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Refreshingly Boring? High Court Considers Statutory Context

By **Christopher Collier and Michael Arndt** (November 5, 2018, 5:58 PM EST)

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After the contentious and divisive confirmation of Associate Justice Brett Kavanaugh, many U.S. Supreme Court commentators have suggested that a series of statutory interpretation cases without much political valence might do us all some good. On cue, enter BNSF v. Loos,[1] a case scheduled for argument on Election Day that addresses whether a railroad employer's payment to an employee for time lost from work is subject to employment taxes under the Railroad Retirement Tax Act.[2]

If the court wishes to return to relative obscurity — where its work is scrutinized only by a dedicated group of lawyers and professors — then cases like Loos are a good start.[3] Front page news, it won't be. Nevertheless, the decision in the case will affect thousands of Federal Employers' Liability Act[4] cases each year. The case also wrestles with the increasingly familiar issue of "discovered" original meaning where a textual argument gains traction after years of contrary practice.[5]

We anticipate the justices will spar with counsel over the "plain" text of the statute and how such meaning fits with neighboring statutory provisions. The level of generality, or the frame of the game, will likely prove dispositive. To that end, we preview Tuesday's argument by examining the varying levels of specificity in the text and statutory context. For the sake of the article, we ignore the decades of practice — which strongly favors Loos — and the regulations/Chevron question — which strongly favor BNSF.

Text

The case asks whether time lost from work qualifies as taxable compensation under the Railroad Retirement Tax Act. Loos, like most of the cases addressing the issue in the last 10 years, involves a personal injury award that includes lost wages. If the personal injury award for lost wages is "compensation" under the RRTA, then the employer may rightly withhold a portion of the verdict to cover the employee's contribution for retirement taxes. Our **earlier article** covered more of the background and history of this litigation.

Under the RRTA, compensation is "any form of money remuneration paid to an individual for services rendered as an employee to one or more employers."[6] The Eighth Circuit found against BNSF in this case because lost wages in a personal injury case were not for services rendered:

> "Damages for lost wages are, by definition, remuneration for a period of time during which the employee did not actually render any services."

Statutory Context

Both sides have arguments as to why the court should move beyond the specific provision at issue and consider the broader statutory context. Specifically, there are three statutes that generally come up when courts have considered this issue: (1) The Internal Revenue Code's definition of income tax, (2) Railroad Retirement Act and (3) Federal Insurance Contributions Act.

Income Tax

At the trial court — the federal district court — BNSF's motion for set-off was denied because of the code section that exempts personal injury awards from income taxes. Income taxes are based on one's "gross income," which is defined broadly as "all income from whatever source derived."[7] This capacious definition has been interpreted as Congress's attempt to use the full measure of its taxing power. The definition contains certain exceptions, including damages on account of personal injuries.[8] The district court's reasoning was "compensation" under the RRTA is surely narrower than "gross income" under the income tax provision, so compensation could not include items that were not considered gross income. Damages for personal injury, including the lost wages, could not be "compensation" because they are not even considered gross income. As both statutes are within Title 26 — the Internal Revenue Code — the district court appears to impose uniformity across related statutes.

BNSF, in its brief to the Supreme Court, makes an interesting counterargument: The exceptions to the broad term — gross income — need not apply to the narrower term — compensation. The success of this argument seems to turn on similarity. If the concepts are too dissimilar, then it is easier to cabin a defined word to a particular code section. As an example, consider two statutes: (1) All persons in Arizona must register for the draft. Persons shall not include veterans who have been honorably discharged. (2) All citizens of Arizona may register to vote. While "citizens" is a certainly a narrower subset of the category of "persons," no one would read the two provisions together to forbid honorably discharged veterans from registering to vote. The limitation of "persons" applies only to the draft requirement and does not apply to every subset of "persons" in different code sections.

As a closer call, which is more analogous to this case, consider this second set of paired statutes. A state passes a law that says, "So long as a charity spends more than 10 percent of the previous year's gross receipts, no state taxes may be charged. Gross receipts shall include any income from whatever source [and similar capacious language]. Gross receipts shall not include lottery winnings from gifted tickets." The second code section states, "municipalities may tax in-kind transfers that appreciate more than 100 percent of the original fair market value since the time of the transfer."

As with the first example, the provisions do not conflict: Municipalities may tax a charity's lottery winnings because (a) it is not a state tax and (b) it is authorized by state law. For this example, however, you see the intuitive appeal of applying the broad definition to the subset: If lottery winnings are not gross receipts, then surely, they should not be in-kind transfers, particularly when the state defined gross receipts so broadly.

Ultimately, however, given the special retirement system for railway workers, the court will likely not resolve the case by comparison to the income tax provisions.

Railroad Retirement Act

BNSF insists that the RRTA must be considered in light of the Railroad Retirement Act because the former funds the latter or, to borrow Judge Richard Posner's phrase, the two statutes are two sides of a coin.[9] When considered together, the court will read RRTA's definition to be consistent with the RRA's definition of the same term.

In the RRA, unlike the RRTA, compensation specifically includes time lost and, even more specifically, time lost on account of personal injury.[10] In short, the funding and implementing statutes aim toward a single goal and will better achieve that goal when read together. While there is intuitive appeal to this argument, it results in a peculiar textual argument because the RRTA definition of compensation previously included language about time lost. This language was deleted from the statute in 1975. So, as a textual argument, it is an uncomfortable move to say that the court should find the deletion — of the language BNSF is relying on in a different code section — had no effect on the statute's meaning.

This strain is lessened by regulations from both the IRS and Railroad Retirement Board that support reading the two statutes identically. This is how the Iowa Supreme Court ruled for a railway employer despite finding that "[i]t is beyond dispute the plain language of the RRTA once provided for

payments for time lost on account of personal injury, but no longer does."[11]

Federal Insurance Contributions Act

The RRTA and the Federal Insurance Contributions Act were passed at the same time, and IRS regulations dictate that RRTA's "compensation" should be interpreted as FICA's "wages."[12] For this reason, cases interpreting FICA are used to help discern the RRTA's meaning. When considering FICA, the Supreme Court held that the statute did not apply to services actually performed but also "the entire employee-employer relationship for which compensation is paid," which includes back pay and severance pay.[13] When faced with this argument, the Eighth Circuit Court of Appeals distinguished based on (circuit) precedent that distinguished the two statutes based on a different term: FICA taxed "employment" while RRTA only taxed for "services."[14] The Supreme Court is not bound by such precedent, of course, and will have to address whether this distinction holds.

At bottom, the court can justify either result by reference to the "plain text" or statutory context. The case is more complicated than it appears at first blush, and we look forward to the court wrestling with the technical issue that has significant ramifications for FELA negotiations and trials.

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[1] BNSF Railway Co. v. Michael D. Loos , case number 17-1042

[2] Railroad Retirement Tax Act

[3] This is not to say the case is free from political concerns. Daniel Hemel of SCOTUS blog, for example, suggested that BNSF might feel confident about the case because it is "a business litigant before a business-friendly court." Daniel Hemel, Argument preview: Please tax me more?, SCOTUS blog (Oct. 30, 2018, 10:02 AM), http://www.scotusblog.com/2018/10/argument-preview-please-tax-me-more/. Similarly, listeners to the oral argument might recall that counsel of record, Lisa Blatt, the self-described "liberal, feminist lawyer," publicly supported then-Judge Kavanaugh at the beginning of his confirmation hearings. Other commentators are better-positioned to address such matters, and the balance of the article will address the legal issues.

[4] Federal Employer's Liability Act

[5] These challenges appeared — at least in appellate decisions — beginning about 10 years ago despite the statutes being on the book for eight times as long. Jeffrey R. White, The Taxman Cometh..to Your FELA Judgment, Trial, April 1, 2014.

[6] 26 U.S.C.S. § 3231 (e)

[7] 26 U.S.C.S. § 61(a)

[8] 26 U.S.C.S. § 104 (a)(2)

[9] Standard Office Bldg. Corp. v. United States , 819 F.2d 1371, 1373 (7th Cir. 1987)

[10] 45 U.S.C.S. § 231 (h)(1) and (2)

[11] Phillips v. Chi. Cent. & Pac. R.R. Co. , 853 N.W.2d 636, 647 (Iowa 2014)

[12] C.F.R. § 31.3231(e)-1(a)(1)

[13] Social Sec. Bd. v. Nierotko , 327 U.S. 358, 365-66 (1946) (back pay); United States v.

Quality Stores, Inc. , 134 S. Ct. 1395, 1400, 188 L. Ed. 2d 413 (2014) (severance pay).

[14] Loos v. BNSF Ry. , 865 F.3d 1106, 1117 (8th Cir. 2017)