

IN THE SUPREME COURT OF OHIO

NORFOLK & SOUTHERN RAILWAY : CASE NO. 06-1025
CO., :
Appellant, : On Appeal from the Cuyahoga County
 : Court of Appeals, Eighth Appellate
 : District
v. :
 :
HOMER R. BOGLE, et al. : Court of Appeals Case No. CA 86339
 :
Appellees.

**BRIEF OF AMICUS CURIAE, NATIONAL ASSOCIATION
OF RETIRED & VETERAN RAILWAY EMPLOYEES, INC. IN SUPPORT OF
APPELLEE'S MOTION FOR RECONSIDERATION**

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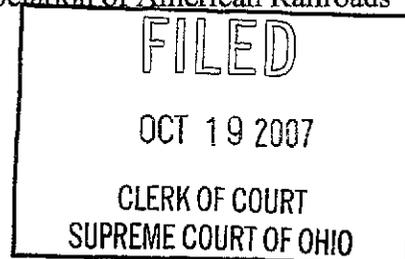


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INTRODUCTION AND INTERESTS OF AMICUS CURIAE

This *Amicus Curiae* represents the interests of the National Association of Retired & Veteran Railway Employees, Inc. (hereinafter, "NARVRE"). NARVRE is the only federally chartered Railroad Retiree Association in the industry representing retired railway workers. In the State of Ohio, alone, NARVRE represents 1,700 members and their families. Today, there are over 37,000 railroad retirees in the entire state having benefits under the Railroad Retirement Act.

This *Amicus Curiae* intervenes in this appeal on behalf of Defendants-Appellees, Charles Weldon, William Monroe, administrator of the estate of Worth Oliver Bryant, deceased, and Eric Wiles, individually and in his capacity as the executor of the estate of Larry Wiles, deceased. NARVRE strongly urges this Court to carefully reconsider the issues presented herein. Procedurally, this Court's ruling – the final decision in this state's legal hierarchy – is troubling to NARVRE because the ruling affects thousands of potential FELA and LBIA claimants when Appellees were denied the right to be heard in oral argument or through briefing. The Appellees' failure to timely file a merit brief (by one day), with literally thousands of claimants' cases at stake, should not sound the death knell to asbestos related FELA claims in the state of Ohio. Rendering a decision, the effects of which effectively undermines the rights of thousands of claimants within this state, in the face of a procedural error is a grave injustice which justifies reconsideration of the issue.

In the interests of justice, sound judicial discretion and federalism, the NARVRE strongly encourages this Court to take the appropriate steps necessary to revisit its decision.

ARGUMENT

I. JUSTICE DEMANDS THAT THIS COURT NOT PROMULGATE LAW WITHOUT THE BENEFIT OF TWO SIDES TO AN ARGUMENT.

It is the understanding of NARVRE that this Court denied an oral hearing by the Appellees based upon their counsel's failure to file the merit brief in a timely fashion. That brief was apparently filed one day late. The Ohio Supreme Court is the final stop for a case's journey. That journey should not terminate in a decision effecting thousands of workers where this Honorable Court heard only one side of the argument. This Court's decision, which effectively undermines long-established principles of federal preemption, is based solely upon the brief and argument of one party - Appellant.

Sound judicial discretion dictates that cases be decided upon their merits rather than a procedural flaw. While the technical mishap here is serious, more grievous is the ultimate effect that the decision has upon thousands of claimants, unheard on the issue, who will suffer most from the decision. Certainly, this Court is not in the business of doling out unequal justice; here, justice was not done where literally thousands of plaintiffs in ongoing litigation have had their federal rights stripped because Appellees failed, by one day, to file their merit brief.

NARVRE, therefore, strongly urges that this Court revisit the issues, allow further briefing, and come to a decision only after hearing why the statute at issue conflicts with the established principles of federalism.

II. THE STATUTE IS SUBSTANTIVE CONTRARY TO THIS COURT'S OPINION.

The opinion authored by this Court affects the federally protected rights of thousands of railroad workers and their families in an area of law where state courts dare not tread. The notion that a state statute can supersede or preempt the federally mandated system of FELA undermines the notion of federalism. Injured railroad workers enjoy a substantive right, through

the FELA and LBIA, to bring an action against their railroad employer and have the merits of that action determined by a jury. This is not only a substantive right, but the sole, exclusive right to relief available to this category of workers in Ohio.

It is well settled that while actions brought under the FELA may be brought in State or Federal Court, “the substantive law governing the cases is Federal.” *Atchison, Topeka & Santa Fe Railway Co. v. Buell*, 480 U.S. 557, 107 S.Ct. 1410; *Hinkle v. Norfolk & Western Railway*, 1996 Ohio APP. LEXIS 3105 (8th App. Dist. 1996). Moreover, it has been long settled that Congress intended the LBIA to preclude all state law respecting locomotives and locomotive parts, material or equipment used in interstate commerce due to the LBIA. *See Napier v. Atlantic C.L.R. Co.*, 272 U.S.605, 608, 47 S.Ct. 207 (1926). Many, many years ago in *Napier*, the Supreme Court unambiguously held that Congress intended the LBIA “to occupy the field” with respect to all areas subject to the LBIA and accordingly, all state law within the LBIA’s grant of authority to the interstate commerce commission is preempted. 272 U.S. at 613, 47 S.Ct. at 215.

There can be no dispute that the FELA, and indeed the LBIA, was designed to regulate the entire field of railroad injuries and supersede and replace state regulation of those injuries. The FELA was clearly “intended to operate uniformly in all the States, as respects interstate commerce, and in that field it is both paramount and exclusive” *Erie Railroad Company v. Winfield*, 244 U.S. 170, 37 S.Ct. 556 (1917) (Emphasis added.)

The purpose of the FELA is clearly set forth in the legislative history of the statute:

[The FELA] is intended in its scope to cover all commerce to which regulative power of congress extends. . . by this bill it is hope to fix a uniform rule of liability throughout the union with reference to the liability of common carriers to their employees. . . a federal statute of this character will supplant the numerous state statutes on the subject so far as they relate to interstate commerce. It will create uniformity throughout the union and the legal status of such employer’s

liability for personal injuries, instead of being subject to numerous rules, will be fixed by one rule in all states.

New York Central Railroad Company v. Winfield, 244 U.S. 147, 150, 37 S.Ct. 546 (1917).

Accordingly, for at least the last 100 years, it has been an overriding principle of FELA jurisprudence, established by Congress, emphasized repeatedly by the Supreme Court of the United States and well recognized here in Ohio, that a “substantive right or defense arising under the act cannot be lessened or destroyed by a local rule. . .” *Norfolk Southern Railroad v. Ferebee*, 238 U.S. 269, 35 S.Ct. 781 (1915). Thus, “peculiarities of local law may not gnaw at rights rooted in federal legislation.” *South Buffalo Rail Company v. Ahern*, 344 U.S. 367, 73 S.Ct. 340 (1952).

This substantive right is in the framework of the FELA and LBIA and is unquestionably federal in nature. *Atchison, supra*, 480 U.S. 557, 107 S. Ct. 1410 (1949). “Injury” in the context of FELA occupational disease actions has been clearly and specifically defined by the Supreme Court of the United States. *See Norfolk & Western Railway Co. v. Freeman Ayers, et al.*, 538 U.S. 135, 123 S. Ct. 1210 (2003) (asbestosis is a cognizable injury under the FELA). As such, the general assembly may not infringe upon the substantive rights granted to railway workers by the United States Congress by establishing its own definition of “injury” in Ohio. This Court’s characterization of the statute as a neutral, procedural rule of judicial administration is misguided. Rather, it is a set of substantive rules specifically delineating what will be considered as an asbestos-related injury in the State of Ohio, thereby, taking that question out of the hands of a jury and placing it squarely in the hands of Ohio’s general assembly. The supremacy clause of the U.S. Constitution forbids any state, Ohio included, from making laws in an area so dominated by federal interests as personal injuries suffered by railroad workers. Masking a

substantive rule under the guise of a “procedural framework” does not alter the intent or effect of the rule, i.e., one that it changes the substantive definition of “injury” under the FELA.

For almost a century it has been well established by the United States Supreme Court that the sole and exclusive remedy for personal injuries suffered by employees of interstate railroad carriers is the FELA and in that arena, no room is left for state regulation. *See New York Central R. Co. v. Winfield*, 244 U.S. 147, 150, 37 S. Ct. 546 (1917). In *Winfield*, the Supreme Court held that the FELA superseded any state acts respecting personal injuries suffered by railroad workers and established one exclusive standard of liability for interstate railroad carriers:

Therefore, by reason of the supremacy clause, a state has no power to adopt a different standard of liability for injuries, nor may it force the carriers of the employees to settle these personal injury claims on a different basis than the federal act supplies.

South Buffalo Rail Co. v. Ahern, et al., 344 U.S. 367 (citing *New York Central Rail Co. v. Winfield*, 244 U.S. 147.)

This Court is more than familiar with the principals of federal preemption and their impact upon the railroad industry. In *Darby v. A-Best Products Co.*, 102 Ohio St.3d 410, 2004-Ohio-3720, Chief Justice Moyer, on behalf of this Court, articulated the standard for preemption at page 418 as follows:

It is unnecessary to survey the law of federal preemption in depth, as we have done so previously. See, e.g., *Minton v. Honda of Am. Mfg., Inc.* (1997), 80 Ohio St.3d 62, 684 N.E.2d 648. Instead, we reiterate the controlling principles that govern this case: (1) the critical question is whether Congress intended state law to be superseded by federal law – the historic police powers of the states are not to be superseded by federal law unless that is the clear and manifest purpose of Congress, (2) a presumption exists against preemption of state police-power regulations, and (3) federal law preempts state law where Congress has occupied the entire field, i.e., where a federal scheme of regulation is “sufficiently comprehensive to make reasonable the inference that Congress “left no room” for” a claim under state law. *Id.* At 69-70 and 76, 684 N.E.2d 648, quoting *California Fed. S. & L. Assn. v. Guerra* (1987), 479 U.S. 272, 281, 107 S.Ct. 683, 93 L.Ed.2d 613.

In holding that the Federal Locomotive Boiler Inspection Act (LBIA) preempts state law tort claims against manufactures of railroad locomotives in the asbestos industry, this Court recognized that based upon the foregoing standard there is no room for state law whatsoever in the railroad industry.

The FELA has conferred upon railroad employees a substantive right to damages suffered as a result of occupational injuries incurred through the negligence of the railroad. *Urie v. Thompson*, 337 U.S. 163, 180, 69 S.Ct. 1018, 1030 (1949). Clearly, the State of Ohio, through its courts or legislatives bodies may not infringe on that substantive right. Courts throughout the country have followed the dictates of the United States Supreme Court and uniformly held that “regardless of the local rule prevailing in a given jurisdiction, suits brought in the state’s court under the Federal Employers’ Liability Act are to be tried and determined in accordance with the provisions of said act as construed by the Supreme Court of the United States.” *Illinois Central Railroad Company v. Coussens*, 77 So. 2nd 818, 821, 223 Miss. 103, 113 (1955). (*Emphasis added*). This Court’s opinion, interpretation and application of the statute to FELA claims, therefore, infringes on the rights and the longstanding precedent followed in every other single jurisdiction to sit idly by and let the US Government regulate the industry.

Thus, no act, order or legislative enactment set forth by any state, or any branch of its government, can infringe upon a Plaintiff’s federal right that his FELA and LBIA claim be tried and determined in accordance with the Federal Statutes. This includes the Plaintiff’s right to a bring a FELA action under the principals espoused by the FELA – not by those standards announced by the Ohio legislature. Restating it, Ohio rules, masked as “procedural guidelines” cannot alter the definition of “injury” under the FELA nor infringe upon claimants’ ability to

bring FELA or LBIA claims. The extra burden placed upon FELA claimants by the Court's opinion is contrary to the notion of federalism.

Because the statute infringes on the Appellees' substantive rights to pursue their FELA claims and have their matters heard by a jury, this Court should reconsider its decision.

III. RECONSIDERATION IN THIS INSTANCE IS ESPECIALLY NECESSARY GIVEN THE NUMBER OF PLAINTIFFS AFFECTED AND THE PROCEDURAL NATURE OF THIS CASE.

NARVRE has thousands of members and recognizes, as this Court should, the impact the ruling in this case will have upon its members and their families. Such a broad effect on an industry which has, at all times, been regulated solely by federal law is sufficient to merit reconsideration. Coupled with the fact that Appellees missed a filing deadline, albeit by one day, and were never heard on these issues creates a more imminent need for reconsideration.

CONCLUSION

For the reasons set forth above, in support of Appellees, and on behalf of its thousands of members, NARVRE strongly urges this Court to reconsider its ruling.

Respectfully submitted,



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CERTIFICATE OF SERVICE

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