. He can then, in 90 days -- sometime in March of 1975 -- come back to work for Dravo.

According to the Government, we could owe him anywhere between 8 and 20 weeks' vacation pay the day he came back to work for us because he has met the requirements of the reemployment statute.

I submit, your Honors, the next day he could quit and go to work for somebody else and there is nothing we could do about it.

Moreover, you take their argument one other point. The lower courts, accepting a decision like this, could say, hospitalization benefits, life insurance, how about vacation bonuses? Many companies pay bonus for vacation and taken at various times of the year.

Is he entitled to this?

According to the Government's theory, I think you can go as far as holding that it would include wages, that for some reason may be argued to appear a prerequisite of seniority.

QUESTION: Now, when you speak of the vacation bonus, you mean that the practice of giving one day and a half for each day you take it between January 1st and

March 1st or something like that.

MR. SHOOP: My familiarity is, we give them \$30. Many companies give them \$50 to take a vacation between January 15th and March 1st, \$40 to take a vacation in the next two months and nothing to take it during the summer and then going back up in the fall. Steel and aluminum all have these type of bonus arrangements.

QUESTION: Going back to your hypothetical case, is it your position that the Government theory would require you to take a man who worked for 30 days for Dravo and then went into the Service for four years and then came back and he might have built up this -- by tacking the military on to the 30 days, initial days --

MR. SHOOP: This much vacation.

QUESTION: -- he might have a months vacation coming.

MR. SHOOP: If the position he held in the 30 days was other than temporary and it is no holding that a probationary employee is other than temporary. That was decided by the Fourth Circuit in Allen versus Werten Steel, I believe, in -- quite a number of years ago.

So probationary employee and other than temporary are not synonymous. However, if he was a summer employee who came to work for Dravo for the summer and wasn't going to come back in the fall. He entered the military. He was

known as a temporary employee under the terms of the Act.

QUESTION: Mr. Shoop, are you suggesting when you mention insurance benefits that if a veteran were to die in service, he would be entitled to participate in the company's group insurance program?

MR. SHOOP: He certainly wouldn't under any of the plans that I am familiar with.

QUESTION: But a logical extension of the Government's argument in this case would appear to me to hold that that is a possibility.

You know, there is no earned -- you know, my understanding of vacation benefits and my understanding of all these other benefits are that they are earned benefits. They are benefits that you earn by working for Dravo.

I think this Court has amply pointed out that the vacation benefits between the time he left Dravo and between the time he came back were paid for by the Government at -- the snide remark of Counsel's -- significantly higher rate of two and a half days for -- per every month of service, he gets 30 days vacation a year where he only gets seven at Dravo.

QUESTION: Since he got no vacation from anyone in the year 1969.

MR. SHOOP: In the year 1969, he got no vacation time off, but he earned vacation that was taken effective

January 1st of 1970 --- or could have been taken at that time.

QUESTION: Which is like saying he earned a vacation sometime in 1970 but he didn't get anything in '69.

MR. SHOOP: He did not get any time off or he did not get any pay, but he earned a vacation that he takes in 1970 and I think you will find that that is the way vacations are. You work for a period of time and then you get a vacation.

QUESTION: Well, sure, you always figure you are going to put in some rookie time or whatever you want to call it before you are qualified but the Government's argument as I understand it is that he shouldn't have to put it in when he first comes to work and then when he first comes back from the service, too.

MR. SHOOP: No, sir, your Honor. I submit that you have to put in time every year to get a vacation. Under your theory, you could take a year off and you wouldn't -- you would get vacation. That isn't true.

QUESTION: Well, he put in a year from the year January 1st, '68 to January 1st, '69; he put in, presumably, 39 weeks worth of military and 13 weeks with Dravo. But he got no vacation the following year.

MR. SHOOP: That is right.

Now, as I stated before, this Act was enacted in

1940 and except to codify what was the escalator principle in Fishgold versus Sullivan Drydock, the Act has not significantly been amended.

QUESTION: Let me back up to your statement about the 13 weeks at the end of '69. Do I understand you to say that in the first week -- that on the first day of January he was then entitled to vacation benefits deriving from the 13 weeks plus his prior service?

MR. SHOOP: No, sir.

To qualify for a vacation in any one year, a regular employee must perform work for Dravo Corporation a period of 25 weeks.

QUESTION: Well, then, when and at what point in 1970 would he get the benefit of the 13 weeks which he worked in 1969?

MR. SHOOP: He would never get the benefit of working those 13 weeks except for the fact that in length of vacation it will be recognized that the entire year of '68 would be -- and I believe those 13 weeks were worked in '68, your Honor -- that is, between '68 and '69.

QUESTION: Didn't the Third Circuit say that that should be remanded to the District Court?

MR. SHOOP: Yes, sir.

QUESTION: That particular portion that the Chief Justice inquired about?

MR. SHOOP: The Government has, at this time, in their brief, that wasn't reached in argument, made a -- an argument for pro rata benefits. They say, well, at least he is entitled to 13/25ths of a vacation. That issue was never raised at the trial level. As I submit in my brief, if your Honor would look on page 24 of my brief and in the Appendix on page 10, what happened was, the judge at the trial level tried to effect a settlement between Dravo and the Government and he suggested this as being an issue "maybe we could pro-rate the vacation for 1968."

I specifically stated to him on the record at that time that that was not the issue before this court and he recognized it.

That was not the issue before the District Court at that time and the judge said, "Yes, I recognize it." But being a non-jury trial, he was trying to settle it and may have said a number of things in the record. I don't think either one of us believed we were going to be here, or I was going to be here today when we tried this case. But --

QUESTION: Well, if we affirm the judgment of the Third Circuit, the case would go back to the District Court and the employee would have a right to litigate, at least as a matter of contract law whether he was entitled to a pro-rated vacation.

MR. SHOOP: Right. The issue before the District

Court would be, one, was the matter raised and litigated there and, two, what is the outcome or what decision would this Court make based on the law and the contract in issue?

If you affirm -- that is exactly what the Third Circuit did. They sent it back to the District Court.

QUESTION: Mr. Shoop, you say that although the Act doesn't require you to recognize that he is entitled to a vacation, you say that if he works all of 1969, then in '70 he is entitled to a vacation and you say you will -- the length of the vacation pay that he is entitled to, you say will include the time he was in the military?

MR. SHOOP: Yes, sir.

QUESTION: Now, do you say the Act requires that?

MR. SHOOP: I would think so, sir. I --

QUESTION: Because you must treat him as having been on the payroll?

MR. SHOOP: Because -- no, because you treat him as seniority. He is, in his relationship to other employees, has five years seniority. You look at your contract and you find that people with five years' seniority are entitled to X-number of weeks' vacation.

QUESTION: No, but that is only if you have worked those -- that is only if you have been entitled to vacation during those periods.

MR. SHOOP: Not necessarily. I would -- that issue

wasn't raised and I wholeheartedly agree with the company's actions in this case of giving the man his benefit in the military service towards the length of his vacation.

QUESTION: Mr. Shoop, what happens with an employee who does not go in the military service but who in 1967, for whatever reason, worked only 20 weeks, in 1968 worked only 15 weeks but then he comes to 1969, he works 52 weeks -- how do you compute his vacation for --

MR. SHOOP: Okay.

QUESTION: -- earned for 1970?

MR. SHOOP: Okay. He would receive no vacation benefits for the year 1967, that which he worked less than 25 work weeks.

QUESTION: All right.

MR. SHOOP: He would receive no vacation benefits for the year 1968, that which he worked less than 25 work weeks. He would receive vacation benefits in 1969 when he worked more than 25 work weeks which would be taken in 1970 and the length of his vacation, I think is the question you are getting to --

QUESTION: That is right.

MR. SHOOP: Would be treated just as if he had been an employee and on the rolls --

QUESTION: Whether or not he earned any vacation.

MR. SHOOP: Whether or not he took it in the

previous years, I think --

QUESTION: Whether or not he earned it.

MR. SHOOP: Whether or not he earned it in each year.

QUESTION: Right.

MR. SHOOP: I think in those cases --

QUESTION: So that is pure seniority.

MR. SHOOP: That is pure seniority. The length of the vacation is pure seniority. The entitlement to a vacation in any given year is earned. You earn your vacation this year. You take it next year.

Let me just --

QUESTION: Mr. Shoop, on remand, if you prevail here -- on remand will you also have under consideration the pro rata for 1965?

MR. SHOOP: Well -- for the --

QUESTION: Or is that --

MR. SHOOP: No, 1965, there is no problem. The -- we'll have under remand the argument of the nine weeks in 1967.

QUESTION: Well, why not '65 also?

MR. SHOOP: Because '65 -- see, that is where they missed -- the Government isn't getting the -- he got his '65 vacation in '66. See? He worked 22 weeks in 1965 and he received 20 hours' vacation in 1966.

QUESTION: Well, why was he entitled to it if it was not 25 weeks? Or is it just because he began work in that year?

MR. SHOOP: As Justice Stewart pointed out, the rookie -- and this is something that is negotiated in a contract to protect an employee who is coming on the payroll new.

QUESTION: Okay.

MR. SHOOP: And he is entitled to some benefits at that period of time as a new employee. But he is only entitled to one day. In this period of time, Mr. Foster in this case was entitled to over two weeks' vacation when he returned. That is why you wouldn't return as a rookie. You'd want to return as a veteran so you can get that length of vacation better than you had before.

QUESTION: In other words, the total length of his service from his first employment date down to 19 -- the beginning of 1970 is used to measure the amount of vacation but not to give him any dollars for the period he was in the military service.

MR. SHOOP: No, sir. You earn your vacation each and every year.

QUESTION: Well, your answer to my question is yes, then, isn't it?

MR. SHOOP: Yes.

QUESTION: I wonder, Mr. Shoop -- you said this was within the statute, this is related to seniority. Yet Section 2 says, "Should be so restored in such manner as to give him such status in his employment as he would have enjoyed if he had continued in employment continuously from the time of his entering the Armed Forces to the time of his restoration in such employment."

Now, the hypothetical I gave you before of the chap who had not gone into service but only 20 weeks or 15 weeks, I gather you are giving him the same status in his employment on restoration as that fellow.

MR. SHOOP: As that fellow did. Yes, sir.

QUESTION: Because, at least for purposes of the length of vacation he gets in 1970 that he earned in 1969, he is given credit for his time in service.

MR. SHOOP: Yes, sir. Right. The length of vacation is no problem. We are giving him all the credit.

And to point out further that a vacation is an earned benefit under the Dravo contract, I would point out that in Article Roman numeral IV Section 3, as cited at my brief, a person at Dravo, who worked considerably more overtime -- that is to say, regularly six days a week -- receives more vacation than the person who doesn't work those hours.

So there is a relationship between the amount of time worked and the amount of vacation you get in that you

get more vacation if you work longer hours and more overtime.

The two cases that were cited by the Government and relied on I think ought to be examined in some detail and the first was Accardi.

What happened in the Accardi decision was the Pennsylvania Railroad attempted to abolish the position of fireman on new diesel tugs back in 1959. A strike ensued. The firemen went on strike.

The entire strike was finally settled in 1960 with an agreement that the position of fireman was abolished. However, they would remain on the payroll, those firemen who had 20 years or more seniority, and they remained on the work force.

The other part of the agreement paid severance pay to those employees who had less than 20 year's seniority.

The severance pay was paid on a theory of the number of years of compensated service you had with the Pennsylvania Railroad. The Pennsylvania Railroad, being wrong again, argued that this was an earned benefit.

This Court correctly saw it wasn't. It couldn't be an earned benefit because the people who weren't severed would never, ever get the benefits. And everybody who was discharged got some benefit.

The only thing they were arguing about was the amount of the benefit and that is exactly like our vacation

The amount is not in question. It is a perquisite of seniority and the entire agreement was the severance pay.

There was no full collective bargaining agreement.

And the Third Circuit in this case reviewed the entire contract and came to the conclusion that vacations at Dravo are an earned benefit.

Eagar versus Magma Copper has also been referred to -- it was a per curiam decision. There was a dissent in that case written by Justice Douglas on behalf of you, Justice Stewart and the late Justice Harland. In that case, though, Eagar had worked the amount of time that was necessary to receive the benefit.

He had worked 75 percent of the hours in the week before he entered the military service -- in the year before he entered the military service.

The only thing was, he wasn't on the payroll at the end of his first anniversary year and wasn't on the payroll on December 31st of the vacation-earning year.

That is the only difference. He earned his. Here it has not been earned.

QUESTION: Well, but he didn't -- he didn't meet the conditions of the collective bargaining agreement.

MR. SHOOP: But he met all the --

QUESTION: There is no question of that.

MR. SHOOP: -- Army's requirements of the collective

bargaining agreement. You take my position that vacations are an earned benefit, that they are a payment for earnings, deferred compensation for working at the company.

Eagar is entitled to it and anybody else at Dravo is entitled to it, provided they have earned their vacation.

QUESTION: Well, you don't have the same agreement that was involved in the Eagar case.

MR. SHOOP: No, but I have got the similar type agreement. In my case you have to work 25 work weeks. In his you had to work 75 percent of the work weeks.

QUESTION: Plus be on the payroll at the end of the year.

MR. SHOOP: I would say -- my position on those, if we had those in these collective bargaining agreements, that those are seniority provisions.

QUESTION: Well, that is an easy position for you to take now.

MR. SHOOP: Yes, sir.

QUESTION: Since you don't have that in your agreement.

MR. SHOOP: Yes, sir.

My law school professor, however, told me that a dissent of three justices in the Supreme Court is better than nothing at all and so, therefore, I would ask for your consideration of your dissent in that opinion which goes

further, by the way, than I intend to ask this Court -- than I have asked this Court to go today.

As I stated before, Dravo expects expects every employer -- every employee to perform the work of 50 weeks.

The judges and justices who, in their judicial opinions, have thoroughly considered the issue of vacation entitlement have all determined that vacation entitlement does not automatically accrue as a result of seniority but are earned benefits as found by this Court.

As far back as 1948, Judge Learned Hand, in Dwyer v. Crosby, cited in my brief, held this.

Judge Hofstadder, in Austin versus Sears and Roebuck in 1974 held this.

Judge Hill in Kasmeier in the Tenth Circuit held this.

Judge Adams in the Third Circuit held this.
[?]

Judge Batten, dissenting, in Locaynia in the Ninth Circuit held this.

These gentlemen have all reviewed thoroughly the collective bargaining agreements in issue, the facts of both Accardi and Eagar and found, as well as Justice Douglas, Justice Stewart and Justice Harlan, that vacation benefits are an earned benefit, that you must meet that earnings requirement -- in this case of 25 weeks -- to be entitled in that year or the next year to a vacation.

Thank you.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen.

The case is submitted.

[Whereupon, at 3:06 o'clock p.m. the case was
submitted.]