IN THE SUPREME COURT OF MISSOURI

LAWRENCE MICKEY,	)	
	)	
Plaintiff- Respondent,	)	
	)	
v.	)	No. SC93591
	)	
BNSF RAILWAY COMPANY and SAFECO INSURANCE COMPANY OF AMERICA,	)	
	)	
Defendants-Appellants.	)	

SUBSTITUTE REPLY BRIEF OF DEFENDANTS-APPELLANTS

BNSF RAILWAY COMPANY AND

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ARGUMENT

I. Plaintiff's interpretation of tax laws and regulations is contrary to the RRA, RRTA, Internal Revenue Code, applicable regulations, and revenue rulings.

Plaintiff has attacked the RRA, RRTA, and Internal Revenue Code, as well as the U.S. government's position that taxes are due. Plaintiff has offered an interpretation that is clearly contrary to the federal law in an attempt to support the conclusion that no tax is owed on the judgment. A review of the pertinent statutes and regulations demonstrates that plaintiff's interpretation is contrary to the plain meaning of the statutes and regulations.

Taxes are due on judgments that include, or are deemed to include, pay for time lost. In the Railroad Retirement system, an employee's successful claim for lost wages is a type of creditable "**compensation**" known as "**pay for time lost**." As defined in 20 CFR §211.2, compensation includes pay for time lost:

(b) **Compensation** includes, but is not limited to, the following:

(1) Salary, wages and bonuses;

(2) **Pay for time lost** as an employee;

20 CFR §211.2(b)(1-2) [emphasis added] (A001-A002)

Pay for time lost is further defined in the regulations at 20 CFR §211.3(a)(1-2) to include pay received due to personal injury:

§211.3 Compensation paid for time lost.

(a) A payment made to an employee for a period during which the employee was absent from the active service of the employer is considered to be pay for time lost and is, therefore, creditable compensation. **Pay for time lost as an employee** includes:

(1) **Pay received for a certain period of time due to personal injury**, or

(2) Pay received for loss of earnings for a certain period of time, resulting from the employee being placed in a position or occupation paying less money. In reporting compensation which represents pay for time lost, employers shall allocate the amount paid to the employee to the month(s) in which the time was actually lost. **The entire amount of any payment made to an employee for personal injury is considered pay for time lost unless, at the time of payment, the employer states that a particular amount of the payment was for reasons other than pay for time lost**.

20 CFR §211.3(a)(1-2) [emphasis added] (A003)

That is why allocation agreements are routinely used when FELA cases are settled as authorized by the RRB.

Pertinent regulations under the Internal Revenue Code (IRC) consistently define compensation as including pay for time lost:

31.3231(e)-1 Compensation.

> (3) The 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** …
>
> (4) Compensation includes **amounts paid to an employee for loss of earnings during an identifiable period** as the result of the displacement of the employee to a less remunerative position or occupation as well as **pay for time lost**.

26 CFR §31.3231(e)-1(a)(3-4) [emphasis added] (A004-A005)

Plaintiff's efforts to redefine compensation so as to exclude pay for time lost are contrary to the pertinent statutes and regulations. Personal injury awards are excludable from the employee's gross income for **income tax** purposes, but subject to payroll tax (Tier 1 and Tier 2) withholding under the RRTA. This is confirmed in Rev. Ruling 85-97, cited by plaintiff, amplifying Rev. Ruling 61-1 cited by defendant. **Both these rulings distinguish between taxation under federal income tax and taxation under the Railroad Retirement Tax Act**. Rev. Ruling 85-97 notes the effect of Rev. Ruling 61-1 and also notes the holding in *Liepelt*, *supra*, as to lost wages not being subject to federal **income** taxation:

> Rev. Rul. 61-1, 1961-1 C.B. 14, holds that the entire amount received by a railroad employee in settlement of any and all claims that the employee had against the railroad for personal injuries is excludable from gross income under section 104 (a) (2) of the Code, even though the

> employee elected to apportion part of the settlement amount to "time lost" in order to receive railroad retirement credit for the time the employee was unable to work. **The revenue ruling states that the fact that the "time lost payments" constituted compensation for purposes of the taxes imposed by the Railroad Retirement Tax Act does not preclude the application of the exclusion from gross income under section 104 (a) (2)**. Thus, the ruling indicates that the exclusion provided by section 104 (a) (2) extends to personal injury damages allocable to lost wages. Also cf., Norfolk & Western Ry. Co. v. Liepelt, 444 U.S. 490, 62 L. Ed. 2d 689, 100 S. Ct. 755 (1980) (defendant is entitled to an instruction to jury that damages for lost future wages are not subject to federal income taxation). Rev. Rul. 85-97 (IRS RRU), 1985-29 I.R.B. 5, 1985-2 C.B. 50, 1985 WL 287177 [emphasis added] (A006-A007).

Rev. Ruling 85-97 confirmed that exclusion of time lost payments from gross income for federal income taxation does not exclude time lost payments from taxation under the RRTA. This is the same distinction made by Rev. Ruling 61-1 (A008), a distinction plaintiff sought to obscure in his brief.

Federal statutes and regulations make it clear that verdicts and judgments for personal injury are excluded from income taxation under federal law but are not excluded from taxation under the RRA and RRTA. Plaintiff's convoluted interpretation cannot change the plain meaning of the pertinent statutes, regulations, and revenue rulings and

cannot overcome the proper taxation under the RRA and RRTA of pay for time lost in personal injury verdicts under the FELA.

Plaintiff further sought to confuse the issues by insinuating that plaintiff's employment relationship with BNSF had ceased in 2007. The employment relationship continued despite the fact that plaintiff was not actively working for BNSF. Plaintiff referred to but did not include a reference to the trial transcript. Plaintiff cited a portion of BNSF's opening statement that referenced when plaintiff "stopped working" in the sense of stopped actively coming in, took a leave of absence, began his RRB sickness benefits, and then went on his RRB disability annuity. Plaintiff did not resign. He was not terminated. This is another canard. (Trial Transcript, 270:2-11. A009)

Had plaintiff resigned and terminated his employment relationship with BNSF he would not have been eligible for RRB sickness benefits or a RRB disability annuity. Plaintiff drew RRB sickness benefits. These were repaid out of the judgment as a lien by the RRB, even though not specified in the mandate. Plaintiff filed for his RRB disability annuity in 2007 and began drawing his RRB disability annuity in April 2008. Plaintiff merely stopped actively working for BNSF in 2007 and remained an employee of BNSF on disability.

Plaintiff's argument that there is an injustice in paying RRB taxes on the entire amount of the general verdict of $345,000 ignored the fact that the taxable amount is actually less. RRB Tier 1 taxes are paid on a maximum of $110,100 and RRB Tier 2 taxes are paid on a maximum of $81,900. In other words, the RRB taxes are only paid on the first $110,100 for Tier 1 and on the first $81,900 for Tier 2. There are no RRB taxes

due on the remainder of the judgment. Accordingly, the amount of RRB taxes paid on the pay for time lost in a lump sum is actually less than if the pay for time lost had been paid out as wages over the years. Had plaintiff been paid the same amount in wages over the years, RRB Tier 1 and Tier 2 taxes would have been paid on his wages each and every year.

Plaintiff asserted that there was no benefit to him by payment of the RRB and Medicare taxes on the judgment and the crediting of additional railroad service months by the RRB. This is not true. Once the additional taxes are paid and the additional railroad service months are credited, the RRB recalculates the benefits due and can increase the benefit paid to plaintiff. 20 CFR §226.90 (A010).

While not in the record before this court, plaintiff has also asserted that he has been harmed by the payment of employee taxes on the judgment and he has to repay the RRB for prior RRB payments. However, there is no evidence or anything in the record indicating he has repaid anything to the RRB. However, plaintiff knowingly sought payment for lost wages in the form of a RRB disability annuity and had been receiving RRB disability payments for the same period of time he sought payment for lost wages in his FELA claim. Plaintiff's complaint is with the RRB not BNSF. Plaintiff is not without remedies. Plaintiff may seek relief from any alleged repayment of his RRB disability benefits by pursuing administrative remedies before the RRB. 20 CFR §404.929 (A011); 20 CFR §404.930 (A012). If plaintiff does not receive relief from the RRB, he may seek relief from the U.S. District Court upon exhausting his administrative remedies. 20 CFR §404.981 (A013).

II. Federal law requires BNSF to withhold and pay plaintiff's portion of RRB and Medicare taxes due on the judgment, independent of the judgment of the trial court and the mandate from the appellate court. Accordingly, the trial court and the mandate from the appellate court cannot abrogate plaintiff's federal tax liability on the judgment, nor BNSF's obligation to pay the taxes.

BNSF has satisfied the judgment. BNSF paid the full amount of costs and interest to plaintiff and in addition, paid plaintiff's portion of the RRB and Medicare taxes due on the judgment. Plaintiff refused to acknowledge his tax obligation and refused to execute a satisfaction of judgment. BNSF was required to file a motion with the trial court seeking entry of satisfaction of judgment. Recognition of BNSF's satisfaction of judgment did not require the trial court to deviate from the mandate of the court.

Plaintiff would have the trial court abrogate BNSFs obligation to pay RRB and Medicare taxes on the judgment. Plaintiff cannot seek to have the trial court set aside RRB and Medicare tax liability anymore than a Medicare secondary payer lien, a tax lien, medical liens, or other amounts that must be satisfied from the judgment. In fact, plaintiff recognizes that despite the mandate the RRB lien for sickness benefits was a proper deduction from the judgment. What should not be permitted is to allow plaintiff to recover a double recovery from defendant. This is beyond the mandate and not necessary to execute the judgment: "*The trial court is clearly without jurisdiction after mandate to make any determinations other than those necessary to execute the judgment*." *Vanderford v. Cameron Mut. Ins. Co.*, 915 S.W.2d 391, 393 (Mo.App. 1996).

RRB and Medicare taxes on the judgment are independent of the mandate and operate as a matter of federal tax law and regulations. When BNSF initially sought to satisfy the judgment, plaintiff objected to the payment of any employment taxes on the judgment. In so doing, plaintiff placed BNSF in the position of having to intentionally disregard its obligation to withhold and pay the employee's portion of taxes RRB and Medicare taxes due as required by federal tax law. Under 45 U.S.C. §231(h)(2) of the Railroad Retirement Act, when payment is made by an employer that includes pay for time lost on account of personal injury, the total payment is deemed pay for time lost unless the payment is apportioned to factors other than time lost at the time payment is made. Unless the payment is apportioned to factors other than time lost, **the entire payment is deemed pay for time lost**. Accordingly, the entire jury verdict was deemed pay for time lost and BNSF properly withheld and paid plaintiff's portion of RRB and Medicare taxes due on the verdict. This was not contrary to the mandate of the appellate court, any more than repaying the RRB sickness benefit lien from the judgment, but rather in fulfillment of the mandate and consistent with federal tax laws. Plaintiff has sought to collect a portion of the judgment twice, once by the railroad withholding and paying his taxes and again by recovering that same amount from the railroad or its surety.

In support of his argument that he did not owe any RRB or Medicare taxes, plaintiff incorrectly characterized his tax obligation as an offset against the judgment. RRB and Medicare taxes are due on the judgment and are not an offset against the judgment. Plaintiff ignored the fact that the tax obligation exists independently of any adjudication by the trial court. The tax liability arises upon the railroad's satisfaction of

the judgment on a general verdict. Payment is the taxable event. Likewise, plaintiff seeks to impose a number of contradictory preconditions on the withholding and payment of the employee's portion of RRB and Medicare taxes, including that BNSF: plead the employee's taxes as an offset to the judgment (Respondent's Brief p. 6); argue the taxability before or at trial (Respondent's Brief p. 6); seek modification of the judgment and verdict (Respondent's Brief p. 6); and seek a designation from the jury of an amount for lost wages through special interrogatories or a special verdict form, which is not allowed in Missouri Approved Instructions (Respondent's Brief p. 20). The preconditions proposed by plaintiff were attempts to set some false preconditions to the operation of federal law requiring the withholding and payment of RRB and Medicare taxes due on the judgment.

Respondent attempts to further blur the distinction between income and employment taxes with its assertion that "*the jury was specifically instructed that its award was not taxable*." Respondent's Substitute Brief, p. 6. This misstates the jury instruction given at trial. Under MAI 8.02[1], Instruction Number 11, instructed the jury that: "*Any award you make is* ***not subject to income tax***." LF 174. [Emphasis added.] (A014) This was a Missouri Approved Instruction, which followed the United States Supreme Court decision in *Norfolk & Western Ry. Co. v. Liepelt*, 444 U.S. 490, 100 S.Ct.

[1] In the 2012 Revision, MAI 8.02 has been replaced by MAI 24.07, which includes the same language regarding "not subject to income tax".

755, 62 L.Ed.2d 689 (1980). There was no instruction to the jury concerning RRB and Medicare taxes.

The obligation to pay RRB and Medicare taxes occurs by operation of law and a railroad employer is required to comply with the RRA and RRTA. The responsibility to withhold at the time of payment rests solely with BNSF:

> (a) Collection; general rule. The employer shall collect from each of his employees the employee tax imposed with respect to the compensation of the employee by deducting or causing to be deducted the amount of such tax from the compensation subject to the tax as and when such compensation is paid. As to the measure of the employee tax, see § 31.3201-1.
>
> 26 CFR 31.3202-1(a) (A015-A016).

There is no action required of the RRB or IRS at the time of payment. If the employer fails to withdraw the employment taxes due at time of payment, then the employer would be liable for civil and criminal penalties, including a penalty equal to the amount that should have been withheld and paid over. 26 U.S.C. §§6672, 7202 and 7203. Accordingly, the obligation to withhold taxes arises when payment is made.

Plaintiff made these proceedings necessary by his refusal to acknowledge the federal tax obligations and his opposition to the payment of RRB and Medicare tax obligations as required by federal law. Plaintiff wants more. Plaintiff wants to have the taxes he owed on the judgment paid and expects BNSF to pay twice.

Contrary to the case law cited by the court in its Order and Judgment of May 24, 2012 and by plaintiff in his brief, this case does not involve matters that go beyond the mandate of the appellate court or actions of the trial court necessary to fulfill the judgment. Plaintiff cites inapposite cases that deal with attorney's fees or other relief dependent upon a ruling by the trial court. This case does not involve attorney's fees or other relief dependent upon a motion in the trial court or the mandate from the appellate court. This is a matter of tax obligations due on the judgment as determined by federal law and regulations independent of the trial court and appellate court.

Coleman v. Meritt, 324 S.W.3d 456 (Mo.App. 2010) dealt with the law of the case doctrine as it applied to a subsequent attempt to change the date of accrual for post-judgment interest.

In *Vanderford v. Cameron Mut. Ins. Co.*, 915 S.W.2d 391, 393 (Mo.App. 1996) it was held that the trial court was without jurisdiction to award appellate attorney's fees where the issue of attorney fees was not presented to the appellate court before the mandate issued and the mandate affirmed the judgment without further directions.

Bird v. Missouri Bd. For Architects, Professional Engineers,…, 309 S.W.3d 855, 860 (Mo.App. 2010) dealt with the circuit court's failure to follow the mandate of the Supreme Court regarding an award of attorney's fees. It quoted *Pope v. Ray*, 298 S.W.2d 53, 57 (Mo.App. 2009), a case relied upon by the trial court in this case for the proposition that a trial court is required to render judgment in conformity with the mandate.

In re Marriage of Bullard, 18 S.W.3d 134 (Mo.App. 2000) was apparently cited because it quoted *Papin v. Papin*, 475 S.W.2d 73 (Mo.App. 1972), a case cited in the trial court's Order and Judgment of May 24, 2012. (LF 179) However, *In re Marriage of Bullard*, supra, dealt with the trial court's subsequent adjudication of marital property issues not previously adjudicated and not authorized by the mandate of the appellate court. In the present case, federal tax liability is not dependent upon adjudication by the trial court or the mandate from the appellate court, but rather operated independently as a matter of federal law.

As plaintiff frames the issue, he would require BNSF to seek relief from the trial court in order to comply with federal tax law and regulations. What plaintiff really seeks is relief from the obligations under federal tax law. Plaintiff seeks to have the trial court go beyond the mandate and relieve him of his tax liabilities and receive payment for taxes already paid on his behalf as required by federal law. Contrary to plaintiff's assertions, the law of the case does **not** allow plaintiff to escape the operation of federal law and regulations, as the trial court cannot relieve him of his obligation to pay all applicable taxes due on the judgment. Satisfaction of judgment should have been entered in this case as BNSF has paid the judgment with interest, costs, and taxes as required under federal law.

III. Federal law requires that the employee RRB and Medicare taxes on any portion of a FELA settlement or judgment attributable to pay for time lost be withheld and paid to the U.S. Treasury by the employer.

Taxes are due on judgments and even settlements, which include pay for time lost, unless the parties agree that the payment does not include pay for time loss via an apportionment agreement. Apportionment agreements have been a part of FELA settlements for decades. Apportionment agreements for purposes of the Railroad Retirement Act (RRA), Railroad Unemployment Insurance Act (RUIA) and Railroad Retirement Tax Act (RRTA) are routinely used in FELA settlements to avoid payment of such taxes. Plaintiff's counsel has been using such agreements for years. Employees making claims against railroad employers have even used apportionment agreements to apportion an amount of the settlement to time lost in order to obtain credit for RRB service months, and pay taxes on the amount allocated. This allows employees to increase RRB service months in order to retire at age sixty with thirty years of service (360 months), or otherwise increase RRB annuity payments. Employees also have used apportionment agreements to reach the minimum 240 service months (twenty years) necessary to apply for a RRB occupational disability annuity rather that a total disability annuity. RRB and Medicare taxes are due on the dollar amounts apportioned to time lost. The employee's portion of RRB and Medicare taxes is withheld from the settlement and paid to the RRB while the employer's portion is paid to the RRB in addition to the settlement.

Apportionment agreements are not part of jury verdicts because by going to trial the parties are allowing the jury to determine whether any damages are due for lost wages. Missouri is not one of those jurisdictions that allows the jury to state what portion of the verdict is payment for time lost. See, MAI, Seventh Edition, 36.00 Forms of

Verdict. Accordingly, such awards are deemed to be attributable to time lost and subject to RRB and Medicare taxes as a matter of federal law.

Just because there may not have been vigorous enforcement of RRB and Medicare tax liability on judgments in FELA cases, does not mean that the laws are invalid or there is no tax liability. For example, one need only look at the enforcement of Medicare Secondary Payer liens in personal injury cases, including FELA cases. The laws allowing Medicare to obtain reimbursement of medical expenses from the proceeds of personal injury claims have been on the books for decades. Only recently have there been widespread efforts to enforce Medicare Secondary Payer liens.

Although not in the record below, plaintiff refers to two recent Missouri Circuit Court cases, in which he claims judgment was satisfied without deducting RRB and Medicare taxes. *Martin v. BNSF Ry.*, No. 1016-CV30671 (16th Cir.), Judgment (July 7, 2011), Acknowledgement of Satisfaction (Dec. 15, 2011); *Carter v. BNSF Ry.*, No. 0816-CV16671 (16th Cir.), Judgment (Nov. 27, 2012), Acknowledgement of Satisfaction (Mar. 28, 2013). What plaintiff does not tell this court is that RRB and Medicare taxes were paid on the judgments once BNSF discovered the error.

In M*artin v. BNSF Ry., supra*, BNSF paid employee RRB Tier 1, Tier 2, and Medicare taxes in the total amount of $16,008.60. BNSF also paid employer RRB Tier 1, Tier 2, and Medicare taxes in the total amount of $22,021.20. In *Carter v. BNSF Ry., supra*, BNSF paid employee RRB Tier 1, Tier 2, and Medicare taxes in the total amount of $13,658.60. BNSF also paid employer RRB Tier 1, Tier 2, and Medicare taxes in the total amount of $20,571.20.

BNSF paid the employee and employer RRB and Medicare taxes due rather than face potential penalties by the RRB and IRS. This resulted in double payment of the employee portion of RRB and Medicare taxes. BNSF is seeking to avoid this very result in this case.

In *Heckman v. Burlington Northern Santa Fe Railway Company*, 286 Neb. 453, --- N.W.2d --- (2013), 2013 WL 4541620 (Neb.) the Nebraska Supreme Court upheld the satisfaction of judgment upon payment of the general verdict to plaintiff and the withholding and payment of the Railroad Retirement taxes and Medicare taxes due on the judgment to the U.S. Treasury. (A017-A026.) As the Nebraska Supreme Court noted:

> Because the verdict was based in part on lost wages and no damages were specifically apportioned, the entire verdict is deemed compensation for lost wages. See 45 U.S.C. § 231(h)(2). Therefore, the entire award became subject to RRTA taxes. See I.R.C. § 3121(a). Under the RRA, the entire award is compensation subject to RRTA taxes that must be paid by the employer.
>
> *Heckman, supra*, at *9.

In *Heckman*, the Nebraska Supreme Court followed the RRA and RRTA in holding that when there is a general verdict with evidence of pay for time lost the entire general verdict is deemed pay for time lost, thus taxable. The employer is obligated to withhold and pay the employee's portion of RRB and Medicare taxes to the U.S. Treasury. Plaintiff would have this court disregard the opinion in *Heckman, supra,* for the

simple reason that it did not follow the convoluted interpretation of tax law advocated by plaintiff.

Similarly, plaintiff also faults *Phillips v. Chicago, Central & Pacific R.R.*, No. 04781 LACV 098439 (Iowa District Court for Pottawattamie County, Order on Defendant's Motion for Satisfaction and Discharge of Judgment, April 12, 2013) because the court in Phillips relied on 45 U.S.C. §231(h)(2) in reaching its conclusion that a general verdict was deemed pay for time lost and taxable under the RRA and RRTA. Plaintiff also tried to make some artificial distinction as to "physical injuries". Respondent's substitute brief, p. 25. Whether the injuries in *Phillips* were physical, mental, or a combination, the personal injury case was brought under the FELA, and the general verdict was deemed pay for time lost and taxable.

Further, *Heckman* did not find *Phillips* inapposite as plaintiff stated. Respondent's substitute brief, p. 25. The court in Heckman noted that the court of appeals in Mickey distinguished *Phillips*. However, contrary to plaintiff's insinuation, both *Heckman* and *Phillips* held that in FELA cases, general verdicts that include pay for time lost are taxable under the RRA and RRTA.

Any failure by BNSF to withhold and pay the employee's and employer's portions of RRB and Medicare taxes, would trigger liability for taxes due. Even if the taxes were paid by the employee, BNSF and the individuals responsible could still be held liable for civil and criminal penalties, including a penalty equal to the amount that should have been withheld and paid. 26 U.S.C. §§6672, 7202 and 7203.

IV. The interpretation of the U.S. government is authoritative and entitled to deference regarding the application of employment tax laws and regulations pertaining to RRB and Medicare taxes on FELA judgments.

The United States has set forth its interpretation of the pertinent statutes and regulations in the amicus brief filed in this case. Its interpretation of RRB and Medicare tax laws and regulations is authoritative and entitled to deference. Its interpretation is consistent with prior interpretations involving employment taxes in other cases. *Chase Bank USA, N.A. v. McCoy*, 131 S.Ct. 871 (2011). This Court need look no further than the U.S. amicus brief for the proper interpretation of statutes and regulations involved in RRB and Medicare taxation.

Contrary to plaintiff's assertions, the U.S. did not misstate that 45 U.S.C. §231(h)(2) was part of the RRTA. (Respondent's substitute brief, p. 16.) However, as part of the RRA, 45 U.S.C. §231(h)(2) defines compensation upon which taxes are collected under the RRTA.

Plaintiff and AAJ advocate an interpretation of the tax laws that serves their own interests. Plaintiff and AAJ would not have any taxes imposed on any personal injury verdicts. Their tortuous interpretation of tax law confuses income tax with employment tax. There is no dispute that judgments under the FELA are not subject to income tax. However, plaintiff would lump employment taxes under the same category in order to escape any tax liability. Clearly, the two are separate and distinct.

AAJ also made the "human capital" argument to support its assertion that personal injury judgments should be exempt from employment taxes. However, AAJ ignores the

distinction between non-economic damages for the injury itself and economic damages such as lost wages. Personal injury judgments are not sacrosanct. For example, there are any number of liens or obligations that can be applied to the judgment by operation of law, such as the RRB sickness benefits lien in this case as well as Medicare Secondary Payer liens and medical or hospital liens required to be paid from a judgment by federal or state law.

In short, plaintiff disputes the applicability of every law that applies to RRB and Medicare taxes in this case. These assertions and arguments are best made to the Congress, or to U.S. Tax Court or the U.S. District Court where plaintiff may seek a refund of the RRB and Medicare taxes withheld and paid on his behalf. BNSF is not liable to plaintiff for the taxes withheld and paid on his behalf. Under 26 U.S.C. §3202(b) the employer is indemnified for taxes withheld and paid pursuant to the RRTA. Plaintiff's recourse is to seek a refund from the IRS.

Contrary to plaintiff's assertions in his brief at page 21, BNSF is protected from actions by others seeking taxes withheld under to the RRTA. As 26 U.S.C. §3202(b) states: "*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*." Plaintiff seeking payment from the surety on the bond is subject to the same defenses he would face in seeking payment from the principal. BNSF is indemnified by 26 U.S.C. §3202(b) from actions by those seeking RRB and Medicare taxes properly withheld and paid. Plaintiff cannot recover from Safeco what it cannot recover from BNSF.

In his brief, plaintiff, again, outside the record below, referred to BNSF's annual report for 2008 regarding BNSF's reported payment for injury claims. Apparently plaintiff demands that BNSF cite details for all these claims or else let the silence speak in support of plaintiff's interpretation of tax law. This is a disingenuous and misleading tactic that would have appellants spend their time chasing plaintiff's numerous false arguments. Taxes are not due on settlements that routinely contain agreements to allocate the entire settlement amount to factors other than time lost. This is well known to plaintiff's counsel.[2] Appellants have established that BNSF, as an employer, is obligated to withhold and pay plaintiff's portion of RRB and Medicare taxes due on the judgment. The amicus brief filed by the United States sets forth the authority under the statutes and regulations for withholding and payment of RRB and Medicare taxes. This authority is not a change in the law.

There is no sea change here, only the recognition of a long-standing liability on the part of a railroad employer to withhold and pay the employee's portion of taxes due on a judgment paid by the employer. By operation of federal tax laws, the burden is on the employer to withhold and pay from the judgment the employee's portion of RRB and

[2] See Release and Settlement Agreement, ¶10, and Stipulation to Dismiss in *Gary McKinney v. BNSF Railway Company*, Cause No. 1122-CC00698, Circuit Court of the City of St. Louis (A027-A030) and Release and Settlement Agreement, ¶8, and Stipulation to Dismiss in *Edward Bauer v. BNSF Railway Company*, Cause No. 1122-CC00699, Circuit Court of the City of St. Louis (A031-A034).

Medicare taxes due on the judgment. The employer must also pay its share of taxes **in addition to** the judgment. Plaintiff would have the employer ignore this responsibility at the risk of further liability for penalties so plaintiff can escape payment of these taxes. The law is still there even if plaintiff chooses to ignore it. The law makes it the responsibility of the employer to withhold and pay these taxes. It indemnifies the employer and requires the employee to seek a refund if the employee believes the taxes were improperly withheld.

AAJ speculated that somehow the payment of RRB and Medicare taxes on judgments will make it more difficult to settle FELA cases. (AAJ Amicus Brief, p. 1.) In fact, just the opposite is true. This fallacious assertion ignored several factors. Avoidance of tax liability by virtue of settlement agreements, which routinely allocate the settlement proceeds to factors other than time lost encourage settlement. Secondly, the RRB and Medicare tax consequences affect both railroad employees and railroad employers. While the employee's portion is withheld and paid out of the settlement or judgment, the railroad employer's portion of RRB and Medicare taxes is paid **in addition to** the settlement or judgment. Payment of additional employer required RRB and Medicare taxes is no benefit to the railroad. The railroad's portion of RRB and Medicare taxes is greater than the employee's portion. Additionally, there are limits on the taxation of settlements and judgments. Even with judgments, juries in certain jurisdictions may be allowed to determine a specific amount for lost wages that may be less than the entire judgment. Even when there is a general verdict and the entire judgment is deemed to be

payment for lost wages, there are maximum taxable amounts that limit RRB taxation. Any amount in excess of the maximum taxable amount is not subject to RRB taxes.

V. Plaintiff cannot use the judgment of the trial court or the mandate from the appellate court to avoid liability for RRB and Medicare taxes due on the judgment or BNSF's responsibility to withhold and pay employee's portion of those taxes from the judgment.

Neither the trial court nor the appellate court can set aside RRA and Medicare tax liabilities. Tax liability for RRB and Medicare taxes on the judgment is a matter of federal law independent of the judgment of the trial court and the mandate of the appellate court. Plaintiff cannot have the trial court or the court of appeals eliminate his RRB and Medicare tax liability on the judgment any more than he could have a federal tax lien or Medicare secondary payer lien set aside. RRB and Medicare taxes exist independent of the trial court judgment and must be paid. BNSF is obligated under federal law to withhold and pay the employee's portion of RRB and Medicare taxes out of the judgment and to pay the employer's portion in addition to the judgment. This is not contrary to the mandate, but rather independent of the mandate.

By operation of law, a general verdict is deemed as payment for lost wages due to the impossibility of revisiting a general verdict to allocate dollar amounts for each element of damages or determining just what the jury believed or disregarded in arriving at a dollar figure for the total verdict. Without special interrogatories or an itemized verdict form, there is no way to determine the exact amount the jury considered

appropriate for what element. This is why the law deems the entire amount of a general verdict as pay for time lost and taxable.

The only way plaintiff could have the trial court force BNSF to pay him the amount of $12,820.80 paid for his portion of RRB and Medicare taxes on the judgment, is to provide proof that he had already paid his portion of RRB and Medicare taxes due on the judgment. BNSF has provided proof that it has paid plaintiff's RRB and Medicare taxes. Judgment has been satisfied. There can be no judgment against Safeco, the surety, as BNSF, the principal, has satisfied judgment. Accordingly, the Order and Judgment of May 24, 2012 should be vacated and set aside with the trial court instructed to enter satisfaction of judgment by BNSF and to release the Safeco from its obligations.

VI. Respondent's numerous procedural objections are baseless and this Court may proceed to the merits of the appeal.

The circumstances surrounding the payment of the employee's portion of taxes on the verdict were set forth in Defendant's Notice to the trial court. LF 181-183. BNSF satisfied the judgment with interests and costs and by remitting the employee's portion of Railroad Retirement taxes and Medicare taxes to the U.S. Treasury, which the U.S. confirms was required to be paid by BNSF.

Plaintiff suggests, inappropriately, that the prior interpleader action, which BNSF filed to protect itself somehow suggests that no taxes were due. However, once BNSF paid the withheld taxes to the U.S. Treasury, there was no longer any basis for the interpleader action and BNSF moved to dismiss the interpleader action.

Plaintiff seeks to interpret the actions of the IRS and RRB in the interpleader action that was dismissed as a ruling on the merits. Plaintiff asserts that BNSF had no obligation to withhold and pay the RRB and Medicare taxes due on the verdict simply because the IRS and RRB did not assert a claim against the $12,820.80 in the interpleader. This is a false argument. Neither the IRS nor RRB asserted a claim in interpleader because it would have required a waiver of sovereign immunity to litigate a tax obligation prior to payment of the tax. Once it became apparent that the IRS and RRB would not waive sovereign immunity to allow the interpleader action to proceed, BNSF paid the withheld taxes to the U.S. Treasury as required by federal law. Payment of the taxes to the U.S. Treasury rendered moot the interpleader action and the interpleader action was dismissed.

BNSF filed the interpleader action to prevent possible double payment of the taxes, which is precisely what plaintiff seeks by judgment against the surety, Safeco. Plaintiff seeks double payment of amount of $12,820.80, already paid on plaintiff's behalf as required by federal law. The IRS and RRB were not obligated waive sovereign immunity and respond to the interpleader action in order to obtain payment of the RRB and Medicare taxes due on the general verdict. The IRS and RRB stood upon BNSF's obligation under the RRA and RRTA to withhold and pay the RRB Tier 1 and Tier 2 and Medicare taxes due on the general verdict. BNSF complied with federal law and regulations. If Mickey wishes to contest the taxability of the general verdict as payment for time lost, he may seek a refund from the IRS.

Further, plaintiff has asserted that BNSF somehow waived it obligation to withhold and pay RRB Tier 1 and 2 and Medicare taxes on the judgment. Compliance with the tax law cannot be waived. The law-of-the-case doctrine does not operate to void federal tax laws. The tax obligations are not a setoff, lien, or affirmative defense. The application of RRB and Medicare taxes does not depend upon whether BNSF raised the issue during trial. No pleadings, pretrial motions, or other motions during trial are required to trigger application of these tax obligations. RRB and Medicare tax obligations are not subject to the consent of plaintiff. The taxable event occurred after trial when BNSF satisfied judgment by paying plaintiff the amount of judgment and withholding and paying the RRB lien, the employee taxes, and Medicare taxes due on the judgment. The only action required of the trial court was entry of satisfaction of judgment upon payment of the judgment and the RRB and Medicare taxes due. Plaintiff cannot seek to avoid the federal employment tax consequences of payment of the judgment by seeking judgment against the surety for the amount of taxes required to be paid under federal law.

Contrary to plaintiff's other procedural objections, the propriety of payment of plaintiff's portion of RRB taxes and Medicare taxes and the resulting satisfaction of judgment was properly presented to the court. However, the trial court declined to modify or vacate judgment against Safeco on the supersedeas bond per order of June 8, 2012. LF 209. The Order and Judgment of May 24, 2012 stood and was the judgment appealed. It is the final judgment that is appealed and not the failure to modify or vacate the final judgment.

CONCLUSION

For all of the foregoing reasons, the Order and Judgment of May 24, 2012, should be reversed with judgment against BNSF and Safeco vacated and the case remanded with instructions for the trial court to deny Plaintiff's Motion for Judgment on the Supersedeas Bond and for the trial court to enter a full satisfaction of judgment, acknowledging payment of the judgment with costs and interest to plaintiff and with the remittance of $12,820.80 as the employee's portion of Railroad Retirement taxes and Medicare taxes to the U.S. Treasury.

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Dated: December 4, 2013

Certificate of Compliance

The undersigned hereby certifies that:

1. This brief complies with the information required by Rule 55.03.

2. This brief complies with the limitations contained in Rule 84.06(b).

3. Per Rule 84.06(c), the word count of this brief is 6,992, as determined by Microsoft Word 2003.

4. The brief was prepared using "Times New Roman" font in 13 point size, in Microsoft Word 2003.

/s/ Thomas P. McDermott

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Certificate of Service

The undersigned hereby certifies that a copy of Appellants' Substitute Reply Brief and Appendix was filed electronically and served by operation of the electronic filing service, on this 4th day of December, 2013, to each of the individuals set forth below:

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