

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

NO. 34156

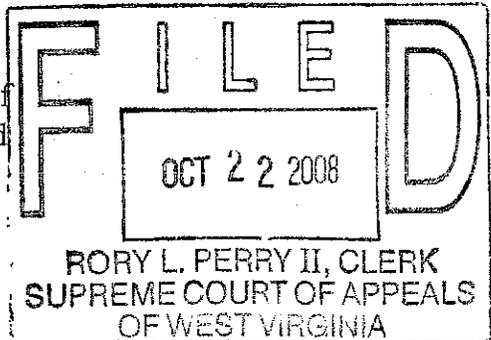
FREDA RATLIFF
Executrix of the Estate of
Sparrel Ratliff, Deceased

APPELLANT

v.

NORFOLK SOUTHERN RAILWAY COMPANY

APPELLEE



**BRIEF OF THE ASSOCIATION OF AMERICAN RAILROADS
AS *AMICUS CURIAE* IN SUPPORT OF APPELLEE
NORFOLK SOUTHERN RAILWAY CORPORATION**

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1. Introduction

Amicus curiae Association of American Railroads (AAR) is an incorporated, nonprofit trade association representing the nation's major freight railroads and Amtrak. AAR's members operate approximately 77 percent of the rail industry's line haul mileage, produce 94 percent of its freight revenues, and employ 92 percent of rail employees. AAR represents its members in proceedings before Congress, the courts and administrative agencies in matters of common interest. Among other things, AAR participates as *amicus curiae* in litigation that raises issues of importance to all railroads in order to bring to the court the perspective of the rail industry as a whole.

One matter of common interest to railroads is the Federal Employers' Liability Act (FELA), 45 U.S.C. §51-60, a fault-based law which provides compensation to railroad employees injured in the course of their employment. FELA permits railroad employees who are injured as the result of their employer's negligence to seek damages in state or federal court. FELA predates the no-fault workers' compensation statutes which subsequently were enacted by every state, as well as by the federal government for employees within its jurisdiction. The workers' compensation system eliminated the notion that recovery for a work-related injury should be conditioned on a showing of employer negligence, leaving the railroad industry virtually the only one where work-related injuries are compensated under a fault-based system.¹

¹ Seamen are covered under FELA by virtue of 46 U.S.C. §30104. All other industries in the United States are covered by either state or federal no-fault workers' compensation systems.

Each year thousands of claims and lawsuits are filed under FELA against AAR members. In recent years, railroads have spent nearly \$1 billion in defense and payment of FELA claims. This case, involving the validity of a release under the FELA, is of great interest to AAR's member railroads because it has a potential impact on numerous cases. General releases are frequently utilized by railroads when an employee is leaving railroad employment in conjunction with the settlement of a claim or in accordance with some other arrangement agreed to by the parties. Therefore, the interpretation of releases under FELA is an important issue to all railroads.

2. ARGUMENT

In this case, plaintiff brought a FELA action alleging an illness caused by his employment many years after he left the railroad. The lower court held that his claim was barred by a release entered into at the time he ended his railroad employment as part of a voluntary separation program. Plaintiff appeals this decision, arguing that the release is invalid under 45 U.S.C. §55. Section 55 prohibits "[a]ny contract, rule, regulation or device, whatsoever, the purpose or intent of which shall be to enable any common carrier to exempt itself from liability"

Section 55 was included in FELA in order to preclude arrangements, common at the time of FELA's enactment, through which railroads attempted to limit their liability for personal injury to their employees. At the time, many railroads established so-called "relief associations" which provided some benefits to injured workers, but which typically required that the employee sign a release waiving the right to seek a remedy for a workplace injury as

a condition of receiving benefits. See H.R. Rep. No. 1386, at 6-9 (1906); *Philadelphia, Baltimore & Washington R.R. v. Schubert*, 224 U.S. 603 (1912). The Supreme Court has held that §55 does not preclude a railroad and its employees from entering into settlement and release of FELA claims, *Callen v. Pennsylvania R.R.*, 352 U.S. 625 (1948), explaining that "a release is not a device to exempt from liability" in violation of §55, and establishing the principle that "releases of railroad employees stand on the same basis as the releases of others." *Id.* at 630-31.

Public policy favors enforcement of contracts, and contracts will be enforced as valid unless they are the product of fraud, misrepresentation or some other improper conduct. See *Satterfield v. CSX Transp., Inc.*, No. 93-002-R (W.D. Va. 12/22/93) (Upholding the validity of a release of "all unknown and unanticipated conditions . . .") While §55 puts some limitations on the ability of rail employers and employees to freely contract, that statutory provision does not prohibit the release of FELA claims. Nor does FELA call for an abrogation of the principles of contract law. *Good v. Pennsylvania R.R. Co.*, 384 F.2d 989, 990 (3rd Cir. 1967). The issue which this Court must decide, and which is the subject of disagreement between the Third and Sixth Circuits, is the types of claims that may be released.

Courts have taken two basic approaches in addressing the validity of releases under FELA. In *Babbitt v. Norfolk & Western Ry.*, 104 F.3d 89 (6th Cir. 1997), the Sixth Circuit ruled that a release is valid under §55 only if it purports to settle "a known claim for a specific injury, as contrasted with an attempt to extinguish potential future claims the

employee might have arising from injuries known or unknown." *Id.* at 93. In contrast, in *Wicker v. Consolidated Rail Corp.*, 142 F.3d 690, 700 (3d Cir.), *cert. denied*, 525 U.S. 1012 (1998), the Third Circuit declined to adopt the *Babbitt* approach because "it is entirely conceivable that both employee and employer could fully comprehend future risks and potential liabilities" which they wished to settle immediately. *Wicker* held that §55 permits employers and employees to enter into a release of risks that are known by the parties. *Id.* at 702. The Court noted that the parties may well decide to settle and release not just claims for a specific known injury—the only types of claims that may be released under *Babbitt*—but also other known risks that may not have manifested themselves at the time the release was executed. *Wicker* is the better reasoned opinion, and this Court should follow the *Wicker* approach in ruling on this appeal.

The approach of the *Wicker* Court provides greater flexibility to employers and employees when they enter into agreements; *Babbitt*, on the other hand, is far too rigid in that it fails to take into account the factors that may affect the parties' decision making when they enter into release agreements. When entering into an agreement under which a consideration (in this case, the employee received a cash payment as well as other benefits) is exchanged for a release of claims, the parties may wish to address not only specific claims that exist at the time of the agreement, but also future claims that may or may not arise. Typically, the consideration will reflect the larger scope of the release, as the employee receives an increased payment in exchange for granting more protection to the employer. In some cases, the advent of an injury in the future may, in hindsight, cause the employee to regret the

decision. By the same token, if no future injury occurs (the more likely scenario), the employee would have received a greater benefit as a result of the agreement.

These types of calculations are especially relevant in the railroad industry which has seen a proliferation of FELA claims for occupational diseases (like the claim here) over the past few decades. General releases play an important role in the settlement of these claims. Many occupational diseases are characterized by long latency periods and typically cannot be tied to a specific accident or event. It often is in the interest of both employer and employee to settle any and all occupational disease claims when a settlement is entered into, even if it is not obvious at the time that the employee will ever manifest a released condition. The employee bargains for more money up front, to compensate for illness which may or may not occur in the future; the railroad, knowing it has satisfied its obligation to the employee, buys its peace. Having done so, should a condition allegedly caused by past exposure to some agent in the workplace become manifest years later, neither party will need to be concerned about addressing the claim in a lawsuit, and producing evidence, many years after the fact.

Because it takes into account the practical considerations that influence the decision making of rail employee and employers when entering into settlement and release agreements, *Wicker* establishes the proper test with regard to validity of releases under FELA. On the other hand, the approach of the *Babbitt* Court would make it all but impossible for railroads to "buy their peace" with employees through settlement and release of FELA claims, a result which is neither required nor contemplated by the *Callen* decision. Therefore, the *Wicker* analysis should be adopted by this Court.

Respectfully submitted,

ASSOCIATION OF
AMERICAN RAILROADS

By:

A handwritten signature in cursive script, appearing to read "Darla A. Mushet", is written over a horizontal line.

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CERTIFICATE OF SERVICE

I Darla A. Mushet, Esq., do hereby certify that a true and correct copy of the foregoing MOTION OF THE ASSOCIATION OF AMERICAN RAILROADS FOR LEAVE TO FILE A BRIEF AS *AMICUS CURIAE* IN SUPPORT OF APPELLEE NORFOLK SOUTHERN RAILWAY CORPORATION is being served upon the following counsel of record by US postage prepaid mail, this 21st day of October, 2008.

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