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FELA Damages Calculations: Issues Relating to Benefits, Payroll Taxes, and Collateral Sources

Thomas R. Ireland*

Introduction

An economic expert's projection of economic damages in a FELA (Federal Employers Liability Action) case follows the same general framework that would apply in any other type of personal injury or wrongful death calculation. A base income must be established from which projections of future income will be made. Growth rates for future income must be established. If the worker retains residual employability in another occupation, a basis for residual earnings must be established, typically with the assistance of a vocational expert. The value of lost job-related fringe benefits with both pre-injury and post-injury employments must be compared and the differentials valued. If future life care needs are claimed, experts will need to establish a foundation for such expenditures. If lost services are to be claimed, a foundation must be provided for the amount and growth rate in the value of those services. One or more discount rates must be established to reduce future values to present values. There are various methods that economists might use to accomplish these tasks, most of which are discussed in *Jones & Laughlin Steel Co. v Pfeifer* (1983), and in basic forensic economics texts like Martin [2003] and Ireland, Horner and Rodgers [2002].

Damages in FELA cases, however, have important special features, not least among them is the fact that there are important unresolved issues in law governing how retirement benefits, Railroad Retirement Taxes and Medicare tax paid by both employers and employees must be handled and how collateral source rules apply.

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An Elephant in the Room

Many FELA cases involve damages calculations that are a mere fiction of reality. If a railroad worker has 240 months of credits or 120 months after age 60 with the Railroad Retirement System (which can include credits for military service), that worker is entitled to an occupational disability retirement annuity. This is one of two disability systems available through the Railroad Retirement System. The first system is called "Freeze" or "Total and Permanent" disability and has disability provisions closely similar to Social Security. To qualify for this type of disability, a worker must prove that he or she cannot earn more than $800 per month in any type of employment. With the second type, called an "occupational disability retirement annuity," however, the injured worker only needs to prove that the worker cannot continue in the occupation he or she was in before the injury. The worker is not required to take residual employment if he or she qualifies for this type of disability benefit. However, if the worker qualifies for an occupational disability retirement annuity, he or she cannot earn more than $400 per month without terminating benefits. The annuity is quite generous and occupationally disabled workers frequently receive benefits between in the range of $30,000 per year in annuity payments. (The average rate for both types of annuities combined in 2003 was $25,116, but the second type of annuity would be expected to have significantly higher benefits than the first type.)

One of the issues in contention between defendant railroads and injured plaintiff workers is whether the existence of this substantial retirement annuity is covered by collateral source rules. The United States Supreme Court ruled in *Eichel v. New York Central Railroad Co.* (1963) that such benefits were a collateral source. Yet the 2nd Circuit interpreted this ruling not to apply if the intent of introducing these benefits was to demonstrate that the worker was "malingering" in *McGrath v. Consolidated Rail Corporation* (1998). "Malingering" is a term that would imply to an economist that a worker was avoiding work activity because of laziness or an intent to inappropriately take advantage of someone else. However, neither laziness nor any inappropriate intent is required to explain the position an injured railroad worker faces if he or she is eligible for an occupational disability pension.

This author has been involved in a number of cases, both on the side of the plaintiff and on the side of the defendant, in involving circumstances similar to the following: both the railroad and the injured plaintiff have hired vocational experts to project the injured plaintiff's earning capacity after the worker's injury. The plaintiff's vocational expert has opined that the best the worker could hope to earn in his injured condition is $13,000 per year. The

defendant's vocational expert has opined that the worker is capable of earning $19,000 per year. The plaintiff's deposition clearly identifies the fact that the plaintiff is receiving $29,000 per year in occupational disability benefits and will continue to receive those benefits, increasing at less than the cost of living, for as long as he or she lives, as long as the worker does not take employment earning more than $400 in any one month. If the worker earns more than $400, the $29,000 in benefits will be terminated as long as the worker continues to earn more than that amount.

This worker would be financially foolish to take employment at either $13,000 or $19,000 under these circumstances, particularly given that the $29,000 will not be reduced by payroll taxes of at least 7.65 percent of those earnings. Typically, the $13,000 and $19,000 employments would be outside the railroad industry and the worker would be liable to employee paid payroll taxes of 6.2 percent for Social Security and 1.45 percent for Medicare. Thus, in equivalent comparison with the $29,000 RRB retirement disability annuity, the $13,000 employment would pay $12,006 and the $19,000 employment would pay $17,647. If "malingering" includes doing what is financially best for oneself and one's family, it may be argued that the term "malingering" applies, but the reality is that this worker is trapped in a world of reasonable financial well-being but unable to take other employment without a significant drop in disposable income.

In such circumstances, a trial will be held if the two sides cannot agree to a settlement amount. Vocational experts and economic experts may testify on each side, carefully ignoring the elephant in the room, the existence of the $29,000 disability retirement annuity benefit because of collateral source requirements. The jury makes its decision based on which of the experts it finds most believable. Some lump sum award is provided for the injured plaintiff, who is nevertheless left in a position where he or she must avoid working more than $400 in any one month in order to maintain the relative financial prosperity into which he or she was forced by the injury. Many injured workers in these circumstances may become experts in how to produce economic value without showing money earnings of more than $400 per month, or $4800 per year.

Fringe Benefits in FELA

In addition to earnings loss, an injured railroad worker has lost two very valuable job related fringe benefits. Major railroads provide excellent medical/dental/vision insurance coverages to their workers by union contract. By the reckoning of the railroads themselves, the costs per worker per year for this insurance package was slightly over $12,000 in 2003. This cost to the

major railroads has been increasing at about 8 percent per year for the past six years. Economic experts must be careful to take into account the fact that this coverage is so attractive that an injured railroad worker can sometimes maintain it, in whole or in part, for up to three years even though the worker is no longer working for the railroad. A worker is entitled to full coverage for the remainder of the calendar year in which he is injured. If the worker has remaining vacation, this can often be postponed until after the first of the next year, which means the worker will be covered for the remainder of that year plus one more calendar year at full coverage. The worker also receives coverage for a second full calendar year, but losses coverage for his dependants in that second year. For example, if a worker was injured in June of 2000 and had vacation left to take, the worker might take that remaining vacation in January 2001. This would mean that the workers medical insurance would continue at no cost to the worker and his dependents through the remainder of 2000, all of 2001, and all of 2002. The worker would still have personal coverage in calendar 2003. If this insurance continuation is ignored by an economist, it will prove embarrassing to the economist. Otherwise, however, medical benefits are not part of the complications with the story above.

The second major benefit railroad workers enjoy is a retirement system that allows any worker with 360 months (30 years) of RRB credits to retire at age 60 with full retirement benefits. The RRB retirement benefit program is a government program that has two "Tiers" (a small supplemental annuity program is sometimes referred to as "Tier III" but is small and not an issue of controversy). Tier I is almost identical to Social Security, with both employers and employees paying 6.2 percent of their earnings up to a specified maximum (currently $87,000 in 2004) in taxes to the Railroad Retirement Board. This is the same maximum level of income and rate that applies with Social Security in non-railroad employments. There are important differences between Tier I and Social Security in the "deeming provisions" that allow a worker to be "deemed" to be older than they actually are under the Social Security formula, but the benefit formula is otherwise the same as with Social Security.

Tier II has a significantly lower maximum income on which Tier II taxes must be paid (currently $65,100 in 2004) and the benefits a worker will receive are much more closely tied to amounts taxes paid on behalf of the worker, both by the worker and by the worker's railroad employer. For many years, the Tier II rate paid by railroad employers was 16.1 percent and the rate paid by the worker was 4.9 percent, a ratio of more than 3 to 1. The employer tax rate was reduced to 14.2 percent by *The Railroad Retirement and Survivors' Improvement Act of 2001*, which also allowed workers with 30 years of RRB credits to retire with full benefits at age 60 instead of age 62.

In addition, both railroads and railroad workers pay the same 1.45 percent in Medicare payroll taxes that workers in other industries pay. Medicare for railroad workers works in the same way as Medicare for other workers. As long as eligibility has been established, the amount of taxes paid by both employers and employees to the Medicare system has no impact on the amount of medical services to be received after age 65. That makes the Medicare tax a "pure tax" in the sense that no benefit of the worker will be affected by the amounts of taxes paid into the system in the worker's name. While that argument has not been raised in the decisions provided with this paper, it could be claimed that the 1.45 percent Medicare payroll tax should be subtracted from lost earnings even if Tier I and Tier II taxes should not be subtracted.

Legal Controversies About RRB Benefits and Taxes

The biggest legal controversy about RRB benefits and taxes lies in whether the 1998 *McGrath* decision of the 2nd Circuit is good law. Under *McGrath* and presumably in all cases in the 2nd Circuit, defendant railroads can introduce the existence of a disability retirement annuity to show that a worker has no incentive to take employment at the rates discussed earlier. Plaintiff attorneys read *McGrath* in direct contradiction to the ruling of the Supreme Court in *Eichel*. Defendants cite *McGrath* to at least show that a defendant railroad should be entitled to subtract railroad retirement taxes from the lost earnings of an injured worker. It is important to recognize, however, that *McGrath* did not rule that the amount being received by a worker in occupational disability retirement annuity could be treated as an offset to lost earnings. The only decision to address that issue has been *Green v. Denver & Rio Grande Western Railroad Company* (1995). In that decision, the 10th Circuit reversed a trial court decision to allow disability benefits to be introduced as an offset to lost earnings. In *McGrath*, the occupational disability retirement annuity was only introduced to show that the worker had no incentive to take residual employment, which the *McGrath* court described as "malingering."

There is, however, a second question that relates to whether occupational disability retirement benefits can be treated as part of the same benefit stream as regular retirement benefits. If a worker is receiving an occupational disability retirement annuity and such payments are treated as part of the worker's retirement benefits, the worker will receive more total present value in retirement benefits than if the worker had not been injured. There is, to this author's knowledge, no legal decision that answers the question of whether occupational disability retirement benefits must be treated part of the retirement benefits stream or should be treated

separately. If disability retirement benefits and regular retirement benefits should be separated, there is no clear indication when they should be separated. An occupational disability retirement benefit starts being called simply a retirement benefit at the Social Security retirement age, but the railroad worker is likely to have retired well before that age.

Suppose, for example, that the worker would have been expected to retire at age 60 because the worker would have qualified for 30/60 retirement. At that age, the worker would have begun receiving a larger regular retirement pension benefit than the amount being paid as a disability retirement annuity. The difference would represent an annual loss to the worker equal to the difference between the two annuity payment amounts. However, the disability retirement annuity would still be called a disability retirement annuity at that point, raising the question of how it is logical to count the disability retirement annuity as an offset after that point, but not before that point. There is no clear answer in legal decisions at the end of this paper.

Defendant railroads would want to argue that occupational disability retirement annuity benefits are simply part of the individual's retirement benefits. If they can make this argument, there is typically no loss of retirement benefits. Benefit amounts paid prior to age 60 have a present value greater than the present value of the difference in retirement benefits after age 60. If that legal argument fails, the next best position for defendant railroads is to argue that the difference in the present value of retirement benefits starting at age 60 is considerably smaller than the present value of amounts the worker would have paid in Tier I and Tier II taxes. There are legal decisions that hold that at least this much of the defendant's position is correct. Key decisions are *Adams v. Burlington Northern* (1993), *Rachel v. Conrail* (1995), *Edwards v. The Atchison, Topeka and Santa Fe Railway Company* (1997), and a judicial memorandum in *White v. Indiana Harbor Belt Railroad Co.* (1998).

There is, however, a series of decisions that plaintiffs can cite, holding that if plaintiffs do not claim lost retirement benefits, defendants cannot reduce lost earnings by Tier I and Tier II taxes. Key cases are *Maylie v. National Railroad Passenger Corporation* (1992), *Berryman v. Consolidated Rail Corporation* (1995), *Norfolk Southern Railway Company v. Perkins* (1997, and *Ramsey v. BNSF* (2004). There is also an even stronger plaintiff decision in *Norfolk & Western v. Chittum* (1996). In that decision, the Virginia Supreme Court held that Railroad Retirement taxes were not mentioned by the Supreme Court in *Liepelt* (1980) and that the Virginia Supreme Court had been unable to find any decision that required RRB taxes to be subtracted. Thus, the Virginia Supreme Court held that they did not have to be subtracted, presumably allowing plaintiffs to claim lost retirement

benefits without having to offset those benefits with employee tax payments that funded them.

There is one more collateral source argument that has not been tested in any reported decision. Logically, a retirement benefit is a collateral source regardless of when a worker retires. Suppose that a worker had already worked past the age at which she could retire with full benefits, but loved her job enough that she wanted to continue working as long as her health allowed her to do so. She is injured in an accident for which a defendant railroad was liable. Given her age, her retirement benefits will be called "retirement annuity benefits," not "occupational disability retirement annuity benefits." As a result of her injury, she starts receiving a very attractive retirement annuity, but her situation is not different from a younger worker who is receiving what is called an "occupational disability retirement benefit." Her retirement benefits are providing for her financial needs in exactly the same way as the younger worker's occupational disability retirement annuity. Would it not follow, therefore, that her retirement benefits are a collateral source in the same sense that they would be for a younger worker? This author was once involved on the defense side in a case in which a plaintiff successfully argued this logic and the trial judge precluded any discussion of retirement benefits available to the worker when the worker reached the then full benefit age of 62.

Defendant railroads, of course, can point out that most railroad workers are likely to have retired at age 60 when they qualify with 30 years of RRB credits. Although the law changed at the end of 2001, the Railroad Retirement Board has projected that at least 60 percent of railroad workers who qualify with 360 months are retiring at age 60 and that retirement rates at age 61 are an additional 40 percent of those remaining, with 40 percent more of the remainders retiring at age 62. These figures are taken from estimates found in Table S-10 of the *Twenty Second Actuarial Valuation of the Assets and Liabilities under the Railroad Retirement Acts as of December 31, 2001 with Technical Supplement.* In the case in which the plaintiff was successful in getting the trial court judge to preclude any testimony about retirement benefits as collateral sources, this author was prepared to testify for the defendant railroad about retirement rates without mentioning the benefits that caused those rates. The case settled before it was determined whether the judge would allow that testimony.

The intent of this short paper was to raise the legal issues that are involved with FELA damage calculations. For most of those questions, there are no clear answers. Until these issues are appealed and decisions are rendered, they will continue to be questions about which plaintiffs and defendants will argue for different answers. Attached as a part of this paper

is a set short descriptions of a number of legal decisions that have addressed the issues of benefits and taxes of the Railroad Retirement System or the collateral source issues discussed above. Some of those decisions were discussed in this paper. Others were not.

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U.S. Railroad Retirement Board, Bureau of the Actuary. 2003. Twenty Second Actuarial Valuation of the Assets and Liabilities under the Railroad Retirement Acts as of December 31, 2001 with Technical Supplement.

Legal Decisions Involving Railroad Retirement Board Benefits, Railroad Retirement Taxes and Collateral Source Determinations in Damages Calculations.

Eichel v. New York Central Railroad Co., 375 U.S. 253 (1963). This decision upheld the decision of the district court and reversed the decision of the 2nd Circuit Court of appeals. The trial court had held that evidence of disability payments could not be introduced, even to demonstrate the extent and duration of the disability suffered by a plaintiff. Benefits received are not a function of payments by employer and thus cannot be considered in mitigation of lost earnings. "The Railroad Retirement Act is substantially a Social Security Act for employees of common carriers . . . The benefits received under such a system of social legislation are not directly attributable to the contributions of the employer, so they cannot be considered in mitigation of the damages caused by the employer."

Jones & Laughlin Steel Corp. v. Pfeifer, 103 S. Ct 2541, or 462 U.S. 523 (1983). This is the single most important case in the field of forensic economics. Justice Stevens delivered the opinion of the United States Supreme Court, which sets out a framework for how damages in a personal injury case should be presented by an economic expert. The court is very careful not to specify a particular set of methods, as urged on it by various amici briefs that were filed, saying: "Because our review of the foregoing cases leads us to draw three conclusions. First, by its very nature the calculation of an award for lost earnings must be a rough approximation. Because a lost stream can never be predicted with

complete confidence, any lump sum represents only a 'rough and ready' effort to put the plaintiff in the position he would have been in if not injured. Second, sustained price inflation can make the award substantially less precise. Inflation's current magnitude and unpredictability create a substantial risk that the damages award will prove to have little relation to the lost wages it purports to replace. Third, the question of lost earnings can arise in many different contexts. In some sectors of the economy, it is far easier to assemble evidence of an individual's most likely career path than others. Thus, instead of providing specific methods, the court provides a list of the issues that must be addressed in the report and the general framework for the methodologies that can be used to address those issues. The coverage of economic issues in this case is quite detailed. The court also reaffirmed its decision in Norfolk & Western Railway Company v. Liepelt, 444 U.S.490, that income taxes should be subtracted from lost earnings in FELA/maritime cases.

Norfolk & Western Railway Company v. Liepelt, 444 U.S. 490, 100 S. Ct. 755 (1980). This decision of the United States Supreme Court held that income taxes should be subtracted from projections of earnings loss damages in FELA cases. It also held that the jury should be informed that the award itself was not taxable: "[t]o put the matter simply, giving the instruction can do no harm, and it can certainly help by preventing the jury from inflating the award and thus over-compensating the plaintiff on the basis of an erroneous assumption that the judgment will be taxable."(at 498, 759).

Hisquierdo v. Hisquierdo, 439 U.S. 572; 99 S.Ct. 802; 59 L. Ed. 2d (1979). In a divorce action, Mrs. Hisquierdo sought an award for her spousal annuity under the Railroad Retirement Board Act. The California Supreme Court had ruled that she was entitled to such an award. The U. S. Supreme Court reversed and ruled that a spousal annuity could not be anticipated under the Railroad Retirement Act of 1974 (45 USCS 231 et seq.) and that the federal constitution took precedence over the community property standards in California. This decision has been cited in FELA litigation as indicating that a claim for losses based on a spousal annuity, resulting from an injury, are precluded from consideration.

McGrath v. Consolidated Rail Corporation, 136 F.3d 838 (1st Cir. 1998). The First Circuit held that the trial court had made no reversible error in allowing admission of testimony about a worker's occupational disability benefits for the purpose of showing that the worker had no financial incentive to resume working, but not as an offset to lost earnings. The

First Circuit interpreted the U.S. Supreme Court decision in Eichel v. New York Cent. R.R. Co, 375 U.S. 253 (1963) as narrowly upholding the trial court's discretionary ruling and not a bright line decision barring the admission of collateral source information under all circumstances. The First Circuit held that there should be a balancing under Rule 403 between the possibility of misuse by the jury of such information and the probative value of such information.

Green v. Denver & Rio Grande Western Railroad Company, 59 F.3d 1029 (10th Cir. 1995). The trial court judge had allowed evidence of Railroad Retirement Board disability payments as an offset to lost earnings of a railroad worker. The 10th Circuit, citing the United States Supreme Court in Eichel v. New York Central R.R., 375 U.S.253 (1963), reversed the trial court decision, indicating that the collateral source rule prevented RRB disability payments from being mentioned.

Berryman v. Consolidated Rail Corporation, 1995 U.S. Dist. LEXIS 12768. This is the third of three decisions reached by judges for the U.S. District Court for the Eastern District of Pennsylvania within one month, all of which had relied on Maylie v. National Railroad Passenger Corporation, 791 F.Supp. 477 (1992). The other two decisions were Sparklin v. Consolidated Rail Corporation, 1999 U.S. Dist LEXIS 10857, and Troy v. National Railroad Passenger Corporation, 1995 U.S. Dist. LEXIS 10596. In each of these decisions, including Maylie, the plaintiff had not claimed any lost retirement benefits. Correspondingly, the court held that Railroad Retirement Board taxes paid to fund those retirement benefits could not be subtracted from lost earnings.

Maylie v. National Railroad Passenger Corporation, 791 F.Supp. 477 (E.D.Pa. 1992). The judge ruled in this case that "Because defendant did not consent to the inclusion of the value of the [Railroad Retirement] pension, it was not error to refuse to reduce plaintiff's lost wages by the amounts he would have had to pay in railroad retirement taxes."

Norfolk Southern Railway Company v. Bradley, 772 So 2d 1147 (Alabama 2000). On appeal, Norfolk Southern argued that the trial court should have instructed the jury that railroad retirement taxes would have to be deducted from any alleged future wage loss. The Court held that Norfolk Southern had failed to object to the failure to deduct for those taxes and failed to question the plaintiff's economist Ted Johnson about Tier I and Tier II taxes and thus could not do so on appeal.

Norfolk Southern Railway Company v. Perkins, 224 Ga. App. 553; 481 S.E.2d 545 (Ga. App. 1997). In an FELA case, the Georgia Court of Appeals held that the trial court did not err in excluding reference to Perkins' receipt

of railroad retirement benefits as income taxes to be subtracted from lost earnings. It quoted an earlier Georgia decision, CSX Transp. v. Levant, 200 Ga. App. 856 (1991), rev'd on other grounds, 262 Ga. 313 (1992) as follows: "Since the railroad retirement taxes would ultimately be paid directly to [Perkins] upon his retirement, we find no error with the trial court's exclusion of this evidence."

Lee v. Lee, 727 So. 2d 622 (La App. 1998). This decision provides extensive discussion of the meaning of Hisquierdo v. Hisquierdo, 439 U.S. 572; 99 S.Ct. 802; 59 L. Ed. 2d (1979). The court held the railroad retirement disability payments of Mrs. Lee could have been treated as community property, but that the husband had not preserved his right to make that claim. The court noted: "As in a social welfare or insurance scheme, the taxes paid by and on behalf of an employee do not necessarily correlate with the benefits to which the employee may be entitled.

Ward v. Consolidated Rail Corporation, 2003 Mich. App. LEXIS 1865. This is an unpublished opinion. The Michigan Court of Appeals cited Maylie v. Nat Railroad Passenger Corp, 791 F.Supp. 477 (E.D.Pa. 1992) in holding that since the plaintiff did not claim lost retirement benefits, it was not in error for the trial court to refuse to reduce plaintiff's lost earnings by the amounts he would have to pay in railroad retirement taxes.

Rachel v. Consolidated Rail Corporation, 891 F.Supp. 428 (N.D.Ohio 1995). In projecting damages, an economist must calculate loss of actual future benefits and cannot use amounts of employer and employee Tier I and Tier II and Medicare taxes as equivalent to lost income. This decision makes it clear that Tier I, Tier II and Medicare taxes are taxes in meaning of Liepelt.

Edwards v. The Atchison, Topeka and Santa Fe Railway Company, 684 N.E.2d 919; 291 Ill.App.3d 817 (1997). The Appellate Court of Illinois held that lost pension benefits must be calculated by the formula used by the Railroad Retirement Board and that tax payments by employer and employee for Tier I, Tier II and Medicare taxes cannot be treated as equivalent to the value of lost income or lost benefits by an injured worker.

White v. Indiana Harbor Belt Railroad Co., 1998 U.S. Dist. LEXIS 8994; 1998 WL 323625 (N.D.Ill. 1998). This is a memorandum from Judge Milton Shadur requiring that a calculation of lost earnings of a railroad worker in an FELA case must be net of Tier I and Tier II taxes, based on the decision in Edwards v. Atchison, T. & S.F. Ry., 291 Ill. App. 3d 817 (1997).

Oltersdorf v. Chesapeake & Ohio, 83 Ill.App. 3d 457; 404 N.E.2d 320 (1980). The trial court decision had been reached shortly before Norfolk & Western Railway Company v. Liepelt, 444 U.S. 490, 100 S. Ct. 755 (1980). The defendant filed an appeal based on the fact that federal income taxes, state income taxes and railroad retirement taxes were not taken out of lost earnings in the plaintiff's calculation of damages. The Illinois Court of Appeals remanded for a new trial on damages without indicating any exception for railroad retirement taxes.

Adams v. Burlington Northern Railroad Company, 865 S.W.2d 748 (Mo.App.W.D. 1993). Held that employer payments of Railroad Retirement Taxes and Medicare Taxes cannot be treated as proxies for benefits lost by an injured railroad worker. Mandated that lost benefits must be calculated on the basis of the defined benefit formula for those benefits. Implied that Railroad Retirement Taxes and Medicare Taxes paid by the employee were taxes in the normal meaning established by Liepelt and Pfeifer. The decision explicates as dicta the "doctrine of curative admissibility" as possibly applying to this case if the defense had preserved this issue on appeal. The suggestion was that the plaintiff, by presenting testimony about the employer costs of benefits, might have opened the door for the "curative admissibility" by the defense of explaining what benefits would actually be lost.

Ramsey v. Burlington Northern, 2004 Mo. App. LEXIS 149 (Mo.App. 2004). The Court held that if a plaintiff does not claim lost retirement benefits from the Railroad Retirement System, Railroad Retirement Board payroll taxes do not have to be subtracted from lost earnings.

Hotaling v. CSX Transportation, 773 N.Y.S.2d 755 (N.Y.App. 2004). In this FELA action, the Court held that the defense had failed to preserve its objection to the fact that railroad retirement taxes were not deducted by the plaintiff economist. The defendant had objected that railroad retirement benefits had not been properly calculated, but had not requested or offered instructions for how those benefits should have been calculated, nor had the defendant objected to the judges final charge that federal and state income taxes should be removed without mentioning railroad retirement taxes. The order also discusses the reasoning of the majority in reducing a $6,000,000 award for pain and suffering to $4,000,000. A dissent defended the jury's pain and suffering award of $6,000,000.

Norfolk & Western v. Chittum, 251 Va. 408 (1996). Ruled that Railroad Retirement Board and Medicare payroll taxes should not be deducted from lost earnings. The court said: "The Supreme Court . . . has never held that Tier I and Tier II payments toward retirement are to be treated the same as federal and state income taxes and, therefore, deducted to establish net income. . . Even though retirement payments are mandated by Congress, we do not equate them with income taxes. Furthermore, N & W has not cited, and we have not found a single FELA decision from either a federal or a state court holding that such retirement payments should be deducted from gross income in calculating net income. We conclude, therefore, that the trial court did not err in rejecting N & W's contention." Cert. to U.S. Supreme Court denied.

Ciminski v. SCI Corporation, 90 Wn.2d 802; 585 P.2d 1182 (Wash. 1978). This decision held that Part A Medicare Payments made to an eligible recipient are payments from a collateral source that cannot be introduced as an offset to damages. The court specifically rejected the argument that this involved double payment by the defendant both for payments to fund Medicare and then for payments that had been covered by Medicare Part A. The plaintiff had been covered through Medicare payments made by her husband along with railroad retirement taxes.