AMERICAN ASSOCIATION for JUSTICE
Formerly the Association of Trial Lawyers of America (ATLA®)

Railroad Law Section

A Publication of the American Association for Justice Vol. 16, No. 1, Fall 2008

INSIDE

ENDOWED BY
ALFRED K. NIPPERT JR.

Mark your calendars...

AAJ 2009 Winter Convention
February 7–11
Sheraton New Orleans
New Orleans, Louisiana

Letter from the Chair
Building on Our Success

By John M. Cooper, Virginia Beach, VA

John M. Cooper

I am honored to serve as the Chair of AAJ's Railroad Law Section. The purpose of a Section, as described by the *Section Leaders Handbook*, is to provide a forum for education, networking, the exchange of information on Section topics, and the promotion of the interests of the members. Worthy goals, indeed!

On the education front, we made great strides in the Railroad Section under our Immediate Past Chair, Jamie Holland. We had a full-day seminar at the 2008 Annual Convention in Philadelphia. This successful, all-day seminar featured David Ball, who drew big crowds and was very stimulating.

We are planning a great slate of speakers for San Diego in 2009, anchored by Pat Malone, the co-author of *Rules of the Road*. It should be fascinating to brainstorm with Pat about how to apply the *Rules* to crossing and FELA cases. Please put the Annual Convention in San Diego from July 11–15, 2009, on your calendar now.

We will also be meeting at the Winter Convention in New Orleans from February 7–11, 2009, for a roundtable discussion (without CLE credit) on railroad topics. This is a great opportunity to bring your recent questions, appellate issues, and expert witness ideas to share with the group in an informal setting.

Networking is also an important part of what the Railroad Section does. We have always had a close relationship with the Railroad/Highway Crossing & Derailment Litigation Group under Pam O'Dwyer's leadership. This bond allows the crossing accident lawyers and the FELA lawyers to exchange ideas and help each other better fight the common opponent—railroad companies.

I am pleased that our Section has a welcoming attitude toward new members. We make a special effort to have receptions and other opportunities at conventions to get together socially and learn more about—and from—each other.

The exchange of information on rail topics is key to our Section's mission. One of the main avenues for exchanging information is our Section List Server and the List Server for the Litigation Group. So often, we face the same issues and expert witnesses in our cases. The List Servers allow us to tap into the experience of lawyers across the country. I am always amazed at how effective it is to send out an e-mail and receive critical information from other railroad litigators who are willing to share information, including briefs, orders, depositions of experts, or specific technical

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documents on railroad equipment. This exchange of information helps us all do a better job for our clients.

The Railroad Section always promotes the interests of Section members and our clients. Through a combination of AAJ staff and our Section's efforts, we moved a statutory improvement through Congress last year that clarifies that preemption should not stop state law claims in crossing accidents. The Section worked well with the AAJ staff, particularly with Sue Steinman, by providing her with our proposals for law changes early and giving her the support she needed to get something done. We hope to repeat that effectiveness on promoting rail safety again this year. Sharon Van Dyke has agreed to continue as our liaison to AAJ for legislative proposals.

My personal goal as Chair this year is fostering institutional competence. I am especially proud of the new slate of Officers. Jose Bautista of Davis, Bethune & Jones, LLC, of Kansas City, MO, is a crossing accident lawyer who will serve as the Chair-Elect; Kirk Sammons of Vasquez & Sammons, LLP, of Houston, TX, is a FELA attorney and our Vice Chair; and Rob Sullivan, a crossing lawyer, from Langdon & Emison of Lexington, MO, is our Secretary/Newsletter Editor. All three have shown incredible energy and enthusiasm for the task of making the Railroad Law Section a great example of concerted effort by plaintiff attorneys to work on behalf of the public. ■

Back issues of Railroad Law Section Newsletters can be found on our Web site at www.justice.org/sections/railroad.

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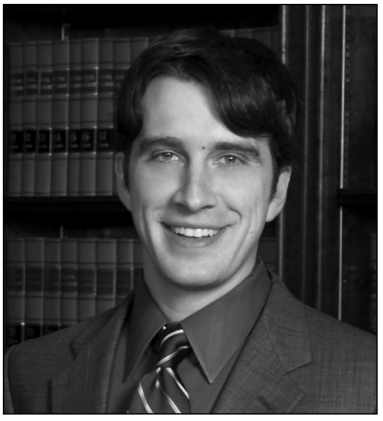
Don't Let the Railroad Trap You on Litigation Island

By Timothy R. Morgan and Robert C. Sullivan



Timothy R. Morgan

Robert C. Sullivan

It is clear that all of our clients benefit from organizations such as AAJ because they allow lawyers with similarly situated clients to discuss their cases. We get great ideas from other lawyers on how to proceed in a given case and sometimes get a heads up as to what the defendant will do under a recurring fact pattern. Essentially, we share good ideas to aid our clients in each case.

It is equally clear that being able to discuss documents produced by the defendant railroad with other lawyers can produce outcome-determinative breakthroughs in our cases. Often times these breakthroughs would not be possible without the ability to discuss documents with other lawyers. This is true regardless of how long or how hard you fight the defendant railroad. The only way to have a meaningful discussion with other lawyers about a railroad's internal documents is to make sure that both parties to the conversation have the opportunity to read and review the documents' substance.

One way that defendants have tried to prevent lawyers from discussing the importance of certain documents is to make the documents subject to restrictive protective orders. Protective orders are often entered to prevent the dissemination of documents produced in a case. Defendants in product liability cases have been using protective orders for years to discourage discovery and prevent formal and informal plaintiff groups from coordinating discovery.

When the defendant is successful in obtaining a protective order with a restrictive scope, the plaintiff is often isolated from coordinating groups and forced to incur considerable expense gaining access to what is otherwise readily available information that has been produced in several other similar cases. The protective order that the defendant successfully put in place bars the plaintiff from distributing the documents beyond the case at issue, thereby cutting off communication with other plaintiff attorneys representing similarly situated litigants. Consequently, the plaintiff litigating the case may be prevented from discussing the actual documents produced with other similarly situated attorneys and making an outcome-determinative breakthrough.

Unfortunately, the railroads are starting to move toward this discovery tactic by trying to place the plaintiff on an island. Railroads are requesting protective orders to govern the production of information in lawsuits. Whether they will be as successful as product liability defendants remains to be seen. Similarly, the full scope and type of information they will seek to produce under a restrictive protective order still remains unclear.

The legal analysis of these issues is too lengthy to fully cover in this article; therefore, this article will mainly focus on the practical reasons why you should oppose a restrictive protective order and the key legal issues that will aid you in your opposition. Under no circumstances should a plaintiff agree to a protective order that does not allow him or her to share documents with other litigants that have similar cases.[1]

The interests of all parties can easily be protected. Numerous courts have entered orders that forbid disclosure of confidential information to the producing party's competitors and to the public, but they have also allowed the plaintiff access (under stated restrictions) to information produced in other similar lawsuits.

Why Fight a Protective Order That Prohibits Sharing with Attorneys with Similar Cases?

The railroad defendant possesses key sources of documentary evidence in railroad crossing cases. These documents often contain critical evidence concerning the principle issues in a crossing case. Because of their complexity, crossing cases are extremely difficult, time consuming, and expensive to prepare. Therefore, the plaintiff must have access to an information sharing mechanism to justly and adequately prepare the client's case for trial.

The railroad's local counsel has access to a highly effective mechanism to assist them in preparing the defense of each individual railroad crossing case. This is perfectly appropriate and permissible.

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Indeed, counsel representing different (sometimes competing) companies in litigation involving common issues may work with one another under a Joint Defense Agreement. The entry of a protective order that allows defense counsel access to their information sharing mechanism, but which denies the plaintiff access to a similar mechanism, unfairly slants the playing field to the defendant railroad's advantage.

Even the Playing Field

One of the main reasons to fight restrictive protective orders is so we can litigate our cases on an even playing field with the defendant railroad lawyers. Otherwise, the railroads will have the benefit of something we do not have access to, which will inevitably give them an advantage at trial.

More Efficient Use of Discovery and Less Burdensome for the Producing Defendant

Another reason to fight restrictive protective orders is so that we do not have to reinvent the wheel with respect to discovery that we know has already been propounded and enforced in another similar case.[2] For those of us not getting paid by the hour, having an information sharing mechanism saves time and money, which ultimately helps our clients because we can spend more time and money in other areas.

The benefit that information sharing has on the cost of discovery also applies to the defendant as well as the plaintiff.[3] Therefore, the standard objection "overly burdensome" no longer holds water. Instead, the plaintiff can receive the information from another case in an ultimately less burdensome manner for the defendant.

Unfortunately, plaintiff attorneys have learned from bitter experience that some defendants can and will effectively stonewall the discovery efforts of one attorney with only one case.

A Verification Tool to Prevent Stonewalling

A protective order that contains a mechanism for the sharing of information between similarly situated litigants also diminishes the motivation and opportunity for the defendant to stonewall the plaintiff during the discovery phase. In other words, if there are several attorneys that we can consult to verify whether all of the relevant documents have been produced, we have a verification tool. "Shared discovery is an effective means to insure full and fair disclosure. Parties subject to a number of suits concerning the same subject are forced to be consistent in their responses by the knowledge that their opponents can compare those responses."[4]

Without the means to verify the defendants' production as full and complete, the economic incentives that the producing defendants have go virtually unchecked.[5] However, with the proper verification tool in place, an offsetting economic disincentive to withhold information is also in place.[6] Unfortunately, plaintiff attorneys have learned from bitter experience that some defendants can and will effectively stonewall the discovery efforts of one attorney with only one case. Defendant railroads also have a history of discovery abuse that plaintiffs must be aware of and which supports the need for a verification tool in the form of an information sharing mechanism.

How to Fight the Defendant's Attempt at a Restrictive Protective Order

The first step is not to agree to a restrictive confidentiality order. Instead, we should take every reasonable step to fight it. The defendant may imply that a restrictive confidentiality order will benefit the plaintiff because it will inspire the corporate defendant to furnish the plaintiff with all relevant information quickly and without great expense. However, the rules of discovery already place the defendant under a legal obligation to produce all of the information that is fairly requested. Therefore, the defendant should not condition its compliance with the rules of discovery on an agreement to sign a restrictive confidentiality order.

Once it is clear that the plaintiff is not going to agree to a protective order that does not include an information sharing mechanism, there are essentially two approaches available to respond to the defendant's request for a restrictive confidentiality order:

- An outright attack on whether the information being produced is a trade secret or worthy of any sort of protection. This route emphasizes the public's right to access information.
- Accept the defendant's classification of the information needing protection, but seek the entry of a protective order allowing information sharing.

This article suggests using the second approach during informal negotiations with the defendant in hopes that the defendant will agree to the sharing mechanism. If the defendant will not agree,

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then use both approaches, with the court deciding the issue.

This article will not address the legal principles regarding what type of information deserves protection and what type of information should be made available to the public. Instead, it will focus on the legal principles and strategy required to make sure that any protective order contains an information sharing mechanism that allows us to share documents with similarly situated litigants.

Besides showing the court the reasons why a "sharing" protective order is necessary, another good tactic is to explain to the court the defendant's true motivation for seeking a restrictive protective order. We can do this by showing the court that a protective order that prevents disclosure of the information to any and all of the defendant's competitors is all that is necessary under the law.

However, the defendant would not agree to that type of protective order because its true motivation in seeking a restrictive protective order has absolutely nothing to do with the protection of its confidential and proprietary information. The real purpose of the defendant's attempt at a restrictive protective order is to gain an unfair advantage in litigation, rather than the protection of trade secrets or other confidential information. One example of this unfair advantage is the defense lawyer's ability to discuss all the documents freely, while the plaintiff is placed on a litigation island.

As stated earlier, the tactic of restrictive protective orders gained much of its effectiveness it in the area of product liability defense. When manufacturers sought restrictive protective orders in early product liability cases, they actually acknowledged that the reason they were seeking these orders in the form requested was to prevent information sharing among plaintiff attorneys. One defendant stated the following in support of its motion:

> The information, if traded with other law firms engaged in similar litigation with Ford, would allow these attorneys to pool their information pertaining to this corporate giant, more adequately prepare their case for trial, simplify the discovery process, confirm Ford's candor in responding to discovery request, and, accordingly, potentially result in verdicts against Ford Motor Company.[7]

The response to this affidavit in open court should have been "exactly, Judge." Courts have routinely rejected the contention that information sharing constitutes good cause to justify a restrictive confidentiality order.[8] In fact, courts have held that "using fruits of discovery from one lawsuit in other litigation, and even in collaboration among various plaintiffs' attorneys, comes squarely within the purposes of the Federal Rules of Civil Procedure."[9]

Therefore, if we posture the case to the court as one where the only issue left to disagree on is whether a sharing information mechanism should be in place, we

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New Section Members, Welcome!

★ **Mark Atlee**
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★ **Jared Cardiff**
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★ **Robert DeRose**
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will have the law on our side because the defendant will not be able to communicate a legally valid reason why it deserves access to an information sharing mechanism and we do not. If the company is truly concerned with its proprietary interest and not in gaining an unfair advantage in litigation, then it should not oppose a protective order that allows similarly situated litigants to share the documents as long as it does not disseminate the information to the public or to competitors.

The true intent behind restrictive protective orders that prohibit sharing documents with similarly situated litigants is to isolate the plaintiff on an island. Articles authored by lawyers who specialize in defense have revealed their true motivation in seeking restrictive protective orders. For example, in *Defendant's Primer*, published by the Defense Research Institute, one author urges defense counsel to routinely move for protective orders, regardless of the merits of the secrecy claim.[10] The article goes on to state, "even where defense counsel can make no special claim of confidentiality, he or she should routinely seek a protective order limiting the dissemination of discovery information."[11]

The following are the standard arguments we are likely to hear or read from the defense when fighting for an information sharing mechanism. Many of the arguments are improperly based on the United States Supreme Court case *Seattle Times Co. v. Rhinehart.*[12]

First, the defendant will argue that the use of discovery materials must be limited to the "present" case under *Seattle Times*. Any use of the discovery information beyond the case at issue is an abuse of discovery and improper.

But this contention is simply baseless. *Seattle Times* only addressed the question of public access to discovery materials. We should ask for a protective order that prevents dissemination to the public. The defendant's argument is just another attempt at actually coming out and saying "we want a restrictive protective order so the plaintiffs cannot share information among themselves."

The true intent behind restrictive protective orders that prohibit sharing documents with similarly situated litigants is to isolate the plaintiff on an island.

Courts have uniformly and repeatedly rejected information sharing as a good cause justification for the entry of a restrictive protective order. If the defendant's contention that the *Seattle Times* case prevents information sharing was accurate, then every post-*Seattle Times* case would have to forbid information sharing. However, even after *Seattle Times*, courts have still uniformly and repeatedly praised and recommended information sharing between litigants as long as the defendant's proprietary interest is protected from public dissemination.[13]

The defendant will argue that the request for information sharing is the equivalent of a request for unrestrained disclosure, which is improper under *Seattle Times*. This is just another attempt by the defendant to blur the difference between disclosure of discovery materials to the public and disclosure of the discovery materials to similarly situated litigants for purposes of preparing the case for trial. The response to this contention is simple: The defendant has incorrectly stated our position because we proposed a protective order that expressly prohibits the disclosure of confidential documents to the public, to the media, and to the defendant's competitors. In addition, the proposal should set forth terms prohibiting the sale and commercial use of confidential materials acquired during discovery.

The defendant may argue that we are using the discovery process in the present case solely to get materials to use in another case. This assertion is simply not true. The response should clearly point out the fact that the requested discovery material, as well as access to an information sharing mechanism, is necessary to prepare the case at issue for trial. Furthermore, for this argument to be valid, the defendant needs to prove that the plaintiff filed a lawsuit just to engage in discovery for another case. Courts that have examined this issue require that the defendant show "bad faith" on the plaintiff's part.[14]

Restrictive protective orders hurt plaintiffs. The more they are agreed to, the more defendants will seek them out. The bottom line is that these orders should only exist if ordered by a court, not by agreement of counsel.

This article is not meant to be fully comprehensive with respect to the arguments we will see and the arguments we should make in response to defendants trying to restrict our ability to discuss documents with other plaintiff attorneys representing similarly situated clients. Instead, it emphasizes the importance of not agreeing to restrictive protective orders because they are dangerous to our ability as a group to discuss the significance of certain confidential documents and to prepare cases for trial. In short, we should never be left on an island to prepare a case because "Wilson" will not be nearly as helpful as he was to Tom Hanks. ■

Timothy R. Morgan & Robert C. Sullivan;

Sullivan is the Newsletter Editor for the Railroad Law Section.

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Notes

1. This article does not define "similar case." That is often unique to the case at hand and is often tied to the scope of discovery in the case in question.
2. The phrase "reinvent the wheel" has been used by several courts to describe the effects of a restrictive protective order. *See, e.g., Ward v. Ford Motor Co.*, 93 F.R.D. 579, 580 (D. Colo. 1982) ("Each plaintiff should not have to undertake to discover anew the basic evidence that other plaintiffs have uncovered. To so require would be tantamount to holding that each litigant who wishes to ride a taxi to court must undertake the expense of inventing the wheel.").
3. *See, e.g. Wauchop v. Domino's Pizza, Inc.*, 138 F.R.D. 539, 547 (N.D. Ind. 1991).
4. *Garcia v. Peeples*, 734 S.W.2d 343, 347 (Tex. 1987).
5. *See* Wayne D. Brazil, *The Adversary Character of Civil Discovery: A Critique and Proposal For Change*, 31 VAND. L. REV. 1295, 1303-31 (1983).
6. *Brandimarti v. Caterpillar of Delaware, Inc.*, CA No. G.D. 83-12468, Op. at 4 (Ct. Com. Pl., Allegheny County, PA Oct. 8, 1985).
7. Affidavit of Rudolph J. Persico, attached in support of the Defendant's Motion for Protective Order, *Green v. Ford Co.* (San Diego County Cal. Super. Ct. Apr. 16, 1971) (No. 403572).
8. *See, e.g., Johnson Foils, Inc. v. Huyck Corp.*, 61 F.R.D. 405, 410 (N.D. N.Y. 1973); *Kamp Implement Company, Inc. v. J.I. Case Co.*, 630 F. Supp. 218, 219 (D. Mont. 1986); *Parsons v. Gen. Motors Corp.*, 85 F.R.D. 724, 726 (N.D. Ga. 1980); *Olympic Ref. Co. v. Carter*, 332 F.2d 260, 264-66 (9th Cir. 1964).
9. *Nestle Foods Corp. v. Aetna Cas. and Sur. Co.*, 129 F.R.D. 483, 486 (D. N.J. 1990).
10. Kearney & Benson, *Preventing Non-party Access to Discovery Materials in Products Liability Actions: A Defendant's Primer*, 30 (1987).
11. *Id.* at 40.
12. *Seattle Times Co. v. Rhinehart*, 467 U.S. 20 (1984).
13. *See, e.g., Baker v. Ligget Group, Inc.*, 132 F.R.D. 123, 126 (D. Mass. 1990); *Burlington City Bd. of Educ. v. U.S. Mineral Products Co.*, 115 F.R.D. 188, 190 (M.D. N.C. 1987); *Deford v. Schmid Products Co.*, 120 F.R.D. 648, 654 (D. Md. 1987); *Garcia*, 734 S.W.2d at 346-48; *Koval v. Gen. Motors Corp.*, 610 N.E.2d 1199, 1202 (Ct. Com. Pl. Ohio 1990); *Nestle Foods Corp.*, 129 F.R.D. at 486.
14. *Cipollone v. Liggett Group, Inc.*, 113 F.R.D. 86, 91 (D.N.J. 1986); *Patterson v. Ford Motor Co.*, 85 F.R.D. 152, 154 (W.D. Tex. 1980).

Set Off, the FELA, and Railroad Retirement Benefits

By Randall E. Appleton, Virginia Beach, VA

Is a railroad defendant entitled to a set off against adverse jury verdicts based on the plaintiff's receipt of an occupational disability pension funded in part by the railroad's contribution to the Tier II portion of the employee's Railroad Retirement benefits? Because the railroads contribute a larger portion (85 percent) to the Tier II benefits under the Railroad Retirement Act (RRA) than the employee, are those benefits no longer a "collateral source" and a proper basis for set off? Does an injured railroad employee enjoy an improper "windfall" by receiving a verdict that provides compensation for past wage loss as well as Railroad Retirement benefits occupational disability annuity benefits when the Railroad Retirement benefits, which are primarily paid for by the defendant railroad, provide a second recovery for past wages lost during a portion of the time considered by the jury?

The proper response to all of these questions is "no"; however, railroads are making a concerted effort to convince trial and appellate courts the answers should be "yes." The defense of set off is being aggressively pursued by railroads in Federal Employers' Liability Act (FELA) claims. The arguments advanced in support of set off by the railroads are based on the 1974 Congressional reorganization of funding under the RRA, which resulted in the current two tiers of Railroad Retirement benefits.

Railroads argue they contribute a much larger share (85 percent) to the Tier II benefits than the employee under the 1974 Act. Consequently, the Tier II benefits are no longer "a collateral source" and "replicate a private pension plan" which entitles them to a set off for the portion they have contributed to the Tier II fund during the employee's receipt of an occupational disability pension under the RRA. The reorganization of the RRA in 1974 is a "red herring" and should not be recognized as a basis for any set off based upon the language of the FELA and the federal common law prohibiting set off in such situations.

Randall E. Appleton

Statutory Prohibition of Set Off

The passage of the FELA, 45 U.S.C. § 51, *et seq*., has been recognized as an "avowed departure" from the rules of common law, including defenses.[1] The FELA provides for the defense of set off in very limited circumstances:

> Any contract, rule, regulation, or device whatsoever, the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created by this chapter, shall to that extent be void: *Provided*, That [*sic*] in any action brought against such common carrier under or by virtue of any provision of this act, such common carrier may set off therein any sum it has contributed or paid to any insurance, relief benefit, or indemnity that may have been paid to the injured employee or the person entitled thereto on account of the injury or death for which said action was brought.[2]

Courts have uniformly held that disability and retirement pensions under the RRA do not qualify for set off under 45 U.S.C. § 55 because the payments are not made "on account of death or injury."[3] The purpose of the RRA is to provide annuity, pension, and death benefits to railroad employees.[4] As a social tax system, its purpose has never been to indemnify railroads from legal liability. Absent the purpose of indemnification from legal liabilities, pension payments made under the Railroad Retirement System should not be set off against a plaintiff's damages.

A decision from the Ninth Circuit provides guidance on this issue.[5] In applying the collateral source rule to benefits received from an employer funded disability plan, the court looked to the purpose of the disability plan:

> Under the pension agreement, the employee's retirement, the length of service, and the extent of his disability are all crucial to his eligibility for benefits. Eligibility is not dependent, however, on disability occurring in the course of employment or as a result of an employer's negligence. A disabled employee receives no pension unless he has worked a minimum of 10 years, has been permanently and totally disabled, and has retired from sea duty. It is unnecessary that an injury cause the disability; an illness suffices. Once the employee is eligible for a pension, the amount increases with the length of employment. Thus, looking at the nature and purpose of the pension plan agreement, it is clear that benefits are paid from it are "collateral" to Matson's obligation to pay for its wrongdoing.[6]

The railroad employee's entitlement to a Railroad Retirement benefits occupa-

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tional disability is based upon years of service and a "physical or mental condition" that prevents the employee from engaging in any regular railroad occupation.[7] There is no requirement that the disability arise from an on duty injury or due to the employer's negligence. Thus, there is no justification for a set off due to the employee's receipt of such benefits.

The Supreme Court opinion in E*ichel v. New York Central Railroad Co.*,[8] which characterizes Railroad Retirement benefits as "collateral source," relies in part upon an analysis of the interplay of the Railroad Retirement benefits and the remedies afforded by the FELA as discussed in *New York, New Haven & Hartford Railroad Co. v. Leary*.[9] The Leary analysis was embraced by the Supreme Court in *Eichel* with regards to the FELA, but not the RRA.

In its analysis in *Leary*, the First Circuit clearly reasoned that set offs for Railroad Retirement benefits were not authorized by the FELA:

> We think these age and service requirements for disability payments remove those payments from the coverage of § 55 of the Federal Employers' Liability Act. Accident indemnity strictly speaking does not seem to be within the Congressional intent discussed in the Retirement Act of 1937. Thus, this is not a set off authorized by § 55 because we think the retirement fund is not an "insurance, relief benefit, or indemnity" within the meaning of that section.…The retirement fund is supported by tax collections from the employer and employee, and to a limited extent by the general public. The benefits received under such a system of social legislation are not directly attributable to the contributions of the employer, so they cannot be considered in mitigation of the damages caused by the employer.[10]

In two recent decisions, courts considering the appropriateness of set off in FELA cases based upon the receipt of other monetary benefits (other than Railroad Retirement benefits) received by injured railroad employees have recognized Railroad retirement and disability benefits should not be set off against FELA verdicts according to the express provision of 45 U.S.C. § 55.[11] Both decisions, handed down subsequent to the 1974 reorganization of the RRA funding, clearly state the collateral source rule is applicable to payments railroad workers receive under the RRA.

There is no statutory justification for the award of a set off to a defendant railroad based upon an injured employee's receipt of Railroad Retirement benefits. To the contrary, courts interpreting the FELA have applied rules of strict statutory construction and limited remedies available under the RRA to those explicitly identified in the statute, thereby excluding a set off in this context.

The Character and Nature of RRB Prohibit Set Off

The railroad's argument that the funds they contribute to the Railroad Retirement benefits on behalf of employees are not from a "collateral source" misses a very basic consideration uniformly recognized by courts applying the collateral source rule. "[C]ourts have been virtually unanimous in their refusal to make the source of funding the determining factor in deciding whether fringe benefits should be considered as emanating from the employer or a 'collateral source.'"[12]

Based upon the character of the Railroad Retirement benefits contributions (paid regardless of source of disability) and nature (funding is mandatory under statute and contributed to by employer and employee), courts which have previously considered whether Railroad Retirement benefits are subject to set off against FELA verdicts have consistently prohibited such a set off. The earliest consideration of a motion by a railroad for an offset against a FELA verdict for sums paid into the Railroad Retirement benefits appears to be *McCarthy v. Palmer*.[13]

There is no statutory justification for the award of a set off to a defendant railroad based upon an injured employee's receipt of Railroad Retirement benefits.

The court in *McCarthy* denied the railroad's request for an offset, holding that the Railroad Retirement benefits received by the employee were excluded from offset under the collateral source rule.[14] The court in *McCarthy* based its application of the collateral source rule to the employee's Railroad Retirement benefits on the fact that the benefits were based upon the employee's age and the benefits were payable to the employee regardless of the cause of his disability. The court stated that "there is not nexus between the purpose for which the contributions in this regard were made and the purpose for which damages in this negligence action are awarded."[15]

A similar motion was also denied in *Hetrick v. Reading Co.*, in which the court explained its evaluation of the legal basis for such a motion for offset balanced against the legislative purpose of the FELA and RRA.[16] In denying the railroad's motion, the court stated:

> The objects of the two pieces of legislation are entirely foreign to each other, and we are of the view that there never was a legislative intent that a jury giving consideration to the last named elements [perceiving loss in diminished earning capacity

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> and pain and suffering in FELA awards] was to draw into its calculations the annuities provided for by the Retirement Act so that payments made by the employer under the latter legislation would be returned to it. Under these circumstances we do not feel that the annuity was ever intended to restore injured employees to a theoretical status quo, but on the contrary was intended to make secure in society those employees suffering injury after thirty years of service, or perhaps because of thirty years of service. Recovery under the Liability Act in such case is beside the point, because that is an attempted restorative alone.[17]

While federal courts have allowed set offs to defendants based on fringe benefits a plaintiff has received which are unrelated to service to the defendant or non-vested in the plaintiff, the same courts have protected plaintiffs from the defendants attempts to obtain set offs from funds which have vested with the plaintiff independent of the underlying cause of action. For example, the courts allowed the federal government to offset a Federal Tort Claim Act (FTCA) verdict with a portion of the plaintiff's veteran's benefits in *U.S. v. Brooks.*[18] However, the courts denied the federal government a set off in a later FTCA claim against the plaintiff's Civil Service Retirement Act benefits after distinguishing between gratuitous benefits (subject to set off) and compulsory benefit programs involving contributions from employers and employees (not subject to set off).[19]

The decision handed down in *Price v. U.S.* by the federal district court is particularly relevant to the consideration of set off and explicitly rejects the applicability of the earlier opinion of *Brooks* to fringe benefit plans in which mandatory contributions are made by the plaintiff. The district court in *Price* noted that *Brooks* involved only "certain veteran's benefits which are, without exception, deemed to be gratuities which the Government may withdraw or modify at will as the recipient has no property or vested right in such benefits."[20] *Price* on the other hand involved a claim for an offset by the U.S. government against the plaintiff's recovery under the Federal Tort Claims Act against *Price*'s receipt of disability benefits under the Civil Service Retirement Act of 1956. The plan was compulsory for Price and funded by contributions from the government and the employee. The court also noted there was no statutory authority for the set off.

The district court in* Price *noted that* Brooks *involved only "certain veteran's benefits which are, without exception, deemed to be gratuities which the Government may withdraw or modify at will as the recipient has no property or vested right in such benefits."

The district court held in *Price* that an employee purchased a substantial right in retirement plans through mandatory contributions and such plans were distinguishable from those without contributions by plaintiffs. The court concluded that the application of the *Brooks* holding was "dubious" in such cases.[21]

In dicta, the holding excluding Civil Service Retirement Act benefits from negligence set offs was analogized to, and came to include, RRA benefits:

> The Civil Service Retirement Act, *like the Railroad Retirement Act counterpart,* is designed, with respect to its disability provisions 'to protect against risk of permanent loss of earnings through disability….' Congress, under the Civil Service Retirement Act, has seen fit to provide for a cessation of disability benefits upon certain conditions dependent upon the earnings of the party receiving such benefits. To require an advance credit by way of offset upon a judgment under the Federal Tort Claims Act would do violence to the social and economic security of all federal employees similarly situated.[22]

The appellate decision in *Price* affirmed the rationale of the district court in denying a set off to the U.S., specifically stating it is the nature and not the source of the benefits which determine the applicability of a set off.[23]

A similar result was handed down by the Indiana Court of Appeals recently in case *CSX Transportation, Inc. v. Gardner,* which addresses the specific issue of the appropriateness of allowing a defendant railroad to offset a FELA verdict by Railroad Retirement benefits received by the injured employee.[24] The *Gardner* court analyzed the basis of the defendant's motion for offset (i.e., contribution to the RRA Fund), the nature of the collateral source rule, the nature of the funds, the accepted factors for determining the applicability of the collateral source rule, and concluded that a set off should not be granted in such a situation.

The *Gardner* court identifies five factors used by federal courts to determine whether payments are "fringe benefits" or the result of payments made by a tortfeasor intending to indemnify itself from future liability. The former is subject to the collateral source rule exclusion, the latter is not. The five factors identified by the *Gardner* court are:

(1) whether the employee makes any

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> contribution to funding of the disability payment; (2) whether the plan arises as a result of a collective bargaining agreement; (3) whether the plan and payments there under cover both work related and non-work related injuries; (4) whether payments from the plan are contingent upon length of service of the employee; and (5) whether the plan contains any specific language contemplating a set-off of benefits received under the plan against a judgment received in a tort action.[25]

After a detailed analysis of each of the above-mentioned factors (which the court concluded are all contrary to allowing offset), the court in *Gardner* concluded that due to the nature of Railroad Retirement benefits, "setoff is not allowed under federal common law."[26]

Once it reached the conclusion that set off of Railroad Retirement benefits is not appropriate under the federal law, the court analyzed whether there is any congressional intent for such a set off independent of, or contrary to, the federal common law. After analyzing several cases from various federal circuits, the court concluded "[i]t is clear the Congress intended the RRA to further the public policy of protecting railroad employees who become disabled on or off the job, and not to protect or reduce the liability of a negligent employer" and rejected CSX's motion for offset.[27]

Conclusion

Courts have uniformly held the source of funding should not be the determining factor when analyzing whether fringe benefits are from a "collateral source." Efforts to justify set off regardless of the purpose of the fringe benefits sought to be set off should fail for the reasons discussed above: (1) statutory prohibition by 45 U.S.C. § 55; (2) federal common law; and (3) absence of legislative authority for such a defense.

While the absence of legislative authority is specifically discussed in several of the cases referenced above, it is also supported by a common sense analysis of the facts that the railroads rely upon so heavily in making the pitch for a set off based on the 1974 reorganization of the RRA. The *Eichel* opinion holding Railroad Retirement benefits are from a collateral source for FELA purposes was handed down in 1963. The litany of cases holding set off was not supported by the RRA and prohibited under the FELA began with *McCarthy* in 1939. These decisions were presumably known to Congress, the railroads, and the unions at the time of the 1974 reorganization of the RRA, yet Congress did not provide for a set off in the language of the 1974 RRA. The absence of such statutory language demonstrates an absence of legislative intent for a set off in this context.

These decisions were presumably known to Congress, the railroads, and the unions at the time of the 1974 reorganization of the RRA, yet Congress did not provide for a set off in the language of the 1974 RRA.

Additionally, the remedies available to the parties under the FELA have been strictly construed by the Supreme Court.[28] Thus, recognizing the defense of set off based upon a plaintiff's receipt of Railroad Retirement benefits would in essence be the enacting of legislation by the judiciary. There simply is no direct authority justifying the defense of set off in this setting. Plaintiffs should be prepared to aggressively and thoroughly contest such a defense through a demonstration of the overwhelming judicial and legislative authority contrary to the defendant's arguments. ■

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Notes

1. *Sinkler v. Missouri Pac. R.R. Co.*, 356 U.S. 326, 329 (1958).
2. 45 U.S.C. § 55.
3. *See, e.g., Eichel v. New York Cent. R.R. Co.*, 375 U.S. 253, 254 (1963); *Haughton v. Blackships, Inc.*, 462 F.2d 788 (5th Cir. 1972); R*usso v. Matson Navigation Co.*, 486 F.2d 1018, 1020-21 (9th Cir. 1973); *Hetrick v. Reading Co.*, 39 F. Supp. 22 (D. N.J. 1941); *Hughes v. Clinchfield R.R. Co.*, 289 F. Supp. 374, 375-6 (E.D. Tenn. 1968).
4. *R.R. Crosstie Corp. v. R.R. Ret. Bd.*, 709 F.2d 1404, 1409 (11th Cir. 1983).
5. *Russo v. Matson Navigation Co.*, 486 F.2d 1018, 1020-21 (9th Cir. 1973).
6. *Id.* at 1021; *see also Folkestad v. Burlington N., Inc.*, 813 F.2d 1377, 1381 (9th Cir. 1987).
7. 45 U.S.C. § 231(a)(1)(iv).
8. 375 U.S. 253 (1963).
9. 204 F.2d 461 (1st Cir. 1953).
10. *Id.* at 468 (internal citations omitted).
11. *Clark v. Burlington N., Inc.,* 726 F.2d 448, 450 (8th Cir. 1984); *Folkestad*, 813 F.2d at 1380.
12. *Folkestad*, 813 F.2d at 1381; *see also U.S. Can Co. v. Nat'l Labor Relations Bd.*, 254 F.3d 626, 633 (7th Cir. 2001).
13. 29 F. Supp. 585 (E.D. N.Y. 1939).
14. *Id.* at 588-89.
15. *Id.* at 588.
16. 39 F. Supp. 22 (D.N.J. 1941).
17. *Id.* at 25; *see also Nice v. Chesapeake & Ohio Ry. Co.*, 305 F. Supp. 1167 (W.D. Mich. 1969); *Price v. U.S.*, 179 F. Supp. 309 (E.D. Va. 1959), *aff'd*, 288 F.2d 488 (4th Cir. 1961).
18. 176 F.2d 482 (4th Cir. 1949).
19. *See U.S. v. Price*, 288 F.2d 448 (4th Cir. 1961).
20. *Price*, 179 F. Supp. at 311 (citations omitted).
21. *Id.* at 312.
22. Id. at 314-15. (emphasis added and internal citations omitted).
23. 288 F.2d 448, 45-52 (1961).
24. 874 N.E.2d 357 (Ind. Ct. App. 2007).
25. *Id.* at 368 (citing *Phillips v. W. Co. of N. Am.*, 953 F.2d 923, 932 (5th Cir. 1992)).
26. *Id.* at 371.
27. *Id.* at 374.
28. S*ee, e.g., Norfolk & W. Ry. Co. v. Ayers,* 538 U.S. 135, 159-61 (2003); *Monessen Sw. Ry. Co. v. Morgan*, 486 U.S. 330, 336-39 (1988).

Congressional Wrap-Up

By Sue Steinman, AAJ Director of Policy—Public Affairs

At the very end of the session, the House and Senate passed a massive Amtrak reauthorization and railroad safety legislation bill, which was signed by the President on October 16, 2008. For awhile, it seemed like the House and Senate were too far apart to reach consensus on either an Amtrak bill or a rail safety bill. However, the September 12, 2008, deadly crash between a Metrolink Commuter train and a Union Pacific freight train jumpstarted the negotiations.

Earlier this year, Public Affairs identified five problems with the Senate version of bill, S. 1889: (1) preemption; (2) discoverability and admissibility of evidence; (3) medical treatment of employees by the railroad; (4) study of cell phone use by employees; and (5) attorney solicitation prohibition. The attorney solicitation prohibition was also contained in the House-passed version of the bill, H.R. 2095.

Preemption

The Senate-passed bill contained a provision to preempt state law, including remedies, if the Secretary of Transportation approves new technology to be installed at a highway-rail grade crossing. This provision completely undermined the preemption fix provided by Congress in Section 1528 of the Implementing Recommendations of the 9/11 Commission Act of 2007 (Pub. Law 110-259), which made clear that the Federal Rail Safety Act should not preempt a cause of action for damages.

After fighting hard for this language earlier in this Congress, we did not want to pass any additional language that would confuse this issue and which the courts could have easily interpreted as overruling the preemption fix. Striking this provision in its entirety is a significant victory.

Discoverability and Admissibility of Evidence

The Senate-passed bill also contained language that would have prohibited data, reports, and surveys compiled or collected for the purpose of evaluating, planning, or implementing a railroad safety risk reduction program or other risk or risk mitigation analyses from being discovered or admitted into a state or federal court proceeding. Not only did this language prohibit the reports from being discovered and admitted, it also prohibited the underlying data from being discovered. The Senate was unwilling to completely drop this language, but we were able to work out a compromise with the help of House Chairman Jim Oberstar (D-MN) that drops the statutory language in favor of an FRA study and potential rulemaking.

After fighting hard for this language earlier in this Congress, we did not want to pass any additional language that would confuse this issue...

Here is the relevant language, which is structured so that the FRA must consider the rights of railroad accident victims and their families:

SEC. 109. PROTECTION OF RAILROAD SAFETY RISK ANALYSES INFORMATION.

(a) *Study*- The Federal Railroad Administration shall complete a study to evaluate whether it is in the public interest, including public safety and the legal rights of persons injured in railroad accidents, to withhold from discovery or admission into evidence in a Federal or State court proceeding for damages involving personal injury or wrongful death against a carrier any report, survey, schedule, list, or data compiled or collected for the purpose of evaluating, planning, or implementing a railroad safety risk reduction program required under this chapter, including a railroad carrier's analysis of its safety risks and its statement of the mitigation measures with which it will address those risks. In conducting this study, the Secretary shall solicit input from the railroads, railroad non-profit employee labor organizations, railroad accident victims and their families, and the general public.

(b) *Authority*- Following completion of the study required under subsection (a), the Secretary, if in the public interest, including public safety and the legal rights of persons injured in railroad accidents, may prescribe a rule subject to notice and comment to address the results of the study. Any such rule prescribed pursuant to this subsection shall not become effective until 1 year after its adoption.

Medical Treatment by Injured Employees

The Senate-passed bill contained language that would have allowed the railroad to determine when an injured or ill employee could return to work. This provision directly contradicted testimony provided by injured railroad employees at a hearing that the House Transportation Committee

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held on October 25, 2007.

The final bill stripped out the bad Senate language, replacing it with the following strong language to protect the employee and prohibit the rail carrier from punishing employees requesting medical care:

SEC. 419. PROMPT MEDICAL ATTENTION.

(a) In General- Section 20109 is amended—

(1) by redesignating subsections (c) through (i) as subsections (d) through (j), respectively; and

(2) by inserting after subsection (b) the following:

(c) *Prompt Medical Attention*—

(1) PROHIBITION- A railroad carrier or person covered under this section may not deny, delay, or interfere with the medical or first aid treatment of an employee who is injured during the course of employment. If transportation to a hospital is requested by an employee who is injured during the course of employment, the railroad shall promptly arrange to have the injured employee transported to the nearest hospital where the employee can receive safe and appropriate medical care.

(2) DISCIPLINE- A railroad carrier or person covered under this section may not discipline, or threaten discipline to, an employee for requesting medical or first aid treatment, or for following orders or a treatment plan of a treating physician, except that a railroad carrier's refusal to permit an employee to return to work following medical treatment shall not be considered a violation of this section if the refusal is pursuant to Federal Railroad Administration medical standards for fitness of duty or, if there are no pertinent Federal Railroad Administration standards, a carrier's medical standards for fitness for duty. For purposes of this paragraph, the term 'discipline' means to bring charges against a person in a disciplinary proceeding, suspend, terminate, place on probation, or make note of reprimand on an employee's record.

Study on the Safety Impact of Cell Phones

Some members of the Railroad Section expressed concern that giving the Secretary of Transportation the authority to proscribe rules for the use of cell phones would hamper an employee's ability to document unsafe working conditions. Given that one of the likely causes of the Metrolink crash was cell phone texting by employees, it was impossible to completely strike this provision. The final language provides that the Secretary of Transportation may prohibit the use of personal electronic devices, such as cell phones, video games, or other electronic devices that may distract employees from safely performing their duties, unless those devices are being used according to railroad operating rules or for other work purposes. AAJ is committed to ensuring that that any rule issued by the Secretary

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Chairman Jim Oberstar Meets with Railroad Law Sections Leaders

By Sue Steinman, AAJ Director of Policy—Public Affairs

Members of the Admiralty, Aviation, and Railroad Sections hosted a joint reception during the Annual Convention in Philadelphia for the Chairman of the House Transportation Committee, Chairman Jim Oberstar (D-MN). This is the first time that a chairman of that committee, which has jurisdiction over the Federal Aviation Administration (FAA), the Federal Railroad Administration (FRA), and the U.S. Coast Guard, attended an AAJ convention.

Members of all three sections were able to speak to the Chairman individually and to hear the Chairman's remarks regarding legislation of interest. Chairman Oberstar has been a harsh critic of the rail industry's safety record and its failure to protect railroad workers from routine on-the-job hazards. Chairman Oberstar was instrumental in securing passage of language to clarify that the Federal Rail Safety Act (FRSA) does not preempt state causes of actions for violation of rules promulgated under the Act. This retroactive provision restored the claims of 300 residents of Minot, North Dakota, whose claims had been dismissed following a finding of preemption by the Eighth Circuit in *Mehl v. Canadian Pacific Railway*.

From left to right: Sharon Van Dyke, Chairman Jim Oberstar, Immediate Past Chair Jamie R. Holland, Chair John M. Cooper.

Members of the Railroad Section spoke to the Chairman about their concerns regarding preemptive rulemaking at the FRA, which the FRA continues to engage in despite the congressional reaffirmation that the purpose of the FRSA is and was a uniform set of minimum standards. They also praised the Chairman's dedication to the rights of railroad workers. ■

Congressional Wrap-Up cont. from page 13

preserves an employee's ability to document unsafe working conditions.

Attorney Solicitation Provision

The provision prohibits attorneys from soliciting for clients for 45 days following an accident. The provision is two-sided—it applies to both plaintiff attorneys and attorneys for the railroad and other defendants—and applies to all legal actions, including settlement offers, which AAJ worked to include in the final version of the language. We also made sure that the provision did not apply to communications between employees and their designated union counsel.

Looking Back

I know that some readers will question why a compromise had to be reached on the evidence provision. Simply put, a 50-50 Senate that is missing a few Democratic Senators (Senators Obama and Biden were on the campaign trail; Senate Kennedy was recuperating from brain cancer) is not a place where we can force votes and expect to prevail. We did the best we could do given the number of votes.

Looking Forward

We will continue to monitor activities at the FRA, including the study on the discoverability and admissibility of evidence. We will be able to have railroad victims and their families weigh in, so please help us by coordinating with your clients and their families at the appropriate time. Your Section Officers will help Public Affairs with the organizing process. ■

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