

A New Class of Hybrid-Tort Actions Based on Recent FELA Decisions?

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Abstract: *Two recent decisions (Heckman 2013 and Phillips 2014) affecting personal injuries to railroad workers under the Federal Employers Liability Act (FELA) have suggested that Railroad Retirement Board payroll taxes should be withheld by railroad employers from personal injury awards paid to railroad workers who were injured on the job. This requirement has thus far been limited to suits against railroad employers for injuries at work by railroad employees and has been supported by railroad employers and the U.S. Department of Justice. Four other recent decisions (Windom 2012, Mickey 2013, Mickey 2014, and Cowden 2014) have, for various reasons, held that payroll taxes should not be withheld in spite of arguments to the contrary from railroad employers and the Department of Justice. This short paper provides descriptions for the six recent decisions and argues that the implications of an appellate ruling in favor of payroll tax withholding by railroad employers could create a new class of “hybrid-tort” personal injury actions that would extend to all employers, and not just railroad employers. If so, all forensic economic experts could find themselves having to change how payroll taxes are treated in all cases involving workers suing employers for lost earnings resulting from on-the-job injuries.*

I. Introduction and Background

The Federal Employers Liability Act (FELA) is a federal law that was enacted in 1908 and has been modified a number of times since enactment. The FELA was designed to give railroad workers or their families (in cases of wrongful death) the ability to recover damages resulting from work injuries. Between 1908 and 1980 there were questions about whether federal income taxes and state income taxes should be subtracted when calculating lost earnings for purposes of determining a worker’s damages when suing railroad employers. In

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Norfolk & Western Railway v. Liepelt (1980), the United States Supreme Court held that damage awards for lost earnings should be reduced for “income” taxes that a worker would have had to pay on earnings that were lost because of an injury. In 1983 that decision was strongly reaffirmed in *Jones & Laughlin Steel Corp. v. Pfeifer* (1983). Since 1983 it has been taken for granted that “income” taxes should be subtracted when calculating the lost earnings of a railroad worker resulting from a physical (but not psychological) injury or death under the FELA. The rulings of the United States Supreme Court in *Liepelt* and *Pfeifer* were that an award for a personal injury is not taxable under the federal personal income tax and generally not under state income taxes. Therefore, since there are no “income” taxes to be paid on the award itself, what an injured worker has lost is earnings net of income taxes.

A majority of states have disagreed with the U.S. Supreme Court with respect to the requirement to calculate lost earnings net of “income” taxes in most personal injury actions in those states (Guest and Schap 2014). However, both federal and state courts agree that taxes should be subtracted from lost earnings in FELA cases, which can be tried in federal court or state court. (For other types of personal injuries tried in state courts, income taxes may or may not be subtracted, depending on state rulings.) The *Liepelt* holding of the United States Supreme Court has been applied to all maritime cases as well as FELA cases. It should be noted that *Pfeifer* was a case under the Longshoremen’s and Harbor Workers’ Compensation Act rather than a FELA case. What was not clarified in either *Liepelt* or *Pfeifer* or in any subsequent decision of the United States Supreme Court was whether the term “income taxes” included payroll taxes as well as personal income taxes. The term “payroll tax” refers to a tax on active income of a worker. It does not apply to all of income, but only the portion of income paid to workers for use of their labor “time.” Dividends, interest, royalties, capital gains, pensions, and other income upon which both federal and state personal income taxes may be levied are not subject to payroll taxes. Payroll taxes include Social Security taxes and Medicare taxes paid by workers not in the railroad industry, and Tier I, Tier II, and Medicare taxes paid by railroad workers. (In addition, some cities levy payroll taxes, which will not be considered in this paper.) Between 1980 and the present, a number of lower courts have reached decisions regarding whether or not *Liepelt* and *Pfeifer* apply to payroll taxes as a type of income tax. Many, but not all, of those decisions were reviewed by Taylor and Ireland (1996) and by Ireland (2005).

In contrast with “income” tax rulings, the question of whether railroad employers could withhold payroll taxes from awards to

injured workers did not appear in court decisions prior to the 2012 decision *Windom v. Norfolk Southern*. *Windom* held that the Norfolk Southern could not withhold payroll taxes because it had not been proven that the Norfolk Southern would have to pay those taxes to the Railroad Retirement Board (RRB). Tax withholding in this context means reducing the amount of a jury award by the amount that an employee owes in payroll taxes. In *Windom*, the jury award included \$100,000 for “net lost earnings and benefits.” The Norfolk Southern determined that *Windom* owed \$6,223.23 in combined Tier I, Tier II, and Medicare payroll taxes and withheld that amount from the payment of the award after the verdict. Because *Windom* had been held responsible for 90 percent of the loss due to contributory negligence, the Norfolk Southern was only responsible for \$10,000 of the loss, but withheld \$6,223.23 from the amount it paid to *Windom*. The *Windom* Court rejected this argument and required the Norfolk Southern to pay the withheld \$6,223.23 to *Windom*.

Withholding of payroll taxes by railroad employers was also central to two 2013 decisions in *Heckman v. BNSF* and *Mickey v. BNSF* (Missouri Court of Appeals) as well as three 2014 decisions in *Phillips v. Chicago Central and Pacific*, *Mickey v. BNSF* (Missouri Supreme Court), and *Cowden v. BNSF*. In each of those five cases, railroad employers argued that the tax exemption from personal income taxes under the Internal Revenue Act on personal injury awards that was the basis for *Liepelt* and *Pfeifer* does not apply to payroll taxes, which are authorized by the Railroad Retirement Tax Act (RRTA). Railroad employers also argued (as the Norfolk Southern had argued in *Windom*) that the lack of specific tax exemption under the RRTA for personal injury awards meant that employers must withhold payroll taxes on portions of a personal injury award that were payments for “time lost” and pay employer matching taxes required under the RRTA on payments for “time lost” itself. Since the RRTA is an entirely different taxing authority from the Internal Revenue Act, railroad employers argued that *Liepelt* and *Pfeifer* did not apply to payroll taxes and that those taxes were owed to the RRB under the RRTA. Thus, the reason why those taxes should not be subtracted in calculating lost earnings is that the injured railroad worker *and the defendant railroad* would both have to pay payroll taxes mandated by the RRTA. Railroad employers were successful in that argument in both *Heckman* (2013) and *Phillips* (2014), but failed in *Windom* (2012), *Mickey* (2013), *Mickey* (2014), and *Cowden* (2014).

Like Social Security and Medicare taxes for most workers, Tier I, Tier II, and RRB Medicare taxes involve matching payments by both railroad worker and railroad employer. Tier I taxes exactly match

Social Security taxes at 6.2% up to a maximum (currently about \$118,000 per year) and Medicare taxes are 1.45% on all income earned. Tier II is an additional tax and benefit for railroad workers only and is currently about 3.9% on earnings up to \$87,000 paid by workers matched by 12.3% by railroad employers. What makes the railroad position that payroll taxes must be paid on the “time lost” portion of personal injury awards appear odd is that railroad employers are arguing that they must pay more taxes than they were paying previously on personal injury awards. For example, using the brackets above, and assuming that the portion of an award allocated to “time lost” was \$300,000, the railroad would have to withhold the following taxes from the railroad worker’s award: Tier I, 6.2% of \$117,000 = \$7,254; Tier II, 3.9% of \$87,000 = \$3,393; Medicare, 1.45% of \$300,000 = \$4,350; total, \$14,997. The railroad itself would have to pay the following taxes: Tier I, 6.2% of \$117,000 = \$7,254; Tier II, 12.3% of \$87,700 = \$10,701; Medicare, 1.45% of \$300,000 = \$4,350; total, \$22,305. The amount withheld from the injured worker would come from the injured worker’s award, but the \$22,305 in employer matching taxes would be a tax cost to the railroad above and beyond the \$300,000 awarded to the injured railroad worker. It is reasonable to ask why railroad employers would want to pay these extra employer matching taxes that there is no evidence that a railroad employer ever paid before the *Windom* decision in 2012 and may still have never paid. The alleged fact that no railroad employer has yet paid those taxes was an issue in *Windom* and has been an issue in the other decisions that are the focus of this paper.

At this point, six legal decisions in the past three years have addressed the question of whether payroll taxes should be withheld by railroad employers on “time lost” portions of personal injury awards of railroad workers who were injured while at work. Four of those decisions have held, for different reasons, that railroad employers could not withhold those taxes. Two of the decisions have held that employers are required to withhold those taxes. Based on statements in the decisions, no railroad employer has thus far paid any taxes, as withheld from workers, or in employer matching amounts required under the taxing authority of the RRTA on amounts awarded for “time lost” in personal injury actions filed by railroad workers. The Railroad Retirement Board has issued formal letters indicating that it believes that such payroll taxes are owed in the manner argued for by railroad employers. Judicial notice has been taken in some of the cases of the RRB formal letters. The Department of Justice has supported the position of railroad employers in amicus briefs. At some point in the future, this matter will probably be resolved in such a way that this will cease to be an issue. In the meantime, however, this situation poses

three questions that will be addressed in the rest of this paper. The possible answers to the first of those questions imply that the possible implications of the six decisions that are the focus of this paper could go well beyond the railroad industry. The questions are:

- (1) What might happen if railroads prevail in their argument that the RRTA requires payment of payroll taxes on “time lost” in FELA personal injuries?
- (2) Given that railroads would also have to pay employer shares, which are larger than employee shares under the RRTA, why might the railroads want to impose larger taxes upon themselves?
- (3) What should forensic economists do in light of the uncertainty about this issue?

II. What Might Happen If the Railroads Prevail on Payroll Taxes?

Under federal anti-discrimination laws and violations of family leave laws (henceforth “wrongful termination”), both personal income and payroll taxes must be paid on awards won by railroad workers or any other workers who win awards under those statutes. Under those statutes, workers may win awards for “back pay,” “front pay,” or “loss of future earning capacity.” Back pay is intended to allow a worker to recover pay for “time lost” because of the wrongful act of the employer. Front pay is intended to compensate a worker who is not reinstated for “time lost” until the worker could reasonably be expected to find new employment at comparable earnings. The third category is for “loss of earning capacity,” which might result in reducing the future earnings a worker could be expected to find by the end of the front pay period (Ireland 2012).

Amounts awarded in all three categories are treated as ordinary income for time lost at work because of the violation of law. However, under current tax rules, all income received in such awards is treated as income earned in the year of the award. This applies to both personal income taxes and payroll taxes. Under progressive personal income taxes, this means that amounts owed for personal income taxes increase relative to what those taxes would have been on year-to-year earnings. This has led to arguments that amounts awarded should be “grossed up” for additional taxes caused by lumping multiple years of income into the same tax year. Under payroll taxes with maximums, such as Tier I, Tier II, and Social Security, the rule that taxes are based on amounts in the year earned leads to a reduction in the amount of

taxes owed and a small “gross down” offset to the “gross up” for personal income taxes. This is discussed in detail in Ireland (2012), which includes multiple citations to the relevant literature. In part, the argument raised by railroad employers is that awards for lost earnings based on “time lost” should be the same for FELA personal injuries as for wrongful termination cases with respect to the application of payroll taxes. That distinction is the basis for the “hybrid-tort” language used in the title of this paper.

The distinction regarding “time lost” is of some importance. An award in a FELA action could include portions of the award for lost past and future earnings, for lost past and future job-related fringe benefits, for lost household services due to death or injury, and for life care costs made necessary because of an injury. These are all elements for which a forensic economist might make calculations. In addition, awards could be made for pain and suffering and loss of enjoyment of life, which would not conventionally appear in forensic economic calculations. As the railroads have recently interpreted the RRTA, payroll taxes only apply to the portion of a personal injury award that is for earnings lost because the railroad worker was injured and unable to continue working, both in the past and in the future. To the extent that a personal injury award is clearly “enumerated” as to what portions are for “time lost,” for job-related fringe benefits, for lost household services, for life care costs made necessary by an injury, and for intangible damages such as pain and suffering, loss of enjoyment of life, and so forth, *only* the part of the award for earnings during “time lost” is argued to be subject to payroll taxes. However, IRS rules require that if no enumeration occurs such that an award is a general award, all of the award will be treated as replacement earnings for “time lost” and subject to whatever taxes may apply (Ireland 2010). For large enough awards, the primary effect of this rule would be in the form of increased Medicare payroll taxes. Since Tier II only applies to the first \$87,000 of an award, and Tier I only applies to the first \$117,000, the only payroll tax on an award larger than \$117,000 is the 1.45% Medicare payroll tax. For that reason, this is not a major consideration.

With or without that expansion to damages other than “time lost,” the effect of a holding by the court system that awards for “time lost” are subject to Tier I, Tier II, and RRB Medicare taxes would be the creation of a new hybrid-tort class of damages that has some of the characteristics of wrongful termination and some of the characteristics of personal injury. In an automobile injury, a losing defendant is not responsible to withhold payroll taxes or match payroll taxes on the amount of an award that is for lost earnings. From that standpoint, it is unlikely that the special provision for paying payroll taxes on

personal injury awards being sought by railroad employers would become universal to all personal injury actions. This special “hybrid-tort” class of personal injury damages would only apply to personal injury actions by railroad workers suing railroad employers for “time lost” because of work-related injuries.

But would this payroll tax requirement be confined to railroad employees? The formulas for Tier I retirement pensions and taxes of railroad workers are the same as the formulas for Social Security benefits and taxes, and Medicare benefits and taxes are the same as for workers in other industries. The only difference is that railroad workers are “deemed” to be age 67 under the Social Security retirement benefit formula if they have reached the age of 60 and have 360 months of “railroad retirement credits” (some amount of payroll taxes paid for work done in each of 360 months). Tier II is unique to railroad employment but is not otherwise different in fundamental structure from Social Security and Tier I retirement benefits. When a railroad worker retires, his pension takes the form of a Tier I amount and a Tier II amount, calculated by the different benefit formulas for the two tiers, both of which are financed by payroll taxes on both employers and employees. As it relates to the arguments made by railroad employers in the six decisions covered by this paper, it is understandable that the RRB would like to have this additional source of tax revenue and that the Department of Justice would support this desire on the part of the RRB. The same incentives exist for the Social Security Administration to obtain the parallel source of additional tax revenue to provide for Social Security and Medicare benefits. To this author’s knowledge, no effort has thus far been made to establish such a taxing power under the Social Security and Medicare acts, but it seems possible that such an attempt might be made in the future. One difference may be that other employers have not sought to have themselves held responsible to be taxed in this way, while railroad employers have done so.

If *Heckman* (2013) and *Phillips* (2014) are recognized to set the new standard for payroll taxes on lost earnings in personal injuries under the FELA, it is conceivable that this payroll tax requirement would be extended to all cases, state and federal, in which injured workers sue employers for recovery of damages for work-related injuries. There is no obvious reason why this same requirement would not be extended to other industries. It seems unlikely that the Social Security Administration would see an important difference between collecting such taxes from railroad employers and employees and from all other employers and employees. Thus, this payroll tax requirement could become relevant even in state personal injury action under state law. If extended that far, this would create an economy-wide change in

cases where injured workers sue employers for work-related damages. Thus, the potential implications are significant and go well beyond the narrow confines of FELA litigation. Whether or not that will happen remains to be seen.

III. Why Might Railroads Want to Impose Payroll Taxes upon Themselves?

The current support by railroad employers for withholding payroll taxes and paying additional payroll taxes themselves is a recent development. If one goes back just a few years, railroads were seeking to have courts declare that payroll taxes were relevant income taxes that should be subtracted from lost earnings for purposes of determining the proper award for lost earnings. The BNSF was the railroad defendant in four of the six cases involving payroll taxes described in this paper. The BNSF was formed from a merger of the Burlington Northern and Santa Fe Railroads. In 1993, the Burlington Northern Railroad enjoyed a major victory in *Adams v. Burlington Northern*. That decision played a central role in this author's 1996 paper with Paul Taylor that considered both Social Security/Medicare payroll taxes and RRTA Tier I and Tier II taxes. In *Adams*, the Western Missouri Court of Appeals held that both Tier I and Tier II taxes should be subtracted and that lost retirement benefits had to be calculated on the basis of benefit formulas of the Railroad Retirement System. The plaintiff economic expert in *Adams* had not subtracted payroll taxes and had treated employer Tier I and Tier II taxes as equal to lost fringe benefits. The *Adams* decision was later supported by decisions in *Rachel v. Consolidated Rail Corporation* (1995), *Edwards v. The Atchison, Topeka and Santa Fe Railway Company* (1997), and *White v. Indiana Harbor Belt Railroad Co.* (1998).

For years, this author cited the *Adams*, *Rachel*, *Edwards*, and *White* decisions in defense assignments. In plaintiff assignments, lost pension benefits were not claimed because it was usually the case that the present value of a railroad worker's Tier I and Tier II tax payments would significantly more than offset the loss of the railroad worker's retirement benefits. Plaintiff attorneys could avoid this net reduction in damages to the railroad worker because another set of legal decisions held that payroll taxes did not have to be subtracted if a plaintiff did not claim loss of pension benefits. Decisions with that holding included *Maylie v. National Railroad Passenger Corporation* (1992), *Berryman v. Consolidated Rail Corporation* (1995), *Troy v. National Railroad Passenger Corporation* (1995), *Sparklin v. Consolidated Rail Corporation* (1999), and *Ramsey v. BNSF* (2004). The last of those

cases was treated as a loss by the BNSF because it would have reduced the award if Tier I and Tier II taxes had been subtracted from Ramsey's lost earnings. The present value of the reduction in pension benefits was smaller than the present value of payroll taxes so that calculating lost pension and reducing lost earnings for payroll taxes resulted in a smaller award.

These two sets of legal decisions did not contradict each other. The first set of decisions, starting with *Adams*, held that the value of lost pension benefits must be calculated based on the relevant RRB formulas and could not be estimated from amounts of employer taxes. *Adams* also held that payroll taxes must be subtracted from lost earnings as an offset to lost retirement benefits. The second set of decisions, starting with *Maylie*, held that payroll taxes did not have to be subtracted if plaintiffs did not claim lost retirement benefits as damages. This author had not seen the new arguments by railroads prior to 2013, even though that argument had clearly been advanced (and failed) in the *Windom* decisions in 2012. This seemed, at first, to be completely puzzling. Why would railroads, which had previously argued in legal actions that payroll taxes should be subtracted from lost earnings, start arguing, apparently starting about three or four years ago, that payroll taxes should be withheld and matched (overmatched for Tier II taxes) with taxes paid by the railroads? In even more basic terms, why would railroads want to put themselves into a position of paying additional taxes on portions of personal injury awards that were based on "time lost?"

There is apparently no simple answer to that question. From the six decisions described in this paper, it appears that railroads have thus far not made any tax payments to the RRB. In *Heckman* (2013) and *Phillips* (2014), railroads have been allowed to withhold payroll taxes from a worker's award, but no tax payments have apparently been made. However, it is not reasonable to suppose that railroads believe that they can withhold taxes indefinitely from awards to injured railroad workers without paying those withheld amounts to the RRB. When such payments are made, railroads will have to pay matching (overmatching with Tier II) payroll tax payments of their own that will be in addition to the amounts they pay in verdicts. Thus, the advantage to the railroads must be sufficient to justify the potential increase in costs to the railroads.

What attorneys representing railroads have told this author is that railroads are concerned that the RRB will attempt to collect payroll taxes for "time lost" in awards won by injured railroad workers. If those taxes have not been withheld, railroads may be subject to additional penalties for failure to withhold payroll taxes as they assume is required under the RRTA as well as having to pay the

worker taxes themselves if the injured railroad workers cannot be compelled to do so. This aspect, however, still does not explain why the railroads reached this decision only a few years ago after having had the entirely different and opposing opinion that payroll taxes should be subtracted from lost earnings for many years before that. There have been no fundamental changes that this author is aware of in the RRTA itself that would have prompted the change of position. It is conceivable that a number of railroad attorneys just happened to read the RRTA again a few years ago and suddenly realized that they had been interpreting the RRTA incorrectly for a number of years and found a new understanding. This explanation, however, may strike some as being far too convenient.

Interpreting motivations for positions taken is a difficult task and economists are not necessarily the best analysts for such purposes. Thus, this author will not offer any opinions of his own about the motivation of the railroads. Such opinions would be guesswork at best and might not be the same from one railroad to the next. The opinions of plaintiff attorneys that have been conveyed to this author, however, can be reported more objectively and with less guesswork. The fears of plaintiff attorneys in this regard are important. It will be useful to begin with those fears and work back to plaintiff opinions on the new motivations of railroads regarding payroll taxes. To understand those fears, assume that it is clearly held in a sufficiently high appellate court that the RRTA requires payment of payroll taxes in the manner being argued for by the railroads. After such a decision, railroads withhold payroll taxes from lost earnings amounts awarded to injured railroad workers. Railroads match those amounts (overmatch for Tier II) and send the withheld and tax matching amounts to the RRB. Having received these amounts, the RRB credits the injured railroad workers for the “time lost” represented by lost earnings. In one sense, this makes the injured railroad workers “whole” for time amounts for which the award for “time lost” was made. Railroad workers get credit for having worked those relevant time periods and thus enjoy increases in their future retirement pensions.

This, however, may be only part of the story. Another part of the story is that injured railroad workers are usually able to file for and begin to receive significant disability pension benefits shortly after their injuries. The disability benefits that long term railroad workers receive are very generous. A railroad worker who was injured at age 52 and had at least 240 months of RRB work credits might be receiving more than \$30,000 per year in disability benefits, with COLA-light pension increases (based upon but lower than cost of living increases) for all ages after qualifying. Those benefits would include both Tier I and Tier II components. The benefits will continue for the rest of a railroad

worker's life as long as the railroad worker does not earn more than \$800 in any one month (RRB website). The standard for establishing disability after 240 months is not that a worker is completely unemployable, but that the worker is no longer able to perform the job in which he was injured. The pension benefits are often significantly less than earnings as a railroad worker but still generous enough for an injured worker to live reasonably well.

Those disability benefits are treated as a collateral source under *Eichel v. New York Central Railroad Company* (1963). That means that the disability benefits cannot be mentioned at trial and cannot be treated as an offset to earnings lost by the injured railroad worker. In this context, assume that the railroad worker has won \$400,000 for past and future "lost time" from railroad work, covering the period from age 52 to age 60 at an assumed earnings rate approximating \$80,000 per year. The railroad calculates and withholds the railroad worker's payroll taxes for this period and pays those taxes along with required employer matching for those amounts. The RRB dutifully reports the taxes paid and gives the injured railroad worker RRB credits for the eight years from age 52 to 60. At this point, the RRB informs the injured railroad worker that since he has received payments for those past and future periods of "time lost," he must now repay to the RRB all of the amounts received in previous disability pensions from the date of the injury to the date of the award. In addition, the RRB cuts off further disability benefits because the worker has been paid by the award for "time lost" to age 60. If the disability benefit is assumed to be \$30,000 per year, the total amount of disability benefits that the railroad worker will have lost can be estimated at \$240,000 ($\$30,000 \times 8$ years). On this basis, the worker has won \$400,000 in lost earnings but will lose \$240,000 in reimbursed disability benefits to the date of trial, plus lost disability benefits to age 60. The amount lost by the railroad worker if this happened would be much greater than the cost of employee payroll taxes that have also been withheld and paid to the RRB from the \$400,000.

There is a relatively small offset to this loss in the fact that at age 60 the railroad worker, under the formulas of Tier I and Tier II, would begin to receive a higher pension than the \$30,000 he began receiving shortly after his injury. Based on the fact that the worker has acquired eight years of additional RRB work credits based on payment of payroll taxes for this period, both his Tier I and Tier II pensions would be larger at age 60 than they would have been without those payments. The actual amount would probably be smaller than this, but assume that the retirement benefit at age 60 would be \$10,000 per year greater than the continued benefit based on age 52 disability. Without accounting for the effect of discounting, it would take 27 years for the

worker to break even. It would take 24 years for the worker to make up for the loss of \$240,000 in disability benefits and another 3 years to make up for the payment of \$30,000 in employee-paid Tier I, Tier II, and Medicare payroll taxes. When discounting is taken into account, the 27 years it would take to break even is extended even further. This is definitely not advantageous from the standpoint of the injured railroad worker. The biggest part of what has been lost is a collateral source benefit that cannot even be mentioned by the defense at trial.

It is at this point that plaintiff attorneys fear that railroads have gained a very important benefit. The potential advantage comes in the context of settlement. All cases can be settled before *or after* a verdict is reached. Before a trial, a railroad and a railroad worker can reach a settlement that precludes the need for a trial. Even after a verdict, a case can be settled to avoid an appeal to a higher court. The railroad and the injured railroad worker can agree as part of a settlement that none of the award is for “time lost.” Even if that is not actually the case, what is said in the settlement agreement determines that nature of the tax liability after the verdict. The amount awarded can be characterized as being for intangible damage such as pain and suffering, loss of enjoyment of life, loss of household services, loss of fringe benefits that would not otherwise be taxable, and so forth. If the terms of the settlement agreement indicate that none of the settlement is for “time lost,” no payroll taxes are owed, saving both the worker and the railroad the amounts that would otherwise have to be paid in payroll taxes. The worker gets no credits that would increase his future retirement benefits, but he also does not lose his disability benefits and does not have to repay any amount of money to the RRB. In the process of settlement on this basis, the railroad enjoys a modest reduction in the matching payroll taxes it must pay.

From this description, it appears that railroads gain a very large advantage in any settlement bargaining process by subjecting themselves to having to pay matching payroll taxes. If a case goes to verdict, the verdict can still be rendered irrelevant by a subsequent settlement between the parties. If the railroad worker wants to settle, the railroad can agree to a settlement that describes the amount awarded as being for anything but “time lost” and save the railroad worker from losing his disability pension benefits as well as employee paid payroll taxes. However, since the benefits are so much greater for a worker to settle than for the railroad to settle, what the worker must give up in order to arrive at settlement is significant. In the poker game of the settlement process, the railroad holds the best hand. This may well be the reason why railroads have been trying to subject themselves to paying taxes they have not had to pay in the past.

IV. How Should Forensic Economists Handle Payroll Taxes in FELA Cases?

The last question is how forensic economists should handle the issue of payroll taxes in FELA assignments. As with all questions regarding legal issues, a forensic economist should follow directions about the law from retaining attorneys. In many situations, however, attorneys might not know what they should want their experts to assume with respect to matters of this sort. Economic experts are not legal experts, but they are often called upon by retaining attorneys to offer their own non-expert yet experienced opinions regarding questions of this sort. If asked by a retaining attorney, this expert will recommend that damages be calculated in FELA cases with and without subtraction for payroll taxes. To other forensic economists, this author recommends having a thorough understanding of this issue to be able to perform quality work on FELA cases. Additionally, it could become relevant to all personal injury cases in which workers sue employers for losses resulting from job-related injuries.

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Windom v. Norfolk Southern Railway Company, 2012 U.S. Dist. LEXIS 173477.

Appendix: Decisions Regarding Payroll Taxes When Employees Sue Employers for Personal Physical Injuries

Cowden v. BNSF, 2014 U.S. Dist. LEXIS 91454 (E.D. MO 2014). Judge Richard Webber held in this FELA case that there is no requirement under federal law for a railroad to pay railroad retirement board taxes on amounts awarded to injured railroad workers or to withhold payroll taxes from those amounts. Judge Webber closely examined requirements under the Railroad Retirement Act (RRA) and the Railroad Retirement Tax Act (RRTA) and arrived at his opinion that the RRTA does not require Tier I or Tier II or Medicare payroll taxes to be paid by a railroad employer or withheld from the earnings of an injured railroad worker. In doing so, he rejected decisions reached by the Nebraska Supreme Court in *Heckman v. BNSF* (2013), the Iowa Supreme Court in *Phillips v. Chi. Cent. & Pac. Rr. Co.* (2014), and another federal district court decision in *Cheetham v. CSX Transportation*, but consistent with a decision of the Missouri Supreme Court in *Mickey v. BNSF*, issued a day after this decision.

Mickey v. BNSF, 2013 WL 2489832; 2013 Mo. App. LEXIS 691 (Mo. App. 2013). At the trial court level, a jury awarded \$345,000 to Mickey for damages in an FELA personal injury matter. In paying the judgement, BNSF withheld \$12,820.80 for Tier I, Tier II, and Medicare payroll taxes that the BNSF claimed were owed on \$345,000 treated as earnings in the year awarded. Mickey refused to accept payment of \$345,000 minus \$12,820.80 on the grounds that the award was insufficient based on the jury's verdict. At issue was whether the award was for "time lost" working. The trial court ruled in favor of Mickey and was affirmed by the Missouri Court of Appeals, saying:

Here, although Plaintiff sought damages for lost wages along with medical expenses and other damages, BNSF did nothing to ensure prior to the entry of the judgment that the judgment entered specify that a portion of the damages awarded to Plaintiff constituted "pay for time lost."

The Court of Appeals went on to say that a verdict, once reached, cannot be modified by the court and thus required BNSF to pay Mickey the full amount of \$345,000.

Heckman v. BNSF, 286 Neb. 453 (Neb. 2013). At the trial court level, Heckman was awarded \$145,000 for on-the-job injuries suffered while working for the BNSF. The BNSF withheld \$6,202.70 in Tier I, Tier II, and Medicare payroll taxes that would have been owed on the verdict if treated as an award for lost earnings (assuming that the award is taxable under IRS rules). The decision provided a detailed explanation for how \$6,202.70 had been determined as the sum of

\$2,684.16 for Tier I taxes, \$1,416.04 for Tier II taxes, and \$2,102.50 for Medicare taxes. Heckman had earned \$42,891.32 working for the BNSF as of the date of the judgment. That amount had been subtracted from \$145,000 in determining the amounts of the award that were subject to Tier I and Tier II taxes. The trial court judge ordered BNSF to specify that none of the award was for lost earnings. The Nebraska Supreme Court reversed, holding that Nebraska law is based on a presumption that a general award (as compared with awards for specific categories) means that the plaintiff has prevailed on all claims. Since one of the claims was for lost earnings, at least part of the award was for lost earnings. Under IRS rules, if a general award is partly for lost earnings, the entire award is treated as if the award was for lost earnings (Ireland, 2010). The Nebraska Supreme Court reversed the order of the trial court that BNSF report the award as not for time lost and supported the decision of the BNSF to withhold \$6,202.70 for employee payroll taxes on \$145,000 in lost earnings. In doing so, the Nebraska Supreme Court distinguished its decision from the decision in *Mickey v. BNSF* (2013) on the basis of differences in the presumed treatment of general versus special damages between Missouri and Nebraska. The Nebraska Supreme Court went on to point out that the parties could have reached a settlement that specified that none of the award was for “lost time” and therefore not taxable for Tier I, Tier II, and Medicare taxes, but had been unable to do so.

Mickey v. BNSF, 2014 Mo. LEXIS 189 (MO 2014). The Missouri Supreme Court affirmed the Missouri Court of Appeals in holding that the BNSF had to pay Mickey the full amount of \$345,000 awarded by the jury, without reduction for payroll taxes. The BNSF had argued that it was required by law to withhold \$12,820.80 from the lost earnings awarded to Mickey to pay Mickey’s portion of payroll taxes to the Railroad Retirement Board. The BNSF had paid that amount *sua sponte*, believing it was obligated to do so under RRB tax requirements. The court pointed out that BNSF could cite no basis in any prior court decision that it was required to make such payments to the RRB.

Phillips v. Chicago Central & Pacific Railroad, 2014 Iowa Sup. LEXIS 77 (IA 2014). The Iowa Supreme Court held that the Railroad Retirement Tax Act (RRTA) required that a railroad employer pay the employer portion of Tier I, Tier II, and Medicare payroll taxes on amounts awarded for personal injury to a railroad worker under the FELA. The court interpreted the RRTA to require that the entire amount of an award be treated as lost earnings subject to RRTA taxes if the loss amounts were not enumerated, as in the jury decision in this case. Portions of the award that were based on fringe benefits or lost household services and would not otherwise have been subject to

RRTA taxes were subject to Tier I, Tier II, and Medicare payroll taxes if the amounts had been “enumerated” in the jury’s verdict rather than as part of a general award for all losses, as was the case.

Windom v. Norfolk Southern Railway Company, 2012 U.S. Dist. LEXIS 173477 (M.D. GA). In this FELA personal injury case, the jury awarded \$200,000 in damages, including \$100,000 in “net lost wages and benefits reduced to present value,” but held that the plaintiff’s contributory negligence resulted in a net award of \$20,000 to be paid by the Norfolk Southern to the plaintiff. The Norfolk Southern withheld \$6,233.23 as payroll taxes allegedly owed by the plaintiff on the \$100,000 portion of the award that was for lost earnings, only \$10,000 of which represented a recovery by the plaintiff. Thus, in effect, the Norfolk Southern was reducing the \$10,000 paid by the Norfolk Southern for the plaintiff’s “time lost” by 62.33% for payroll taxes. The Norfolk Southern asked the court to rule that the judgment had been satisfied by \$13,766.77 paid to the plaintiff as a result of the award, with the \$6,233.23 being withheld Tier I, Tier II, and Medicare payroll taxes the Norfolk Southern was allegedly going to have to pay to the Railroad Retirement Board. The court held that the Norfolk Southern must pay the \$6,233.23 to the plaintiff on the grounds that the Norfolk Southern had not provided that the Norfolk Southern would have to pay the amounts withheld to the Railroad Retirement Board.