

Descriptions of Legal Decisions Regarding Treatment of Payroll Taxes on Personal Injury  
Award after the 2019 U.S. Supreme Court in *BNSF v. Loos*  
Compiled by Thomas R. Ireland, 8/10/2022

*Burlington Northern Santa Fe Ry. v. Loos*, 139 S. Ct. 893 (U.S. 2019). In a seven to two decision, the United States Supreme Court reversed both the trial court and 8th Circuit Court and held that FELA awards for “time lost” were taxable under the Railroad Retirement Tax Act (RTTA). The lower courts had held that awards were not taxable under the RTTA. This was in spite of the fact that such awards are not taxed under the federal personal income tax or state income taxes. The FELA (Federal Employers Liability Act) applies exclusively to railroad workers who have been injured or killed and are suing employing railroads for compensation. Railroad Retirement taxes are payroll taxes paid by both railroad employees and railroad employers to provide disability and retirement benefits for railroad workers, including Tier I, Tier II, and Medicare taxes, as administered by the Railroad Retirement Board. The decision indicated that railroads were required to withhold employee payroll taxes and to pay the employer taxes on the portions of awards that were for lost earnings. The decision did not address how payment of those taxes would be considered in determining future disability and retirement benefits of railroad workers.

*Kowalewski v. BNSF Ry. Co.*, 2019 Minn. App. Unpub. LEXIS 339; 2019 WL 175924 (MN App. 4-22-2019). As part of responding to an appeal by BNSF of a trial court award to Kowalewski on various issues, the Court said:

BNSF . . . argues that Kowalewski's entire award should be taxed as earned income and that amounts be withheld to satisfy taxes required by the Railroad Retirement Act (RRTA). FELA damages for lost wages qualify as taxable compensation under the RRTA. See *BNSF Ry. v. Loos*, No. 17-1042, 139 S. Ct. 893, 203 L. Ed. 2d 160, 2019 WL 1005830, at \*8 (U.S. Mar. 4, 2019). In this case, however, the jury awarded Kowalewski \$15,343,753, but none of that amount was designated as wage loss on the special-verdict form. As such, none of the award need be withheld.

*Kouma v. Franzen and BNSF*, 2019 Neb. Trial Order LEXIS 2036 (4/25/2019). This is an order issued by Nebraska District Court Judge Jodi L. Nelson for the District of Lancaster County, Nebraska. The order accepts a stipulation of the parties that granted a motion by BNSF indicating that BNSF was entitled to an offset of \$1,445.76 for Medicare payroll taxes and \$2,390 in RRTA (Railroad Retirement Tax Act) taxes of \$2,390, both of which had to be paid based on the lost earnings component of the award to Susan K. Franzen resulting from the death of her husband James P. Franzen. BNSF was also ordered to report that the decedent's daily rate was \$259.04 “for purposes of crediting months of service.” Much of the background underlying this order is not explained, but this must have been a wrongful death award under the (FELA) Federal Employers Liability Act and based upon the *BNSF v. Loos* (2019) decision of the United States Supreme Court.

*Munoz v. Norfolk Southern Ry.*, 2019 IL App (1st) 171009-B; Ill. App. LEXIS 487 (IL App 2019). The Court reversed its own 2018 decision in light of the U.S. Supreme Court decision in *BNSF v. Loos*, 139 S. Ct. 893 (2019). It reverses its own 2018 decision as a direct consequence of *BNSF v. Loos* and remanded to the trial court for a determination of the amount of Tier I and Tier II taxes that both Munoz and Norfolk Southern own on the FELA award to Munoz. The decision provided a detailed discussion of decisions leading up to the U.S. Supreme Court decision in *BNSF v. Loos*.

But the parties have overlooked one aspect of the jury award. The jury reduced the award by \$150,000 based on Little's failure to "tak[e] reasonable steps to secure alternative employment." Dkt. 100 (verdict). This amount for failure to mitigate affects only the award for lost wages. And a reduction of \$150,000 affects only the calculation of the Tier I Medicare tax, as the other payroll taxes are subject to limits that are reached regardless of the reduction. By the court's calculation, the reduction in Tier I Medicare tax would be \$3,525. Thus, the total offset for payroll taxes to which BNSF is entitled is \$19,946.25.

*Burlington Northern Santa Fe Ry. v. Loos*, 139 S. Ct. 893 (U.S. 2019). In a seven to two decision, the United States Supreme Court reversed both the trial court and 8th Circuit Court and held that FELA awards for "time lost" were taxable under the Railroad Retirement Tax Act (RTTA). The lower courts had held that awards were not taxable under the RTTA. This was in spite of the fact that such awards are not taxed under the federal personal income tax or state income taxes. The FELA (Federal Employers Liability Act) applies exclusively to railroad workers who have been injured or killed and are suing employing railroads for compensation. Railroad Retirement taxes are payroll taxes paid by both railroad employees and railroad employers to provide disability and retirement benefits for railroad workers, including Tier I, Tier II, and Medicare taxes, as administered by the Railroad Retirement Board. The decision indicated that railroads were required to withhold employee payroll taxes and to pay the employer taxes on the portions of awards that were for lost earnings. The decision did not address how payment of those taxes would be considered in determining future disability and retirement benefits of railroad workers.

*Lessert v. BNSF Ry. Co.*, 476 F. Supp. 3d 926; 2020 U.S. Dist. LEXIS 139672; 2020 WL 4500218. This was a wrongful death action under the FELA. The decision was reached after the U.S. Supreme Court decision in *BNSF v. Loos* (2019) by U.S. District Judge Jeffrey L. Viken. The decision involved challenge to the testimony of Dr. Stan V. Smith's calculations for loss of earning capacity, much of which criticized Dr. Smith for hedonic damages calculations in other cases, which Judge Viken indicated was irrelevant to the case at hand. He did, however, comment on Thomas Ireland's report calling for the subtraction of Railroad Retirement payroll taxes for purposes of determining after-tax lost earnings. *BNSF v. Loos* (2019) was not mentioned in the decision, but Ireland's report was written before *BNSF v. Loos*. Ireland's report had relied upon the 8th Circuit decision in *Loos v. BNSF* (2017), which had held that railroad retirement payroll

taxes were not to be withheld from an award.

*Haynes v. Union Pac. R.R. Co.*, 395 S.W.3d 192 (TX App. 2020). The decision was devoted primarily to other issues. The argument that Union Pacific was entitled to an offset for employee retirement taxes it withheld and paid from the award to Haynes was not opposed by Haynes. The court said:

UP asserts that it is entitled to an offset for its payment of railroad retirement taxes. In his reply brief, Haynes recognized that, in the interim between the trial court's ruling on this issue and this appeal, the U.S. Supreme Court has settled this issue and ruled that past wage loss awards are taxable. See *BNSF Ry. Co. v. Loos*, 139 S. Ct. 893, 899-900, 203 L. Ed. 2d 160 (2019). . . . We sustain UP's request that we modify the judgment to reduce the lost-wages award by \$14,648.40 as an offset to account for the taxes paid.

*Little v. BNSF Ry. Co.*, 2020 U.S. Dist. LEXIS 222151 (W.D. WI 2020). This decision was reached in March of 2020, one year after the United States Supreme Court decision in *BNSF v. Loos*. It provides an innovative suggestion for dealing with what the Court understood to be the general principle that if an award includes damages for lost earnings and no apportionment is made for other damage elements including loss of fringe benefits, loss of household services, and pain and suffering, the entire award will be deemed as for lost earnings and subject to payroll tax reductions. BNSF proposed the following solution, which the Court implemented along with its own modification, as follows:

The court concludes that the general damages award is subject to payroll tax under the RRTA. But BNSF isn't pushing for an offset for taxes on the entire \$726,000 damages award. BNSF proposes to calculate Little's tax liability using the testimony of Little's economist, Jeffrey Opp. Opp testified, consistent with his expert report, that Little's lost wages totaled \$519,004. See Dkt. 122 (trial transcript), at 116 (estimated past lost wages totaling \$227,997) and *id.* at 121 (estimated future lost wages totaling \$291,007); see also Dkt. 18 (Opp report). BNSF thus calculates Little's payroll tax liability, based on 2019 rates, to be \$23,471.25. Little doesn't dispute BNSF's calculation of the payroll taxes on the damage award.

*Urquehart v. Union Pac. R.R. Co.* (E.D. AR 2021). The court said:

Defendant's Motion to Setoff or Withhold Portion of Judgment (Doc. No. 83) is GRANTED. Plaintiff's \$140,000.00 judgment is setoff by \$23,064.94. Defendant must pay \$7,151.14 directly to the RRB in satisfaction of its statutory lien and \$15,913.80 for Plaintiff's share of RRTA taxes and Medicare taxes.

*Pepin v. Wisconsin Central, Ltd.*, 2021 U.S. Dist. LEXIS 187909 (W.D. MI 2021). The Court that railroad retirement taxes should not be excluded when calculating loss of earnings. The court

provided two rationales for not excluding Tier I and Tier II taxes: (1) That such taxes will be levied on the portion of an award that is for lost earnings under *BNSF v. Loos* (2018); and (2) That because Pepin is not claiming a loss of pension benefits, taxes to finance those benefits should not be excluded.. This decision provides a good review of legal decisions regarding claims of lost pension benefits and railroad retirement taxes.