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Looking Forward To Oral Argument In BNSF V. Loos

By **Christopher Collier and Michael Arndt** (August 8, 2018, 5:17 PM EDT)

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The U.S. Supreme Court added BNSF Railway Company v. Michael D. Loos[1] to its October term 2018, scheduling a resolution to the issue of whether a railroad's payment to an employee for time lost from work is subject to employment taxes under the Railroad Retirement Tax Act, or RRTA. Far from a one-off tax matter, the case impacts thousands of claims from railway workers each year and raises interesting questions about history, statutory construction, and the proper deference to administrative agencies.

A Page of History

Railway workers' workplace injuries are covered by Federal Employers' Liability Act, or FELA. Into its second century, FELA has never been without controversy. FELA was originally passed in 1906 as a response to the explosive growth of railroads and concomitant rise of injuries to railway workers[2], which often went uncompensated due to the "unholy trinity" of common law defenses: Fellow servant, contributory negligence and assumption of risk.[3]

The Supreme Court declared the 1906 FELA unconstitutional, however, because it swept beyond the interstate commerce clause of the Constitution.[4] President Theodore Roosevelt sent a special dispatch to Congress, informing it of the Supreme Court's ruling, and Congress quickly addressed the issue, passing the 1908 version that remains in effect today. Criticism of FELA began soon after passage and has been continued to the modern era, most notably with the repeal effort in the late 1980s. For the most part, these reform efforts have been unsuccessful.[5]

Consequently, FELA cases do not fit neatly into either a general litigation or workers' compensation regime.[6] For example, FELA lowers the burden of establishing liability as a railroad worker need not establish proximate cause and instead need only demonstrate that a railroad's negligence played a part — no matter how small — in bringing about the injury.[7] Federal law determines the amount of damages for FELA cases, and, unlike worker's compensation statutory schemes, there are no caps on the damages. Disagreements rage about the efficacy[8] and fairness of FELA's amalgam approach to injury claims, as well as a host of smaller doctrinal points.[9]

The Issue: Taxability of Payments for Time Lost From Work

The Loos case fits comfortably into the latter category as a narrow issue of whether an employer defendant can withhold payments to an injured worker for time lost from work. The resolution of the narrow legal issue could impact any of the approximately 4,000 on-the-job injuries of railway workers each year.[10]

Generally, a claimant does not owe taxes on damages received for personal injuries.[11] As a result, with few exceptions, "a breakdown of the damage award by categories is both unnecessary and irrelevant because no portion of the damage award is taxable."[12] Despite this clear — and long-standing — rule, the Supreme Court presumed the general public was unaware of it and feared that FELA awards might be artificially inflated as a result of a jury's wrongful assumption that a prevailing plaintiff would pay taxes on the award. This was the primary reason the Supreme Court found it reversible error to deny a request to charge the jury that FELA awards were exempt from federal taxes.[13] The holding forms the backdrop for Loos: A plaintiff will not pay federal taxes on FELA

awards and the defendant may tell the jury as much.

Loos addresses an issue of recent vintage. Within the last ten years, railway defendants began requesting the ability to deduct RRTA contributions from FELA judgments. In short, their argument is that federal statutes and regulations treat an award for time lost from work as if received as "regular" wages for retirement tax purposes, which means that the employer must (a) pay taxes on the employee's behalf and (b) withhold a portion of the employee's wages to contribute to such taxes.

A simple example illustrates the ostensible fairness of the argument. Assume a railway worker claims he was injured and forced to miss six months of work as a result. Had he not been injured, the railway worker would receive his regular paychecks for those six months, which includes mandatory withholdings for his retirement contributions that count as credits toward his retirement benefits — although a separate system, the railroad retirement scheme is similar to the more familiar social security system in that both the employer and employee pay a percentage of each paycheck to the system and the employer is responsible for withholding the employee's contribution. The railway defendants argue that the injured worker is made whole by ensuring the worker is in the same position he would have been without the injury.[14] So, after the plaintiff proves his claim and is awarded six months for time lost from work, the employer would pay what it would have paid and would deduct what it would have withheld from the paycheck. The injured worker thus receives the same amount of money he would have received and does not lose any credits toward his retirement. As the questions below make clear, the issue becomes murkier with different facts, but this simple example reveals the allure of the railway defendants' argument.

The legal justifications for this position are more complex. Without getting into the weeds, the railway employers' basic argument is that the railroad retirement system sits on two inextricably intertwined statutes: The RRTA, administered by the Internal Revenue Service, and the Railroad Retirement Act, or RRA, administered by Railroad Retirement Board. The former funds the latter and reading one in isolation from the other will result in error. Because of the closeness of the statutes, courts should have no problem reading the RRA to help define the RRTA. In particular, when asked if payment for time lost qualifies as "compensation" under RRTA, the railway employers point to the RRA definition, which expressly includes time lost.[15] The regulations for the RRTA, the railway employers argue, affirm this reading and, under Chevron, are entitled to deference.

The Split: How the Argument of Reducing Awards for Retirement Taxes Has Fared

This argument has worked on occasion, but most opinions, particularly from the federal courts, go the other way:

Allowing the reduction of award by employee's share of retirement taxes	**Not allowing the reduction**
Sixth Circuit Court of Appeals (*not a personal injury case*) [16]	Eighth Circuit Court of Appeals (Loos, case now pending at Supreme Court)
Supreme Court of Nebraska [17]	USDC E.D. of Missouri [18]
Supreme Court of Iowa [19]	USDC N.D. of Indiana [20]
Alabama Civil Appeals Court [21]	USDC S.D. of Iowa [22]
Superior Court of Pennsylvania [23]	USDC M.D. of Georgia [23]
	Supreme Court of Missouri [25]
	Appellate Court of Illinois

[26]

Questions We Expect and A Prediction

We look forward to the oral argument in this case. We anticipate the justices will ask BNSF, the railway entity involved in Loos, many questions about the timing of the issue and related complications. The regulations at issue were in place long before the railway employers advanced the argument that they should be allowed to withhold a portion of the judgment for the employee's contributions to retirement taxes, which casts doubt on the argument in the first place and also raises retroactivity problems. If railway employers should have been deducting these amounts, what should the IRS do about the large number of judgments across the years that were not reduced? Along the same lines, we expect questions about the lack of enforcement actions from the IRS — presumably the agency would not simply forego monies owed and there is no indication that the IRS ever assessed penalties or back taxes to a railway defendant who did not withhold a portion of a personal injury award.

This history, in light of the long-standing exemption of damages in personal injury award actions, suggests that counsel for BNSF will face a skeptical court. Finally, we expect questions about how the deduction works in light of fairly common state laws that determine that a general verdict is indivisible. This came up in several cases and the railway defendants argue — by way of a separate regulation — that indivisible awards are treated as all lost wages. This is true even if the total award is more than a plaintiff claimed for lost wages and becomes increasingly problematic with large awards or comparatively older plaintiffs.

Ultimately, although BNSF presents strong statutory and Chevron-arguments, we predict the Supreme Court will follow the previous federal courts and rule that railway defendants may not reduce personal injury awards for RRTA tax contributions.

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[1] Burlington N. & Santa Fe Ry. v. Loos , 138 S. Ct. 1988 (2018)

[2] Kyle Orne, It's About Time: Modernizing the Federal Employers' Liability Act of 1908, 47 Ariz. St. L.J. 343, 344-345 (2015) (noting the dangers: "In 1888, over 2,000 railroad workers were killed in service and over 20,000 were injured on the job. A switchman's life expectancy was only seven years in 1893, and the chances of a railroad worker being injured on the job in 1904 were one out of thirty.").

[3] Michael D. Green, The Federal Employers' Liability Act: Sense and Nonsense about Causation, 61 DePaul L. Rev. 503, 508 (2012).

[4] Employers' Liab. Cases, 207 U.S. 463, 489, 141 (1908) ("The Employers' Liability Act is not a regulation of commerce at all[…]The act is simply a bold attempt to regulate one of the ordinary relations of life, that of master and servant, a relation hitherto supposed to be entirely within the control of the State. If Congress can thus take hold of the relation of master and servant, if can with equal power take hold of the relation of guardian and ward and other domestic relations.").

[5] Melissa Sandoval Greenidge, Getting the Train on the Right Track: A Modern Proposal for Changes to the Federal Employers' Liability Act, 41 McGeorge L. Rev. 407, 411 (2010).

[6] For a longer, thoughtful description of the compromises in the law and how FELA is a product of the tensions of the Progressive Era, see Larry Zacharias, Louis D. Brandeis: An Interdisciplinary

Retrospective Justice Brandeis and Railroad Accidents: Fairness, Uniformity and Consistency, 33 Touro L. Rev. 51, 62 (2017).

[7] CSX Transp., Inc. v. McBride, 564 U.S. 685, 688 (2011).

[8] Compare, e.g., Gary Schwartz, Reality in the Economic Analysis of Tort Law: Does Tort Law Really Deter?, 42 UCLA L. Rev. 377, 391-392, n. 65 (1994) (arguing FELA successfully reduced fatality rate of rail workers) with Orne, Modernizing, 47 Ariz. St. L. J. at 343 ("Under the Federal Employers' Liability Act ("FELA"), lawyers win and everyone else loses. Essentially, FELA fails on two accounts: time and money. FELA is the exclusive remedy for claims by railroad employees against employers for injuries suffered on the job; it supersedes all state laws.").

[9] E.g., Greenidge, A Modern Proposal, 41 MCGEORGE L. REV. at 409-410 (arguing that FELA is ill-suited for cumulative-trauma injuries and proposing worker's compensation scheme as an alternative); Michael Beethe, Railroads Suing Injured Employees: Should The Federal Employers' Liability Act Allow Railroads to Recover from Injured Railroad Workers for Property Damages?, 65 UMKC L. Rev. 231, 261-262 (1996) (answering the titular question in the negative).

[10] BNSF Petition for a Writ of Certiorari, 4. https://www.supremecourt.gov/DocketPDF/17/17-1042/28862/20180123105937357_BNSF%20Railway%20Company%20v.%20Loos_Petition.pdf.

[11] This has been true since the inception of the Internal Revenue Code. Lawrence A. Frolik, The Convergence of I.R.C. 104(a)(2), Norfolk & Western Railway Co. v. Liepelt and Structured Tort Settlements: Tax Policy "Derailed," 51 Fordham L. Rev. 565, n.1 (1983).

[12] Id. at 568.

[13] Norfolk & W. Ry. Co. v. Liepelt , 444 U.S. 490, 496-97 (1980).

[14] This is also how the Railroad Retirement Board explains the matter: "Since the intent of an award for pay for time lost is to treat the employee as if he or she had actually performed compensated service during that period of time, the effect upon railroad retirement eligibility and benefits is identical to the effect of regular earnings for which service and compensation credit is received." Loos, Joint Appendix, Appendix E, p. 65a (available here: https://www.supremecourt.gov/DocketPDF/17/17-1042/54953/20180720143652948_281505_Joint%20Appendix.pdf)

[15] BNSF Petition for a Writ of Certiorari, 5; BNSF Brief for Petitioner, 25 https://www.supremecourt.gov/DocketPDF/17/17-1042/54944/20180720142857087_281505_Brief-Addendum.pdf); American Railroads Amicus Curiae, p. 3; 12-13 (https://www.supremecourt.gov/DocketPDF/17/17-1042/55757/20180727144454813_17-1042tsacAssociationOfAmericanRailroads.pdf)

[16] Hance v. Norfolk S. Ry. , 571 F.3d 511, 523 (6th Cir. 2009) ("The Railroad Retirement Tax Act and its accompanying regulations also require an employer to pay Tier I and Tier II taxes on all "compensation" to employees, including payment "for time lost." See 45 U.S.C. § 231(h)(2); 20 C.F.R. § 211.2(a). Thus, Norfolk Southern will be required to report and pay Tier I and Tier II taxes on the back pay award, and Hance will receive retirement credit for the time periods covered by the back pay award, putting him in the position he would have been in had he not been discharged.")

[17] Heckman v. Burlington N. Santa Fe Ry. Co ., 286 Neb. 453, 466 (2013).

[18] Cowden v. Bnsf Ry. Co. , No. 4:08CV01534 ERW, 2014 U.S. Dist. LEXIS 91454, at *31 (RIA) 5125 (E.D. Mo. July 7, 2014) ("In short, Plaintiff's verdict may be partially "compensation" under the RRTA, but it is excluded from "income" in whole under 26 U.S.C. § 104(a)(2), and therefore improperly withheld from Plaintiff. The Court is not persuaded by cases finding taxation is proper. In general, these cases rely on RRA provisions or apply state law not relevant to the instant Motion.")

[19] Phillips v. Chi. Cent. & Pac. R.R. Co. , 853 N.W.2d 636, 652 (Iowa 2014) ("In any event, the railroad is required by law to withhold amounts due for taxes under the RRTA. We do not view compliance with the law in withholding of taxes as an impediment to a satisfaction of judgment. By

law, Phillips is not entitled to payment of these amounts. Phillips having received all that was due, the railroad is entitled to an order of satisfaction from the district court.").

[20] Loy v. Norfolk S. Ry ., No. 3:12-CV-96-TLS, 2016 U.S. Dist. LEXIS 48824, at *14 (N.D. Ind. Apr. 12, 2016) ("Adopting the rationale in Marlin and Cowden, this Court finds Loy's entire jury award is based on his physical injury and is excludable from RRTA withholdings under § 104(a)(2).").

[21] Norfolk S. Ry. Co. v. Williams , No. 2160823, 2018 Ala. Civ. App. LEXIS 101, at *36 (Civ. App. June 15, 2018) (reversing the trial court and holding that since "the general verdict in favor of Williams contained an unspecified amount of damages for lost wages, the entire $360,488 should be treated as compensation subject to the taxes imposed by the RRTA and that the personal-injury exclusion does not exclude the $360,488 from taxation under the RRTA.").

[22] Marlin v. BNSF Ry. Co. , 163 F. Supp. 3d 576, 582 (S.D. Iowa 2016) ("Applying the rationale in Cowden, the Court finds the entire amount of the jury award is excludable from RRTA withholdings under § 104(a)(2) because it is based upon Marlin's physical injury.")

[23] Liberatore v. Monongahela Ry. Co ., 2016 PA Super 79, 140 A.3d 16, 32 (2016) ("we conclude Railroad was statutorily required to deduct RRTA taxes from Liberatore's general FELA verdict, and the trial court erred when it directed Railroad to satisfy the entire verdict. We note Liberatore's remedy, if he is entitled to one, lies with the IRS or in federal court.")

[24] Windom v. Norfolk S. Ry. Co. , No. 5:10-CV-407 (MTT), 2012 U.S. Dist. LEXIS 173477, at *7 (M.D. Ga. Dec. 7, 2012) ("The Defendant appears to acknowledge that the RRB will not hold it responsible for any Tier I and Tier II withholdings after the Plaintiff's termination. (Doc. 89 at 6 n. 9). In short, the Defendant has not proved that it has suffered or will suffer any liability for contributions for which the Plaintiff should have been liable.").

[25] Mickey v. BNSF Ry. Co. , 437 S.W.3d 207, 215-16 (Mo. 2014) ("Moreover, the approach argued by BNSF and adopted by Phillips ignores the fact that the RRTA has its own definition of "compensation" that does not require taxation of personal injury damages. No credible reason is given by the parties to this suit or the Iowa Supreme Court's opinion in Phillips why this Court should incorporate a definition of compensation from the RRA into its interpretation of the RRTA in order to determine whether withholding taxes are due on personal injury awards.")

[26] Munoz v. Norfolk S. Ry. Co. , 2018 IL App (1st) 171009, ¶ 41 (2018) ("the RRTA is unambiguous and does not include damages for lost wages within the definition of "compensation." As a result, IRS and RRB regulations providing to the contrary do not receive deference, as "'the agency[ ] must give effect to the unambiguously expressed intent of Congress.'").