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Agency Deference May Be At Risk In High Court Railroad Row

By **Vidya Kauri**

Law360 (November 15, 2018, 8:57 PM EST) -- A pending U.S. Supreme Court decision on whether compensation for an injured railroad worker's lost wages should be taxed could jeopardize the deference that courts have afforded government agencies in interpreting legislation for nearly 35 years.

Following oral arguments last week, justices are set to rule on whether payroll taxes should be deducted from a $30,000 award that Michael Loos, a former BNSF Railway Co. employee, won in lost wages after falling into a snow-covered drainage grate in BNSF's train yard and twisting his knee.

The Supreme Court will rule on whether payroll taxes should be deducted from a $30,000 award that a former BNSF Railway Co. employee won in lost wages. (AP)

The Internal Revenue Service has held for more than 60 years that taxable compensation, under the Railroad Retirement Tax Act, or RRTA, should include pay for time lost. However, the majority of the Supreme Court bench, including its newest associate justices Neil Gorsuch and Brett Kavanaugh, is unfriendly to the notion of automatically acquiescing to administrative agencies' interpretation of legislation passed by the U.S. Congress.

A decision in favor of Loos, who is arguing that tort awards are not included in the RRTA's definition of taxable income, has the potential to limit how much weight courts give agency regulations in the future, according to Andrew Tauber, an attorney in Mayer Brown LLP's Supreme Court and appellate practice, who has significant experience litigating on behalf of railroads.

The case "is interesting not only for railroad and railroad practitioners but for the much broader implications that it may have on judicial deference to agency rules and regulations," Tauber said.

The row reveals a disconnect between the definitions of taxable compensation in two federal statutes that work together to fund retirement benefits for rail employees who do not participate in the Social Security system.

While the Railroad Retirement Act, or RRA, created benefits for rail staff and included pay for time lost

in its definition of taxable compensation, the RRTA established the taxes needed to fund the benefits but was amended twice to remove references to pay for time lost.

Although BNSF argued in lower courts that the removal of the "time lost" language from the RRTA was not intended to exempt such payments from taxation, the Eighth Circuit concluded that the RRTA unambiguously limits taxable compensation to remuneration paid for services that an employee actually renders, and not services that the employee "would have rendered but could not."

However, the Sixth Circuit reached the opposite conclusion in a similar case in 2009, and state Supreme Courts in Iowa and Nebraska have noted that the RRTA's statutory language and structure are unclear on whether lawmakers intended to include time lost in the definition of taxable compensation.

The federal government has intervened in the dispute between Loos and BNSF, which says it has already paid the IRS $3,765 as a share of Loos' payroll taxes. Arguing in support of the railway company, the government told justices that if any ambiguity is found in the statutes, the IRS' interpretation would control "under principles of acquiescence."

The so-called Chevron deference standard was established in a 1984 Supreme Court opinion in Chevron USA Inc. v. Natural Resources Defense Council Inc. Since then, Justices Samuel Alito, Clarence Thomas, John Roberts and Kavanaugh's predecessor Anthony Kennedy, have all expressed skepticism of this doctrine. The reflexive application of the doctrine could grant the executive branch more power than it is due and it lessens the judiciary's proper role in interpreting statutes, they have reasoned.

Even if the U.S. Supreme Court ultimately eliminates the doctrine in either BNSF's case or other cases that squarely put the Chevron doctrine in the crosshairs of the five justices concerned about its application, Tauber said that such an outcome would "not hinder agencies from issuing regulation."

"It simply affects what weight courts will subsequently give those regulations," he said.

A win for Loos does not necessarily mean that the Chevron deference is being chipped away. Justices could have other reasons to find that compensation for lost wages is not taxable, and similarly, if they rule in favor of BNSF, they may do so for reasons unrelated to Chevron.

William Weissman, an employment tax attorney at Littler Mendelson PC, noted that even though the government relied on Chevron deference, among other arguments, in its briefs and during oral arguments, justices did not really reference the doctrine in their questions to the parties.

"You can see some sort of split decision where somebody says the statue's clear on its face [and] so we don't need Chevron deference, someone else who says the statute's not clear [and] so, we're going to defer to the IRS and somebody else who says that it's not clear but … not deferring to the IRS," Weissman said.

Regardless of whether the Supreme Court uses the BNSF case to rein in the Chevron doctrine, the case has other implications beyond the railroad industry.

Observers have pointed out that there are enough similarities between the Social Security tax system and the railroad statutes that if justices follow the Eighth Circuit's rationale, there could be numerous questions around whether remuneration for other services that are not physically performed in any industry — such as holiday or sick pay — should be taxed or not.

Justices did, in fact, seem to struggle with what it means to render services when BNSF argued that compensation for lost pay is no different from taxable sickness or disability pay and that active service is not required to meet the standard of "services rendered."

With the scope of what it means to render services coming into question, Weissman said that there is "really no definition of work" in the statute.

"That could end up being something that's remarkably broad and have implications for employment generally, not just taxes," he said.

Tauber also said there could be an incentive for employees to malinger, or feign illness more severe than reality, if tort awards for lost wages are not taxed in the same way that other wages are taxed.

Employees may suffer real injuries, but if the court rules against BNSF, they may exaggerate the extent of their injuries and be slower to return to work because of the prospect of suing for damages under a negligence theory, he said.

"Plaintiffs compensated through a tort award for lost wages will be in a better position than employees who earn wages through actual work" if tort awards are not taxed, Tauber said. "As someone who has done a fair amount of litigation with respect to employee injury cases in the railroad space, I think there's a real problem with malingering, especially with respect to employees who are in their late 50s and know they could retire with full benefits at the age of 60."

BNSF has also argued that the inability to tax awards such as Loos' could ultimately lead to a long-term "risk of insolvency or instability" since the whole point of the RRTA is to fund retirement benefits for railroad workers.

However, Weissman said that a tax exemption for tort awards does not automatically equate to a disharmony between the RRA and the RRTA, and that it is not for the courts to make a decision based on whether insolvency is an outcome.

"If Congress ... didn't create a sufficient funding mechanism for benefits, that's on them. It's not really the courts' place to fix it," he said. "The question is: Does not subjecting lost work time to tax create some sort of lack of symmetry? And I don't think the answer to that is yes."

The case is BNSF Railway Co. v. Michael D. Loos, case number 17-1042, in the U.S. Supreme Court.

--Editing by Tim Ruel and Neil Cohen.

Clarification: This article has been changed to clarify remarks from Andrew Tauber.