No. 17-1042

IN THE
Supreme Court of the United States

BNSF RAILWAY COMPANY,
Petitioner,
v.
MICHAEL D. LOOS,
Respondent.

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

BRIEF OF THE ASSOCIATION OF AMERICAN RAILROADS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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STATEMENT OF INTEREST OF *AMICUS CURIAE*[1]

Amicus curiae Association of American Railroads (AAR) is an incorporated, nonprofit trade association representing the nation's major freight railroads, many smaller freight railroads, Amtrak, and some commuter authorities. AAR's members operate approximately 83 percent of the rail industry's line haul mileage, produce 97 percent of its freight revenues, and employ 95 percent of rail employees. In matters of significant interest to its members, AAR frequently appears on behalf of the railroad industry before Congress, the courts and administrative agencies. AAR seeks to participate as *amicus curiae* to represent the views of its members when a case raises an issue of importance to the railroad industry as a whole.

AAR is participating in this case as *amicus curiae* because it involves two federal statutes that apply uniquely to the railroad industry: the Federal Employers' Liability Act (FELA), 45 U.S.C. §§51-60 and the Railroad Retirement Tax Act (RRTA), 26 U.S.C. §§3201-3241. These statutes affect all railroads, and involve the expenditure of significant sums of money: the payment of hundreds of millions of dollars in settlements and verdicts under FELA, and the payment of billions of dollars in taxes under the RRTA, which fund billions of dollars in benefits provided under the Railroad Retirement Act (RRA). 45 U.S.C. §§231–231v.

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[1] Both parties have consented to AAR's filing of an *amicus* brief. Pursuant to Rule 37.6, AAR states that no person or entity other than AAR has made monetary contributions toward this brief, and no counsel for any party authored this brief in whole or in part.

AAR works closely with its members to ensure consistent and correct application of FELA around the country. Similarly, AAR works with its members and the Railroad Retirement Board (RRB)—an independent agency in the executive branch of the federal government charged with administering the RRA, 45 U.S.C. §231f—to ensure that the railroad retirement system is administered in an equitable and efficient manner, and in accordance with the requirements of the law.

SUMMARY OF THE ARGUMENT

The Eighth Circuit's decision, which held that FELA awards for lost wages are not subject to RRTA payroll taxes, should be reversed. Railroad employees who are injured on the job may bring negligence suits against their employing railroad under FELA. Lost wages often make up a significant portion of the damages sought and recovered in those suits.

Railroad employees are also covered by a unique retirement system under which they become eligible for retirement, disability and other benefits based on their years of service and creditable compensation. The railroad retirement system is comparable to the Social Security system in some ways, but differs in others. RRA benefits are funded by payroll taxes levied under the RRTA on the compensation received by employees and paid by employers, which employers must collect and pay to the IRS.

The Eighth Circuit held that damages for lost wages (so-called "time-lost" awards) are not taxable because they do not meet the definition of compensation under the RRTA. Compensation is defined as "any form of money remuneration paid to an individual for services rendered as an employee to one of more employers."

The Court held that such awards are not taxable because they are not made for "services rendered," but instead are compensation for periods of time when "the employee did not actually render any services." This unduly restrictive reading of the term "compensation" would call into question not just the taxability of time-lost awards, but also the taxability of other payments made to employees for periods when they do not actually perform services, such as vacation and sick pay. Virtually every other lower court that has addressed this issue has rejected this interpretation of RRTA compensation.

However, a number of those courts have held that even though time-lost awards are compensation, they are not taxable under the RRTA because personal injury damages are excluded from gross income under section 104 of the Internal Revenue Code. Those courts have reasoned that compensation is a subset of gross income, and if time-lost awards are not gross income they necessarily cannot be compensation. As did the Eighth Circuit, those courts also have misread the law and failed to account for the close connection between "compensation" under the RRA and "compensation" under the RRTA.

A proper reading of the RRTA—which takes into account the purpose of RRTA payroll taxes—requires that FELA time-lost awards be subject to RRTA taxes. The railroad retirement system is an integrated statutory scheme under which benefits paid under the RRA are funded by taxes levied under the RRTA. Both eligibility for, and the level of, benefits payable to a retired railroad employee under the RRA are based on the employee's years of services and the amount of compensation with which the employee is credited. For the purpose of calculating the benefits for which

a railroad worker will become eligible, payments received for time lost (including pay received due to a personal injury) are considered compensation and included in determining both the employee's "years of service" and creditable compensation. As a result, when a FELA award for lost wages is made, and treated as a payment for time lost under the RRA, the employee realizes a distinct benefit because such treatment serves to increase the employee's years of service and creditable compensation. Because railroad employees receive RRA credit for the time-lost FELA awards they receive, those awards must be treated as compensation that is subject to the payroll taxes that support those RRA benefits.

ARGUMENT

TIME-LOST FELA PAYMENTS ARE COMPENSATION UNDER THE RRTA AND ARE SUBJECT TO RRTA PAYROLL TAXES.

This case concerns the interplay between two federal statutes that are unique to the railroad industry: FELA and the RRTA. FELA is a federal negligence law that provides compensation to employees who are injured on the job. The RRTA levies taxes that fund benefits under the RRA, a statute which created and governs the railroad retirement system. The court below held that payments made to railroad employees under FELA for wages lost as a result of an injury—"time-lost" awards—are not subject to RRTA taxes. Not only is the ruling below based on an incorrect reading of the statute, it violates the Congressional design because it exempts time-lost awards from the taxes that are specifically earmarked to fund RRA pension benefits, even while the payment of such awards to employees serves to enhance the benefits those employees receive.

A. Railroad Workers Who Are Injured on the Job May Collect Damages for Lost Wages Under the Federal Employers' Liability Act.

FELA was enacted over a century ago, predating the modern no-fault workers' compensation laws which became universal for the rest of U.S. industry in the decades after FELA's enactment. *See* Gen. Accounting Office, *Federal Employers' Liability Act: Issues Associated With Changing How Railroad Work-Related Injuries Are Compensated* 15 (1996).[2] Congress incorporated into FELA the concept of common law negligence as the basis for recovery. 45 U.S.C. §51; *New Orleans & N. E. R.R.,* 247 U.S. 367, 371 (1916) ("negligence is essential to recovery"); *Southern Ry. v. Gray*, 241 U.S. 333, 339 (1916) (The rights and obligations under FELA depend upon "applicable principles of common law. . . . Negligence by the railway company is essential to a recovery.").

When a railroad employee is injured on the job, unless the parties can reach a settlement the employee must bring a lawsuit in state or federal court in order to recover. 45 U.S.C. §56 (granting state and federal courts concurrent jurisdiction in FELA cases). In these FELA lawsuits, injured workers may seek both economic and noneconomic damages. *See Frazier v. Norfolk & W. Ry. Co.,* 996 F.2d 922, 925 (7th Cir. 1993).

Damage claims for past and future lost wages often are a major component of a FELA suit. During the past three years, railroads reported to the Federal Railroad

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[2] The maritime industry, by virtue of the Jones Act, also is covered by the FELA. 46 U.S.C. §30104. Virtually all other employers and employees in the United States are covered by a state or federal no-fault workers' compensation law.

Administration an annual average of 2,983 on-duty injuries resulting in time away from the job. http://safetydata.fra.gov/OfficeofSafety/publicsite/Query/casemp.aspxQuery4.09WorkerSafetyReport. Not surprisingly, many of the hundreds of FELA suits filed against railroads each year seek recovery for wage loss incurred when the employee was unable to work due to the injury. Often such awards constitute a significant portion of the damages awarded. *See e.g., DeBiasio v. Illinois Cent. R.R.,* 52 F.3d 678, 687 (7th Cir. 1995) (plaintiff awarded $51,000 for past lost earnings and $1,150,000 for future lost earnings); *Frazier*, 996 F.2d at 925 (plaintiff awarded $2.3 million had sought $114,600 in past lost wages and $430,000 in future lost earnings).

FELA is but one example of how Congress historically has singled out railroads for unique treatment, motivated in part by the industry's outsized role in the national economy. *See State of Calif. v. Cent. Pac. R.R.*, 127 U.S. 1, 39-40 (1888) (describing efforts by Congress to promote expansion of the railroad industry as a means of promoting the country's economic development). Given the pervasive role railroads played in national commerce, Congress frequently focused first on railroads as it extended its authority over industry and the national economy. *E.g.,* Interstate Commerce Act of 1887, c.104, 24 Stat. 379 (economic regulation); Safety Appliances Act of 1893, c. 196, 27 Stat. 531 (safety); Railway Labor Act, c. 347, 44 Stat. 577 (1926) (labor relations); Federal Railroad Safety Act, Pub. L. No. 91-458, 84 Stat. 971 (1970) (safety).

Today, railroads are just one of several transportation modes that play a major role in interstate, and international, commerce. However, in the areas of economic regulation, employer liability, safety, and

labor relations, railroads remain subject to unique statutory schemes that operate parallel to (though at times starkly differently from) the comparable laws that govern most other industries. When applying statutes to which railroads—and only railroads—are subject, courts must be mindful of the specific goals and purposes Congress intended to advance, and how Congress intended those laws to interrelate.

B. Railroad Employees are Eligible for Railroad Retirement Benefits Which are Funded by Payroll Taxes Levied on Their Compensation Under the RRTA.

As with compensation for work-related injuries, railroads and their employees are treated differently from other industries when it comes to retirement and related benefits. They are not covered by the Social Security system that covers virtually all other employers and employees (and self-employed individuals) in the United States. *See* 42 U.S.C. §410(a)(9) (excluding service performed by employees of carriers by railroad from the definition of service under the Social Security Act). Instead, they are covered by the RRA, a retirement security system that was enacted around the same time as Social Security. R.R. Ret. Bd., *Railroad Retirement Handbook* 1-2 (2015) (available at https://www.rrb.gov/Sites/default/files/2017-04/RRB%20Handbook%20%282015%29.pdf.). The RRA provides retirement and disability benefits to railroad workers, their spouses and survivors.

The RRA provides two tiers of benefits: tier I benefits are comparable to the benefits provided under the Social Security system, but are based on railroad retirement age and service requirements; tier II provides additional retirement benefits, above and beyond what Social Security provides, that are comparable to

private multiemployer pension plans. Tier II also provides other benefits not available under Social Security. *See e.g.,* 45 U.S.C. §231a(a)(1)(iv) (providing an occupational disability benefit).[3] Eligibility requirements under the RRA differ from Social Security, and in some cases are more favorable to long–term railroad employees. *See e.g*., 45 U.S.C. §231a(a)(1)(ii) (permitting workers aged 60 with at least 30 years of service to retire with an unreduced benefit). *See generally Railroad Retirement Handbook* at 15-20.

The substantial sums paid in railroad retirement benefits each year require a reliable funding source. At the end of fiscal 2016, 222,100 age and disability annuities, 145,900 spousal annuities, and 116,800 survivor annuities were being paid. R.R. Ret. Bd., *2017 Annual Report* at 4 (available at https://www.rrb.gov/sites/default/files/2017-09/2017AnnualReport.pdf). In fiscal year 2016, about $12.3 billion in retirement benefits were paid to those beneficiaries. *Id*. at 1, 15.

The "payroll taxes levied on covered employers and their employees" under the RRTA are the "primary source of income to the railroad retirement and survivor program." *2017 Annual Report,* at 7; *Railroad Retirement Handbook* at 45. The RRTA imposes separate payroll taxes on "compensation" paid by railroad employers and received by railroad employees to fund each tier of benefits. 26 U.S.C. §3201(a) & (b) (imposing tier I and tier II payroll tax on compensation received by employees); 26 U.S.C. §3221(a) & (b)

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[3] Some courts have permitted railroad employees to receive both unreduced FELA awards and occupational disability benefits for the same work-related injuries. *E.g., Sloas v. CSX Transp., Inc.*, 616 F.3d 380, 392 (4th Cir. 2010); *Green v. Denver & Rio Grande W. R.R.*, 59 F.3d 1029, 1032-33 (10th Cir. 1995).

(imposing tier I and tier II payroll tax on compensation paid by employers). Compensation is defined as "any form of money remuneration paid to an individual for services rendered as an employee to one of more employers." 26 U.S.C. §3231(e)(1).

Tier I taxes are the equivalent of the Social Security payroll taxes and fund Social Security-equivalent benefits (as well as Medicare). Tier II payroll taxes fund the benefits that are available to railroad employees but not to Social Security beneficiaries. Tier II taxes have a different earnings base (the maximum amount of earnings that is subject to the tax each year) than tier I taxes, and utilize a different rate for employees and employers, which can fluctuate year to year based on the "average account benefit ratio"—a ratio of fund assets to benefits and expenses. *Railroad Retirement Handbook* at 46.

The RRTA requires that railroad employers collect the taxes owed by their employees by deducting the proper amounts from the employee's compensation and paying those amounts to the IRS. 26 U.S.C. §3202(a); 26 C.F.R. §31.3202-1(a). The law is clear that the employer has an absolute obligation to pay the taxes to the IRS and not to anyone else. 26 U.S.C. §3202(b); 26 C.F.R. §31.3202-1(e).

C. The Court Below Was Wrong When it Held That FELA Time-Lost Awards Are Not Subject to RRTA Taxes, as Were Other Lower Courts Which Reached the Same Result Using A Different Rationale.

Following the law, in the case below petitioner BNSF withheld, and paid to the IRS, an amount that covered respondent Loos' payroll tax obligation on the portion of his FELA verdict that was attributable to

time lost. Pet. Br. at 11. This was consistent with the long-standing views of both the RRB and the IRS. "All compensation under the Railroad Retirement Tax Act (RRTA) is subject to the Tier I and Tier II tax rates . . . This is also true of pay for time lost." R.R. Ret. Bd., *Pay for Time Lost from Regular Railroad Employment*, Form 1B-4, at 8 (06-95). The RRB explains that "[p]ay for time lost is compensation paid by a railroad employer which is creditable under the [RRA] and which is attributable to lost earnings for an identifiable period of absence from active service." *Id.* at 1. In addition, Treasury regulations interpret compensation under the RRTA to include time-lost payments. 26 C.F.R. §31.3231(e)-1(a)(3)-(4).[4] Thus, both the IRS and RRB take the position that time-lost payments constitute compensation for the purpose of both calculating benefits and levying taxes, and that railroads and their employees must pay RRTA payroll taxes on time-lost payments made to employees, including awards made under FELA.

The Eighth Circuit disagreed and held that RRTA taxes are not owed on time-lost payments. Pet. App. 1a – 24a. Reading the RRTA's definition of compensation narrowly, the court held that time-lost payments are not taxable because they are not made for "services rendered," but instead are compensation for periods of time when "the employee did not actually render any services." Pet App. 20a. This crabbed reading of the definition of compensation has grave implications for the railroad retirement system beyond the tax treatment of FELA time-lost awards. If FELA time-lost

[4] The regulation states that "[t]he term compensation is not confined to amounts paid for active service, but includes amounts paid for an identifiable period during which the employee is absent from the active service of the employer . . . ."

awards are not subject to RRTA taxes because they are payments for time periods during which services were not actually rendered by the employee, there is no logical reason why other payments for time periods during which services are not rendered—like vacation, holiday, and sick pay—also would not be taxable. Under the rationale of the court below there is no way to distinguish those types of payments—also made for periods when an employee does "not actually render any services"—from time-lost awards. Thus, the decision below calls into question whether large sums of money regularly paid to railroad employees are subject to RRTA taxes. Many millions of dollars in payroll taxes, which heretofore have been levied without controversy, would be at stake. Wage-related data showing the magnitude of these payments provided to the Surface Transportation Board by railroads are available at https://www.stb.gov/econdata.nsf/dc81d49e325f550a852566210062addf?OpenView&Start==1& Count=300&Expand=1#1.

Other courts have reached the same outcome as the Eighth Circuit even while rejecting its reading of the definition of compensation under the RRTA. *See Cowden v. BNSF Ry. Co*., 2014 U.S. Dist. LEXIS 91454, at *23 (E.D. Mo. 2014) ("[T]he Court finds an FELA award of lost pay falls within the definition of 'compensation' under the RRTA. Contrary to Plaintiff's arguments, Plaintiff's verdict is not excluded from the definition of 'compensation' under the RRTA merely because personal injury prevented Plaintiff from performing his job duties."); *Marlin v. BNSF Ry. Co.,* 163 F.Supp.3d 576, 579 (S.D. Iowa 2016) (agreeing with *Cowden* conclusion that FELA judgments for lost pay fall within the definition of compensation for RRTA purposes) *Loy v. Norfolk S. Ry. Co.,* 2016 U.S. Dist. LEXIS 48824 (N.D. Ind. 2016) (same). *See* Pet. Br. at

18-22, and n. 20 (explaining why the narrow definition of "compensation" adopted by the Eighth Circuit is incorrect and listing cases that have rejected that interpretation).[5]

However, those courts have offered an alternative, equally erroneous, rationale for holding that time-lost awards are not taxable under the RRTA. Despite concluding that FELA time-lost awards are compensation under the RRTA, they have held that such awards are not subject to RRTA taxes because they are excluded from gross income under 26 U.S.C. §104(a)(2) as "damages . . . received . . . on account of personal physical injuries." *Cowden*, 2014 U.S. Dist. LEXIS 91454, at *26-29; *Marlin*, 163 F.Supp.3d at 581-82; *Loy*, 2016 U.S. Dist. LEXIS 48824, at *11-14. The Missouri Supreme Court also concluded that FELA awards are not subject to RRTA payroll taxes because personal injury awards are not subject to federal income taxes pursuant to 26 U.S.C. §104(a)(2), nor to payroll taxes under the Federal Insurance Contributions Act (FICA), 26 U.S.C. §§3101 *et seq*., the statute which funds Social Security benefits. *Mickey v. BNSF Ry. Co.,* 437 S.W.3d 207, 211-12 (Mo. 2014).[6] But these courts also have misread the statute and upset the symmetry between the benefit and tax sides of the railroad retirement coin. *Standard Office Bldg. Corp., v. United States,* 819 F.2d 1371, 1373 (7th Cir. 1987) (The RRA

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[5] However, a recent Illinois appellate court adopted the reasoning of the court below. *Munoz v. Norfolk S. Ry. Co.,* 2018 Il. App. (1st) 171009 (Ill. App. 2018).

[6] *See Redfield v. Insur. Co. of N. Am.,* 940 F.2d 542, 548 (9th Cir. 1991) (income excludable from income taxes under §104 also is excluded from FICA payroll taxes).

is "the expenditure side of the coin" and the RRTA "is the revenue side.").

In contrast, other courts have correctly concluded that time-lost payments are taxable compensation for the purposes of the RRTA notwithstanding their exclusion from gross income under 26 U.S.C. §104. *Phillips v. Chicago Cent. & Pac. R.R.*, 853 N.W.2d 636, 649 (Iowa 2014) (The RRA and RRTA are "inextricably interconnected because the latter funds the former" and it is "logical to read these two statutes in harmony to conclude that compensation as used in the RRTA implicitly includes time lost."); *Heckman v. Burlington N. Santa Fe Ry, Co.,* 837 N.W.2d 532, 540 (Neb. 2013); *Liberatore v. Monongahela Ry. Co.,* 140 A.3d 16, 29 (Pa. Super 2016) ("Although the *Mickey* Court attempted to disassociate the RRA and RRTA, we find the statutes are inextricably intertwined, and must be considered *in pari materia*. Indeed, without the benefits provided for in the RRA, there would be no need for the taxing provisions of the RRTA."); *Norfolk S. Ry. Co. v. Williams,* 2018 Ala. Civ. App. LEXIS 101 (Ala. Civ. App. 2018). These courts have focused on the relationship between the RRTA and RRA—and the connection between the taxes paid and benefits received—in concluding that time-lost payments must be treated similarly under both statutes.

D. Railroad Employees' RRA Benefits are Enhanced By Their Receipt of Pay for Time Lost and Therefore Railroad Retirement Taxes Must Be Paid on Time-Lost Awards.

The RRA, which is designed to provide specific benefits to a specific class of beneficiaries, cannot be considered as separate from and unconnected to the RRTA, the statute that levies the taxes which fund

those benefits. Rather, these statutes must be seen as inextricably interconnected, and payments that are compensation under one must also be treated as compensation under the other. As the Court explained in *Galveston By Bd. of Trustees v. United States,* 22 Cl. Ct. 600, 610 (Cl. Ct. 1991):

> The taxes on employees and carriers under RRTA . . . are earmarked to fund the retirement, . . . and disability benefits payable under the RRA . . . . The statutes that provide the benefits to railroad employees and the statutes that provide the supporting taxes are parts of the same legislative scheme. They are two sides of the same coin. Although the RRB administers the employee benefits system, and the IRS administers tax collections that support the system, the statutory scheme is highly integrated.

See also Standard Office Bldg. Corp., 819 F.2d at 1373 (The RRTA imposes "an employment or payroll tax on both employer and employee, with the proceeds used to pay pensions and other benefits."); *Florida E. Coast Ry. Co. v. United States,* 470 F.2d 513, 515 (Ct. Cl. 1972) ("The funding of [RRA] benefits . . . is provided by an employment tax levied equally on the railroad employers and their employees . . . ."). This close connection between the two statutes should inform this Court's analysis.

The definition of compensation under the RRA is highly relevant to the tax treatment of time-lost awards, far more relevant than how such awards are treated for income tax purposes, or how analogous payments are treated under FICA. The RRA's definition of "compensation" includes pay for "time lost," including pay for an "absence on account of personal

injury." 45 U.S.C. §231(h)(1) & (2). While the definition of compensation under the RRTA does not expressly refer to time-lost payments, 26 U.S.C. §3231(e)(1), the Treasury Department maintains the position that, as it does under the RRA, compensation under the RRTA includes "pay for time lost." 26 C.F.R. §31.3231(e)-1(a)(3)-(4). There is a sound reason for this.

Both eligibility for, and the level of, benefits payable to a retired railroad employee under the RRA are based on the employee's years of service and the amount of compensation with which the employee is credited. 20 C.F.R. §211.1; *Railroad Retirement Handbook* at 15 ("Benefits are based on earnings credits and months of service."). *See* 45 U.S.C. §231a(a)(1) (describing eligibility for both retirement and disability benefits); 45 U.S. C. §231a(b) (describing eligibility for supplemental retirement benefits). And "[a]ny month or any part of a month during which an employee performed no active service but received pay for time lost as an employee is counted as a month of service," 20 C.F.R. §210.5(d), and is considered "creditable compensation." 20 C.F.R. §211.3(a). Thus, for the purpose of calculating the benefits for which a railroad worker will become eligible, payment received for time lost (including pay received due to a personal injury) is included in determining both the employee's "years of service," 45 U.S.C. §231(f)(1), and "compensation." 45 U.S.C. §231(h)(1)&(2); 20 C.F.R. §211.2(b)(2).

As a result, when a FELA award for lost wages is made, and treated as a payment for time lost under the RRA, the employee realizes a distinct benefit because such treatment serves to increase the employee's years of service and compensation. *See* Pet. Br. at 11, 26 (Mr. Loos received credit for four months of service as a result of the time-lost payment received as

part of his FELA award). The rationale for this treatment is that but for the injury which caused the employee to miss work, he or she would have been working for the railroad and earning compensation. The RRB has explained that

> [t]he intent behind the pay for time lost concept is to treat an employee as if he or she had actually performed compensated services during an identifiable period of time. The effect of pay for time lost upon eligibility and benefits under the RRA [ ] is identical to the effect of regular earnings for which service and compensation credit are received.

Pay for Time Lost From Regular Railroad Employment at 1; *see Jacques v. R.R. Retirement Bd.*, 736 F.2d 34, 39-40 (2d Cir. 1984) (where the plaintiff's FELA complaint alleged loss of earnings due to the injury, the settlement award entered into was considered to be pay for time lost, resulting in the five months missed from work being counted as creditable compensation, thereby qualifying the plaintiff for a disability annuity under the RRA).

Because the employee receives RRA credit for the time lost, there is no rationale for permitting the employee to avoid the RRTA tax payment obligation. Had the employee-FELA claimant been working, he or she would have been paying railroad retirement taxes, which the railroad employer would deduct automatically from the employee's paycheck. As the court in *Liberatore* explained:

> [u]nder the RRA, a railroad employee receives an **increase** in benefits based upon his 'average monthly compensation.' That 'compensation' includes pay for time lost 'on

> account of personal injury.' Because an employee's RRA benefits increase based upon 'time lost' pay in a personal injury award, it follows that the same 'time lost' award should be taxed under RRTA to pay those benefits.

140 A.3d at 29. (citations omitted) (emphasis in the original). *See also Williams*, 2018 Ala. Civ. App. 101, at *31 (agreeing with the rationale of *Liberatore*).

That is why the non-taxability of personal injury awards for income tax or FICA tax purposes has nothing to do with the tax treatment of those awards under the RRTA. A FELA award for time lost enhances a railroad worker's future railroad retirement benefits. In contrast, the receipt of a personal injury award neither confers an additional governmental benefit funded out of general funds nor enhances the plaintiff's Social Security benefits.

> [T]he SSA does not explicitly include an employee's pay for lost time due to personal injury when calculating benefits. Therefore, it follows that for purposes of collecting SSA taxes, FICA also does not tax an award for time lost due to personal injury.

Liberatore, 140 A. 3d at 30 (citation omitted).

Unpersuaded, the court below concluded that it "should not read the RRTA and the RRA *in pari materia* and that it is inappropriate to import the RRA's definition of 'compensation' into the RRTA." Pet App. 23a.[7] In discounting the close interconnection

[7] Similarly, *Mickey* explained that the RRA's definition of compensation is irrelevant because "[t]he RRA and RRTA are separate statutes that are administered by separate agencies and serve different purposes," 437 S.W.3d at 214.

between the RRA and RRTA the Eighth Circuit noted that the "taxes paid by and on behalf of an employee [under the RRTA] do not necessarily correlate with the benefits to which the employee may be entitled under the RRA." Pet. App. 23a (quoting *Hisquardo v. Hisquardo,* 439 U.S. 572, 575 (1979) (internal quotation marks omitted)). That statement misses the larger point. While there is not necessarily a dollar-for-dollar correlation between the taxes paid and the benefits received, the taxes paid and hours of service credited directly enhance the benefits for which the employee ultimately will become eligible. *See Hance v. Norfolk S. Ry Co.,* 571 F.3d 511, 523 (6th Cir. 2009) (when the railroad pays tier I and tier II taxes on an employee's back pay award, the employee "will receive retirement credit for the time periods covered by the back pay award, putting him in the position he would have been in had he not been discharged."); *Norton v. R.R. Retirement Bd.,* 69 F.3d 282, 283 (8th Cir. 1995) ("'time lost' from active service counts toward an employee's total years of service if the employer compensates the employee for the time lost").

Recognizing the connection between the benefits and tax sides of the railroad retirement system, for more than a half-century the IRS has consistently maintained the position that the income tax treatment of personal injury awards under section 104 has no bearing on the RRTA tax treatment of pay for time lost. *See* IRS Rev. Rul. 61-1, 1961-1-C.B. 14, 1961 WL 12630 (1961) (ruling that payment received by a railroad employee under a settlement agreement for personal injuries was excluded from gross income for income tax purposes even though that same amount was taxable as pay for time lost under RRTA, explaining that tax treatment of a payment under the RRTA "is not controlling" for purposes of determining

the tax treatment for income tax purposes); IRS Rev. Rul. 85-97, 1985-2.C.B. 50, 1985 WL 287177 (1985) (reaffirming after the 1975 and 1983 RRTA amendments that a personal injury settlement was excludable from gross income, notwithstanding its treatment as taxable pay for time lost under the RRTA); *See also* IRS, Technical Advice Memorandum 8115012, 1980 WL 137627 (1980) ("payments are excludable from gross income under section 104(a)(2) of the Code, but constitute compensation for purposes of RRTA"); IRS, Technical Advice Memorandum 9322001, 1993 WL 187036 (1993) (explaining why removal of the specific reference to time lost from the RRTA's definition of compensation does not mean that time lost payments are excluded from taxable compensation under the RRTA); *See also* Pet Br. at 28-33 (explaining the purpose of the deletions of the references to time lost in the definition of compensation under the RRTA, and why those deletions did not change the meaning of compensation).

Some courts have reasoned that because wages (compensation) paid to an employee are a subset of gross income, if personal injury payments are excluded from gross income they necessarily cannot be considered compensation. *E.g., Cowden*, 2014 U.S. Dist. LEXIS 91454, at *26-27; *Mickey*, 437 S.W. 3d at 212. But the statute does not subscribe to that logic.

Personal injury damages is one of a number of items the Internal Revenue Code expressly excludes from gross income. The RRTA expressly incorporates some, *but not all*, of those exclusions from gross income into its definition of "compensation," meaning they are also

not considered RRTA compensation.[8] If all of the exclusions from gross income were necessarily excluded from compensation under the RRTA because compensation is a subset of gross income, there would be no reason to specifically reference those exclusions in the RRTA. That Congress did so confirms that it did not intend to automatically import all of the income tax code's exclusions from gross income wholesale into the RRTA. Indeed, while specifically incorporating many of the exclusions from gross income, the RRTA *does not* incorporate the exclusion of personal injury awards under §104(a)(2).

* * *

The purpose of the unified railroad retirement statutory scheme—to provide for and fund retirement and other benefits for railroad retirees—is undermined if the definitions of compensation under the RRA and RRTA are decoupled, or if the personal injury exclusion of 26 U.S.C. §104 is applied to RRTA taxes. Allowing railroad employees to receive credit for time-lost payments that can serve to enhance the benefits they will receive, or hasten their eligibility for those

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[8] *See, e.g.*, 26 U.S.C. §3231(e)(5), incorporating exclusions under 26 U.S.C. §74(c) (employee achievement awards), 26 U.S.C. §108(f)(4) (amounts received under federal or state student loan forgiveness programs), 26 U.S.C. 117 (qualified scholarships), and 26 U.S.C. §132 (fringe benefits); 26 U.S.C. §3231(e)(6), incorporating exclusion under 26 U.S.C. §127 (employer-provided educational assistance); 26 U.S.C. §3231(e)(9), incorporating exclusion under 26 U.S.C. §119 (value of meals and lodging furnished by employer); 26 U.S.C. §3231(e)(10), incorporating exclusion under 26 U.S.C. §106(b) (medical savings account contributions); 26 U.S.C. §3231(e)(11), incorporating exclusion under 26 U.S.C. §106(d) (employer contributions to health savings accounts); 26 U.S.C. §3231(e)(12), incorporating exclusions under 26 U.S.C. §422(b) and §423(b) (qualified stock options).

benefits, while exempting those payments from the very taxes which fund those benefits, is bad policy as it undermines Congress' carefully calibrated balance between benefits and funding. Ultimately, such a result would mean additional funding will be required to keep the systems in financial balance. Absent some clear indication from Congress that it intended that there be a lack of balance between the calculation of benefits on the one hand and the funding of those benefits on the other, the statutes should not be read to create such an imbalance.

CONCLUSION

For the foregoing reasons the ruling below should be reversed.

Respectfully submitted,

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