ORIGINAL

In the

Supreme Court of the United States

THOMAS E. COFFY,

PETITIONER,

V.

REPUBLIC STEEL CORPORATION,

RESPONDENT.

No. 79-81

Washington, D. C.
February 27, 1980

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Respondent.

Wednesday, February 27, 1980

Washington, D.C.

The above-entitled matter came on for oral argument at

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
JOHN PAUL STEVENS, Associate Justice

APPEARANCES:

ALAN I. HOROWITZ, ESQ., Assistant to the Solicitor General, Department of Justice, Washington, D.C. 20530; on behalf of the petitioner.

MICHAEL A. NIMS, ESQ., Jones, Day, Reavis & Pogue, 1700 Union Commerce Building, Cleveland, Ohio, 44114; on behalf of the respondent.

C O N T E N T S

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in Coffy against Republic Steel Corporation, No. 79-81.

Mr. Horowitz, I think you may proceed whenever you are ready.

ORAL ARGUMENT OF ALAN I. HOROWITZ, ESQ.,

ON BEHALF OF THE PETITIONER

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

This case is here on a writ of certiorari from the United States Court of Appeals for the Sixth Circuit. It concerns the proper interpretation of the statutory provisions that guarantee certain re-employment rights to veterans upon their return to employment.

These provisions are now codified in 38 USC 2021.

The question here is how those provisions apply to the supplemental unemployment benefits, or SUB's, that are provided under the collective bargaining agreement between respondents and the United Steel Workers.

Specifically, the question is whether the guarantee against loss of seniority under the Act requires that the time spent by a veteran in the Service be included in the time used to compute SUB's.

SUB's are payments that are made by the employer

to employees who have been laid off. These payments are over and above the unemployment compensation that the employee otherwise receives from the State.

Under the SUB plan involved in this case, which is set out beginning at page 17 of the Appendix, SUB payments are made on a weekly basis for a period of up to 52 weeks. That period depends on the number of SUB credits that the employee has accrued.

The amount of each weekly payment is determined according to a formula set out in Section 1 of the plan. That formula depends on several factors, including the employee's present salary and his number of dependents, and the amount of compensation that he receives from the state.

The formula does not depend on the amount of time that the employee has been employed. Therefore, there is no dispute in this case about the amount of each weekly benefit that was received by petitioner.

What the dispute in this case does concern is the length of the time period over which these weekly SUB payments continued. This period is determined by the number of SUB credits. And these credits are earned through the passage of time, as described in Section 2 of the SUB plan, on page 19.

One-half credit is earned per week. An eligible week for which one-half credit may be earned is one in

which the employee has any of the following hours: Hours worked for the company; hours that are not worked but for which the employee is paid--for example, vacation time, or time spent on jury duty; and also, certain categories of hours not worked and for which the employee is not paid, where the employee is performing certain duties for the local union, or is on a certain specified disability leave.

When an employee is laid off and receives weekly payments, he uses up his SUB credits.

Finally, under the plan, an employee is not eligible to receive SUB payments at all, no matter how many credits he has accrued, until he has two years of continuous service with the employer. As an example of how the system works, if an employee began work for the company, and worked or engaged in some of these other eligible activities, for a continuous period of a year and a half, and was then laid off, he would have accrued 39 SUB credits by that time. That would be at the rate of one-half credit per week. However, because he had not reached the two year eligibility threshold, he would not receive any SUB payments when he was laid off.

In this case, petitioner began working for respondent in 1968, and worked for respondent for a period of four and one-half months during that time. He was then laid off, and he then left respondent's employment. He had

accrued nine SUB credits during the time that he was employed in '68. However, because he elected to leave respondent's employment, those credits were cancelled.

He then began to work for respondent again in late January of 1969, and continued to work for respondent until he entered military service in September of 1969. He thus earned approximately 16 SUB periods--excuse me, SUB credits--during this latter period.

He served in the military until August, 1971, when he was honorably discharged.

He was then reinstated to his previous position with respondent. However, because of respondent's economic situation, he was immediately placed in layoff status. He remained laid off for a period of nine and one-half months, until July, 1972.

During the layoff period, petitioner received SUB payments for approximately 16 weeks, corresponding to the 16 SUB credits that he had earned before he entered the Service. However, he did not receive any payments for the remaining five and one-half months that the layoff continued.

Had petitioner not entered military service and continued in respondent's employment, the parties have stipulated that he would have had 52 SUB credits at the time of his layoff. Thus, he would have received SUB credits--excuse me, SUB payments--for the entire duration of

his layoff.

The question presented in this case, then, is simply whether petitioner should have had his military service counted in determining his total of SUB credits when he was reinstated following his military service.

Petitioner originally brought suit in the district court for the Northern District of Ohio, alleging that the failure to consider his Service time in computing his SUB credits violated his statutory right.

The District Court rejected petitioner's contention, holding that the SUB plan established a bona fide work requirements for the earning of SUB credits.

Petitioner appealed, and while the case was pending on appeal, this Court handed down its decision in Alabama Power Company v. Davis, holding that pension benefits are a perquisite of seniority under the Act.

The Court of Appeals then vacated the District Court's decision, and remanded for reconsideration in light of Alabama Power.

The District Court again held for respondent, stating that, quote, entitlement to SUB benefits requires more than continued status, such as a work requirement demanding actual performance on the job.

The Court of Appeals then affirmed for the reasons stated by the District Court.

The relevant provision of the statute involved here is that portion of 38 USC 2021(b)(1) that requires veterans to be reinstated without loss of seniority.

If this Court finds that SUB payments are a perquisite of seniority within the meaning of that section, then petitioner must be given credit for his Army service time in computing his SUB credits.

That is a consequence of two main principles that were established in this Court's decision in Fishgold. First, the escalator principle was established; that is, that a veteran who returns to his employment is to be reinstated at the same place he would have been had he remained in the employment, that is, at the place he would have been on the escalator had he remained in employment, not at the place he got off the escalator when he entered the service.

Secondly, Fishgold also established that the provisions of the Act are to be liberally construed for the benefit of the veteran.

In this Court's decision in Alabama Power, it established the appropriate analysis for determining whether a particular benefit is indeed a perquisite of seniority. The real nature of the benefit is to be examined, and it is to be determined whether, on the one hand, the benefit is primarily in the nature of a reward for length of service; in which case, it is a perquisite of seniority. Or on the

other hand, whether the benefit is primarily a short-term compensation for work performed.

Applying this test, severance pay and pension benefits have been held by this Court to be perquisites of seniority. Vacation pay has been held to be primarily in the nature of compensation for work performed.

Before I turn to a discussion of those factors that we believe indicate that SUB's should be treated as a perquisite of seniority, I would like briefly to discuss the notion of a work requirement upon which the District Court and respondent have focused some of their attention.

There is no dispute here that SUB credits are primarily earned by employees who are working. This is factually true of most benefits that this Court has dealt with, whether they are determined by language in the collective bargaining agreement, or whether it is determined by language that refers to years of service.

Now, in Alabama Power the contention was made to this Court that any benefit that is determined by a work requirement, that is, where a collective bargaining agreement specifies that most of the employees who earn the benefit will be working, should automatically dispose of any contention that the benefit may be treated as a perquisite of seniority.

The Court expressly rejected that contention in Alabama Power, and it noted that almost any benefit could be

tied to a work requirement such as existed in that case.

That would permit the employer himself to decide whether a benefit was a perquisite of seniority, and the employer himself could decide whether the veteran was entitled to have his service tone credited.

However, Congress has not left that decision up to the employer. This is a decision that Congress has made.

Now, as far as the work requirement in this case, it is significantly less than the work requirement that this Court rejected in Alabama Power. There, the question was whether the employee was entitled to accredited service time for the time that he spent in the military. The credit of service was defined in terms of full time service at 40 hours per week.

Moreover, the limited exceptions in Alabama Power applied only to employees who were on paid leave, not employees who are in certain categories of unpaid leave, as in this case.

We believe that SUB benefits should be treated as a perquisite of seniority. They serve a purpose that is akin to the most traditional seniority benefit. And this analysis, incidentally, was made by the Third Circuit in the Foster decision, which was later affirmed by this Court.

The primary purpose of SUB benefits is to protect

employees against economic loss during periods of diminished employment. It acts as an adjunct to the normal layoff protection that employees get when they accrue seniority benefits.

Thus, when there is an economic downturn, and the employer is forced to lay off a number of employees, what happens is, those employees that have accrued the most amount of seniority are protected from layoff because of the seniority that they have accrued. Employees who have not accrued enough seniority to be protected from layoff, get this more limited protection of the SUB benefits; that is, they receive some money to tide them over the period for which they are unemployed.

And employees who have the least seniority of all will either not beeligible at all for SUB payments, or they will receive less because they have accrued fewer credits.

QUESTION: All employees laid off, I take it, will receive unemployment benefits from the state?

MR. HOROWITZ: That's correct. The SUB's are only intended to be a supplement to the unemployment benefits provided by the State. And the formula for figuring out how much SUB is to be paid includes a deduction for the amount of state unemployment benefits; and in fact, if an employee for some reason does not get state

unemployment benefits, for a reason that was in his control, if he doesn't apply for them, for example, then he will not be eligible to receive SUB's.

We think the best analogy to SUB is the quite similar benefit of severance pay that this Court held to be a perquisite of seniority in Accardi case. Severance pay also provides income that tides an employee over a period of unemployment, as do SUB's.

The difference, essentially, is that with SUB's, layoff is only temporary, and severance pay deals with the issue of a permanent layoff.

As in Accardi, the intent of SUB's is to provide compensation for the loss of the rights and expectations that the employee has accrued over his period of service. It is not to provide compensation for the work that the employee did in the past.

The amount of the SUB benefits, as the amount of severance pay benefits, are not at all tied to the amount of work that was done in the past.

Moreover, the provisions of the plan are completely inconsistent with any notion that SUB's are to be treated as compensation for work performed. First of all, SUB credits are forfeitable at any time if the employee incurs a break in continuous service. Therefore, an employee could work for 20 years, and if he then incurred a break in service,

he would lose all the SUB credit that he had accrued. And if he hadn't been laid off in that time, he never would have received any benefits at all from it.

QUESTION: Well, he--but all that he would have accrued in 20 years is the same as he would have accrued in two years, isn't it?

MR. HOROWITZ: That's correct.

QUESTION: Because there's a maximum of 52.

MR. HOROWITZ: There's a maximum of 52.

QUESTION: You get them at half a credit a week.

MR. HOROWITZ: At the time that--in this collective bargaining agreement as it existed at the time the petitioner was laid off, yes.

QUESTION: And this particular employee was laid off, was he not?

MR. HOROWITZ: He was laid off.

QUESTION: And so he started all over again when he went back to work in the process of accruing SUB benefits?

MR. HOROWITZ: No.

QUESTION: He was laid off immediately on his reinstatement.

MR. HOROWITZ: That's correct. He was laid off as soon as he came back to work.

QUESTION: He was reinstated, then laid off.

MR. HOROWITZ: Right, because according to his

seniority status, they'd already passed the time when he would have been laid off had he been back before.

He still had the--

QUESTION: I thought he quit.

MR. HOROWITZ: Well, he first worked for a period in 1968, then was laid off, then quit. And at that time he forfeited all the credits that he had.

He then came back to work and worked for a period of time which enabled him to accrue 16 more credits. And he then entered the service. And when he came back he was given those 16 credits that he had accrued before he entered the service.

QUESTION: But was he also given the part that he had accrued before he quit?

MR. HOROWITZ: Well, when you quit, you forfeit the benefits. Now what happened here is that the employer actually made a mistake and did give him credit for the benefits that he had accrued even before he quit, and made payments upon--under that. But later on the mistake was realized, and the petitioner had to repay that money. So in effect, he did not get credit. And we don't contend that he should have gotten credit for that time.

Most significantly, there is a vesting requirement here before the employee is eligible to receive SUB payments. As in Alabama Power, there was a vesting requirement.

is generally--occurs throughout the seniority provisions of the collective bargaining agreement, and is defined through the same definitional section. And it's clear from the more traditional seniority benefits he would have to have been given credit for his time in the Army.

So if respondent had not given him credit for his time in the Army, he would have been using the same definition, and giving him credit under that definition for some purposes and not for other purposes.

QUESTION: So they, in effect, agree that the two-year--the eligibility is an aspect of seniority?

MR. HOROWITZ: That's correct.

Moreover, there is absolutely no correlation between the amount of work that is performed by the employee and the amount of benefit that he accrues. He accrues one-half credit per week, no matter how much work he does during that week.

Now--

QUESTION: Yes, but do you not concede that 32 hours is the rule, rather than 1 hour, the exception?

MR. HOROWITZ: One hour is certainly the exception. And there are probably no instances of one hour.

Respondent put on testimony in the District Court, and we accept the District Court's finding, that as a general

amount that is paid under his payments. That was discussed by this Court in Alabama Power, where as well it was noted that the pension benefits that were paid depended upon the employee's compensation at the time that he was--began to receive the pension benefits, not at the time that he earned the credits for them.

Finally, the specific point that this Court mentioned in Foster as indicating some sort of correlation between the amount of work and the amount of earned credit are absent in this case. There are two factors that this Court mentioned in Foster: First, that vacation--more vacation benefits were earned by employees who worked overtime than employees who did not. And there was--a special provision was made for overtime. Here there is no such provision. Secondly, in Foster employees who did not meet the minimum threshold--there, you had to work 25 weeks per year in order to get a vacation--certain employees who did not work the 25 weeks per year were entitled to pro rata vacation.

And here, there is no such pro rata requirement. An employee who works all the way up to the two years is not entitled to any SUB payments at all.

Now, we submit that--

QUESTION: But the employees who work less than 32 hours per week under Section 4 of the collective bargaining

agreement are entitled to some sort of pro rata SUB's?

MR. HOROWITZ: An employee who works less than 32 hours is entitled to the full one-half SUB credit. Now, what Section 4 of the agreement does is that it defines what's called a short-week benefit; that is, if an employee works 24 hours in the week, he's entitled to a benefit that he'll be paid as if he worked 32.

But--and the idea, I think, of that provision, is probably--it was probably put in mostly at the instigation of the union--is to encourage the employer to make sure--I should say to penalize the employer for not allowing employees to work 32 hours per week. It acts as a disincentive to the employer to schedule employees for less than 32 hours per week.

Now, as far as how it fits into the SUB plan, an employee who works less than 32 hours per week, does get half an SUB credit, no matter how many hours he works. He may be eligible for a benefit under Section 4 of the plan. Again, he's not eligible for that benefit unless he's already got two years of service under his belt.

If he receives a benefit under Section 4, he would still accrue one-half SUB credit for that time. But because he's receiving a benefit, he would also have to give up one SUB--excuse me, one-half SUB credit for that time. So he would end up not accruing additional credits, if he

was actually receiving the benefits.

Petitioner in this case left his employment and went to serve in the military. When he returned from his employment, he was disadvantaged as compared to those other employees who began employment on the same day that he did. Had he remained in his civilian employment, he would have had 52 SUB credits, and would have received payments for an additional 22 weeks.

Having served in the military, he was denied these payments.

We believe that this is precisely the result that Congress was intending to avoid when it passed the Veterans Reemployment Rights statute. And we submit that this Court should hold that SUB benefits are a perquisite of seniority, and that the petitioner was entitled to his credits.

If there are no further questions, I'd like to reserve the remainder of my time.

MR. CHIEF JUSTICE BURGER: Mr. Nims.

ORAL ARGUMENT OF MICHAEL A. NIMS, ESQ.,

ON BEHALF OF THE RESPONDENT.

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

I think that when one understands the supplemental unemployment benefits plan that the Court is considering, one will realize that, if anything, it has exactly a reverse

relationship to seniority, rather than being a perquisite of seniority.

In the first place, the principal benefit of seniority obviously in a layoff situation is layoff preference. And the more seniority the employee accumulates, the less likely it is that he will in fact be laid off; that the layoff will reach his seniority date.

The employees--

QUESTION: Isn't that always true of a seniority plan?

MR. NIMS: Pardon, Your Honor?

QUESTION: Isn't that always true of a seniority plan?

MR. NIMS: Yes.

QUESTION: Why is this one so significant, then?

MR. NIMS: That's always true of a seniority plan. That's the point I'm making, Your Honor, that the supplemental unemployment benefit, which is the benefit we're talking about here, is actually a benefit which is most often used by people with lesser seniority than people with greater seniority. It's more important to people with lesser seniority than people with greater seniority.

And the point I'm making is, rather than being a perquisite of seniority, it indeed operates in a reverse relationship with seniority.

QUESTION: Mr. Nims, aren't there really three classes of seniority? People who were senior enough not to be laid off; people who were in kind of a middle category who get these benefits; and then the very, very junior people who don't even get these benefits.

MR. NIMS: That's true, Your Honor, but that's true with almost any benefit. Indeed, I believe it was true with the vacation benefit before the Court in Foster--that there there was a one-year requirement before you became eligible for a vacation. You got entitlement to a vacation in the second year by virtue of having worked 25 weeks in the first year.

And I don't think that that analysis would make this benefit, or the vacation benefit in Foster, a perquisite of seniority, or it would make every benefit a perquisite of seniority.

QUESTION: No, but all I was suggesting was, the fact that people who have even greater seniority get some greater benefit doesn't necessarily take this benefit out of the category of benefits that are affected by the length of service.

MR. NIMS: No, I agree that it doesn't necessarily do that.

But the point being that greater seniority, once you pass the eligibility threshold so that you're

entitled to the benefit, greater seniority does not have any affect on the benefit at all, in a positive way. The two-year man who is eligible to receive a payment will get a benefit as will the 15-year man, if the layoff happens to reach his level of seniority. And the 15-year man will not have any greater benefit, any advantage, over being a 15-year man--

QUESTION: Are you saying that every person who meets the two-year requirement always gets 52 units?

MR. NIMS: No, it depends on the work requirement.

QUESTION: Then, even with--among those who are eligible, seniority has an affect on the number of units, and therefore the number of dollars.

MR. NIMS: No, not seniority, Your Honor; working may, up to accumulating the maximum of 52 credit units, if you haven't worked in two years, and accumulated the 52 maximum credit units, yes, the fact that you haven't done that work may result in your having a lesser number of benefits.

But once you have worked in two years and accumulated 52 credit units, not only increased seniority will not give you a greater benefit, increased work won't give you a greater benefit.

Further, the amount of the benefit represented by each credit unit also bears a reverse relationship

to seniority, if it bears any relationship to seniority. The plan provides that the amount of benefit that you'll receive in the event that you ever receive supplemental unemployment benefits, is affected by four factors: Number one, the wage rate of your job classification. That wage rate is established by the collective bargaining agreement for each job classification, and has nothing to do with seniority other than in the sense that in some jobs preference is a factor of seniority, and your ability to hold a particular job may be dependent on seniority.

But the actual wage rate for that job classification will be the same whether the individual holding it is a two-year man or a five-year man or a ten-year man or a twenty-year man.

The second factor in the amount of the benefit is the number of dependents that the employee has; obviously, that has no relationship to seniority with the company.

The third factor in determining the amount of the benefit for reach credit unit is the amount of State unemployment compensation which the employee receives from whatever State program exists in that particular State. That has no involvement with seniority.

And finally, the fourth factor that influences the amount of benefit is the amount of money remaining in the plan as a whole. The obligation of the industry is

to fund the plan with a finite number of dollars agreed to in the collective bargaining process. Then as the plan is exhausted through layoffs, once it reaches a sufficient dimunition to key in that part of the formula, the amount of benefit represented by each credit unit drops.

So that you actual have the anomalous situation, if you're focusing on seniority, that the three-year man is much more likely to have his benefit be 100 percent of the possible benefit than the 20-year man, because if a layoff in fact gets severe enough to reach the 20-year man, you're likely to have the fund substantially depleted by the previous payments made to persons of lesser seniority, so that the 20-year man in fact finds that he's getting a lesser benefit if his seniority number is in fact reached during the layoff.

We don't believe that that kind of a benefit should be classified to be a perquisite of seniority. And indeed, the testimony in the record below is clear that it's not thought, certainly by the industry and by the people who negotiated it to be in any sense a perquisite of seniority.

Rather, it is based on a formula which is governed by the actual, practical realities of the steel industry which found that prior to 1960 they actually had a SUB plan which had a very precise relationship between how

many hours you worked and the accumulation of credit units, and they determined that that wasn't necessary. It created an administrative headache that they didn't need, because in point of fact, people were working at least 32 hours if they worked at all because of the existence of the short week benefit.

A short week benefit provides that if you call an employee in during a week and have him work less than 32 hours, essentially you're going to have to pay him for 32 hours anyway. So naturally, you try not to call an employee at all unless you actually have 32 hours of work for him.

So the SUB plan, and the formula for the earning of credit units in the SUB plan, is tied to a formula which in the industry and the practical reality is based on at least 32 hours of work achieving the earning of entitlement to one-half credit unit.

Now, whether or not that ever translates into a benefit, of course, depends on whether the employee ever gets laid off, and that admittedly is a factor of his seniority.

But the benefit, as opposed to the layoff, is not a factor of seniority; indeed, if it has any relationship with seniority, it's a reverse relationship.

One of the arguments that the government has made in this case is that in trying to analogize to other

benefits which have been before the Court, the closest benefit, according to the government, is the severance pay that was before the Court in Accardi; well, respondent believe that that analogy is faulty.

Severance pay is, normally, and was in Accardi, very much a factor of seniority. Somebody who had worked for that particular railroad 19 years--and the 20-year people were not subject to the discharge, but it was people with less than 20-year seniority--somebody who had worked for the railroad for 19 years was entitled to a larger amount of severance pay than someone who had worked for 18 years, and 17 years, and 16 years; in fact, down the line. And that, we submit, was key to this Court's analysis of severance pay being a long-term benefit which really the notion of compensated service before the Court in the Accardi case really measuring only time on the rolls as an employee.

But the SUB benefit is very different. The 15-year man has no advantage whatsoever over the 2-year man, so long as each have accumulated the maximum number of credit units available of 52. And indeed, as we've shown, it might happen to work out that the 15-year man is at a disadvantage because of the dimunition of the money in the fund, should a layoff reach his level of seniority.

So we don't feel that the SUB benefits can

possibly be analogized properly or fairly to a severance benefit.

The government has argued this morning that in a sense the steel industry is acting in an inconsistent fashion in treating the two-year continuous service requirement as seniority and crediting the veteran for that, but not crediting him with the time in the military for purposes of accruing credit units.

We don't feel that's inconsistent at all. In the first place, the applicable bargaining agreements and plans expressly provide for both of those situations. They expressly provide that service in the military will not break continuous service in the company; and they expressly provide that there will be no accrual of credit units for the individual during the time he is in the military. So they're certainly consistent with the underlying contractual documents.

But more important, they're consistent with what the industry regards the law being, as interpreted by this Court and other courts throughout the last several years. Continuous service, as that is defined in the pension program, has indeed notions of seniority, notions of simply being on the rolls as an employee. And the industry recognizes that, and does not break continuous service for pension purposes, for SUB purposes, or any

purposes.

When the veteran leaves the civilian employ and then comes back within the permitted statutory period, that's no different than the situation that was in front of this Court in the Foster v. Dravo case in which this Court considered vacation entitlement. And this Court pointed out in a footnote that while you have to work in the required number of weeks in order to earn vacation eligibility for any particular year, if in fact a five-year man has two weeks vacation and a ten-year man has three weeks' vacation and a twenty-year man has four weeks' vacation, in that sense under the plan in front of the Court in Dravo, the defendant there, the company there, did credit time and service for purposes of determining the maximum amount of vacation eligibility, which an individual employee would have. And the Court noted that in its footnote.

But that doesn't mean that earning that four weeks' vacation that you may have the potential entitlement to is also a factor of seniority. The Court found that it was not. The Court found that it was conditioned upon a bona fide work requirement. That the traditional notion of a vacation is a short-term reward for work actually rendered.

And that wasn't changed by the fact that also

it's traditional that the amount of vacation you can earn a reward for is a factor of your total service over a large number of years. And therefore, a 20-year man may get four weeks' vacation, where a 15-year man gets three; that didn't change the actual earning of vacation in any particular year as being keyed to a bona fide work requirement, as being reasonably keyed to such a requirement. That didn't change the traditional notion of vacation in this Court's eyes.

We think that the same is true with the SUB plan. There is a minimum vesting period of two years. But it also should be understood that that period relates only to the actual entitlement to payment of a benefit. It does not relate to the earning of the credit unit.

So that the first week in which the individual employee works, he accumulates one-half credit unit. He merely has a two-year eligibility requirement before he can receive a benefit in the event of layoff. But that's no different than with lots of other benefits which don't kick in until an employee has had some minimum period of time with the company. That's true in many companies of hospitalization benefits, of sick pay, of many other kinds of benefits which I think the Court would readily agree that if the focus is on the real nature of the benefit, those benefits are thought to be short-term

compensation benefits rather than perquisites of seniority. But they still may have an eligibility requirement that you be with the company one or two years before the company starts to fund those benefits for you.

And we don't think that that changes every benefit that may exist into a perquisite of seniority. We don't think the Court found that in the Foster v. Dravo decision.

So in summing up, unless the Court has other questions, we think that the District Court in this case wrote two very detailed opinions. And he wrote the first opinion before he had the benefit of this Court's guidance in Alabama Power, in which he analyzed why the industry had the work requirement it had; why it had the formula it had; how the benefit was applied; and as he interpreted the Court's decision up to that point in time, he wrote a, we believe, very detailed opinion as to why the SUB benefit was not a perquisite of seniority, and why the plan should be administered according to its terms.

Following this Court's decision in Alabama Power, he wrote another detailed opinion focusing precisely on the real nature of the benefit, and concluding, based on the record made in front of him, that the real nature of the benefit was short-term compensation which substitute for wages in areas where wages had traditionally been paid.

We believe those two decisions correctly interpret

the plan and the law. We believe the affirmance by the Sixth Circuit Court of Appeals was proper.

We would say one thing. There is, of course, a conflict between the courts in this case, and the United States Court of Appeals for the Third Circuit, which also had the steel industry plan in front of it in its decision in Hoffman v. Bethlehem Steel. But that decision--and Your Honors, I am sure, will read it carefully--was rendered in 1973 prior to either the opinion of this Court in Foster v. Dravo or the opinion of this Court in Alabama Power v. Davis.

And the focus of the Third Circuit Court of Appeals in Hoffman was that since it was theoretically possible to earn a one-half credit unit with as little as one hour's work in a week, the Third Circuit felt that the same bizarre result which this Court had mentioned in Accardi was possible; that this Court has indicated in its decision in Foster v. Dravo, and its decision in Alabama Power v. Davis, that that bizarre result, theoretical though it may be, is not the appropriate analysis.

QUESTION: That is highly theoretical, isn't it?

MR. NIMS: It's very theoretical, particularly in this case in which there's been testimony as to the industry's need under its own agreements to bring an individual in for 32 hours if it brings him in for one

hour during the week.

Thank you.

MR. CHIEF JUSTICE BURGER: Do you have anything further, Mr. Horowitz?

REBUTTAL ARGUMENT OF ALAN I. HOROWITZ, ESQ.,

ON BEHALF OF THE PETITIONER

MR. HOROWITZ: I do have a couple of points I would like to make, Mr. Chief Justice.

First, in regard to the comment about the bizarre results, as Mr. Justice Blackmun pointed out, that is merely a theoretical analysis. And I am sure it was theoretical in Accardi as well.

The Court there was just using the bizarre results to indicate that the plan in no way attempted to compensate for the amount of work performed.

The same is true here. There is absolutely nothing in this plan that indicates that SUB benefits are intended to be compensation. Respondent has noted the four factors that go into determining the amount of the weekly payment that is made. Not one of those factors has anything to do with compensation for work.

The only work requirement that is involved in this case is the fact that most of the employees who earn these benefits work. There is not a requirement that all employees work, as I discussed in setting out

the plan. There are several categories of employees who are not working who can also receive benefits.

And essentially, the only difference between the work requirement here and the work requirement in any case where there is just a period of service that is required to accrue benefits, for example, in the most standard seniority situation, is that respondent has seen fit to exclude certain categories of employees who are on leaves of absence from receiving these SUB benefits.

Now our contention is that these rights are guaranteed by Congress. And the fact that respondent chooses to exclude certain employees who are on leaves of absence does not mean that veterans can be excluded from these benefits.

I'd also like to discuss the point about whether this is a seniority benefit, simply because employees who have 20 years of service and employees who have 15 years of service will receive the same benefit.

Now, it's clear that at the lower levels of the seniority ladder, there is a seniority distinction made based upon length of service. Employees who have more service are eligible for the benefits; employees who have less than two years are not. Employees who have more service may get up to the 52 credit maximum.

QUESTION: How long does it take to accumulate

the 52? Two years?

MR. HOROWITZ: It takes two years, yes.

QUESTION: So that once you've worked two years, and accumulated the 52 credits, from then on length of service doesn't count; or how much you work doesn't count?

MR. HOROWITZ: That's correct. That's correct, Your Honor.

QUESTION: So any time from two years on, there's no difference. But up to that time---

MR. HOROWITZ: Up until that time, there is a difference. And we submit that the fact--

QUESTION: And that's the advantage that's being claimed here?

MR. HOROWITZ: That's right. It's of no significance to petitioner that everyone--whether everyone above him had 52 units, or whether some of them had 52 and some of them had 200 and some of them had 300.

QUESTION: But nobody can have more than 52?

MR. HOROWITZ: That's right. Nobody can have more than 52.

QUESTION: So nobody could have 200 to 300.

MR. HOROWITZ: No. But it wouldn't hmake any difference in this case if someone could have 200 or 300.

QUESTION: But you can have less?

MR. HOROWITZ: Yes, you can have less. And

petitioner had less. And he should have had more.

QUESTION: And petitioner says he was given less, and he was entitled to the 52.

MR. HOROWITZ: That's correct.

QUESTION: An employee for the first two years is totally ineligible. He doesn't acquire any SUB's.

MR. HOROWITZ: He acquires credit, but they're not good for anything.

QUESTION: But then, on the first day of his third year, if he's worked at least 32 hours every week in the first two years, does he immediately get 52?

MR. HOROWITZ: Well, no, he gets one-half per week. So after a year, he has 26.

QUESTION: Yes.

MR. HOROWITZ: He has them written in a ledger; 26. But they're not good for anything. If he's laid off, he can't collect any payments.

QUESTION: But my question was after--on the first day of the third years--

MR. HOROWITZ: Right, he would then have 52.

QUESTION: --he's worked at least 32 hours a week--

MR. HOROWITZ: That's correct.

QUESTION: --for each of the previous two years, does he immediately have 52 SUB's?

MR. HOROWITZ: That's right, he would have--he would have accrued 52 by then, yes.

QUESTION: Mr. Horowitz, other than the interrupted service because of military duty, could a man get--satisfy the two-year requirement without also accumulating the 52 units?

MR. HOROWITZ: Yes, if he was on some leave of absence for two years that--

QUESTION: Any other leave of absence, he could still be accumulating his two years without earning any credit?

MR. HOROWITZ: That's right. And if he was on layoff status as well, he would be accumulating his two years' of credit.

And I'd just like to briefly allude to the Foster decision which respondent has cited. In Foster, as this Court explained in Alabama Power, the Court relied on the fact that vacation benefits are understood to be directly related to work; that they are a respite for work performed; and that there, the Court did not find that there was any reason to diverge from that understanding.

But here, where there's clearly a seniority aspect to this benefit, as we've just discussed, the question then is whether the benefit is to be characterized

as short-term compensation for work performed. And we submit that there is no evidence--

QUESTION: So you say in two respects there's a seniority--one just for the two-year eligibility.

MR. HOROWITZ: And for the number of credits.

QUESTION: And also the work credits.

MR. HOROWITZ: The number of credits earned, right, whether by work or by some other--

QUESTION: And you say, if he hadn't been away, he'd have been working, and that would--would not only have been satisfying his two year eligibility requirement, but also accumulating credit.

MR. HOROWITZ: That's correct. It's stipulated that had he remained in the employment, he would have 52 credits.

If there are no further questions, thank you.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen. The case is submitted.

(Whereupon, at 11:40 o'clock, a.m., the case in the above-entitled matter was submitted.)