

Case Name: Daly v. Norfolk Southern Railroad Co., et al.

Date Decided: February 17th, 2010

Originally Filed in: New Jersey (State)

Decided by: New Jersey District Court (Federal)

Court: U.S.D.C. D. New Jersey

Judge: Judge Martini

Citation: 2010 WL 572116 (D.N.J.)

Background:

Representative of deceased brought this action against railroad employer under FELA, Federal Employers' Liability Act, alleging a wrongful death and survival action. Sean Daly was an employee of Intermodal Ramp Management, Inc. assigned to work at a Norfolk Southern site in New Jersey. While working at the site, Daly suffered a fatal accident. Daly's wife brought this action against Norfolk Southern and Intermodal in the N.J. Superior Court which was then removed to federal court by Norfolk Southern. Norfolk Southern then filed a motion to dismiss and after reviewing the papers, the Court held a hearing and questioned whether removal of this FELA action was proper. The Court noted at the hearing the plaintiff attached an amended complaint to his opposition briefing on the motion to dismiss.

Issue:

Should this Court find that removal of this FELA action was improper and remand it back to state court?

Overall Issues Discussed or Touched Upon in this Case:

- *Procedural Issues - Federal*

Held:

Plaintiff argued that removal was improper as barred under 28 U.S.C. Â§1445(a) which does not allow removal of a civil action in state court against a railroad. However, Norfolk argued that plaintiff failed to object in a timely manner and thus, waived the right to object to improper removal. This Court found that plaintiff's failure to object to removal within the statutory period thirty days effectively waived the procedural defect. Accordingly this Court denied plaintiff's request to remove this FELA action to state court.

Comments:

28 U.S.C. Â§1445(a) states that "a civil action in any State court against a railroad, arising under FELA may not be removed to any district court of the United States". Removal in violation of this statutory provision, however, does not deprive a district court of subject matter jurisdiction, provided that the court would have had original jurisdiction over the matter had it been filed in federal court in the first place. As such, removal is treated as a procedural defect,

and failure of the plaintiff to object in a timely manner (30 days here), results in any objection of being waived. It appears that the plaintiff's counsel dropped the ball in this case.

Steve Gordon