

Descriptions of Legal Decisions Leading to and After the *BNSF v. Loos Decision*
of the United States Supreme Court in February 2019
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[This set of descriptions of legal decisions begins with the 1985 trial court decision in *Loos v. BNSF* and continues through all decisions that have cited or been impacted by the 2019 U.S. Supreme Court in *BNSF v. Loos*. It does not include decisions relating to the payroll taxability of awards for lost earnings in FELA (Federal Employers Liability Act) cases.]

Loos v. BNSF Ry. Co., 2015 U.S. Dist. LEXIS 167603 (D. MN 2015). The BNSF Railroad withheld \$3,765 in Railroad Retirement payroll taxes based upon an \$85,000 award for injuries while working for the BNSF. This amount was the amount that would have been owed if the \$85,000 was treated as wage earnings. Loos relied upon *Cowden v. BNSF Ry. Co.*, 2014 U.S. Dist. LEXIS 91454, arguing that the RTTA (Railroad Retirement Tax Act) does not apply to personal injury awards.

Loos v. BNSF, 865 F.3d 1106 (8th Cir. 2017). This decision involved an appeal and cross appeal of two district court decisions, one granting summary judgment against Loos regarding a retaliation claim under the Federal Railroad Safety Act (FRSA) and the other in favor of Loos involving an attempt by the BNSF to withhold railroad retirement taxes (Tier I, Tier II and Medicare payroll taxes) from Loos's personal injury claim, which had been successful at the trial court level. The second ruling is relevant to forensic economists in that the 8th Circuit held that payroll taxes should not be withheld. This was a significant win by the railroad plaintiff bar against the railroad defense bar. Railroads, and particularly the BNSF, have been trying to maintain for several years that even though federal and state income taxes are not withheld from personal injury awards, the Railroad Retirement Tax Act (RTTA) required payroll taxes to be withheld from personal injury awards. On this issue, Loos was supported by an amicus brief from the American Association for Justice and the BNSF was supported by an amicus brief from the U.S. Department of Justice. The 8th Circuit held that:

Under the RRTA's plain text, damages for lost wages are not remuneration "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. Instead, the damages compensate the employee for wages the employee should have earned had he been able to render services. Unlike FICA, the plain language of the RRTA refers to services that an employee actually renders, not to services that the employee would have rendered but could not. See 26 U.S.C. § 3231(e)(1); see also *id.* § 3231(d) (defining "service"). Thus, damages for lost wages do not fit within the plain meaning of the RRTA.

This decision was reversed by *Burlington Northern Santa Fe Ry. v. Loos*, 139 S. Ct. 893 (U.S. 2019).

Munoz v. Norfolk Southern Railway Company, 2018 IL App (1st) 171009; 2018 Ill. App. LEXIS

330 (IL App. 2018). This decision of the Illinois Court of Appeals affirmed the trial court decision that the tax exemption from income taxes on personal injury awards applies to payroll taxes, rejecting Norfolk Southern's claims that it was required by law to withhold payroll taxes from FELA awards even though not required to withhold federal and state personal income taxes on such awards. This was the decision of two of three judges on the Court of Appeals. The third judge dissented on the basis that he believed that the award was subject to payroll taxes. This decision provided an extensive review of decisions regarding whether payroll taxes should be subtracted from personal injury awards in FELA actions. This decision was reversed by *Munoz v. Norfolk Southern Ry.*, 2019 IL App (1st) 171009-B; Ill. App. LEXIS 487 (IL App 2019).

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.

Loos v. BNSF, 920 F.3d 1218 (8th Cir. 2019). This short decision of the 8th Circuit reversed its own decision in light of *Burlington Northern Santa Fe Ry. v. Loos*, 139 S. Ct. 893 (U.S. 2019) and granted an offset to BNSF for amounts paid by BNSF on behalf of the plaintiff (withheld) in railroad retirement taxes.

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. Franson resulting from the death of her husband James P. Franson. 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). The Court had previously ruled in 2018 that payroll taxes should not be subtracted from personal injury awards. In light of *BNSF v. Loos*, the Court remanded the case to the trial court for a determination of the amount of Tier I and Tier II taxes that should be withheld from the award. The decision provided a detailed discussion of decisions leading up to the U.S. Supreme Court decision in *BNSF v. Loos*.

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.

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 and 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.

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 1 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.