No. 17-1042

IN THE
Supreme Court of the United States

BNSF RAILWAY COMPANY,
Petitioner,
v.

MICHAEL D. LOOS,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Is the satisfaction of a FELA judgment that includes an award of lost wages subject to taxation under the Railroad Retirement Tax Act (RRTA)?

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INTRODUCTION

No Federal court has held that the satisfaction of a FELA judgment is taxable under the RRTA. Only one Circuit Court, the court below, has addressed the question presented. It, and every District Court that has addressed the question, concludes that FELA satisfactions are not taxable. The three State courts that have held otherwise provide no sound reasoning against the conclusion of all the Federal courts. There is no issue for this Court to decide. The Court should deny BNSF's petition.

STATEMENT OF THE CASE

I. The Railroad Retirement Tax Act and related statutes.

Railroad employees participate in a pension system under the Railroad Retirement Act (RRA, 45 U.S.C. §§231–231v), which is administered by the Railroad Retirement Board (45 U.S.C. §231f).[1] This is in lieu of participation in the Social Security system. Benefits under the RRA are provided in two tiers. Tier 1 benefits are the railroad equivalent of Social Security benefits. 45 U.S.C. §231b(a); *Hisquierdo v. Hisquierdo*, 439 U.S. 572, 574–75 (1979). Tier 2 benefits are a "supplemental annuity" that is based on years of service and the average of the employee's highest 60 months of compensation. 45 U.S.C. §231b(b). The monthly compensation used to calculate these benefits is the amount reported by the railroad employer and is limited to 1/12 of the maximum annual taxable wages under 26 U.S.C. §3121 (FICA). 45 U.S.C. §§231b(b)(1), 231b(j); 20

[1] The current RRA was enacted in 1974. Pub. L. 93-445, 88 Stat. 1305 (Oct. 16, 1974). The original RRA was enacted in 1937. Pub. L. 75-162, 50 Stat. 307 (June 24, 1937).

C.F.R. §211.14. "Compensation" under the RRA "means any form of money remuneration paid to an individual for services rendered as an employee to one or more employers ..., including remuneration paid for time lost as an employee[.]" 45 U.S.C. §231(h)(1) (Pet. 41a).

Each benefit has different eligibility requirements, including different required minimum years of service, calculated as any twelve months, consecutive or not. 45 U.S.C. §231a; 45 U.S.C. §231(f)(1); 20 C.F.R. §210.4.

RRA benefits are funded by taxes imposed by the Railroad Retirement Tax Act (RRTA, 26 U.S.C. §§3201–3241), which is Chapter 22 of the Internal Revenue Code. The RRTA was originally enacted in 1937. *Standard Office Bldg. Corp. v. United States*, 819 F.2d 1371, 1372 (7th Cir. 1987). The RRTA is administered by the IRS. The taxes imposed by the RRTA do not necessarily correlate with the benefits that an employee might receive. *Hisquierdo*, 439 U.S. at 574–75.

The employer's RRTA tax is an *excise* tax based on "compensation paid during any calendar year by such employer for services rendered to such employer." 26 U.S.C. §3221. The Tier 1 rates are the same as under FICA. 26 U.S.C. §3221(a). The Tier 2 rate is determined annually by the RRB based upon the investment performance of and distributions from the Railroad Retirement Account and the National Railroad Retirement Investment Trust. 26 U.S.C. §3221(b), §3241.

The employee's RRTA tax is an *income* tax, "imposed on the income of each employee" and calculated as a "percentage of the compensation received during any calendar year by such employee for services rendered by such employee." 26 U.S.C.

§3201.[2] Tier 1 taxes are calculated in the same manner as under FICA and Tier 2 taxes are calculated by the RRB in a manner similar to the employer's tax. 26 U.S.C. §3201, §3241. Part of the Tier 1 tax rate under FICA is a 1.45% Medicare tax that has no income limit and a 0.9% surtax on the employee's total annual income that exceeds $200,000 ($250,000 for joint filers). 26 U.S.C. §3101(b) (Hospital insurance). The employer must collect the employee's RRTA taxes "from the compensation of the employee as and when paid." 26 U.S.C. §3202(a).

An "employee" for purposes of the RRTA is an "individual in the service of" an employer for "compensation." 26 U.S.C. §3231(b). To be in the "service" of an employer, the employee must be "subject to the continuing authority of the employer to supervise and direct the manner of rendition of his service" and providing the service for "compensation." 26 U.S.C. §3231(b), (d). "Compensation" is "any form of money remuneration paid to an individual for services rendered as an employee to one or more employers." 26 U.S.C. §3231(e)(1) (Pet. 33a).

Section 104(a)(2) of the Internal Revenue Code provides that "gross income does not include ... the amount of any damages (other than punitive damages) received (whether by suit or agreement and whether as lump sums or as periodic payments) on account of personal physical injuries or physical sickness." 26 U.S.C. §104(a)(2). That exclusion applies even to injury awards that include an award of lost wages. *Comm'r v. Schleier*, 515 U.S. 323, 329–30 (1995); *Norfolk & W. Ry. v. Liepelt*, 444 U.S. 490, 496 (1980).

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[2] BNSF significantly errs in contending that the tax is imposed on the employee's "compensation." Pet. 5.

The Federal Employers' Liability Act (FELA, 45 U.S.C. §§51–60), enacted in 1908, holds a railroad liable to its employee for injuries caused by the railroad's negligence. *CSX Transp., Inc. v. McBride*, 564 U.S. 685, 688 (2011). Hundreds of millions of dollars in damages have been paid by railroads to their employees under the FELA. Pet. 22. Neither BNSF nor the United States in the court below, nor BNSF in its petition to this Court, identified any Federal authority in the 80-year coexistence of the FELA and RRTA that declares a satisfaction of a FELA judgment is taxable under the RRTA.[3] This contention first arose in 2013, when BNSF itself argued that it must deduct from its satisfaction of a FELA judgment amounts it claimed were due under the RRTA. Pet. 22; *Heckman v. Burlington N. Santa Fe Ry.*, 837 N.W.2d 532 (Neb. 2013). No IRS regulation expressly states that FELA satisfactions are subject to RRTA taxation.

II. The proceedings below.

BNSF's negligence physically injured Michael Loos. Pet. 4a, 7a. Loos filed suit to recover for his injuries under the FELA on December 9, 2013. Pet. 7a. By that time, BNSF had already terminated his employment. Pet. 7a. On September 15, 2015 a jury returned a verdict awarding Loos total damages of $126,213, which included $85,000 for past pain, disability, and emotional distress, $11,213 in past medical expenses, and $30,000 in past wage loss. Pet. 7a, 26a.

BNSF moved to offset the verdict by the amount it claimed was due for RRTA withholdings. Pet. 28a.

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[3] Even the American Association of Railroads, in its proposed amicus brief, fails to cite any instance in which the IRS has pursued a railroad for RRTA taxes due on FELA judgments the railroad satisfied without withholding RRTA taxes.

The court denied BNSF's motion, concluding that since the satisfaction of the judgment was excluded from taxable income by IRC §104(a)(2), it was not subject to withholding under the RRTA. Pet. 29a–30a (citing *Cowden v. BNSF Ry.*, No. 08-1534, 2014 U.S.Dist.LEXIS 91454 (E.D. Mo. July 7, 2014)(2014 WL 3096867)).

The Court of Appeals for the Eighth Circuit affirmed that decision, but on different grounds. Pet. 17a–24a. It found that the RRTA unambiguously limited "compensation" to "money remuneration paid to an individual for services rendered as an employee[.]" Pet. 18a–19a. The Court rejected the IRS's interpretation of "compensation" to extend to "amounts paid for an identifiable period during which the employee is absent from the active service of the employer ... as well as pay for time lost" (26 C.F.R. §31.3231(e)-1(a)(3)–(4)) because it contradicted the plain meaning of §3231(e)(1) and because Congress twice amended the RRTA to remove any reference to "pay for time lost" as a form of "compensation[.]" Pet. 21a–23a. The Eighth Circuit rejected BNSF's argument for conforming the RRTA's definition of compensation to the RRA's definition for the same reasons. Pet. 21a–24a.

The Eighth Circuit did not address IRC §104(a)(2) or Loos's other arguments as to why a FELA satisfaction is not "pay for time lost" or "compensation" under the RRTA. Pet. 24a.

REASONS FOR DENYING THE PETITION

I. There is no Circuit split. The Federal courts all agree FELA satisfactions are not taxable under the RRTA.

A. There is no Circuit split.

Among the Courts of Appeals only the Eighth Circuit has addressed the question presented, in the case below. Contrary to BNSF's assertion, the Sixth Circuit did not address this question. *Cf.* Pet. 13–14 (citing *Hance v. Norfolk So. Ry.*, 571 F.3d 511 (6th Cir. 2009)(per curiam)). *Hance* did not involve an award for physical injuries under the FELA. It addressed a wrongful discharge claim under the Uniformed Services Employment and Reemployment Rights Act of 1994 (38 U.S.C. §§4301–4333), in which Hance sought reinstatement to his railroad employment, back pay, and an "award of damages equivalent to Railroad Retirement Tax Act (RRTA) contributions that Norfolk Southern would have made on Hance's behalf had he not been discharged." *Id.* at 515, 522. Hance was ordered reinstated and awarded his back pay, which would result in the railroad's reporting of RRTA compensation and Hance receiving the RRA credits he sought. *Id.* at 522–23. In contrast, Loos did not seek and was not awarded damages equivalent to RRTA contributions that BNSF would have made on Loos's behalf had he not been injured. Loos did not seek reinstatement to his employment and was not a BNSF employee when BNSF partially satisfied his judgment.

B. The District Courts agree FELA satisfactions are not taxable.

All the District Courts that have addressed the question presented have concluded that FELA

satisfactions are not subject to RRTA taxes. *Loy v. Norfolk S. Ry.*, No. 12-96, 2016 U.S.Dist.LEXIS 48824 (N.D. Ind. Apr. 12, 2016); *Marlin v. BNSF Ry.*, 163 F.Supp.3d 576 (S.D. Iowa 2016); *Loos v. BNSF Ry.*, No. 13-3373, 2015 U.S.Dist.LEXIS 167603 (D. Minn. Dec. 15, 2015)(2015 WL 8779813); *Cowden*, 2014 U.S.Dist.LEXIS 91454; *Windom v. Norfolk So. Ry.*, No. 10-407, 2012 U.S. Dist. LEXIS 173477 (M.D. Ga. 2012)(2012 WL 6096990). Although those decisions contain various reasons, some of which the Eighth Circuit rejected or did not address, they all agree FELA satisfactions are not taxable.

Because there is no conflict among the Federal courts that have addressed the question presented, there is no split for this Court to resolve. Although the question of whether FELA satisfactions are subject to RRTA taxes is certainly important, the fact that the Federal courts have unanimously agreed they are not, and the fact that the IRS has never formally ruled that they are despite the 80-year existence of the RRTA, and the apparent fact that the IRS has never sought from railroads payment of RRTA taxes on the hundreds of millions of dollar in FELA judgments they have paid, means that there is no need for the Court to consider this question in this case.

C. There is only an illusory State court split.

While four State courts have reached different conclusions on RRTA taxation of FELA judgments, the split is illusory given the more thorough reasoning of the Missouri Supreme Court, which concluded FELA judgments are not taxable. *Mickey v. BNSF Ry.*, 437 S.W.3d 207, 210–16 (Mo. 2014)(en

banc);[4] *cf. Heckman*, 837 N.W.2d 532; *Phillips v. Chi. Cent. & Pac. R.R.*, 853 N.W.2d 636 (Iowa 2014). District Courts also have rejected *Heckman* and *Phillips*. *Marlin*, 163 F.Supp.3d at 580–81; *Loy*, 2016 U.S.Dist.LEXIS 48824, at *13; *Cowden*, 2014 U.S.Dist.LEXIS 91454, at *31–32. *Heckman* and *Phillips* also fail to address the Code's exclusion from taxation of *any* portion of an award for personal physical injury. 26 U.S.C. §104(a)(2); *Cowden*, 2014 U.S.Dist.LEXIS 91454, at *26–29 (citing *CSX Corp. v. United States*, 518 F.3d 1328, 1343 (Fed. Cir. 2008), and *United States v. Quality Stores, Inc.*, 134 S.Ct. 1395, 1405 (2014), among others); *Mickey*, 437 S.W.3d at 211.

The Pennsylvania court of appeals followed *Heckman* and *Phillips* and rejected *Mickey* for reasons that are unpersuasive. *Liberatore v. Monongahela Ry.*, 2016 PA Super 79. That court addressed §104(a)(2), but rejected its application to the RRTA in light of the RRA's definition of compensation to include pay for time lost on account of personal injury. *Id.* at 13–27. It did not explain why satisfactions of FELA judgments that do not expressly include awards of RRTA compensation are "pay for time lost" and did not address this Court's rejection of reading the taxing and benefits statutes underlying Social Security as *in pari materia*. *See United States v. Cleveland Indians Baseball Co.*, 532 U.S. 200, 212–13 (2001). The court below rejected *Liberatore* because it concluded Congress intended "compensation" to have different meanings in the RRTA and RRA. Pet 21a (citing *Burlington N. & Santa Fe Ry. v. White*, 548 U.S. 53, 62–63 (2006)). No other court has relied on *Liberatore*.

The three State court decisions that erroneously concluded that FELA judgments are taxable have

[4] BNSF did not petition for a writ of certiorari.

been rejected by every Federal court that has examined them. They provide no reason for this Court to issue a writ in this case.

II. The Internal Revenue Service has not ruled that satisfaction of FELA judgments are subject to RRTA taxes.

In addition to the lack of any Federal court split in opinion or real conflict among State courts that have thoroughly examined the question, the IRS itself has not formally declared that satisfaction of a FELA judgment is taxable under the RRTA. At one time, the RRTA regulations *did* specify that "compensation" included "a payment ... made to an employee *with respect to a personal injury* [that] includes pay for an identifiable period of absence from active service." Republication of Regulations, 25 Fed. Reg. 13032, 13067 (Dec. 20, 1960) (§31.3231(e)-1(b)(3), (emphasis added). The IRS, however, deleted that subparagraph (b)(3) from the regulation in 1979. Definition of Compensation for Purposes of the Railroad Retirement Tax Act, 44 Fed. Reg. 15484, 15484–85 (Mar. 14, 1979). To the extent a payment with respect to a personal injury for an identifiable period of absence from active service means an award of lost wages in a FELA judgment (*cf.* Part IV.B., *infra*), this revision demonstrates payment of that judgment is *not* "compensation" under the current version of the RRTA. The IRS has not issued any regulation or guidance since then indicating that it now considers satisfaction of FELA judgments to be "compensation" or "income" taxable under the RRTA.

The two revenue rulings that BNSF cites apply only to settlement agreements in which the railroad and employee agreed to apportion part of a payment to time lost for the purpose of providing the employee

railroad retirement credit. Rev. Rul. 61-1, 1961-1 C.B. 14 (Jan. 1961); Rev. Rul. 85-97, 1985-2 C.B. 50 (July 1985). The 1985 Ruling does not concern a railroad employee and only paraphrases Ruling 61-1. Such a payment is similar to the award in *Hance*, and is wholly dissimilar to Loos's case, since he did not request such an award and was not BNSF's employee when BNSF partially satisfied his judgment or even when he commenced his FELA action. The Eighth Circuit properly rejected consideration of those rulings. Pet 24a.

III. The Eighth Circuit's decision does not conflict with this Court's decisions.

A. There is no conflict with *Nierotko* and *Quality Stores*.

Neither *Nierotko* nor *Quality Stores* address whether awards of lost wages as part of a personal physical injury judgment are subject to taxation under FICA. Nor can they be construed to compel an interpretation of the RRTA to impose taxes on FELA satisfactions. *Nierotko* holds that an employee awarded back pay as a remedy along with reinstatement to his employment under the NLRA is entitled to have that back pay credited to his Old Age and Survivors Insurance Account. *Social Sec. Bd. v. Nierotko*, 327 U.S. 358, 364–66 (1946). In that case, the employee received the back pay while still an employee of the employer (since he had been reinstated). That does not address whether a payment of lost wages to a plaintiff as part of his personal physical injury damages after he no longer is an employee is "compensation" or "income" under the RRTA or even "wages" under FICA.

Quality Stores holds that severance payments are "wages" under FICA in part because they are taxable

income. 134 S.Ct. at 1404–05 (citing *Rowan Cos. v. United States*, 452 U.S. 247 (1981)). This Court recognizes that "wages" should be construed in the same manner for income tax purposes as for the income-tax withholding statutes and FICA. *Rowan*, 452 U.S. 247, 254. The decision below is entirely consistent with *Rowan*, since physical injury awards that include lost wages are exempt from income taxation under IRC §104(a)(2) and therefore must be exempt from RRTA taxation, just as they would be exempt from FICA taxation.

B. The court below properly applied *Chevron*.

The Eighth Circuit's decision does not conflict with *Chevron USA Inc. v. National Resources Defense Council*, 467 U.S. 837 (1984). The court followed *Chevron* by first examining the RRTA's definition of "compensation" and concluding that it unambiguously does not include "pay for time lost" (which the Court assumed includes satisfaction of FELA judgments even though Loos argued otherwise). Pet. 18a–23a. BNSF attempts to create an ambiguity by importing the RRA's broader definition of "compensation" into the RRTA, but the Eighth Circuit properly rejected that. Pet. 21a; *Cleveland Indians*, 532 U.S. at 212–13 (Social Security Act and FICA are not *in pari materia*); *Hisquierdo*, 439 U.S. at 574–75 (no direct relation between RRTA taxes and RRA benefits). When the statutory language is plain, the Court must enforce it according to its terms, as the Eighth Circuit did. *Jimenez v. Quarterman*, 555 U.S. 113, 118 (2009); *Chevron*, 467 U.S. at 843.

Even if the Court decided the court below misinterpreted the RRTA (and there are other arguments why the RRTA does not compel taxation

of FELA satisfactions), the Court would have to determine whether the IRS has issued a rule interpreting "income" or "compensation" to include FELA satisfactions, and then determine whether that rule is a reasonable interpretation of the statute. *Mayo Found. For Med. Educ. & Research v. United States*, 562 U.S. 44, 58 (2011). As noted *supra*, the IRS has not issued such a rule and, in fact, expressly amended its §3231 regulation to remove any reference to personal injury awards.

IV. This is not an ideal vehicle for the Court to address the question presented because the court below did not address the many other reasons why FELA satisfactions are not subject to RRTA taxes.

This case is not an ideal vehicle for the Court to determine whether a satisfaction of a FELA judgment is subject to RRTA taxation primarily because the Eighth Circuit's decision is correct and reaches the same conclusion as all other Federal courts that have addressed the question presented. Moreover, the court below did not address all of the reasons why FELA satisfactions are not taxable, which this Court would have to address were it to find error in the specific reasoning for the Eighth Circuit's decision. Among the points the court below did not address are that IRC §104(a)(2) excludes FELA judgments from taxation and that FELA awards of lost wages are not necessarily awards of "pay for time lost."

A. IRC §104(a)(2) excludes FELA judgments from taxation.

The employee's portion of the RRTA tax is imposed on the employee's "income[.]" 26 U.S.C. §3201.

Section 104(a)(2) provides that "gross income does not include ... the amount of any damages (other than punitive damages) received (whether by suit or agreement and whether as lump sums or as periodic payments) on account of personal physical injuries or physical sickness." 26 U.S.C. §104(a)(2). That exclusion applies even to injury awards that include an award of lost wages. *Schleier*, 515 U.S. at 329–30; *Liepelt*, 444 U.S. at 496.

Since such awards are not income taxable, they also are not subject to FICA taxes or withholding. *Gerbec v. United States*, 164 F.3d 1015, 1025 (6th Cir. 1999); *Dotson v. United States*, 87 F.3d 682, 689–90 (5th Cir. 1996)(citing *Rowan*, 452 U.S. at 254, and *Anderson v. United States*, 929 F.2d 648, 654 (Fed. Cir. 1991)); *Redfield v. Ins. Co. of N. Am.*, 940 F.2d 542, 548 (9th Cir. 1991).[5] This is a conclusion also recognized by the IRS. "Amounts excludable from gross income under §104(a)(2) ... are not wages for FICA and income tax withholding purposes." Memorandum from the Office of Chief Counsel at 8 (October 22, 2008)(non-precedential);[6] *see also* Lawsuits, Awards, and Settlements Audit Techniques Guide at 14 (5/2011)("There is general agreement that to the extent damages are excludable from gross income, they are not subject to employment taxes.").[7] The IRS has not stated otherwise for purposes of "income" or "compensation" under the RRTA.

For these reasons, §104(a)(2) excludes all FELA judgments from taxation under the RRTA. *Marlin*, 163 F.Supp.3d at 579–81; *Loy*, 2016 U.S.Dist.LEXIS

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[5] Like the RRTA, FICA also imposes the employee portion of its tax on the employee's "income." 26 U.S.C. §3101.

[6] http://www.irs.gov/pub/lanoa/pmta2009-035.pdf.

[7] http://www.irs.gov/pub/irs-utl/lawsuitesawardssettlements.pdf.

48824 at *6–12; *Cowden*, 2014 U.S.Dist.LEXIS 91454 at *25–29; *Mickey*, 437 S.W.3d at 210–11.

B. FELA awards of lost wages are not necessarily "pay for time lost."

BNSF cites no authority for its contention that "pay for time lost" in the RRA and the RRTA regulations is the same as a FELA injury award that includes an award of lost wages. The court below also did not address Loos's arguments why they are not.

The RRA and RRTA regulations use the specific phrase "pay for time lost" instead of a more comprehensive phrase such as "payment of lost wages." That suggests a difference in meaning. A "pay for time lost" is a deliberate payment of "compensation" by agreement between the railroad and employee expressly for the purpose of providing the employee enough "years of service" to be eligible for RRA benefits. *Norton v. RRB*, 69 F.3d 282 (8th Cir. 1995); *Capovilla v. RRB*, 924 F.2d 885, 886 (9th Cir. 1991); *Jacques v. RRB*, 736 F.2d 34 (2d Cir. 1984); Rev. Rul. 61-1. The purpose of a "pay for time lost is to treat the employee as if he or she had actually performed compensated service during that period of time[.]" RRB, *Railroad Retirement Service Credits and Pay for Time Lost.*[8] A pay for time lost is "often intended to provide an employee with additional months of creditable service needed to qualify for railroad retirement benefits." *Id.* A properly designated "pay for time lost" is treated as if the employee actually received remuneration for services rendered during the designated period (months in which the time was lost). *See* 45 U.S.C.

[8] https://www.rrb.gov/opa/qa/pub_0805.asp. This RRB publication says nothing about FELA judgments or satisfaction of FELA judgments.

§231(h)(1)(including as "compensation" "remuneration paid for time lost as an employee"), §231(h)(2) (payments for personal injury and time lost deemed all for time lost unless specifically apportioned otherwise). Such effective remuneration for the overall employment relationship could be treated as "compensation" under the RRTA. *Railroad Retirement Service Credits and Pay for Time Lost*, at 8–9; 26 C.F.R. §31.3231(e)-1(a)(3)–(4) (Pet. 46a–47a); *see also Hance*, 571 F.3d at 522–23.

Such a payment for time lost from the employer to an employee is distinct from an award to compensate an injured employee for the net income he would have received had he not been injured. An employee who seeks compensation for his lost wages is seeking to recover his take-home pay, net of all taxes and deductions. An employee who is seeking, in addition to his take-home pay, a report of creditable compensation for purposes of qualifying for or enhancing his RRA benefits is seeking to have his *gross* (pre-tax) compensation reported to the RRB as creditable compensation in specific amounts for specific months. While that award of creditable compensation might be taxable under the RRTA, that does not mean the employee's net take-home pay should also be taxed. FELA juries are instructed that their FELA awards are not taxable and that awards of lost earnings must be based on after-tax earnings. *Liepelt*, 444 U.S. 497–98; 8th Cir. Civil Jury Instr. §15.73 (2017).

The employee-plaintiff should decide whether he gets non-taxable, net take-home pay as his damage award and whether he gets taxable gross compensation so as to receive specific RRA credits. The RRA is designed for the remedial purpose of benefitting *employees*. *Mickey*, 437 S.W.3d at 215. Allocating satisfactions of FELA judgments to "pay for time lost" against the employee's wishes provides

no benefit to the employee, it only harms the employee by providing him less than full satisfaction of his FELA judgment. It also subjects what is supposed to be an award of after-tax take-home pay to double taxation.

The threat of that discounted satisfaction allows railroads to coerce injured employees to take less than their full damages in a settlement that allocates nothing to pay for time lost and thus is not taxable. While in this case Loos would suffer a discount of only $3,765, in cases with larger damages awards the consequences are more severe. *Loy*, for example, concerned a $29,247.25 tax liability. 2016 U.S.Dist. Lexis 48824 at *2.

It is not reasonable to construe the RRA's remedial provisions to be a means by which railroad employers can force employees to take unwanted "pay for time lost" at the railroad's election and suffer a diminution of the employee's award of damages under FELA. *Mickey*, 437 S.W.3d at 215; *Cowden,* 2014 U.S.Dist.LEXIS 91454 at *7 ("the Court simply cannot conclude Congress intended to tax personal injury judgments under the RRTA").

Because of the limited attention the question presented has received in the lower courts, the question presented here is not ripe for the Court's review. The Court should allow the lower courts to address the question and more clearly define what, if any, conflicts this Court must resolve. As it is, the lower courts continue to find FELA satisfactions are not taxable. So long as that continues, there is no issue for this Court to resolve.

CONCLUSION

The Court should deny the petition.

Respectfully submitted,

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APPENDIX

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26 U.S.C. §104(a)(2). Compensation for injuries or sickness.

(a) In general. Except in the case of amounts attributable to (and not in excess of) deductions allowed under section 213 (relating to medical, etc., expenses) for any prior taxable year, gross income does not include— ...

(2) the amount of any damages (other than punitive damages) received (whether by suit or agreement and whether as lump sums or as periodic payments) on account of personal physical injuries or physical sickness;

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26 U.S.C. §3101. Rate of Tax

(a) Old-age, survivors, and disability insurance. In addition to other taxes, there is hereby imposed on the income of every individual a tax equal to 6.2 percent of the wages (as defined in section 3121(a)) received by the individual with respect to employment (as defined in section 3121(b)).

(b) Hospital insurance.

(1) In general. In addition to the tax imposed by the preceding subsection, there is hereby imposed on the income of every individual a tax equal to 1.45 percent of the wages (as defined in section 3121(a)) received by him with respect to employment (as defined in section 3121(b)).

(2) Additional tax. In addition to the tax imposed by paragraph (1) and the preceding subsection, there is hereby imposed on every taxpayer (other than a corporation, estate, or trust) a tax equal to 0.9 percent of wages which are received with respect to employment (as defined in section 3121(b)) during any taxable year beginning after December 31, 2012, and which are in excess of—

(A) in the case of a joint return, $250,000,

(B) in the case of a married taxpayer (as defined in section 7703) filing a separate return, 1/2 of the dollar amount determined under subparagraph (A), and

(C) in any other case, $200,000.

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26 U.S.C. §3201. Rate of tax [on Employees].

(a) Tier 1 tax. In addition to other taxes, there is hereby imposed on the income of each employee a tax equal to the applicable percentage of the compensation received during any calendar year by such employee for services rendered by such employee. For purposes of the preceding sentence, the term "applicable percentage" means the percentage equal to the sum of the rates of tax in effect under subsections (a) and (b) of section 3101 for the calendar year.

(b) Tier 2 tax. In addition to other taxes, there is hereby imposed on the income of each employee a tax equal to the percentage determined under section 3241 for any calendar year of the compensation received during such calendar year by such employee for services rendered by such employee.

(c) Cross reference. For application of different contribution bases with respect to the taxes imposed by subsections (a) and (b), see section 3231(e)(2).

26 U.S.C. §3202. Deduction of tax from compensation.

(a) Requirement. The taxes imposed by section 3201 shall be collected by the employer of the taxpayer by deducting the amount of the taxes from the compensation of the employee as and when paid.

....

(b) Indemnification of employer. Every employer required under subsection (a) to deduct the tax shall be liable for the payment of such tax and shall not be

liable to any person for the amount of any such payment.

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26 U.S.C. §3221. Rate of tax [on Employers]

(a) Tier 1 tax. In addition to other taxes, there is hereby imposed on every employer an excise tax, with respect to having individuals in his employ, equal to the applicable percentage of compensation paid during any calendar year by such employer for services rendered to such employer. For purposes of the preceding sentence, the term "applicable percentage" means the percentage equal to the sum of the rates of tax in effect under subsections (a) and (b) of section 3111 for the calendar year.

(b) Tier 2 tax. In addition to other taxes, there is hereby imposed on every employer an excise tax, with respect to having individuals in his employ, equal to the percentage determined under section 3241 for any calendar year of the compensation paid during such calendar year by such employer for services rendered to such employer.

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26 U.S.C. §3231. Definitions

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(b) Employee. For purposes of this chapter, the term "employee" means any individual in the service of one or more employers for compensation. The term "employee" includes an officer of an employer. The term "employee" shall not include any individual while such individual is engaged in the physical operations consisting of the mining of coal, the preparation of coal, the handling (other than movement by rail with standard railroad locomotives) of coal not beyond the mine tipple, or the loading of coal at the tipple.

****

(d) Service. For purposes of this chapter, an individual is in the service of an employer whether his service is rendered within or without the United States, if –

(1) he is subject to the continuing authority of the employer to supervise and direct the manner of rendition of his service, or he is rendering professional or technical services and is integrated into the staff of the employer, or he is rendering, on the property used in the employer's operations, other personal services the rendition of which is integrated into the employer's operations, and

(2) he renders such service for compensation;

except that an individual shall be deemed to be in the service of an employer, other than a local lodge or division or a general committee of a railway-labor-organization employer, not conducting the principal part of its business in the United States, only when he is rendering service to it in the United States; and an individual shall be deemed to be in the service of such a local lodge or division only if ....

(e) Compensation. For purposes of this chapter—

(1) The term "compensation" means any form of money remuneration paid to an individual for services rendered as an employee to one or more employers. Such term does not include (i) the amount of any payment (including any amount paid by an employer for insurance or annuities, or into a fund, to provide for any such payment) made to, or on behalf of, an employee or any of his dependents under a plan or system established by an employer which makes provision for his employees generally (or for his employees generally and their dependents) or for a class or classes of his employees (or for a class or classes of his employees and their dependents), on account of sickness or accident disability or medical or hospitalization expenses in connection with

sickness or accident disability or death, except that this clause does not apply to a payment for group-term life insurance to the extent that such payment is includible in the gross income of the employee, (ii) tips (except as is provided under paragraph (3)), (iii) an amount paid specifically—either as an advance, as reimbursement or allowance—for traveling or other bona fide and necessary expenses incurred or reasonably expected to be incurred in the business of the employer provided any such payment is identified by the employer either by a separate payment or by specifically indicating the separate amounts where both wages and expense reimbursement or allowance are combined in a single payment, or (iv) any remuneration which would not (if chapter 21 applied to such remuneration) be treated as wages (as defined in section 3121(a)) by reason of section 3121(a)(5). Such term does not include remuneration for service which is performed by a nonresident alien individual for the period he is temporarily present in the United States as a nonimmigrant under subparagraph (F), (J), (M), or (Q) of section 101(a)(15) of the Immigration and Nationality Act, as amended, and which is performed to carry out the purpose specified in subparagraph (F), (J), (M), or (Q), as the case may be. For the purpose of determining the amount of taxes under sections 3201 and 3221, compensation earned in the service of a local lodge or division of a railway-labor-organization employer shall be disregarded with respect to any calendar month if the amount thereof is less than $25. Compensation for service as a delegate to a national or international convention of a railway labor organization defined as an "employer" in subsection (a) of this section shall be disregarded for purposes of determining the amount of taxes

due pursuant to this chapter if the individual rendering such service has not previously rendered service, other than as such a delegate, which may be included in his "years of service" for purposes of the Railroad Retirement Act. Nothing in the regulations prescribed for purposes of chapter 24 (relating to wage withholding) which provides an exclusion from "wages" as used in such chapter shall be construed to require a similar exclusion from "compensation" in regulations prescribed for purposes of this chapter.

(2) Application of contribution bases.

(A) Compensation in excess of applicable base excluded.

(i) In general. The term "compensation" does not include that part of remuneration paid during any calendar year to an individual by an employer after remuneration equal to the applicable base has been paid during such calendar year to such individual by such employer for services rendered as an employee to such employer.

(ii) Remuneration not treated as compensation excluded. There shall not be taken into account under clause (i) remuneration which (without regard to clause (i)) is not treated as compensation under this subsection.

(iii) Hospital insurance taxes. Clause (i) shall not apply to—

(I) so much of the rate applicable under section 3201(a) or 3221(a) as does not exceed the rate of tax in effect under section 3101(b), and

(II) so much of the rate applicable under section 3211(a) as does not exceed the rate of tax in effect under section 1401(b).

(B) Applicable base.

(i) Tier 1 taxes. Except as provided in clause (ii), the term "applicable base" means for any calendar year the contribution and benefit base determined under section 230 of the Social Security Act for such calendar year.

(ii) Tier 2 taxes, etc. For purposes of—

(I) the taxes imposed by sections 3201(b), 3211(b), and 3221(b), and

(II) computing average monthly compensation under section 3(j) of the Railroad Retirement Act of 1974 (except with respect to annuity amounts determined under subsection (a) or (f)(3) of section 3 of such Act), clause (2) of the first sentence, and the second sentence, of subsection (c) of section 230 of the Social Security Act shall be disregarded.

(C) Successor employers. ...

***

(4)(A) For purposes of applying sections 3201(a), 3211(a), and 3221(a), in the case of payments made to an employee or any of his dependents on account of sickness or accident disability, clause (i) of the second sentence of paragraph (1) shall exclude from the term “compensation” only—

(i) payments which are received under a workmen’s compensation law, and

(ii) benefits received under the Railroad Retirement Act of 1974.

(B) Notwithstanding any other provision of law, for purposes of the sections specified in subparagraph (A), the term “compensation” shall include benefits paid under section 2(a) of the Railroad Unemployment Insurance Act for days of sickness, except to the extent that such sickness (as determined in accordance with standards prescribed by the Railroad

Retirement Board) is the result of on-the-job injury.

(C) Under regulations prescribed by the Secretary, subparagraphs (A) and (B) shall not apply to payments made after the expiration of a 6-month period comparable to the 6-month period described in section 3121(a)(4).

(D) Except as otherwise provided in regulations prescribed by the Secretary, any third party which makes a payment included in compensation solely by reason of subparagraph (A) or (B) shall be treated for purposes of this chapter as the employer with respect to such compensation.

(5) The term "compensation" shall not include any benefit provided to or on behalf of an employee if at the time such benefit is provided it is reasonable to believe that the employee will be able to exclude such benefit from income under section 74(c), 108(f)(4), 117, or 132.

(6) The term "compensation" shall not include any payment made, or benefit furnished, to or for the benefit of an employee if at the time of such payment or such furnishing it is reasonable to believe that the employee will be able to exclude such payment or benefit from income under section 127.

(7) The term "compensation" shall not include any contribution, payment, or service provided by an employer which may be excluded from the gross income of an employee, his spouse, or his dependents, under the provisions of section 120 (relating to amounts received under qualified group legal services plans).

(8) Treatment of certain deferred compensation and salary reduction arrangements. ...

(9) Meals and lodging. The term "compensation" shall not include the value of meals or lodging

furnished by or on behalf of the employer if at the time of such furnishing it is reasonable to believe that the employee will be able to exclude such items from income under section 119.

(10) Archer MSA contributions. ...

(11) Health savings account contributions. ...

(12) Qualified stock options. ...

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26 U.S.C. §3241. Determination of tier 2 tax rate based on average account benefits ratio.

(a) In general. For purposes of sections 3201(b), 3211(b), and 3221(b), the applicable percentage for any calendar year is the percentage determined in accordance with the table in subsection (b).

(b) Tax rate schedule

Average account benefits ratio		Applicable percentage for sections 3211(b) and 3221(b)	Applicable percentage for section 3201(b)
At least	But less than		
	2.5	22.1	4.9
2.5	3.0	18.1	4.9
3.0	3.5	15.1	4.9
3.5	4.0	14.1	4.9
4.0	6.1	13.1	4.9
6.1	6.5	12.6	4.4
***			

(c) Definitions related to determination of rates of tax

(1) Average account benefits ratio. For purposes of this section, the term "average account benefits ratio" means, with respect to any calendar year, the average determined by the Secretary of the account benefits ratios for the 10 most recent fiscal years ending before such calendar year. If the amount determined under the preceding sentence is not a

multiple of 0.1, such amount shall be increased to the next highest multiple of 0.1.

(2) Account benefits ratio. For purposes of this section, the term "account benefits ratio" means, with respect to any fiscal year, the amount determined by the Railroad Retirement Board by dividing the fair market value of the assets in the Railroad Retirement Account and of the National Railroad Retirement Investment Trust (and for years before 2002, the Social Security Equivalent Benefits Account) as of the close of such fiscal year by the total benefits and administrative expenses paid from the Railroad Retirement Account and the National Railroad Retirement Investment Trust during such fiscal year.

(d) Notice. No later than December 1 of each calendar year, the Secretary shall publish a notice in the Federal Register of the rates of tax determined under this section which are applicable for the following calendar year.

45 U.S.C. §231a. Annuity eligibility requirements.

(a) Individuals eligible for annuities; disability standards; proof of continued disability.

(1) The following-described individuals, if they shall have completed ten years of service (or, for purposes of paragraphs (i), (iii), and (v), five years of service, all of which accrues after December 31, 1995) and shall have filed application for annuities, shall, subject to the conditions set forth in subsections (e), (f), and (h) of this section, be entitled to annuities in the amounts provided under section 231b of this title—

(i) individuals who have attained retirement age (as defined in section 216(l) of the Social Security Act);

(ii) individuals who have attained the age of sixty and have completed thirty years of service;

(iii) individuals who have attained the age of sixty-two and have completed less than thirty years of service, but the annuity of such individuals shall be reduced by 1/180 for each of the first 36 months that he or she is under retirement age (as defined in section 216(l) of the Social Security Act) when the annuity begins to accrue and by 1/240 for each additional month that he or she is under retirement age (as defined in section 216(l) of the Social Security Act) when the annuity begins to accrue;

(iv) individuals who have a current connection with the railroad industry, whose permanent physical or mental condition is such as to be disabling for work in their regular occupation, and who (A) have completed twenty years of service or (B) have attained the age of sixty; and

(v) individuals whose permanent physical or mental condition is such that they are unable to engage in any regular employment.

****

(4) An individual who is entitled to an annuity under paragraph (v) of subdivision (1), but who does not have at least ten years of service, shall, prior to the month in which the individual attains age 62, be entitled only to an annuity amount computed under section 231b(a) of this title (without regard to section 231b(a)(2) of this title) or section 231b(f)(3) of this title. Upon attainment of age 62, such an individual may also be entitled to an annuity amount computed under section 231b(b) of this title, but such annuity amount shall be reduced for early retirement in the same manner as if the individual were entitled to an annuity under subsection (a)(1)(iii) of this section.

(b) Individuals eligible for supplemental annuities. An individual who—

(i) has attained age 60 and completed thirty years of service or attained age 65;

(ii) has completed twenty-five years of service;

(iii) is entitled to the payment of an annuity under subsection (a)(1) of this section;

(iv) had a current connection with the railroad industry at the time such annuity began to accrue; and

(v) has performed compensated service in at least one month prior to October 1, 1981;

shall, subject to the conditions set forth [in] subsections (e) and (h), be entitled to a supplemental annuity in the amount provided under section 3 of this Act: Provided, however, That in cases where an individual's annuity under subsection (a)(1) begins to accrue on other than the first day of the month, the amount of any supplemental annuity to which he is entitled for that month shall be reduced by one-thirtieth for each day with respect to which he is not entitled to an annuity under subsection (a)(1).

****

45 U.S.C. §231b. Computation of annuities

(a) Amount

(1) The annuity of an individual under section 2(a)(1) of this Act shall be in an amount equal to the amount (before any reduction on account of age and before any deductions on account of work) of the old-age insurance benefit or disability insurance benefit to which such individual would have been entitled under the Social Security Act if all of his or her service as an employee after December 31, 1936, had been included in the term "employment" as defined in that Act.

(2) For purposes of this subsection, individuals entitled to an annuity under section 2(a)(1)(ii) of

this Act shall, except for the purposes of recomputations in accordance with section 215(f) of the Social Security Act, be deemed to have attained retirement age (as defined by section 216(l) of the Social Security Act). For purposes of this subsection, individuals entitled to an annuity under paragraph (iv) or (v) of section 2(a)(1) of this Act shall be deemed to be entitled to a disability insurance benefit under section 223 of the Social Security Act.

(3) If an individual entitled to an annuity under section 2(a)(1)(i) or (iii) of this Act on the basis of less than ten years of service is entitled to a benefit under section 202(a), section 202(b), or section 202(c) of the Social Security Act which began to accrue before the annuity under section 2(a)(1)(i) or (iii) of this Act, the annuity amount provided such individual under this subsection, shall be computed as though the annuity under this Act began to accrue on the later of (A) the date on which the benefit under section 202(a), section 202(b), or section 202(c) of the Social Security Act began, or (B) the date on which the individual first met the conditions for entitlement to an age reduced annuity under this Act other than the conditions set forth in sections 2(e)(1) and 2(e)(2) of this Act and the requirement that an application be filed.

(b) Increased annuities under subsection (a)

(1) The amount of the annuity of an individual provided under subsection (a) shall be increased by an amount equal to seven-tenths of 1 per centum of the product which is obtained by multiplying such individual's "years of service" by such individual's "average monthly compensation" as determined under this subsection. The annuity amount payable to the individual under this subsection shall be reduced by 25 per centum of the annuity amount computed for such individual under subsection

(h)(1) or (h)(2), and subsection (h)(5), of this section without regard to section 7(c)(1) of this Act. An individual's "average monthly compensation" for purposes of this subsection shall be the quotient obtained by dividing by 60 such individual's total compensation for the 60 months, consecutive or otherwise, during which such individual received that individual's highest monthly compensation, except that no part of any month's compensation in excess of the maximum amount creditable for any individual for such month under subsection (j) of this section shall be recognized. In determining the months of compensation to be used for purposes of this subsection, the total compensation reported for the individual under section 9 of this Act or credited to such individual under subsection (j) of this section for a year divided by the number of months of service credited to such individual under subsection (i) of this section with respect to such year shall be considered the monthly compensation of the individual for each month of service in any year for which records of the Board do not show the amount of compensation paid to the individual on a monthly basis. If the "average monthly compensation" computed under this subsection is not a multiple of $ 1, it shall be rounded to the next lower multiple of $ 1.

(2) For purposes of subdivision (1) of this subsection, in determining “average monthly compensation” for an individual who has not engaged in employment for an employer in the 60-month period preceding the month in which such individual's annuity began to accrue, and whose major employment during such 60-month period was for a United States department or agency named in section 1(o) of this Act, the amount of compensation used with respect to each month used

in making such determination shall be the product of—

(i) the compensation credited to such individual for such month under paragraph (1) of this subsection; and

(ii) the quotient obtained by dividing—

(I) the average of total wages (as determined under section 215(b)(3)(A)(ii)(I) of the Social Security Act) for the second calendar year preceding the earliest of the year of the individual's death or the year in which an annuity begins to accrue to such individual (disregarding an annuity based on disability which is terminated because such individual has recovered from such disability if such individual engages in any regular employment after such termination); by

(II) the average of total wages (as determined under section 215(b)(3)(A)(ii)(II) of the Social Security Act) for the calendar year during which such month occurred, unless such month occurred prior to calendar year 1951, in which case, the average of total wages so determined for 1951.

In no event shall "average monthly compensation" determined for an individual under this subdivision exceed the maximum "average monthly compensation" which can be determined under subdivision (1) of this subsection for any person retiring January 1 of the year in which such individual's annuity began to accrue.

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