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Vacation Pay for Rehired Veterans

Harry Montgomery Leet

I

The Problem

ALTHOUGH RETURN of veterans to civilian life following the recent war has largely been completed, some of the problems created by this return still loom large. Among these is the question how far the statutes requiring that the serviceman be rehired¹ excuse him from meeting conditions of eligibility for vacation pay where his military service prevented him from meeting the conditions. Collective bargaining agreements or employer practices generally provide vacations (or pay in lieu thereof) for employees who meet one or more of these requirements: (1) are

in the employ for a given period, (2) work during a specified percentage of a period preceding the vacation, and (3) are on the job on a particular day, usually at the end of the vacation year.² Language

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imposing these conditions varies widely, especially as to the degree of definiteness with which work on the job is required.³

Veterans have claimed longer vacations where their military service plus prior employment equaled the number of years of employment required for the longer vacation. They have claimed vacations for the

¹Section 8 of the Selective Training and Service Act of 1940, 54 STAT. 890, as amended, 50 U.S.C. APP. § 308 (1946), is the basic provision:

"(b) In the case of any such person who, in order to perform such training and service, has left or leaves a position, other than a temporary position, in the employ of any employer, and who (1) receives such certificate, (2) is still qualified to perform the duties of such position, and (3) makes application for reemployment within ninety days after he is relieved from such training and service—or from hospitalization continuing after discharge for a period of not more than one year—

"(B) if such position was in the employ of a private employer, such employer shall restore such person to such position or to a position of like seniority, status, and pay unless the employer's circumstances have so changed as to make it impossible or unreasonable to do so;

"(c) Any person who is restored to a position in accordance with the provisions of paragraph (A) or (B) of subsection (b) shall be considered as having been on furlough or leave of absence during his period of training and service in the land

year of their induction or return, where their absence in military service prevented their meeting one of the conditions. And where a specified amount of work is required, they have sought to prorate their vacation to the amount of work they performed. Disagreements arise because the collective bargaining agreement or employer's custom prohibits crediting time away from the job toward vacation pay, or is ambiguous in this respect.

The Supreme Court in *Fishgold v. Sullivan Drydock & Repair Corp.*,⁴ held that Sections 8(b) and 8(c) of the Selective Training and Service Act⁵ confer no "superseniority" on the veteran, but guarantee him against any "loss of ground" because of his military service. Employers contend that this rule applies only to seniority; that the only provisions of the Act relating to vacation pay are those clauses of 8(c) granting the veteran the right (1) to be "considered as having been on furlough or leave of absence," and (2) to "insurance and other benefits offered by the employer pursuant to established rules and practices relating to employees on furlough or leave of absence in effect with the employer at the time such person was inducted"; and that unless there is an affirmative practice or agreement permitting all time on leave to be counted toward vacations, military service is not a substitute for compliance with the vacation requirements.

The veterans answer that even if these clauses relate to vacation pay (which is not certain) they establish a floor rather than a ceiling for it; that vacation pay and similar benefits are part of the employee's "posi-

or naval forces, shall be so restored without loss of seniority, shall be entitled to participate in insurance or other benefits offered by the employer pursuant to established rules and practices relating to employees on furlough or leave of absence in effect with the employer at the time such person was inducted into such forces, and shall not be discharged from such position without cause within one year after such restoration." This provision was continued in effect by the Service Extension Act of 1941, 55 STAT. 627, 50 U.S.C. APP. § 357. Identical provisions are contained in the Army Reserve and Retired Personnel Law of 1940, 54 STAT. 859, 891, 50 U.S.C. APP. § 403; and in the Merchant Marine Reemployment Act, 57 STAT. 162, 50 U.S.C. APP. § 1472 (1943). Similar provisions are found in the Selective Service Act of 1948, 62 STAT. 604, 50 U.S.C. APP. § 459. These statutes are administered by the Department of Labor.

² Severance pay, retroactive pay increases, pension participation, insurance benefits and other advantages are often contingent on similar requirements, and the discussion is applicable to them except where distinctions are made.

³ See COLLECTIVE BARGAINING PROVISIONS — VACATIONS, HOLIDAYS AND WEEK-END WORK (Bur. Labor Statistics, U.S. Dep't Labor, Bull. No. 908-2) 4 (1948). "Days of compensated service" is occasionally the test; sometimes it is "on the payroll"; more often it is "in the employ." Some contracts are silent on the point, and others base vacation pay on the employee's earnings, pay rate, or hours worked in some earlier period.

⁴ 328 U.S. 275, 66 Sup. Ct. 1105 (1946).

⁵ 54 STAT. 890, 50 U.S.C. APP. §§ 308(b) and 308(c) (1940).

tion" and the general guaranty of "seniority, status and pay" included thereunder in 8(b); that under the *Fishgold* rule and the liberal construction of the statute required by that case, a veteran is entitled to all increases in all types of benefits which he would have received solely through passage of time had he remained at work instead of entering military service; that no contract or custom can cut down these benefits; and that his military service should be counted toward meeting vacation pay requirements.⁶

II

8(c) as a Limitation on Vacation Pay

Both the "considered as having been on furlough or leave of absence" and "insurance or other benefits" clauses were added to the original provisions of the Act in an effort to make it a clearer and more effective means of protecting veterans.⁷ In fact, the language and purpose of the "other benefits" clause strongly intimate that it protects and conserves only those interests of the employee involving contributions made by him or in his behalf, a financial outlay having present money value which should not be forfeited or impaired through absences and non-payment of premiums, but which does not continue to accumulate automatically during the veteran's military service.⁸ That the "other benefits" must be

⁶ One other interpretation of the statute is possible: Vacation pay is an incident of seniority and the clause "without loss of seniority" in 8(c) insures the veteran the right to count military service toward vacation pay for all purposes. However, as will be seen later, in many cases the right to vacation pay seems not to be an incident solely of seniority; where it is such an incident, it appears that 8(b) would protect the veteran to the same extent as 8(c).

⁷ 86 CONG. REC. 10,914 (1940). The amendment substituted the present section 8(c). The previous language was: "Any person who is restored to a position in accordance with the provisions of paragraph (A) or (B) of subsection (b) shall so be restored without loss of seniority, insurance participation or benefits, or other benefits, and such person shall not be discharged from such position without cause within 1 year after such restoration." *Id.* at 10,079. Senator Davis, author of the amendment, regarded the change as *increasing* the protection previously afforded; the committee chairman, Senator Sheppard, concurred. *Id.* at 10,914.

⁸ Representative May stated, "I do not think it [Section 8(c)] would protect any employee against that provision [war-risk clause in a group insurance policy] because it is a provision within a contract. . . ." 86 CONG. REC. 11,702 (1940). That is, this section protects and conserves rights existing at the time of induction, but has no bearing on additional rights, one way or another. Further, the "other benefits" provision "refers solely to the benefits to which he was entitled up to the time he left his employment" and means that "if a man goes out to serve his country under this conscription plan and comes back he assumes his prior status less one year's payment." *Id.* at 10,107. "The chief purpose of the amendment is to preserve the seniority rights of the thousands and hundreds of thousands of railroad employees and other employees of that character who have certain seniority privileges on the railroads. In other words, we put them on furlough during the time they were in the service and they will even be permitted to count this time on their retirement. . . ." *Id.* at 11,702.

"offered by the employer" suggests that this clause excludes advantages based on specific *quid pro quo* in the employment, and relates only to the employer's contributions to the general security and welfare of his employees simply on account of the employment relation, without regard to individual merits or services rendered.⁹ Also, 8(c) states that "any person *who is restored* to a position" shall receive the benefits mentioned, but it is clear that a veteran has certain of these rights—for example, the right to his proper place on the seniority list—even if he is never restored.¹⁰ It can hardly be objected that 8(b) is merely descriptive and offers no affirmative protection beyond that contained in 8(c), for the 8(b) guaranty of "former position or position of like seniority, status and pay" on its face is considerably broader than the 8(c) "without loss of seniority" and "leave of absence" clauses. For these reasons, it appears doubtful that 8(c) limits a veteran's vacation pay to that granted other employees on leave of absence.

Congress seems to have rejected this view by inserting a new provision in the 1948 Act,¹¹ that the veteran should be restored so as "to give him such status in his employment as he would have enjoyed if he had continued in such employment continuously"; this was considered merely to express what the statute previously meant.¹² Further, to consider the

⁹ On this view, pension rights and group insurance might be "other benefits," and vacation pay tied to production and performance of work would not.

¹⁰ 8(c) takes effect only *after* restoration. *MacLaughlin v. Union Switch and Signal Co.*, 70 F.Supp. 744 (W.D. Pa. 1947), *rev'd on other grounds*, 166 F.2d 46 (3rd Cir. 1948); *Murphy v. Chrysler Corp.*, 306 Mich. 610, 11 N.W.2d 261 (1943). See also *Dwyer v. Crosby Co.*, 167 F.2d 567 (2d Cir. 1948). Some benefits clearly protected by 8(c), say insurance and pensions, can take effect only after restoration, in most cases. "Neither grammatically nor substantively could the discharge provision be given effect without reference to the prior restoration clauses." *Trailmobile Co. v. Whirls*, 331 U.S. 40, 55, 67 Sup. Ct. 982, 989 (1947). Rights after restoration need not depend solely on 8(c), of course; but if 8(c) is a general limitation on 8(b), there can be no rights before restoration under 8(b).

¹¹ Selective Service Act of 1948, 62 STAT. 604, 50 U.S.C. APP. § 459 (c) (z) (1950). The provision was added by the Senate Armed Services Committee. "The Committee has taken the position that as a matter of policy, no reemployment rights should be granted to personnel serving under this legislation which would contravene, or take precedence over, reemployment rights now enjoyed by men who already have been in the services, and who are now receiving benefits under the 1940 Act. For that reason no important substantive changes have been made in the provisions of the 1940 act." SEN. REP. NO. 1288, 80th Cong., 2d Sess. 15 (1948). In commenting specifically upon the new section, the Senate committee added that "the provisions of this legislation differ from those contained in the Selective Training and Service Act of 1940, as amended, in that [this] is *specifically stated* to be the intent of Congress." (Italics supplied) *Id.* at 16.

¹² *Aeronautical Lodge v. Campbell*, 337 U.S. 521, 69 Sup. Ct. 1287 (1949) so held under the 1940 statute; *accord*, *MacLaughlin v. Union Switch & Signal Co.*, 166 F.2d 46 (3rd Cir. 1948); *Dwyer v. Crosby*, 167 F.2d 567 (2d Cir. 1948); *In re Walker's Estate*, 185 N.Y. Misc. 1046, 53 N.Y.S.2d 106 (Surr. Ct. 1944). In

"other benefits" clause as the sole provision protecting vacation pay would mean a veteran could be denied pensions, vacation pay, or increases in benefits established during his absence, since the rule in effect at the time of his induction would govern.¹³ The statute thus would espouse the very discrimination it was designed to avoid. Veterans inducted at different times would receive widely varying treatment, and the employer could not revise the scale of benefits uniformly for veterans and non-veterans;¹⁴ such lack of flexibility would greatly disturb labor relations. Nor does the clause "considered as having been on furlough or leave of absence" restrict the veteran to vacation pay granted other employees on leave. If it did, a custom or contract provision that employees on leave could not accumulate seniority would prevent veterans from doing so, contrary to the *Fishgold* principle.¹⁵

That principle establishes the veteran's right to step back on the "escalator" of advantages at the point he would have occupied but for his absence in military service, so that he suffers no "loss of ground" by reason of his absence.¹⁶ According to the Supreme Court's definition of the escalator principle in *Oakley v. Louisville & Nashville R.R.*:

An honorably discharged veteran, covered by the statute, was entitled by the Act to be restored not to a position which would be the precise equivalent of that which he had left when he joined the Armed Forces, but rather to a position which, on the moving escalator of terms and conditions

Spearmon v. Thompson, 173 F.2d 452, 454 (3rd Cir. 1949), the court stated that the statutory addition made by the 1940 Act to contractual rights gives the veterans such "status . . . [as would have] been achieved without interruption of their work through military service." The real question is, of course, what job incidents accrue as a result of remaining "in the employ."

¹³ Such result is not the intent or effect of the statute. A collective bargaining agreement negotiated during the veteran's absence in the armed services confers vacation rights on him to the same extent as on those remaining behind. *Mentzel v. Elizabeth Iron Works*, 167 F.2d 299 (3rd Cir. 1948). See also the cases granting rehired veterans wage increases (occurring during their absence) resulting from general wage raises, increased prosperity of the employer, or increased importance or difficulty of the job, collected in INTERPRETATIVE BULLETIN AND LEGAL GUIDE, VETERANS' REEMPLOYMENT RIGHTS (U. S. Dep't Labor) § 6.2 (1948) and Supplement, § 6.2 (July, 1948).

¹⁴ *Aeronautical Industrial Lodge v. Campbell*, 337 U.S. 521, 69 Sup. Ct. 1287 (1948) indicates this is not the effect of the act.

¹⁵ It has been suggested that the first "furlough or leave" clause in 8(c) assures the veteran of the benefits of rules in effect upon his restoration, and that the "other benefits" clause assures him of the advantages of rules in effect when he is inducted. If the clauses can be read together so as to cover accrual of all such benefits in accordance with either rule while the veteran is absent in military service, there is no objection to this view, even though the language of the statute itself seems not to warrant such a bifurcation. But where employees on other types of leave are denied accrual of benefits, this interpretation begs the question.

¹⁶ *Fishgold v. Sullivan Corp.*, 328 U.S. 275, 284, 66 Sup. Ct. 1105, 1110 (1946). "The Act was designed to protect the veteran in several ways. He who was called

affecting that particular employment, would be comparable to the position which he would have held if he had remained continuously in his civilian employment.¹⁷

The rationale of the escalator principle is not dependent on the "without loss of seniority" clause of 8(c)¹⁸ and applies to job features other than seniority. For, as the Court observed in *Aeronautical Industrial Lodge v. Campbell*, the veteran "becomes the beneficiary of those gains" created in his absence, a result at odds with limiting him to the gains accruing to those on leave or furlough.¹⁹ Many other remarks of the Court, though not made in consideration of this point, offer some additional support to the view that the veteran may have rights under 8(b) beyond those granted employees on leave of absence and beyond those protected by 8(c).²⁰

to the colors was not to be penalized on his return by reason of his absence from his civilian job."

"Thus he does not step back on the seniority escalator at the point he stepped off. He steps back on at the precise point he would have occupied had he kept his position continuously during the war." *Id.* at 284-85, 66 Sup. Ct. at 1111.

"As we have said, these provisions guarantee the veteran against loss of position or loss of seniority by reason of his absence. He acquires not only the same seniority he had; his service in the armed services is counted as service in the plant so that he does not lose ground by reason of his absence." *Id.* at 285, 66 Sup. Ct. at 1111.

"Congress protected the veteran against loss of ground or demotion on his return." *Id.* at 286, 66 Sup. Ct. at 1111.

¹⁷ *Oakley v. Louisville & N.R.R.*, 338 U.S. 278, 283, 70 Sup. Ct. 119, 122 (1949).

¹⁸ That clause of itself does not require any escalator. It does little to establish what the seniority is which the veteran is not to lose. Is it what he had when he entered military service? The bare words of the clause favor this construction, but this is also clearly protected in 8(b) as "seniority." Is it what he would have acquired under rules in effect at the time of his induction? Or at the time of his reinstatement? Apparently the Supreme Court rejected all of these views in favor of the escalator upon which the veteran rides by authority of the statute.

¹⁹ 337 U.S. 521, 526, 69 Sup. Ct. 1287, 1289 (1949). The Court's remarks that the Act gives the serviceman "the status of one who has been 'on furlough or leave of absence,'" and that he "is not to be favored as a furloughed employee as against his fellows" do not mean he is limited to advantages accruing to his fellow employees on leave; the change in the collective bargaining agreement which, the court held, must neither favor nor prejudice the veteran was not one affecting employees on leave, but one affecting all employees. Whether the additional protection arises under the "furlough or leave of absence" clause or under 8(b) is of relatively minor importance so long as the principle is recognized that neither this clause nor the "other benefits" clause denies the veteran advantages because they do not accrue to other employees on leave. Since the *Campbell* case does not seem inconsistent with the view that this protection lies in 8(b), reasons indicated in the text favor that view.

²⁰ The Court has frequently equated "position" with "seniority," "status" and "pay" and indicated the veteran must not lose ground in respect of any of these. In the *Fishgold* case, it said, "the veteran is entitled to be restored to his old *position*. . . . If . . . he is demoted, his *status*, which the act is designed to protect, has been affected. . . . He would then lose his old *position*." (Italics supplied) 328 U.S. at 286, 66 Sup. Ct. at 1112. In *Trailmobile Co. v. Whirls*, 331 U.S. 40, 57 and 53 n. 23, 67 Sup. Ct. 982, 990 and 988 n.23 (1947), the Court indicated that "the in-

Lower courts have vacillated on this issue. The Third Circuit held in *Mentzel v. Diamond*²¹ that a veteran who met all other requirements was entitled to count military service as part of the "five years service" which, under the collective bargaining agreement, entitled him to a second week of vacation. Treatment accorded other employees on leave or furlough was not considered. "The veteran is to be treated, as far as benefits under the Act are concerned, as though he had worked every day at the plant,"²² the opinion stated. This followed the same court's decision in *MacLaughlin v. Union Switch and Signal Co.*²³ that, where vacations were "based on total service to and including December 31 of the preceding calendar year" and could be "taken only during the current calendar year," a veteran inducted before December 31 was entitled to vacation pay for that year, payable in the year of his return. December 31 was no "magic day" establishing eligibility, but "merely a terminal date stipulated for computation of vacation rights";²⁴ the Act "tolled the running of the calendar year, so that the year of return became the calendar year. There can be little quarrel with such a reading of the Act."²⁵ However, in *Dougherty v. General Motors Corp.*,²⁶ under a provision that an employee with five years seniority should

cidents of employment" were embraced in "the right to employment itself," that the year's protection of 8(c) extends to "pay" (not mentioned in 8(c)), and that "seniority" is part of the veteran's "position." And in the *Campbell* case, it held the veteran's "rights, including seniority" were defined by the agreement adopted in his absence. 337 U.S. at 527, 69 Sup. Ct. at 1290. But "seniority" is the only part of the veteran's "position" specifically protected by 8(c); therefore, 8(b) also affirmatively protects the veteran's position. The need for belaboring what might seem an obvious point will appear in the examination of lower court cases on vacation pay.

²¹ 167 F.2d 299 (1948).

²² *Id.* at 301.

²³ 166 F.2d 46 (1948).

²⁴ *Contra*: *Flynn v. Ward Leonard Electric Co.*, 18 CCH LABOR CASES ¶ 65,710 (S.D. N.Y. 1950) *Zagaiski v. Carboly Co.*, 88 F. Supp. 162 (E.D. Mich. 1950). Both cases involved retroactive wage increases given to employees on the active payroll on a specified date; the veterans had worked part of the period for which the increase was granted, were inducted before the crucial date, and sought the increase for the time they worked. An earlier decision in the *Flynn* case by a different judge, on motion to dismiss the complaint, was in accord with the *MacLaughlin* case. 84 F. Supp. 399 (S.D. N.Y. 1949).

²⁵ It cannot be objected that the court's comment, "Vacation advantages accorded employees are certainly no less to be prized than such benefits as pensions, bonuses, and participation in insurance programs," shows that vacation pay is protected only by the "other benefits" clause. The court also spoke of the "vacation escalator"; there is no escalator in 8(c) for "other benefits," so the escalator must operate by license of 8(b) and the comment was merely descriptive. Of course, even if vacation pay were among the "other benefits," it would not necessarily be excluded from "seniority, status and pay" under 8(b).

²⁶ 176 F.2d 561 (3rd Cir. 1949), *cert. denied*, 70 Sup. Ct. 494 (1950).

receive vacation pay of 4½ per cent of his previous year's earnings, a veteran reinstated in 1946 was denied vacation pay for that year. Two justifications were advanced: (1) the provision did not violate the statute "as long as the intent and operation do not place veterans in a position inferior to that of non-veterans on leave of absence"; and (2) the effect of the provision was to deny vacation pay to any employee who had no 1945 earnings, and this the Act does not forbid so long as veterans and non-veterans are treated alike.²⁷ The first reason shows a substantial retreat from the *Mentzel* decision. The second stems from interpreting as a requirement of eligibility a provision seeming to relate only to the *amount* of the vacation pay. To paraphrase the *MacLaughlin* opinion, this was "merely a base period stipulated for the computation of vacation pay"; thus it is inconsistent with the "no magic day" rationale of that case.

Similar difficulties have beset the Second Circuit. The collective bargaining agreement in *Siaskewicz v. General Electric Co.*²⁸ provided that employees reengaged with continuity of service must work six months before being eligible for a vacation; a longer vacation was given to those with five years' "continuous service." Though holding that a veteran who was reinstated too late to work six months in the vacation year was not entitled to vacation pay, the court seemed to consider the five-year increase a requisite of seniority. But the reef lay just beneath the surface. When confronted by a collective bargaining agreement providing vacation pay for those "in the employ for 26 weeks," the court held the Act to require the veteran to be considered "in the employ" during his military service. However, it is the "position" rather than the "employ" to which the veteran must be restored under the Act. Advantages accruing to the veteran's "position" during his military service are only those accruing to other employees on leave. Hence a veteran reinstated for only 25 weeks was not entitled to vacation pay because "it was an essential element of the case that the company have a rule or practice treating employees 'on leave of absence' as entitled to include their leave within the twenty-six weeks, and it was not proved."²⁹ By this reasoning, "in the employ" is taken to entitle

²⁷ As a third reason, the court stated the provision did not discriminate against veterans because neither the union nor General Motors sought or contemplated restriction of veterans' vacation benefits. This point lies outside the present inquiry.

²⁸ 166 F.2d 463 (1948).

²⁹ *Dwyer v. Crosby Co.*, 167 F.2d 567 (1948). "In the employ," as used in the contract, does not, of course, necessarily mean the same thing as it does under the Act. Cf. INTERPRETATIVE BULLETIN, *supra* note 13 at § 3.22, stating that the meaning of "temporary" in the statute depends on the facts of the case rather than the language of the contract. However, where the language of the contract coincides with the wording of the statute, the absence of evidence as to special meaning to be given the contract should favor similarity of meaning, and not (as here) the reverse.

the veteran only to the protection of 8(c) and to the treatment accorded other employees on leave; and the advantages of "employ" do not accrue under the Act during the employee's military service. And, in the court's view, either the advantages of the "position" to which the veteran must be restored do not accumulate during his military service, or vacation pay is not part of that "position." In the former case, the entire Act is reduced to meaning the veteran shall be restored "without loss of benefits" he had when inducted, a result contrary to the *Fishgold* requirement that seniority *must* accumulate during military service;³⁰ in the latter, the "seniority, status and pay" guaranteed by 8(b) are ignored and the escalator principle cabined in a manner contrary to the *Fishgold* and *Oakley* definitions of it.³¹

No such doubts distracted the Ninth Circuit. It held a veteran not entitled to include time in the army in "total years of full time continuous employment" on which severance pay was based, because the rule in

³⁰ See note 7 *supra* for Congress's rejection of a version of 8(c) which was so limited. By importing the "position-employ" distinction into the Act in its attempt to avoid the difficulty noted in the text, the Second Circuit seems to have created greater difficulties. Whatever 8(b) does not do as to "employ," it guarantees the veteran the same "position" he formerly held, including advantages accumulated during military service. *Loeb v. Kivo*, 169 F.2d 346 (2d Cir. 1948); *Trusteed Funds v. Dacey*, 160 F.2d 413 (1st Cir. 1947); *Martin v. John S. Doane Co.*, 164 F.2d 531 (1st Cir. 1947); *Levine v. Berman*, 161 F.2d 386 (7th Cir. 1947), holding the veteran entitled to pay increases due, not to length of service, but to expansion of the enterprise, war-induced prosperity of the employer, and a general rise in wage or salary levels; *Morris v. Chesapeake & O. Ry.*, 171 F.2d 579 (7th Cir. 1948), *cert. denied* 336 U.S. 967, 69 Sup. Ct. 938 (1949); *Conner v. Pennsylvania R.R.*, 177 F.2d 854 (D.C. Cir. 1949), *petition for cert. pending*; *Payne v. Wright Aeronautical Corp.*, 162 F.2d 549 (3rd Cir. 1947), holding a returning veteran must be given promotion opportunities and seniority credit which he would have had by remaining at work instead of entering military service. *Contra*: *Raulins v. Memphis Union Station Co.*, 168 F.2d 466 (6th Cir. 1948) *semble*.

³¹ "The real trouble however is . . . it assumes . . . that employment within the meaning of the Act is something wholly distinct and separate from its incidents, including seniority, rates of pay, etc." *Trailmobile Co. v. Whirls*, 331 U.S. 40, 55, 67 Sup. Ct. 982, 989 (1947). *Cf.* *Feore v. North Shore Bus Co.*, 161 F.2d 552 (2d Cir. 1947), holding a returned veteran near the head of the seniority list not exempt from the requirement that in order to choose a desirable run he must make his choice on the quarterly dates established by the collective bargaining contract. The court stated that the "leave of absence" clause in 8(c) must be considered in determining whether the veteran has been offered a job of "like seniority, status and pay" as required by 8(b), thus implying 8(c) is not the sole provision dealing with job incidents there listed; two points made by the court showed the "leave or furlough" test is to be applied sparingly: (1) the veteran must have a reasonable chance to comply with the condition imposed on those on leave, *i.e.* there must be no long delay between "picks"; and (2) the condition itself must be reasonable to be valid, as this one was because the employees themselves, in a referendum in which the veteran had a chance to participate, voted almost unanimously against the "bumping" process which the granting of the veteran's claim would have caused. See also the remarks concerning reasonableness of the contract provisions in the *Campbell* case, 337 U.S. at 527-528, 69 Sup. Ct. at 1290-91.

effect when the veteran was inducted did not permit employees on other types of leave to include leave time. The court reached this conclusion directly, in an opinion uncomplicated by notice of the escalator principle, mention of 8(b), or distinction between the "leave of absence" and "other benefits" clauses of 8(c).³²

To say that credit of military service toward vacation pay is by 8(c) restricted to the credit allowed for other kinds of leave time leads to serious inconsistencies with the structure and purpose of the Act. It means that if the veterans are protected without the statute, the statute also protects them; and if they are not protected without it, the statute does not aid them.

Apparently the Supreme Court considers that the escalator on which the veteran rides during his military service carries all incidents of the job dependent on length of employment, including the right to or duration of the vacation. Thus it is unnecessary to determine whether vacation pay is included in "other benefits" under 8(c),³³ for the veteran can assert vacation rights to any extent that they are conferred by the guaranty in 8(b) of "a position of like seniority, status and pay."

III

Vacation Pay as Part of "Position" Under 8(b)

"Loss of position" against which the *Fishgold* case held that 8(b) protects the veteran includes the loss of any significant elements of the position. Thus the veteran is protected from demotion, from loss of opportunity for sure advancement, and from loss of general pay increases.³⁴ He is also pro-

³² *Seattle Star, Inc. v. Randolph*, 168 F.2d 274 (1948); accord, *Woods v. Glen Alden Coal Co.*, 73 F.Supp. 87 (M.D. Pa. 1947); *Cushnier v. Ford Motor Co.*, 17 CCH LABOR CASES ¶ 65,616 (E.D. Mich. 1950); *Brown v. Watt Car & Wheel Co.*, 17 CCH LABOR CASES ¶ 65,293 (S.D. Ohio 1948); *Horan v. Todd Shipyards Corp.*, 13 CCH LABOR CASES ¶ 63,942 (S.D. N.Y. 1947). In the *Brown* and *Horan* cases, the "other benefits" clause of 8(c) was considered along with the "leave of absence" clause. Sometimes, as in the *Woods* case, the court was troubled by the fact that collective bargaining contracts are of limited duration and vacation pay provisions relate only to specific years; there is thus no rule in effect at time of induction applicable to the period after restoration. Some courts tried to solve the problem in part by considering the applicability of the contract in effect on the veteran's return, but ignored the escalator rule, the applicability of 8(b), and the fact that the rule in effect at the time of induction need not, under the "other benefits" clause, apply to the period of the veteran's return. The *Mentzel* agreement was negotiated during the veteran's absence, and caused the Third Court of Appeals no such difficulties because of the court's frank recognition that the statute was designed to give special protection to those on military leave.

³³ Unless, indeed, the veteran claims that the "other benefits" clause protects him from a reduction of vacation rights applied uniformly to all other employees during his absence in the armed forces; the *Campbell* case seems to make such argument untenable.

³⁴ See note 30 *supra*.

tected from impairment of his duties and responsibilities, and from loss of fringe advantages such as desirable working hours or conditions and convenient housing.³⁵ The veteran has a right to general increases in such advantages even if no collective bargaining agreement or employer custom confers them on employees on leave. Thus the veteran's right results from the Act and cannot be reduced by contract or custom to the contrary.³⁶ His "status" with respect to the level of benefits of his position is protected against impairment resulting from his absence in military service. The reasoning applies to vacation advantages as well as to the others listed.³⁷ In fact, vacation pay is so much a part of the veteran's total "position" that its receipt was held to show the position itself was other than temporary.³⁸

Vacation rights may also be part of the veteran's "seniority" or "pay." In *Siaskewicz v. General Electric Co.*, it was said that vacation rights may be "merely a perquisite of seniority" in some circumstances.³⁹ The *Mentzel* case so held; and, in *Winton v. City Truck Co.*, correct computation of seniority under 8(b) was held to confer an added week of vacation.⁴⁰ Likewise, in the *Siaskewicz* case, the court indicated that vacation pay may be part of the veteran's "pay," saying, "vacation rights are not pay unless they are for work actually done."⁴¹ A similar remark was made in the *MacLaughlin* case.⁴² Vacation pay would seem to be as much a part of the veteran's total compensation as the right to his former rate of pay, or the opportunity to take advantage of an improved business environment. Hence it would be protected under 8(b) rather than under 8(c), for the

³⁵ The cases are collected in INTERPRETATIVE BULLETIN, *supra* note 13, at §§ 6.42 and 6.44.

³⁶ *Fishgold v. Sullivan Repair Corp.*, 328 U.S. 275, 285, 66 Sup. Ct. 1105, 1111 (1946).

³⁷ In *Mentzel v. Diamond*, 167 F.2d 299 (1948), the Third Court of Appeals, to support granting vacation pay to the veteran, cited its own decision in *Gauweiler v. Elastic Stop Nur Co.*, 162 F.2d 448 (1947), that veterans were bound by a collective bargaining agreement made during their absence, giving union officials top seniority. The description in the *Campbell* case of collective bargaining as a "continuous process," the incidents of which are not "frozen" while the veteran is in military service, bears out this view.

³⁸ *E.I. du Pont de Nemours & Co. v. Martin*, 174 F.2d 602 (6th Cir. 1949).

³⁹ 166 F.2d 463, 466 (1948). *Dwyer v. Crosby Co.*, 167 F.2d 567 (1948) does not overrule the *Siaskewicz* case on this point; each case was bottomed on interpretation of a particular collective bargaining agreement.

⁴⁰ Civil No. 7219, D. Mass., Jan. 20, 1949.

⁴¹ 166 F.2d 463, 466 (2d Cir. 1948).

⁴² 166 F.2d 46, 48 (3rd Cir. 1948). However, the court's emphasis on the unequal contributions of work expected from individual employees—that is, the lack of a direct relation between time worked and amount of vacation pay in each case—would perhaps show that their vacation pay was an incident of "status" rather than "pay."

latter section does not mention "pay." On this view, moreover, whether vacation pay or other advantages have been "fully earned" by performance of every work requirement, as some courts have thought, is not necessarily decisive of the veteran's claim,⁴³ his claim is largely one for a present level or rate of compensation for current employment rather than pay for past work.⁴⁴

It seems plain that to deny veterans vacation pay merely because no provision confers it on employees on leave or furlough is an erroneous interpretation of the statute. But it is equally plain that in every vacation pay case the controlling element may be the interpretation of a collective bargaining contract or of an employer practice. Vacation pay is a job incident entirely dependent on the existence of such agreement or practice, since there is no right to it merely on account of the employment relation.⁴⁵

⁴³ The *MacLaughlin* case first announced the "fully earned" view, though it was not necessary to the decision. This led to a curious result in *Horan v. Todd Shipyards*, 13 CCH LABOR CASES 63,942 (S.D. N.Y. 1947), where the court denied vacation pay prorated in accordance with the proportion of the required number of hours which the veteran was able to work on return from service. The court said that "vacation rights cannot be considered 'pay' under Section 8(b) (B) of the Act until they have been 'fully earned'." It is difficult to follow this reasoning. A vacation of one year for each past year of service, granted on condition the employee had worked for six of the preceding twelve months might be "fully earned" as to the additional weeks resulting from years of employment after the first. Moreover, the right to *accrue* a vacation could easily be considered part of the employee's "pay", by analogy to this *rate* of pay, which is protected by the statute as much as the pay due him on departure for military service.

Even if vacation pay were only "partly" earned because the veteran worked only part of the required period after return, it would seem that this has no bearing on whether it should be considered "pay", since a weekly wage only 60% earned because of absence on two days is nonetheless "pay". See *Flynn v. Ward Leonard Electric Co.*, 84 F. Supp.399, 401 (S.D. N.Y. 1949), holding, on motion to dismiss the complaint, that veterans would be penalized "if they were denied equal pay for equal work done, merely because they were in the armed forces on October 10, 1943." *Contra*: *Flynn v. Ward Leonard Electric Co.*, 18 CCH LABOR CASES ¶ 65,710 (S.D. N.Y. 1950) (later decision on merits); *Zagaiski v. Carboly Co.*, 88 F. Supp. 162 (E.D. Mich. 1950).

⁴⁴ It follows that the veteran is not entitled to vacation pay received by on-the-job employees during the years he is in military service. In the debate on the statute, Senators Sheppard and Danaher made it clear that the employer was not liable for any retirement insurance contributions the veteran would have had to pay had he remained on the job. 86 CONG. REC. 10,107 (1940). Fear of some such result may underly the lower court decisions in the *Dwyer*, *Mentzel*, *MacLaughlin*, and *Woods* cases, confining vacation pay to the "other benefits" clause, *supra* note 32; and in fact such claim was advanced by the *MacLaughlin* veterans. Reported arbitration awards in this field have generally favored the veteran, possibly because the arbitrators are less inhibited by the fear of establishing a precedent. *Favorable*: 2 BNA LAB. ARB. REP. 227; 3 *Id.* 227, 859; 4 *Id.* 186, 306, 529, 594; 6 *Id.* 238, 403; 7 *Id.* 746; 8 *Id.* 100, 740. *Unfavorable*: 4 BNA LAB. ARB. REP. 280; 5 *Id.* 342, 508; 6 *Id.* 164, 369, 729, 767; 12 *Id.* 201.

Agreement or practice can make vacation rights depend wholly or partially on performance of work, as recompense for the work; this the Act does not forbid. Denial of vacation rights to those on leave shows that presence on the job is required for accrual of the rights, a requirement which the Act excuses for veterans. Such denial, without more, or even coupled with a requirement or presence on the active payroll for an insignificant time, say a day or a pay period, does not show that vacation rights are recompense for performance of work. Rather, the minuscule amount of work required indicates the opposite, that performance of work is not the essential factor in the right.⁴⁶ To the extent vacation pay depends on circumstances other than performance of work during the period the veteran is in military service, he should receive it. And in ascertaining this extent, courts will find it necessary to explore the meaning of each collective bargaining agreement and examine closely the facts of each veteran's case.⁴⁷

⁴⁵ Cf. the following remarks in the *Campbell* case concerning the existence of seniority apart from the contract: "In providing that a veteran shall be restored to the position he had before he entered the military service 'without loss of seniority,' § 8 of the Act uses the term 'seniority' without definition. It is thus apparent that Congress was not creating a system of seniority but recognizing its operation as part of the process of collective bargaining. We must, therefore, look to the conventional uses of the seniority system in the process of collective bargaining in order to determine the rights of seniority which the Selective Service Act guaranteed the veteran. Barring legislation not here involved, seniority rights derive their scope and significance from union contracts, confined as they almost exclusively are to unionized industry. See *Trailmobile Co. v. Whirls*, 331 U.S. 40, 53, n.21. There are great variations in the use of the seniority principle through collective bargaining bearing on the time when seniority begins, determination of the units subject to the same seniority, and the consequences which flow from seniority." 337 U.S. at 526, 69 Sup. Ct. at 1290.

⁴⁶ It might be argued that a contract limiting vacation pay which persons on ordinary leave of absence are granted defines the rights which the Act guarantees the veteran, and that the Act protects only those vacation rights earned in accordance with the terms of the contract. The method of earning vacation pay would then be regarded as a binding and valid condition of the veteran's job, like the condition in *Feore v. North Shore Bus Co., Inc.*, 161 F.2d 552 (2d Cir. 1947). However, requiring performance of work (as distinguished from presence in the employ) for vacation rights which are in fact a reward for other features of the employment relation is to penalize the veteran because of his absence in military service. The condition in the *Feore* case had no such defect. It remains a fact that veterans are at a disadvantage because they are most often unable to meet the conditions; moreover, their absence is involuntary and for ends not personal; the purpose of the statute, said *Fishgold*, is to insure that performance of this public duty secures them the same benefits they would have had had they shirked that duty; the results of the contractual language, not its form, must fit the statute.

⁴⁷ If the court does not do so, it would seem that in the absence of a provision requiring, say "800 hours of compensated service" or "six months work" in the vacation year, the veteran should prevail, as in the *Mentzel* case. For abortive efforts to interpret collective bargaining agreements, apparently with little or no assistance from counsel, see the *Horan* and *Cushmanier* cases, *supra* note 32.

Vacations or vacation pay, as the *MacLaughlin* case pointed out, are of course to some extent compensation for work related to production, in the sense of not being largess or a gratuity and of being given only on account of the employment relation. In addition, actual vacations serve to some extent the purpose of recuperation or relaxation from fatigue of a job and in this respect are contingent on actual performance of work. On the other hand, it must be remembered that industrial vacations in fact very often take the form of pay in lieu of vacation rather than a rest period, as has been true in all cases thus far decided by the courts. Also, an increase in the length of vacation (or the amount of vacation pay) is related to the employee's loyalty to and long tenure with the company and to the desire of the employer to retain a trained and reliable labor force. If the purpose of the increase is to insure a stable staff by encouraging employees to continue work with the company and identify themselves with its long-term welfare, or even to avoid contributions to short-term employees, the return of the veteran to the job is sufficient indication that he is not a bird of passage. The increase in rights is not connected with the period of labor for that particular year, nor even with specified amounts of labor for preceding years.

Under the typical provision for one week of vacation after one year of service and two weeks after five years, the second week of vacation is not related to performance of work in the particular year in which the vacation occurs but is given on account of length of service with the employer and loyalty to him. Giving one week of vacation for one year in the employ shows that only the first week of the vacation is given for that particular year's work. Where the veteran's pre-military employment plus time spent in military service plus his post-military employment total five years, he should receive the second week of vacation even though he is not at work on the required days in that year. He should also receive a part of the first week of vacation proportionate to the time he has worked during the year of his return, since the veteran has in fact "earned" this portion of the vacation.⁴⁸ The same principles apply where the vacation provision contains different requirements: the veteran is entitled to credit military service towards whatever part of the vacation or vacation pay is not dependent on the actual performance of work, and is entitled to such pro rata share of the

⁴⁸ Other methods of computation may be imagined. Veterans have argued that they should receive the full amount of vacation pay, because the statute excuses their failure to meet work requirements. The entire vacation might be prorated to the proportion of the work requirement which the veteran has met. The veteran's rate of work following reinstatement might be projected over the entire year, and his vacation computed accordingly. Or his work in the years of departure and return might be tacked together to enable him to meet the work requirement (*cf.* the remark in the *MacLaughlin* case that the Act "tolled the running of the calendar year,"

remainder as his actual work during the year of his return bears to the required work.⁴⁹

Admittedly an element of speculation is involved in this treatment of vacation pay; but the Act necessarily gives rise to this in protecting the veteran against loss of ground. No great hardship is imposed on the employer, since the veteran's replacement will have received less vacation pay than the veteran would have, by about as much as the veteran's increase. The veteran receives no advantage over those remaining on the job, since the amount of his credit for military service could not exceed that accruing to the other employees for time on the job. There is no question here of exempting veterans generally from changes in collective bargaining agreements which alter the framework of job benefits, seniority, or incidents of employment. Likewise, there is no proposal here to restrict the freedom of an employer or of a union to bargain collectively concerning this framework. Once the framework is established, however, the Act requires that a veteran's time in military service be treated as time on the job so as to enable him to reach that status, that level of privilege or benefit, that rate of compensation, that degree of advancement—in short, that "position" in the framework—which he would have reached had not military service blocked his progress. And this credit for military service must continue through subsequent years of the veteran's employment, so long as it may affect his vacation rights.⁵⁰

supra, page 33). All such computations seem further removed than that in the text from the "escalator" rule and the reasons underlying the existence of vacation pay. Where vacation is time off, and must be taken at a specified time, the veteran loses it unless he is on the job at that time, for the same reason that he is entitled to no vacation pay for the years he is absent. See note 44 *supra*.

⁴⁹To take an extreme example, assume a provision requiring 800 hours work in each of the five preceding years, in order to be eligible for vacation pay. A veteran who worked 800 hours in 1941, spent 1942-1944 in military service and worked 400 hours in 1945 following his return to the job would be entitled to 30 per cent of the vacation pay given those steadily on the job. Where the amount of vacation pay is a percentage of previous earnings and the veteran had no such earnings because of his absence in military service (as in the *Dougherty* case), he should be given constructive earnings of the average employee doing similar work. Vacation pay for the year of the veteran's entry into military service should be determined similarly. Under the provisions mentioned in the text, if he has five years service at that time, he is entitled to one week of vacation, etc. However, payment would not be required until the veteran returned to the job, since he has no rights under the Act prior to qualifying for reinstatement.

⁵⁰*Oakley v. Louisville & N. R.R.*, 338 U.S. 278, 70 Sup. Ct. 119 (1949).