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SUPREME COURT
OF THE UNITED STATES

In the Matter of:	)	
	)	
MONESSEN SOUTHWESTERN RAILWAY COMPANY,	)	
	)	No. 86-1743
Appellant,	)	
v.	)	
	)	
GERALD L. MORGAN	)	

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IN THE SUPREME COURT OF THE UNITED STATES

MONESSEN SOUTHWESTERN RAILWAY COMPANY,
Appellant,
v. : No. 86-1743
GERALD L. MORGAN

Washington, D.C.
Monday, February 22, 1988

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 11:03 a.m.

APPEARANCES:

PAUL A. MANION, ESQ., Pittsburgh, Pennsylvania;
on behalf of the Appellant.

THOMAS HOLLANDER, ESQ., Pittsburgh, Pennsylvania;
on behalf of the Appellee.

C O N T E N T S

P R O C E E D I N G S

(11:03 a.m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument next in number 86-1743, Monessen Southwestern Railway Company versus Gerald L. Morgan.

Mr. Manion, you may proceed whenever you're ready.

ORAL ARGUMENT OF PAUL A. MANION, ESQ.

ON BEHALF OF APPELLANT

MR. MANION: Mr. Chief Justice, and may it please the Court.

This case presents the question whether a Pennsylvania Court of Common Pleas sitting in a Federal employers liability act case is free to apply State Court rules concerning the propriety of an award of prejudgment interest and the reduction of an award for impairment of future earning power to its present value, or must apply the Federal law applicable to those issues.

The facts relevant to this question can be stated very briefly. The plaintiff was injured in the course of his employment with the Monessen Southwestern Railway as a brakeman conductor. He was off work for about eighteen months. When he returned to work, he returned as a radio supply clerk, rather than as a brakeman conductor.

He filed suit under the FELA in the Court of Common Pleas of Allegheny County in Pittsburgh. At that trial, he

claimed damages first based on his lost wages to the date of trial, which approximately $50,000. And for impairment of his future earning power based on his claim that he would earn approximately $5,000 a year less as a radio supply clerk than he would have as a brakeman conductor for the remaining fifteen years of his expected work life.

At the close of the evidence, counsel for the Railroad submitted a point for charge to the Court, requesting the Court to charge the jury on reducing an award for impairment of future earning power to its present value. In that request, there was specifically included a reference to present worth tables of which the Court had already taken judicial notice, and which would assist the jury in making the present worth reduction.

The Court denied the request stating on three separate occasions, both orally and in writing that the basis for the Court's refusal was the recently announced decision of the Supreme Court of Pennsylvania holding that a present worth instruction should no longer be given in the Courts of the Commonwealth in personal injury cases in which claims for impairment of future earning power were asserted.

The Judge made that very specific in chambers in ruling on the request for charge before she instructed the jury, then again in the charge itself, and then thirdly in her opinion on post-trial motions for judgment N.O.V. and for a new

trial.

After closing arguments of counsel and the Court's charge, the jury returned a verdict in favor of the plaintiff for $125,000, an amount equal to the claim for lost wages to the date of trial of $50,000 and of the claim for impairment of future earning power at $5,000 a year for fifteen years, the plaintiff being fifty years of age at the date of trial and counsel arguing to the jury on behalf of the plaintiff that although it could award damages to age 70, an award based on retirement at age 65 would not be unreasonable.

Eleven days after the jury verdict and pursuant to a motion of counsel for plaintiff and over the objection of counsel for defendant, the Judge increased the jury's verdict by adding thereto prejudgment interest at the rate of ten percent per year to increase the $125,000 to approximately $152,000.

The basis for that addition was a rule which had been promulgated by the Pennsylvania Supreme Court in 1978, stating that in bodily injury cases tried in the Courts of the Commonwealth, such an award would be made provided that certain conditions were met. That is that the defendant had not made an offer prior to trial, which was at least 75 percent of the amount which the jury ultimately returned. That was done over the objection of the defendant.

QUESTION: Is the announced purpose of Rule 238 to

encourage settlement in this kind of case?

MR. MANION: It is, Your Honor. The Pennsylvania Supreme Court both in this case and in Laudenberger said that its purpose was to encourage settlement to rid the courts of congested dockets. There are serious questions as to whether that was a substantive rule within the rulemaking part of the Pennsylvania Supreme Court. It dealt with that issue within one year after the rule was promulgated, found it to be procedural but acknowledged that it had very substantial substantive implications.

And the Third Circuit Court of Appeals has found it to be substantive in the Jarvis case and therefore that a Federal Court must apply it in a case in that Court based on diversity of citizenship because of its substantial substantive effect. But the articulated reason by the Court in justifying the rule was that it was within its rulemaking powers.

Of course, the Court had to justify it on that basis because otherwise it would have been found to have not been validly promulgated.

QUESTION: But Pennsylvania doesn't say prejudgment interest is awarded as a matter of right to a prevailing plaintiff; it's only where there was a failure to submit an offer of a particular kind by the defendant?

MR. MANION: Yes, Your Honor, that is true. It's not an absolute rule, there is one condition. And I should, to

bring the Court up to date, there was the Craig decision by the Pennsylvania Supreme Court which came down between the Superior Court and Supreme Court decision in this case which said that there were questions of due process raised by the rule in that the defendant may not have been at fault for the delay, and therefore in cases after Craig where this issue came up, there would have to be a hearing following the verdict and a determination made.

But within the last month, the Court announced in Craig that its procedural rules committee was instructed to come up with a new rule. The new rule as promulgated in the Pennsylvania Bulletin on February 6th, which will take effect in a month and a half, in essence provides that as long as no offer has been made that upon the jury verdict, there will be an award of prejudgment interest unless the defendant files a motion affirmatively establishing that the plaintiff was the cause of at least some of the delay.

Except for those conditions, Your Honor, that rule was applied uniformly. It was applied uniformly before Craig, in the interval after Craig before the Supreme Court Procedural Rules Committee came out with the suggested new rule, and it's being applied every day in the Courts of the Commonwealth.

As Justice Hutchinson pointed out in the Supreme Court of Pennsylvania, there can be no question that this rule has a substantial effect on damages. In this case, it

increased the award by at least 20 percent.

That gets me to the point that the first question really in many respects this case perhaps more than coincidentally is being argued on the 50th anniversary by only a few days of this Court's decision in Erie Railroad v. Tompkins. As Your Honors will recall, that case involved the question whether a Federal court, hearing a case based on its diversity jurisdiction which arose solely under State law was free to apply its own general version of what the common law should be, or was obliged to apply State law as construed by the Courts of the State.

And of course, Justice Brandeis' classic opinion and landmark in the field of federal-state relations said that the Federal court would have to defer to State law, not because of any notion of superiority or inferiority between the two systems of courts, but because of the fundamental precept. First that the law to be applied to a claim should be the law out of which the claim arose. Secondly, the fostering of any other rule would lead to chaos as it has in Pennsylvania because the Third Circuit justice declared last August that you cannot apply prejudgment interest in an FELA case.

So that litigants in Pittsburgh under a Statute the principal purpose -- or at least one of the primary purposes of which was to provide for a national uniformity for railroad workers across the country, not only are we getting different

results between one state and another, but in Pittsburgh, you will get a substantially different result depending upon whether you file your suit at 7th and Grant in the Federal Court where you won't get prejudgment interest, or up the street at 4th and Grant, where you'll get an award of at least 20 percent in this case, substantially enlarging the damages.

It's clear that Federal law has to be applied here, not because the Federal Courts are superior to the State Courts, but this is a Federal Statute. It cries out for national uniformity and enforcement. And it can't be justified on the ground of a substantive procedural distinction.

This Court has long held in FELA cases starting at least in 1916 in the Chesapeake & Ohio Railroad v. Kelly case the question of the proper measure of damages is inseparably connected with the right of action. And in cases arising under the FELA, it must be settled according to general principles of law as administered in the Federal Courts.

Eight years ago in the Liepelt case, Justice Stevens said, it has long been settled that questions concerning the measure of damages in an FELA action are Federal in character. And Justice Blackmun in dissent stating that income tax instructions the question whether they should be given is an incidental matter. Perhaps we should defer to State procedure. But he said, of course, I assume that if this procedural rule has substantive impact -- as it does in our case -- regardless

of how the State labels its rule, it's got to give way to Federal law.

QUESTION: Mr. Manion, in this case, who decided on the prejudgment interest? That wasn't the jury that did that, was it?

MR. MANION: It was not, Your Honor. It was done by the trial judge 11 days after the verdict.

QUESTION: It wasn't characterized then as an element of the damages?

MR. MANION: It was not, Your Honor.

QUESTION: And how did the Judge decide on the ten percent rate?

MR. MANION: Rule 238 which is applicable since 1978 in common law bodily injury cases or those which involve property damage provides that the award shall be at the rate of ten percent per year providing the conditions are met that there's been no offer by the defendant and that the award exceeds any offer by 125 percent.

QUESTION: I see.

MR. MANION: And of course, that's another reason why this rule of course was adopted in that inflationary period of the late 70s. It's being applied at a rate of ten percent per annum. We are getting in some States, of course, there's no prejudgment interest in most FELA cases in any State Court. This Statute has been construed over 80 years on the question

of the allowance of the award of prejudgment interest consistently. State and Federal courts have held uniformly that you cannot award prejudgment interest under the FELA.

It was held not only -- and we've cited a multitude contrary to the suggestion of counsel for the plaintiff that these are primarily Federal cases -- not only are they State Court cases but they are State Court cases in States which have prejudgment interest rules, many of them, and the State Courts have said, we have to apply Federal law because this is the FELA. This isn't the ordinary automobile accident case. This is a Federal Statute. For 80 years the Court has held that you cannot award prejudgment interest --

QUESTION: When you say for 80 years, the Court has held that. Are you relying on any particular decision of this Court?

MR. MANION: I am not, Your Honor. I am relying primarily on decisions of the Federal Appellate Courts and decisions of the Supreme Courts of the highest States in the country. I think that the course of history is such that there has been so much judicial precedent that this long history of judicial precedent construing this statute when Congress has had the opportunity to, and has amended it repeatedly by --

QUESTION: Mr. Manion, did any of those cases involve the peculiar wrinkle we have in this case of a separate rule that provides that this can be done as a remedy for failing to

make a high enough settlement offer?

MR. MANION: Yes, Your Honor. Most of them are based either on State statutes involving prejudgment interest, or court rules. Many of the court rules -- they vary all over the lot -- that's another reason why a State Court rule should not be applied in an FELA case.

QUESTION: But particularly to any of them involve State Court rules that are dealing with the subject of trying to motivate settlement offers?

MR. MANION: I believe a substantial number of them do, Your Honor.

QUESTION: The Third Circuit case certainly would be because it was dealing with the Pennsylvania Rule, wasn't it?

MR. MANION: It was in the first. Judge Becker's opinion is about 20 pages and he starts off his opinion, you can't possibly justify the use of Rule 238 to award prejudgment interest in an FELA case. A closer question which still must be resolved against the plaintiff is not whether you can use a State Court rule to justify it. That's clear. That's the clear air in this opinion.

Regardless of what's done here, the Judge did it on the basis of a State rule. Justice Steven's decision for the Court in the Pfeifer case makes it clear you can't do it no that basis.

There's a nicer question. That is, would such an

award be consistent with Federal law. On that question, that has to be resolved against the plaintiff, because when the FELA was adopted in 1908, Congress took the state of the common law as it then existed with respect to tort claims for personal injuries and adopted in Section 1 a rule that provided that FELA plaintiffs would be awarded damages for injuries sustained as a result of the negligence of the employer, how slight.

Prejudgment interest existed at common law in 1908, but it was permitted only in liquidated damages claims for breach of contract or other situations where the damages were liquidated. It was never permitted in personal injury cases where the damages were unliquidated.

Congress saw fit to abolish the common law rule under which contributory negligence was an absolute bar. It said that it will not be an absolute bar; comparative negligence will be the rule. In Section 3, the very same section in which it did that, it said, moreover, contributory negligence will not be any defense where the injury arises from a violation of the Safety Appliance Act.

In 1939, all the while we have hundreds of cases going up through the Federal courts and the State courts, none of which allows prejudgment interest. In '39, Congress, looking at the FELA, a Statute with which Congress has been concerned, with which this Court has been concerned, consistent line of decisions. In '39, Congress said, we're going to

abolish assumption of the risk as a defense.

They did that. Eighty years of history from 1908 to 1988. Not one court has ever said that prejudgment interest is authorized until the Pennsylvania Supreme Court. The only Court that did so was a District Court in Colorado which was reversed in the Tenth Circuit a few years ago in the Garcia case. And even in Garcia, they didn't say you can justify this under a State statute. They said it may be consistent with Federal law.

When you take the state of the law at the time of the adoption of the FELA, Congress' deliberate decisions which aspects of common law it would do away with and which it would incorporate in this admittedly liberal statute, which this Court has consistently construed as broadening liability but has never held that you can get prejudgment interest. The state of the law at that time, the 80 years of precedent, Congress all the while acting on this Statute, amending it when it felt appropriate, never adopting a rule.

As the Fifth Circuit has said, and other courts have said, the silence of Congress in 1908 speaks loudly and clearly that Congress never intended to allow prejudgment interest.

QUESTION: Supposing the State rule, instead of having a prejudgment interest as a remedy for failing to make a settlement offer provided that say it would be double costs or a thousand dollar flat one percent of the judgment. You'd make

the same argument on such a rule, wouldn't you?

Is the fact that it's prejudgment interest I'm not sure is as important as whether there can be any remedy in an FELA procedure for failing to make settlement offers that would not normally be allowed in Federal court, but is allowed in all State proceedings. And double costs is one that occurs to me.

MR. MANION: Your Honor -- yes. Well, Your Honor, I think if there were a sanction imposed, for example.

QUESTION: Right.

MR. MANION: Because counsel had delayed the prosecution of the case --

QUESTION: Leave it the same. He failed to make a settlement offer of at least 75 percent of the verdict.

MR. MANION: I don't think that would be permitted, Your Honor.

QUESTION: And they couldn't do anything of that kind?

MR. MANION: Not as a State rule. Not unless it was a Federal matter, because you're doing something which has a substantial effect on the amount of damages, on the award itself. You could justify an award as a penalty because counsel did something wrong, but merely because they didn't make an offer, when an offer may not have been appropriate. They couldn't do that. That would substantially enlarge the remedy and the remedy is extricably intertwined with the cause

of action.

I'd just cover the --

QUESTION: I presume you would also argue that the State rule is not really designed to punish for not making settlement offer, but rather the rule is designed to provide prejudgment interest and however there is a dispensation for someone who has been good enough to make a settlement offer? I mean, it's hard to say whether you're punishing the failure to make one or rewarding the making of one.

MR. MANION: Whether the true motivation of the Court is to clear up the congested docket, that also is a consideration, Your Honor.

I think regardless of the rationale advanced, the core inquiry is does this rule, this law have a substantial effect on the rights of the litigants. And using the outcome determinative test that was developed after Erie Railroad, are you going to get a substantially different result when you go down Grant Street to State Court, compared with when you go up Grant Street to Federal Court?

And here, it's clear. This is a relatively nominal award, considering that there was only two years of prejudgment interest. But if the case happens to be on a docket and the cases aren't tried for three or four years, you're going to have awards which can double in some instances, the amount that's awarded by the jury. To say that doesn't have

substantive effect is to ignore reality.

QUESTION: Mr. Manion, do you plan to discuss the total offset damages issue at all?

MR. MANION: I was about to address that, Your Honor.

QUESTION: And in that regard, may I inquire whether at trial there was any effort on the part of your client to establish a technically more accurate method --

MR. MANION: There was, Your Honor.

QUESTION: -- than the total offset method?

MR. MANION: Yes, Your Honor. There was such an effort. As the Third Circuit has held, that obligation is not on the defendant; it's on the plaintiff because the plaintiff has the burden of proof. But in 1916, this Court held in Chesapeake & Ohio R.R. v. Kelly that any award for impairment of future earning power had to be reduced to its present value.

And the case really dealt with the fact that whether present worth tables not only were good evidence, but were they conclusive. And the Court held they are good evidence probative of what the jury should do or what the fact finder should do in reducing an award to its present value. But it's clear that they are good evidence.

In our case, we had an instruction that is set out in our brief and also in the Appendix.

QUESTION: I didn't find anything to indicate that you established that that was a better method than the total

offset method.

MR. MANION: Well, Your Honor, --

QUESTION: Do you think it's open to the Court to select any reasonable method?

MR. MANION: I don't think it's open to the Court, Your Honor. I think it's a matter for the fact finder.

QUESTION: We held that it was in Pfeifer.

MR. MANION: It was in Pfeifer, Your Honor, because the Court was sitting non-jury.

QUESTION: Yes. But do you think there's anything in our cases that indicates that the choice of a method of calculation of damages which is a legal question should be submitted to the jury?

MR. MANION: It is, Your Honor, because like a lot of questions of that kind, it depends on the evidence which goes into the record. The plaintiff may call an economist that says, this is the best record. The defendant may call an economist --

QUESTION: Well, I would have thought the method of calculating damages was one for the Court.

MR. MANION: I don't think so, Your Honor, for this reason. As long as there are disputed issues concerning facts that are inherent in the method whether we use a six percent discount rate --

QUESTION: Well, once the method is selected, then

the factual question and its application goes to the jury. I just couldn't really imagine how you got the proposition that the jury should determine the method?

MR. MANION: I think Justice Hutchinson makes the point in his dissent in this case and Your Honor understanding now we're talking not just about the method in terms of a legal method, but where it involves issues of fact concerning the discount rate. Whether it should be total offset, whether it should be real interest rate the difference between inflation and the nominal interest rate. Whether it should be what someone earns in their savings account.

This Court held that in Chesapeake & Ohio. The jury knows. They put money in savings accounts. We're not going to use the rate of interest that Ivan Boesky or someone might get. We're going to use what the ordinary person, and jurors being ordinary people know what interest is. It's up to them to make that selection. It must be, Your Honor, with appropriate instructions from the Court. You've heard varying methods of discounting to present value.

But Justice Stevens in his opinion for the Court in Pfeifer said, it is for the fact finder to make that determination. He surveyed at least seven different methods and said, we're going to return this and it's for the fact finder.

In this case, the Court violated this Court's mandate

in Dickerson saying that you can't refuse the charge on the basis of the State rule. And Dickerson says, you've got to leave it to the fact finder. Judge Finkelhor took it away from the fact finder.

I see my time is up.

Thank you very much, Your Honor.

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Manion.

We'll hear now from you, Mr. Hollander.

ORAL ARGUMENT OF THOMAS HOLLANDER, ESQ.

ON BEHALF OF APPELLEE

MR. HOLLANDER: Mr. Chief Justice, and may it please the Court.

We're considering here today the application to a remedial statute, the Federal Employers Liability Act of two of what have become the most important cornerstones in the past decade of the civil practice in the Commonwealth of Pennsylvania. Rule 238 about which there's already been some discussion, and the Pennsylvania Supreme Court decision in Kaczkowski v. Bolubasz which has straightened up, at least for the time being, some very curious developments in how we reduce verdicts for impairment of earning capacity and other future payments to present value.

I can't help but make this comment, that Rule 238 being designed to reduce congestion and delay which was the avowed purpose of the Pennsylvania Supreme Court in

promulgating it, if my colleague for the railroad is correct, may do more to reduce the backlog in Federal Court because it will attract litigants down Grant Street to the State Court where their possibility of getting Rule 238 exists.

But nonetheless, it's the kind of rule -- about which I'll speak later -- that the Pennsylvania Supreme Court should be permitted to promulgate to deal with the matter of the disposition of the cases in its system.

I would like to first however discuss the total offset method that was used to reduce the verdict in this case to present worth. The trial court tried this case in 1981. For a long period of time, since this Court's decision in Chesapeake & Ohio v. Kelly in 1916, announcing that future payments in FELA cases, and for that matter, it has affected the fabric of all litigation involving future payments and especially personal injury litigation, must be reduced to present value. This Court in 1916 expressly did not lay down a precise rule or formula for how that reduction was to take place. And said it was not its purpose to do so.

Thereafter then until the decision of this Court through Justice Stevens in 1983 in the Pfeifer case, a period of 67 years, the State courts and the Federal courts across this country used a wide variety of methods to reduce future impairment of earning capacity to present value, all with at least the tacit approval of this Court, because this Court let

that go on for 67 years, and, I submit, should continue to let it go on because we're talking about methods of proof and how you handled methods of proof, evidentiary questions in trial courts.

In 1980, in this context, the Supreme Court of Pennsylvania said that they wanted this evidentiary rule based on the theory that the market interest rate offsets the inflation rate and that therefore we will consider those totally offset and those issues will not be entertained for evidentiary purposes, and that proposal will not be submitted to the jury that the reduction to present worth will have taken effect in that way.

That was to remedy an inequity that has been pointed out in a number of the circuit courts to which the appellant refers in which we had a situation where you could not introduce inflationary evidence at all and still had a discount to present worth which was essentially a double discount for the defendant. And I should add, all of this is in the context of what I submit is an economically inequitable process where you get nothing for delay in an FELA case under ordinary circumstances, and when all rules of the court are complied with, up through until the time of trial even though economic loss has occurred, but that future damages are discounted, which is an economically inequitable circumstance.

QUESTION: You should make that argument to Congress

when it enacted the FELA. I mean, Congress did make that judgment, didn't it?

MR. HOLLANDER: Well, Your Honor, I'm glad you raised that, because Congress -- and we're talking now about prejudgment interest, I take it, is what your question is -- Congress said nothing about prejudgment interest. And in an inference that a Court made many many years ago, and not this Court, the inference was that Congress' silence in 1908 meant there would be no prejudgment interest permitted.

In 1908, there was neither prejudgment nor post-judgment interest in this country, as I read these cases. So the fact that there was no interest at all mentioned was deemed therefore without any discussion nor reference to the Congressional Record, it's questionable whether Congress considered it at all.

But what Congress did consider at that time, and an examination of the Congressional Record will show -- and I would like to refer the Court -- and it's not in my brief, but I will read it into the argument -- Congressional Record 60th Congress First Session, Vol. 42 in 1908, at pages 4527 to 4550, discussed the reasons for granting concurrent jurisdiction.

Justice Holmes in 1916, which was apparently a banner year for litigation in this Court for FELA cases, referred to the fact that the Congress was to anticipate -- I'll give you his words, which I think are pertinent here -- "that Congress

contemplated suits in State courts and accepted State procedures in advance." In that case there was a question about a lien on an FELA claim by a local lawyer and the question that there couldn't be a lien because Congress hadn't allowed it.

Oddly enough, about that same time, this Court affirmed a State court addition of ten percent in an FELA case in an appeal because the appeal was affirmed and the defendant had to add ten percent to the award on that basis which is coincidentally the same interest rate we're talking about here.

Congress was concerned when it granted concurrent jurisdiction with the access of injured railroaders to the courts in 1908 and the sizes of the Federal Districts and the circuits, the question of how far people had to travel, how they'd get their witnesses to court if it were a Federal Court matter, and whether that imposed a great burden on the litigant. And Congress considered and determined not to grant removal powers to a defendant in an FELA case because of the costs and the denial of adequate access to the courts.

That was in 1908. I submit, Your Honors, that at this time in 1988, the denial to access of the litigants injured in railroad cases and in any other cases to the courts, is now the delay and congestion that's occurring which is equally significant to the costs that would be incurred in the long distance travels and the transportation and hiring of

lawyers in two or more locations in 1908. In short, the economic burdens that are placed on the plaintiffs now in the delays means that their verdicts are less valuable and have less meaning and are more costly in personal loss over the long run than they would be with the use of prejudgment interest.

So I think that Congress has actually spoken to this issue, but not talking about interest, talking about access to the courts. And that because this Court has said that the FELA is a dynamic statute to be liberally construed and in the words of the Kernan decision, not a static remedy but one enlarged and developed to meet changing conditions and concepts over a period of time, suggests clearly that this is not a Congressional matter. Congress remains silent on interest. it remains silent on damages. The courts have --

QUESTION: Mr. Hollander, this Court has handed down many many decisions saying on fairly minor points that Federal law rather than State law governs how you construe a complaint. What standard is used for judging a release. And it seems to me none of those are any more really distinguishable from this.

MR. HOLLANDER: Your Honor, if you're referring to whether the Rule for 238 prejudgment interest applies?

QUESTION: Yes.

MR. HOLLANDER: There are a number of things that I would like to comment on with regard to that, because we're really talking about the uniformity of the application of the

FELA across the country. And what in effect happens if a prejudgment interest rule occurs and if that impacts on the formula. There are because of the concurrent jurisdiction of this Statute, a number, a wide variety of things that effect uniformity. Up until the amendment of the Section 1961 of the Code, all post-judgment interest in Federal courts were controlled by State rules. That varied a great deal.

Verdict sizes vary from region to region. Jury sizes vary from district court to State court. The nature of the verdicts, whether they're a majority or whether they're five-sixths, or unanimous varies. Present worth calculations have varied from time to time. Pleadings are different, provisions are different.

Does Rule 238 really create a disparity in the treatment of FELA claimants? And my response to that is not unlike what I was trying to get to in response to Justice Scalia's question. And that is this. Prejudgment interest is a just economic concept. The earlier that a defendant pays a verdict of judgment, the more expensive it is for the defendant and the better it is for the claimant. The later in time that a defendant is required to pay a verdict or judgment in an FELA case, the less expensive it is --

QUESTION: Well, is that really the question whether it's a just concept here? In other words, if we thought it was a desirable thing, does that mean that even though it would

make quite a different result in Pennsylvania as opposed to the Federal Courts instead, we should nonetheless say it's all right because we think it's just?

MR. HOLLANDER: Your Honor, --

QUESTION: I don't think that's the standard that our cases have laid down.

MR. HOLLANDER: Well, let me make this comment with regard to that question.

There are two issues that we seem to be addressing here with regard to Rule 238 of the Pennsylvania Supreme Court. One is whether prejudgment interest is an acceptable award in an FELA case, pursuant to that rule, which we submit is a procedural rule with substantive incidence. Or whether prejudgment interest is appropriate in general.

On the latter point, let me say this. This Court and many of the circuit courts --

QUESTION: In general, you mean as a matter of Federal law? That's what you're addressing now, you think? Right?

MR. HOLLANDER: I think a case can be made, Justice Scalia, that prejudgment interest ought to be awarded in FELA cases because prejudgment interest is awarded in so many Federal claims across the country in Federal courts.

QUESTION: But I'm not asking --

QUESTION: Couldn't you say the same thing for Jones

Act cases?

MR. HOLLANDER: It has been done in Jones Act, Death on the High Seas Act, Outer Continental Shelf Lands Act cases. In fact, they are listed in our brief. And I can give you more.

QUESTION: That's quite a different argument than saying Rule 238 can be applied by the Pennsylvania State Court?

MR. HOLLANDER: That's correct.

On that point, I was going to make this comment. The Tenth Amendment reserves to the States among other things, as interpreted by the Courts, the power to take care of the matters essentially for the disposition of cases in its jurisdiction. And in that regard, and in fact, Justice Frankfurter said in the Indianapolis v. Chase National Bank case that only Congress can restrict the power of States to provide for the determination of controversies within it.

QUESTION: Mr. Hollander, how many States have a statute like this?

MR. HOLLANDER: I don't know how many States, if any, Your Honor.

QUESTION: I don't mean just interest. I mean, like this Statute?

MR. HOLLANDER: I can only report that Pennsylvania has this rule.

QUESTION: Well, did you do any research to find out

if --

MR. HOLLANDER: I did and I saw that there are 32 States with prejudgment interest statutes.

QUESTION: Like this one?

MR. HOLLANDER: No, no. Not like this one. This rule --

QUESTION: So now we're going to have fifty of them?

MR. HOLLANDER: Your Honor, --

QUESTION: We're going to have fifty of them, right? Right?

MR. HOLLANDER: I don't know that.

QUESTION: Well, you could, couldn't you?

MR. HOLLANDER: You could have. Every State could say that this would be a way in which we can reduce congestion and delay by encouraging settlements.

QUESTION: That's what I said, each State could do a different one?

MR. HOLLANDER: Yes, yes.

QUESTION: That's a little different.

MR. HOLLANDER: That's correct, I'm sorry. Each State can easily promulgate its own rules to determine how it wants to move along the congestion in its courts.

QUESTION: Mr. Hollander, suppose you decide to eliminate congestion instead of by providing prejudgment interest where there hasn't been a proper settlement offer,

suppose you decide to do it by simply increasing the damages? You say in all actions in this State, the damage award will be increased 50 percent when there has been no settlement offer of 75 percent of the jury award. Does that mean that we would follow that rule in Federal cases as well because the objective is a procedural one and therefore it's all right, we increase the damages fifty percent?

MR. HOLLANDER: Let me say this, Your Honor. I would agree that if we had the kinds of interest rates that we see in South America and the Middle East in three digit numbers, that it would not be unreasonable to have --

QUESTION: I didn't ask whether it would be reasonable. I asked whether you would consider that the kind of a rule under our Erie holdings that could be applied, or analogously to our Erie holdings, whether that's the kind of a rule that would be applied to FELA cases?

MR. HOLLANDER: Well, I guess I heard the fifty percent and thought you wanted me to respond to that.

That, if it's a damage percentage that is applied like that, the answer to that is I think it's consistent with Rule 238, yes. And I think that the problem with it is that there's a substantive due process question raised because of the amounts that are imposed.

QUESTION: Well, change the amount. My point is if you are avowedly are increasing the damages, but your purpose

in increasing them is to reduce congestion, does that mean that it's okay as far as Federal courts adopting it is concerned?

MR. HOLLANDER: Well, let me respond first, it's not my position that Federal courts should adopt Rule 238. I'm not seeking that. I'm simply saying that State courts should be permitted to use a rule like this as Pennsylvania has.

QUESTION: No, I mean as far as this Federal Court receiving an appeal from the courts doing that, from the State courts doing that?

MR. HOLLANDER: Yes. What I'm saying is that because --

QUESTION: Do you think the State courts could apply that rule and increase FELA damages a certain percentage so long as their purpose in increasing the damages is to eliminate congestion in State courts?

MR. HOLLANDER: Yes, I do take that position.

QUESTION: Counsel, assume that we adopted the Federal rule that there would be prejudgment interest. Could the railroad then avoid it by tendering the offer under the Pennsylvania Rule?

MR. HOLLANDER: Yes. Well, no, I'm sorry. If there was a flat across the board prejudgment interest rule, a common law rule as I assume you're asking, Justice Kennedy, no, it couldn't be. It would be just part of the damages.

QUESTION: Well, then you're saying it's a Federal

rule if there's interest but not a Federal rule if there's no interest?

MR. HOLLANDER: Perhaps I'm having difficulty with the question.

I believe that the Federal courts have established in many many cases, excluding railroaders which I believe is an anachronism in view of Congressional intent to make it liberal for railroaders to be able to recover, has excluded them and I think that in all these other cases that we've referred to that are decided in the brief where prejudgment interest is awarded, equity is done. As a common law rule then it would apply across the board to railroad workers which are the group now that are singled out.

QUESTION: All right, suppose we say you're right. What happens under the Pennsylvania rule if the railroad tenders an offer and the offer is rejected?

MR. HOLLANDER: If the offer is tendered and rejected --

QUESTION: Could the Pennsylvania courts encourage settlement by saying that prejudgment interest would not apply in that event?

MR. HOLLANDER: I don't think they could take the position that if it was a Federal rule allowing prejudgment interest that they could prevent its imposition in State courts, that's correct.

QUESTION: I don't see how that's any different than the case before us.

MR. HOLLANDER: Well, I guess if --

QUESTION: It's the same purpose. You're saying in order to end their congestion, they can reverse a Federal Rule of no prejudgment interest, but in order to decrease their congestion, they can't reverse a Federal Rule of prejudgment. Why?

MR. HOLLANDER: I guess I'm getting caught in the dilemma that I was going to refer to earlier of the consideration of whether there is a State court right to have a procedural rule to eliminate congestion which passes constitutional muster in Pennsylvania as well as Federal Constitutional muster, both by this Court's denying certiorari in the Laudenberger opinion, and the Third Circuit's affirmance of that matter in Insurance Federation of Pennsylvania v. Supreme Court of Pennsylvania.

So I'm saying that yes, I think that's consistent. I think States have that power. It does nothing to violate the supremacy clause and it's not an area that is preempted because Congress has not spoken on it. And therefore, I think procedurally they're allowed to do that, even if it has some substantive implications.

QUESTION: Could Pennsylvania pass a rule that applies only to FELA cases?

MR. HOLLANDER: No, Your Honor.

QUESTION: They couldn't do that, could they?

MR. HOLLANDER: No, I don't believe they could.

QUESTION: No question about it.

MR. HOLLANDER: They have treated all cases over which they have jurisdiction alike, whether it's an FELA case or not. In fact, to exclude the FELA case, I would submit might violate the Equal Protections clause.

QUESTION: So if they wanted to get to the FELA cases, all they'd have to do is pass a general statute.

MR. HOLLANDER: That's correct, if they wanted to do that in Pennsylvania, they could pass a general statute. But I'm not so sure that that --

QUESTION: Do you think that Congress meant that?

MR. HOLLANDER: My argument is what I have indicated --

QUESTION: Do you think Congress meant that?

MR. HOLLANDER: I think that Congress did not preclude it. I think Congress, in its debates, concerning the Statute, did not address that issue. I think that Congress' concern about access to courts and the fact that lay damages reduces the validity and the fairness of the awards is consistent with the award of prejudgment interest.

So if I may for a moment return to the total offset point that we were discussing earlier, the question that was

raised earlier during the railroad's argument concerning whether it believed the jury should make the determination of the method of selection is one that I would like to comment on briefly. Because, interestingly enough, that would assume that the Pfeifer decision of Justice Stevens and this Court in 1983 applies in this case.

Amicus curiae, in its brief, indicates that Pfeifer does not apply to this case, although the railroad takes the position that it does, or at least it has taken that position up to now.

The question that comes up with regard to Pfeifer is this. When it was decided in 1983, it gave council to the courts and lawyers across the country that there were a number of methods that were appropriate to use in FELA cases, or in that case, I'm sorry, in 5(b) Longshoremen Harbor Workers Act cases.

In that regard, Justice Stevens said that the total offset method that Pennsylvania has adopted has the virtue of simplicity and may even be economically precise, which we take it really to be quite an endorsement of that process. Because in that opinion, the discussion is that trying to approximately impaired earning capacity by reduction to present worth is a kind of rough and ready process. And if this one has some economic precision, it would be of value.

What the Court said, however, was that a deliberate

choice must be made, and it remanded the case to the District Court sitting in Pittsburgh and said, you don't have to reopen the record, but take a look at what's gone on here, and then consider it. But in Dickerson decided by this Court in 1985, the Court restated the Chesapeake & Ohio v. Kelly holding and again selected no single method as did the Kelly Court, the same thing, and said with regard to what the lower Court should do in Missouri was to require that whatever method is used, that it take into account inflation, other sources of wage increases and the rate of interest.

At that point, the Court said, nothing was done in Missouri, the Missouri Court ignored the entire question of reduction to present worth, and as a result, there was no reduction to present worth in that case. And it was sent back to require an instruction.

In the case before this Court now, I submit to you that Kelly, Pfeifer and Dickerson have been complied with. As a matter of fact, I submit to you that the Pennsylvania Courts have slavishly followed the reduction to present worth requirements of Federal law in this case.

First of all, there was a reduction. The record is clear that the reduction was in conformity with the Pennsylvania decision on using the total offset method. Amicus, in its brief, admits that there was a reduction.

And what's the question then? Whether there was a

reduction or whether there should be an instruction for a reduction. And it's obvious that the reduction is the bottom line and the important part of the element of damages.

QUESTION: Well, the jury was not instructed that it had to make a reduction or that it had t calculate present worth.

MR. HOLLANDER: That's correct, Your Honor. What the jury was instructed was that the Court was going to take care of it. It was an admonition essentially to the jury not to do anything about inflation and not to do anything about reduction.

QUESTION: Well, do you suppose that Dickerson requires at least that the jury be told they have to base damages on present worth?

MR. HOLLANDER: Your Honor, the jury was told that their award would essentially have a reduced worth implication because of what the Court told them it was doing with regard to the use of the total offset method. The net effect is that there is a reduction to present worth but the jury doesn't have to calculate it.

So what I think happened in this case, as a matter of fact, based on the figures that were cited to you by counsel is the jury may well have reduced it twice. After the Court did it by the total offset method, and then when it went out to the jury room to deliberate because if in fact the jury followed

the instructions of the Court, and if the defendant's contention that all of the balance of the verdict of the $125,000 less the $50,000 lost income was true, there would have been no award for pain and suffering and the other elements of emotional distress that are part of the award, and the jury would have then disobeyed the Court's orders.

I submit to you that what the jury did was give less than even the total offset method would have provided for in this case.

After that -- and by the way, I should also say that the Judge did make a selection as the Pfeifer case was suggesting the non-jury district court case should be done and that was between the total offset method which the plaintiffs were prepared to submit and the position that the defendant took in a request for instructions that essentially would have caused a double discount because the Court had not entertained evidence concerning inflation in accordance with Kaczkowski.

It instructed the jury on the income tax considerations required by this Court in the Leipelt case and then when the Pfeifer decision came down, which was after the trial of this case and the decision of the post-trial motion by the trial judge, the Pennsylvania Superior Court asked for supplemental briefs concerning the Pfeifer case. The Pennsylvania Superior Court then did with a three-judge panel evaluate the record and appraise it to determine whether the

total offset method as the Pfeifer opinion had required was the appropriate method to use for a railroad worker in Pittsburgh.

The Superior Court could have remanded the case. It kept it and said, we looked at it, we think it's appropriate and they affirmed it. And then the Supreme Court, which had previously gone through the agonizing appraisal of the various methods to select the total offset method, affirmed.

As an officer of the Court -- and I'll be brief in this regard -- I would like to make one comment concerning the Pfeifer case. And that is, under it, if it is to apply in State courts and if it is to apply in jury cases, which we submit it should not be extended to, then we need some guidance. And we need guidance because of the very question that Justice O'Connor asked, do you expect this to go to juries, and if so, how do you go about doing it.

This Court said in the Pfeifer case, we don't want seminars on economics in the court room. We don't have to bring in all of the expert witnesses to talk about actuarial information, economic information and what methods are better and what methods are worse. And then to introduce evidence of how to implement them in the trial of a personal injury case of a railroader. It becomes time consuming and exorbitant and would add seriously to congestion.

If it is to be applied in cases like this, then I ask that it be done prospectively with some consideration given to

some clarification because obviously the railroad has a belief that we submit is inconsistent with Pfeifer.

In short -- and I see that my time is up -- there are -- there was a reduction to present worth in this case in compliance with Federal law.

QUESTION: May I ask one question.

This case was tried before Pfeifer was decided. The case took a long time to get here, it seems to me. It was tried in 1981, was it?

MR. HOLLANDER: The verdict was in 1981.

QUESTION: How much of the appellate proceedings were post-Pfeifer?

MR. HOLLANDER: The Superior Court argument briefs were done before Pfeifer. The Superior Court argument and the Pennsylvania Supreme Court argument were post-Pfeifer.

QUESTION: Were post-Pfeifer.

MR. HOLLANDER: Since there was a reduction to present worth, since there is equity and justice in prejudgment interest in any event, and since there is no violation of the Supremacy Clause, nothing that is done by the State Supreme Court in promulgating Rule 238 that is inconsistent with the FELA or with Congress' intent except by somebody's inference of what their silence was many years ago that has been honored reluctantly by Circuit Courts who have expounded in the very recent time in the Third Circuit, in the Ninth Circuit and in

the Tenth Circuit and in the Fifth Circuit, that prejudgment interest ought to be allowed in these cases, and since there is no reason to exclude railroaders from the rest of the litigants in the Federal system who are entitled to have prejudgment interest, I ask this Court to dismiss the appeal or to affirm the judgment of the Supreme Court in its entirety.

Thank you very much.

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Hollander.

Mr. Manion, you have three minutes remaining.

ORAL ARGUMENT OF PAUL A. MANION, ESQ.

ON BEHALF OF THE APPELLANT - REBUTTAL

MR. MANION: Your Honor, to answer Justice Stevens' last question, part of the delay in the appellate courts was that the Superior Court, on suggestion of counsel, delayed its decision or consideration pending Pfeifer which had been granted cert. So that about two years of it was because of Pfeifer because of the thought that it might have some impact.

Justice O'Connor, to address again your present value question, it's our position that Dickerson controls and that as Your Honor suggested, the Court must charge on present value. What we say is that this Court, even assuming it were a Court decision, a deliberate choice of the Court as Justice Stevens' language suggests concerning that there must be a deliberate choice, no such deliberate choice was made in this case by the court, by the jury or anyone else.

You can't read this record. When Judge Finkelhor said in chambers, we have reached the decision not to give the present worth charge, and the basis for it is, Chief Justice Nix's decision in Bolubasz, it's clear that it was, as Your Honor Justice Stevens said in Pfeifer, blind adherence to State law. It wasn't a deliberate choice. She said it three times, once in writing in her post-judgment opinion, and twice, once in chambers and then when she charged the jury, you don't have to bother to make this reduction any more because there's a recent decision, the decision of the Supreme Court of Pennsylvania.

To say that that was a deliberate choice, as Justice Hutchinson pointed out, is to defy the record.

Your Honor, it is the choice of the fact finder, because like any issue, you're dealing with economics. And we don't have to call economists in. You do it the way the Court suggested 70 years ago. You have present value tables in which the jury makes the determination of what rate is appropriate and the tables indicate what you award based on the years out into the future. Just as you use life expectancy tables.

What we're suggesting would actually do away with economists in terms of their need in these kinds of cases because --

QUESTION: Yes, but you'd have a one-way discount if you just used the table without any offset for inflation?

MR. MANION: Oh, no, Your Honor. We would permit --

QUESTION: Of course, that wasn't really debated, was it?

MR. MANION: Well, Your Honor, it's clear that when one is projecting into the future, particularly in these cases, you take into account what the wage rates were for the last ten years, and what they might be into the future. No decent plaintiff's lawyer doesn't say, if he was making this much and it increased this much each year, probably most of which was attributable to inflation or cost of living, that you can do that into the future. And that you can show productivity or merit increases. That's permissible.

But you can't do it when you're discounting to present value.

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Manion.

The case is submitted.

(Whereupon, at 12:01 p.m., the case in the above-entitled matter was submitted.)

REPORTERS' CERTIFICATE

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CASE TITLE: MORRISSEN V. MORGAN

HEARING DATE: 2/22/85

LOCATION: WASHINGTON, DC

I hereby certify that the proceedings and evidence are contained fully and accurately on the tapes and notes reported by me at the hearing in the above case before the Supreme Court of the United States and that this is a true and accurate transcript of the case.

Date: 2/22/85

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