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## *Tyrrell v. BNSF Railway Company: Is BNSF Being Railroaded into the Montana Court System?*

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**CASENOTE; *Tyrrell v. BNSF Railway Company*: Is BNSF Being Railroaded into the Montana Court System?**

**Molenda L. McCarty**

**I. INTRODUCTION**

“It is one thing to hold a corporation answerable for operations in the forum State, . . . quite another to expose it to suit on claims having no connection whatever to the forum State.”<sup>1</sup> General jurisdiction is the form of personal jurisdiction that allows a forum state to assert judicial authority over “any and all claims” against a defendant who has sufficient, close contacts with the state—even claims that arise elsewhere.<sup>2</sup> In *Daimler AG v. Bauman*,<sup>3</sup> the United States Supreme Court held that a corporation must be “essentially at home” in the forum state to assert general jurisdiction.<sup>4</sup> To date, the Supreme Court has only found one example of a corporation “essentially at home” outside of its place of incorporation or principal place of business.<sup>5</sup> Congress’s enactment of the FELA does not make railroad companies doing business in Montana another example.<sup>6</sup> Thus, the due process of a railroad corporation should be assessed in the same manner as that of any other corporation by applying the *Daimler* standard.

**II. FACTUAL AND PROCEDURAL BACKGROUND**

BNSF Railway Company (“BNSF”) is a Delaware corporation with its principal place of business in Texas.<sup>7</sup> Robert Nelson sued BNSF in Montana’s Thirteenth Judicial District Court, Yellowstone County to recover damages from knee injuries he allegedly sustained while employed with BNSF.<sup>8</sup> In his complaint, Nelson did not assert that he had ever worked in Montana or that his injuries were sustained in Montana.<sup>9</sup>

Kelli Tyrrell (“Tyrrell”), Special Administrator of the Estate of Brent Tyrrell (“Brent”), also sued BNSF in Yellowstone County when Brent died, allegedly due to exposure to various carcinogenic chemicals

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<sup>1</sup> *Daimler AG v. Bauman*, \_\_\_ U.S. \_\_\_, 135 S. Ct. 746, 761 n.19 (2014).

<sup>2</sup> *Goodyear Dunlop Operations, S.A. v. Brown*, 564 U.S. 915, 919 (2011) (“Specific jurisdiction” applies when the case itself arises out of or relates to the defendant’s activity within the state.).

<sup>3</sup> \_\_\_ U.S. \_\_\_, 135 S. Ct. 746 (2014).

<sup>4</sup> *Id.*, \_\_\_ U.S. at \_\_\_, 134 S. Ct. at 751.

<sup>5</sup> See e.g., *Perkins v. Benguet Mining Co.*, 342 U.S. 437 (1952) (holding that asserting personal jurisdiction over a foreign company having temporary headquarters in the forum state due to a war comports with the Due Process Clause); see also *Daimler*, \_\_\_ U.S. at \_\_\_, 134 S. Ct. at 761, n.19 (“[A] corporation’s operations in a forum other than its formal place of incorporation or principal place of business may be so substantial and of such nature as to render the corporation at home in that State.”).

<sup>6</sup> See *Tyrrell v. BNSF Ry. Co.*, 373 P.3d 1, 11–12, (Mont. 2016) (McKinnon, L. dissenting).

<sup>7</sup> *Id.* at 3.

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

during his employment with BNSF.<sup>10</sup> The complaint did not include a statement that Brent ever worked in Montana or that any chemical exposure occurred in Montana.<sup>11</sup>

Nelson and Tyrrell pled violations of the Federal Employers' Liability Act (FELA),<sup>12</sup> and BNSF moved to dismiss both cases for lack of personal jurisdiction.<sup>13</sup> Concerning Nelson's case, Judge Baugh relied on the recent United States Supreme Court decision, *Daimler AG v. Bauman*,<sup>14</sup> and granted the motion to dismiss.<sup>15</sup> Judge Baugh held that BNSF's "due process rights prevent this Court from exercising general all-purpose jurisdiction over [BNSF] and this Court does not have specific jurisdiction."<sup>16</sup> Contrarily, Judge Moses denied BNSF's motion to dismiss Tyrrell's case, relying on the Montana Supreme Court and the United States Supreme Court's previous interpretation of the FELA's influence on personal jurisdiction.<sup>17</sup> Judge Moses held that BNSF "does meet the criteria of being found within Montana and having substantial, continuous and systematic activities within Montana for general jurisdiction purposes."<sup>18</sup> BNSF appealed Judge Moses's order, and Nelson appealed Judge Baugh's order.<sup>19</sup>

### III. MAJORITY HOLDING

In an opinion authored by Justice Shea, the majority held that Montana courts have general personal jurisdiction over BNSF under both the FELA and Montana law.<sup>20</sup> The order granting BNSF's motion to dismiss was reversed, the order denying BNSF's motion to dismiss was affirmed, and both cases were remanded for further proceedings.<sup>21</sup>

#### A. Federal Employers' Liability Act

The majority based its holding with regard to personal jurisdiction under the FELA on the United States Supreme Court's interpretation of 45 U.S.C. § 56,<sup>22</sup> which allows state courts to hear FELA cases even when

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<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

<sup>12</sup> See 45 U.S.C. §§ 51–60 (2016).

<sup>13</sup> *Tyrrell*, 373 P.3d at 3.

<sup>14</sup> \_\_\_ U.S. \_\_\_, 134 S. Ct. 746, 761–62 (2014) (holding a state has personal jurisdiction over a corporation when the corporation is incorporated there or has its principal place of business there).

<sup>15</sup> *Tyrrell*, 373 P.3d at 3.

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

<sup>20</sup> *Id.* at 9.

<sup>21</sup> *Tyrrell*, 373 P.3d at 9.

<sup>22</sup> (A FELA "action may be brought in a district court of the United States, in the district of the residence of the defendant, or in which the cause of action arose, or in which the defendant shall be

the only basis for general jurisdiction is the railroad doing business in the forum state.<sup>23</sup> The Court rejected BNSF's contention that *Daimler* supersedes the Supreme Court's previous interpretation.<sup>24</sup> The majority held that "*Daimler* did not present novel law"; rather, *Daimler* merely reinforced *Goodyear Dunlop Tire Operations, S.A. v. Brown*,<sup>25</sup> in which the Court held that general jurisdiction over foreign corporations requires affiliations so "continuous and systematic" as to render the corporation "at home" in the forum state.<sup>26</sup> Yet, the majority concluded that Congress drafted the FELA to render a railroad "at home" for jurisdiction purposes wherever it is "doing business."<sup>27</sup> Because it is undisputed that BNSF is "doing business" within Montana, the majority concluded that the FELA confers general personal jurisdiction to Montana state courts.<sup>28</sup>

### B. Montana Law

Montana applies a two-prong test to decide whether it may assert personal jurisdiction over a non-resident.<sup>29</sup> Jurisdiction must be consistent with Montana's long-arm statute,<sup>30</sup> and the exercise of personal jurisdiction must comport with the Due Process Clause of the Fourteenth Amendment of the United States.<sup>31</sup> The Court held jurisdiction is proper under the long-arm statute because BNSF is "found within the state of Montana" when it conducts business, owns real estate, maintains facilities, has a telephone listing, and does direct advertising in Montana.<sup>32</sup> The majority transitioned to the constitutionality prong emphasizing that Montana has previously held that "[t]he District Courts of Montana clearly have jurisdiction" to hear FELA cases.<sup>33</sup> Further, the Court held the

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doing business at the time of commencing such action. The jurisdiction of the courts of the United States . . . shall be concurrent with that of the courts of the several States.")

<sup>23</sup> *Tyrrell*, 373 P.3d at 4–5; see e.g., *Pope v. Atl. Coast Line R.R. Co.*, 345 U.S. 379 (1953) (holding that plaintiff has the right to sue where the railroad is doing business and that the state forum where the injury occurred is without the power to enjoin prosecution of the suit in the state where the railroad is doing business); *Miles v. Ill. Cent. R.R. Co.*, 315 U.S. 698 (1942) (holding that the FELA prevents a state court from enjoining, on the ground of the inconvenience to the railroad, a resident citizen of the state from furthering an action in a state court of another state which has jurisdiction under the FELA).

<sup>24</sup> *Tyrrell*, 373 P.3d at 6; see *Daimler AG v. Bauman*, \_\_\_ U.S. \_\_\_, 134 S. Ct. 746, 751 (2014) (quoting *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915, 919 (2011) (holding that "a court may assert jurisdiction over a foreign corporation 'to hear any and all claims against [it]' only when the corporation's affiliations with the State in which suit is brought are so constant and pervasive 'as to render [it] essentially at home in the forum State.'" (internal citations omitted)).

<sup>25</sup> 564 U.S. 915 (2011).

<sup>26</sup> *Tyrrell*, 373 P.3d at 6 (citing *Goodyear*, 564 U.S. at 919).

<sup>27</sup> *Id.* (citing *Balt. & Ohio R.R. Co. v. Kepner*, 314 U.S. 44, 49–50 (1941)).

<sup>28</sup> *Id.* at 7.

<sup>29</sup> *Id.* at 8.

<sup>30</sup> See Mont. R. Civ. P. 4(b)(1).

<sup>31</sup> *Tyrrell*, 373 P.3d at 8.

<sup>32</sup> *Id.*; see Mont. R. Civ. P. 4(b)(1) ("All persons found within the state of Montana are subject to the jurisdiction of Montana courts.").

<sup>33</sup> *Tyrrell*, 373 P.3d at 8 (quoting *Labella v. Burlington N.*, 595 P.2d 1184, 1186 (Mont. 1979)).

constitutionality of Montana's personal jurisdiction over BNSF comported with the Montana Constitution's provision that 'courts of justice shall be open to every person . . . .'<sup>34</sup> Therefore, under both Montana's long-arm statute and the Due Process Clause, the majority held that Montana has general personal jurisdiction over BNSF.<sup>35</sup>

#### IV. JUSTICE MCKINNON'S DISSENT

Justice McKinnon authored the dissent, writing that she would hold that the Montana District Courts lack general personal jurisdiction over BNSF under the Due Process Clause.<sup>36</sup> The dissent emphasized that the United States Supreme Court has made "clear" that state courts may only assert general personal jurisdiction when foreign corporations are "essentially at home" in the forum state.<sup>37</sup> The Supreme Court instructed that a corporation is "essentially at home" where it is incorporated or has its principal place of business.<sup>38</sup> Because BNSF is neither incorporated under the laws of Montana nor has its principal place of business in Montana, Justice McKinnon contended that there is "no dispute" that BNSF is not "at home" in Montana.<sup>39</sup> She concluded that BNSF's contacts are inadequate to satisfy the due process standards set forth by the Supreme Court.<sup>40</sup>

#### V. ANALYSIS

The FELA enables railroad employees to recover damages for injuries resulting from a railroad equipment deficiency or from the negligence of the agents or employees of the railroad.<sup>41</sup> Although it seems anomalous today that only railroad workers have a federal remedy for workplace injuries rather than a state workers' compensation remedy, the roots of the FELA stem from the unique role of the American railroad employee. In the late nineteenth century, the average life expectancy of a switch-man was seven years, and a brakeman's chance of dying from natural causes was less than one in five.<sup>42</sup> In response to the dangers of railroad working conditions, Congress enacted the present law in 1908.<sup>43</sup> Prior to the FELA, injured railroad workers found recovery difficult

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<sup>34</sup> *Id.* at 9 (quoting Mont. Const., art II, § 16).

<sup>35</sup> *Id.*

<sup>36</sup> *Id.* at 9 (McKinnon, L. dissenting).

<sup>37</sup> *Id.* (citing *Daimler AG v. Bauman*, \_\_\_ U.S. \_\_\_, 134 S. Ct. 746, 751 (2014); *Goodyear Dunlop Tire Operations, S.A. v. Brown*, 564 U.S. 915, 919 (2011)).

<sup>38</sup> *Id.* at 10 (quoting *Daimler*, \_\_\_ U.S. at \_\_\_, 134 S. Ct. at 760).

<sup>39</sup> *Tyrrell*, 373 P.3d at 10 (McKinnon, L. dissenting).

<sup>40</sup> *Id.* at 11.

<sup>41</sup> 45 U.S.C. § 51 (2016).

<sup>42</sup> Thomas E. Baker, *Why Congress Should Repeal the Federal Employers' Liability Act of 1908*, 29 HARV. J. ON LEGIS. 79, 81 (1992).

<sup>43</sup> *Railroad Employers' Liability*, Pub. L. No. 60-100, 35 Stat. 65 (1908).

because of common-law tort principles.<sup>44</sup> The FELA served the public policy objectives of doing away with the fellow-servant rule, the doctrine of assumption of risk, and the principle of contributory negligence as a complete defense.<sup>45</sup> Enacted in New York in 1910, the first workers' compensation law was almost immediately struck down as unconstitutional.<sup>46</sup> Since workers' compensation was not a viable legislative option in the early twentieth century, the FELA was ahead of its time and ensured compensation for injured railroad workers.<sup>47</sup>

The statute sets forth that federal jurisdiction shall be concurrent with that of the states and that FELA claims can be brought in the district in which the defendant resides, in which the action arose, or in which the defendant is doing business.<sup>48</sup> The Supreme Court has addressed the question of whether the Act compels the states to accept jurisdiction a number of times. States cannot reject jurisdiction simply because the claim was brought under a federal act<sup>49</sup> or when the FELA does not coincide with existing state workers' compensation laws.<sup>50</sup> However, little guidance has been offered to lower courts regarding the applicability of the modern general jurisdiction doctrine to FELA actions. If the FELA confers jurisdiction to states where the defendant cannot be not found "essentially at home," it has the potential to violate railroad employers' due process rights. Justice McKinnon notably opens up a discussion about analyzing general jurisdiction over FELA claims in a new fashion.

#### A. *Statutes Conferring Jurisdiction to States*

Whenever a railroad is a named defendant in Montana, the Court will find that both the FELA and Montana Rule of Civil Procedure 4(b)(1) are satisfied. The plain language of the FELA makes clear that an action may be brought in a district court of the United States "in which the defendant shall be doing business at the time of commencing such action" and that state and federal courts have concurrent jurisdiction.<sup>51</sup> Prior to the addition of this language in 1910, the plaintiff had no option but to bring a claim where the defendant resided.<sup>52</sup> In order to save the expense of transporting of witnesses, lawyers, and parties, the amendment was "deliberately chosen to enable the plaintiff" to find the railroad at any place it was doing business.<sup>53</sup> The foundation of the amended language

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<sup>44</sup> Baker, *supra* note 42, at 82.

<sup>45</sup> *Id.*

<sup>46</sup> *Ives v. S. Buffalo Ry. Co.*, 201 N.Y. 271 (N.Y. 1911).

<sup>47</sup> See Baker, *supra* note 42, at 83.

<sup>48</sup> 45 U.S.C. § 56 (2016).

<sup>49</sup> *McKnett v. St. Louis & S.F. Ry. Co.*, 292 U.S. 230 (1934).

<sup>50</sup> *Second Emp'rs' Liab. Cases*, 223 U.S. 1 (1912).

<sup>51</sup> 45 U.S.C. § 56 (2016).

<sup>52</sup> See *Balt. & Ohio R.R. Co. v. Kepner*, 314 U.S. 44, 49 (1941).

<sup>53</sup> *Id.* at 50.

coincides with the FELA's underlying policy of rectifying "the injustice to an injured employee."<sup>54</sup>

The majority applied *Denver & Rio Grande West Railroad Company v. Terte*,<sup>55</sup> decided in 1935, to determine whether the "doing business" standard of the FELA was met.<sup>56</sup> In *Terte*, the United States Supreme Court held that a railroad company satisfied the "doing business" standard when it: (1) owned and operated railroad lines in the forum state; (2) was licensed to do business in the forum state; (3) had an office and agents in the forum state; and (4) those agents transacted "the business ordinarily connected with the operation of a carrier by railroad."<sup>57</sup> Conversely, a railroad company that merely owned property, maintained offices, and employed agents soliciting traffic in the forum state did not satisfy the "doing business" standard.<sup>58</sup>

Per the *Terte* standard, it is undisputed that BNSF is doing business in the state of Montana.<sup>59</sup> BNSF owns and operates railroad lines in Montana.<sup>60</sup> BNSF is licensed to do business and has offices and agents in Montana.<sup>61</sup> Further, BNSF's Montana agents transact business connected with the ordinary operation of a railroad carrier.<sup>62</sup> Therefore, the majority properly concluded BNSF was "doing business" in Montana; the Court appropriately determined that the statutory standard of the FELA was satisfied.<sup>63</sup>

The "found within" standard under Montana's long-arm statute, Montana Rule of Civil Procedure 4(b)(1), is similar to the "doing business" standard under the FELA. The majority focused on the general jurisdiction that exists over "[a]ll persons found within the state of Montana."<sup>64</sup> The phrase "found within" is ambiguous on its face but has been developed through case law. To be "found within" a state, the defendant's activities must be substantial, systematic, and continuous,<sup>65</sup> "as opposed to isolated, casual, or incidental."<sup>66</sup> Under *Bedrejo v. Triple E Canada, Ltd.*,<sup>67</sup> significant factors to consider when determining if a corporation is "found within" Montana include whether the corporation: (1) is registered to do business in Montana; (2) has Montana offices; (3) has employees in Montana; and (4) has conducted business in Montana.<sup>68</sup>

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<sup>54</sup> *See id.*

<sup>55</sup> 284 U.S. 285 (1932).

<sup>56</sup> *See Tyrrell v. BNSF Ry. Co.*, 373 P.3d 1, 6–7 (Mont. 2016).

<sup>57</sup> *Terte*, 284 U.S. at 286.

<sup>58</sup> *Id.*

<sup>59</sup> *See Tyrrell*, 373 P.3d at 7; *Terte*, 284 U.S. at 286.

<sup>60</sup> *Tyrrell*, 373 P.3d at 7.

<sup>61</sup> *Id.*

<sup>62</sup> *Id.*

<sup>63</sup> *See id.*; 45 U.S.C. § 56 (2016).

<sup>64</sup> *Tyrrell*, 373 P.3d at 8.

<sup>65</sup> *See Int'l Shoe Co. v. Wash.*, 326 U.S. 310 (1945).

<sup>66</sup> *Reed v. Am. Airlines*, 640 P.2d 912, 914 (Mont. 1982).

<sup>67</sup> 984 P.2d 739 (Mont. 1999).

<sup>68</sup> *Bedrejo*, 984 P.2d at 741–42.

Further, the activities in Montana must compose “a significant component of the company’s business, although the percentage as related to the total business may be small.”<sup>69</sup>

BNSF is found within Montana because its business activities are not isolated, casual, or incidental. As previously noted, BNSF is licensed to do business in Montana and has offices and employees in Montana.<sup>70</sup> Further, it is undisputed that BNSF operates trains and maintains traffic offices in Montana.<sup>71</sup> BNSF claims it has six percent of its track and about five percent of its workforce in Montana.<sup>72</sup> BNSF also maintains facilities in Montana, owns Montana real estate, and directly advertises through Montana media.<sup>73</sup> The essential factors of *Bedrejo* are satisfied, and although BNSF’s revenues in Montana are less than ten percent, statutory personal jurisdiction cannot be defeated on the small revenue percentage alone.<sup>74</sup> Consequently, the Court properly held BNSF has contacts with Montana such that it is “found” within the state under Rule 4(b)(1).<sup>75</sup>

The majority properly determined that Montana state courts can statutorily assert personal jurisdiction over BNSF because it cannot be disputed BNSF is “doing business” in and “found within” Montana. However, whether federal or state, statutory jurisdiction is merely the first element. The plain language of the FELA seemingly provides railroad employees an unrivaled opportunity to forum shop when railroad companies like BNSF operate throughout the country.<sup>76</sup> Regardless of the FELA’s grant of jurisdiction, though, there are constitutional limitations on the number of forums a plaintiff may select from, and the Due Process Clause of the Fourteenth Amendment should operate to limit forum shopping in FELA cases.<sup>77</sup>

### B. Due Process Clause

The dissent appropriately disagrees with the majority’s contention “that Congress, *not* the Constitution, controls the sufficiency of process that is required to hale BNSF into state courts in Montana.”<sup>78</sup> BNSF is not found “essentially at home” in Montana, and so Montana’s assertion of

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<sup>69</sup> *Reed*, 640 P.2d at 914.

<sup>70</sup> *Tyrrell v. BNSF Ry. Co.*, 373 P.3d 1, 8 (Mont. 2016).

<sup>71</sup> *Id.*

<sup>72</sup> Opening Br. of BNSF Ry. Co. at 4, Apr. 15, 2015, Cause No. DA 14-0826; *see also Tyrrell*, 373 P.3d at 8.

<sup>73</sup> *Tyrrell*, 373 P.3d at 8.

<sup>74</sup> *See Reed*, 640 P.2d at 914.

<sup>75</sup> *See Tyrrell*, 373 P.3d at 8.

<sup>76</sup> *See BNSF Ry., About BNSF*, BNSF.com, <http://www.bnsf.com/about-bnsf/> (last visited Jul. 15, 2016) (“[o]perates in 28 states and three Canadian provinces”).

<sup>77</sup> *See Helicopteros Nacionales De Columbia v. Hall*, 466 U.S. 408, 414 (1984) (“Even when the cause of action does not arise out of or relate to the foreign corporations’ activities in the State, due process is not offended by a State’s subjecting the corporation to its *in personam* jurisdiction when there are sufficient contacts between the State and foreign corporation” (citation omitted)).

<sup>78</sup> *Tyrrell*, 373 P.3d at 13 (emphasis in original) (McKinnon, L. dissenting).



general personal jurisdiction violates the Due Process Clause.<sup>79</sup> The majority properly noted that after personal jurisdiction is held to exist statutorily under Montana's long-arm statute, the Court must determine "whether the exercise of personal jurisdiction comports with traditional notions of fair play and substantial justice embodied in the [D]ue [P]rocess [C]lause."<sup>80</sup> The second part of the general jurisdiction analysis should also be used in determining whether personal jurisdiction exists when the FELA statute is satisfied. The majority's opinion that the FELA renders *Daimler* inapplicable to railroad employers<sup>81</sup> is unpersuasive because it does not offer a substitute constitutionality prong for general jurisdiction over railroads to comport with the Due Process Clause.

The Due Process Clause of the Fourteenth Amendment provides in part that "[n]o State shall . . . deprive any person of life, liberty, or property, without due process of law."<sup>82</sup> Although *International Shoe Company v. Washington*<sup>83</sup> involved specific jurisdiction, its introduction of the phrase "continuous and systematic" laid the foundation for all personal jurisdiction cases.<sup>84</sup> In *International Shoe*, the Supreme Court shifted the focus to the defendant corporation's contacts with a forum, rather than simply whether it was present or doing business in the forum.<sup>85</sup> Contacts imply that the defendant has taken advantage of the benefits and protections of the state's laws.<sup>86</sup> To require a corporation to defend suits away from its home or where it carries on substantial activities "has been thought to lay too great and unreasonable burden on the corporation to comport with due process."<sup>87</sup> Thus, the constitutional standard for general jurisdiction requires that a corporation have "continuous and systematic" contacts such that "the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'"<sup>88</sup>

Prior to *Daimler*, the Supreme Court had only decided three general jurisdiction cases involving corporations.<sup>89</sup> Until *Goodyear's* qualification of what it meant to be "at home" in 2011,<sup>90</sup> the Supreme

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<sup>79</sup> See *id.* at 14.

<sup>80</sup> *Id.* at 8 (majority opinion) (quoting *Simmons Oil Corp. v. Holly Corp.*, 796 P.2d 189, 193 (Mont. 1990)); see also *Int'l Shoe Co. v. Wash.*, 326 U.S. 310, 316 (1945).

<sup>81</sup> *Tyrrell*, 373 P.3d at 6

<sup>82</sup> U.S. CONST. amend. XIV, § 1.

<sup>83</sup> 326 U.S. 310 (1945).

<sup>84</sup> *Int'l Shoe Co.*, 326 U.S. at 317; see also Tanya J. Monestier, *Where is Home Depot "At Home"?: Daimler v. Bauman and the End of Doing Business Jurisdiction*, 66 HASTING L.J. 233, 239 (2014).

<sup>85</sup> *Int'l Shoe Co.*, 325 U.S. at 316.

<sup>86</sup> See *id.* at 320.

<sup>87</sup> *Id.* at 317.

<sup>88</sup> *Id.* at 316–17 (internal citation omitted).

<sup>89</sup> See e.g., *Perkins v. Benguet Mining Co.*, 342 U.S. 437 (1952); *Helicopteros Nacionales De Columbia v. Hall*, 466 U.S. 408 (1984); *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915 (2011).

<sup>90</sup> *Goodyear*, 564 U.S. at 924 ("For an individual, the paradigm forum for the exercise of general jurisdiction is the individual's domicile; for a corporation, it is an equivalent place, one in which the

Court's requirement of "continuous and systematic" contacts provided little guidance because "it failed to address what types of contacts are necessary, how extensive those contacts must be, and how continuous they must be."<sup>91</sup> Again in *Daimler*, the Supreme Court upheld *Goodyear's* contacts rule to determine the constitutionality of state forum jurisdiction over a foreign defendant.<sup>92</sup> There are only a limited set of affiliations that will confer all-purpose jurisdiction over a defendant, and "the paradigm all-purpose forums for general jurisdiction are a corporation's place of incorporation and principal place of business."<sup>93</sup> There has only been one "textbook" exceptional case in which general jurisdiction was properly exercised over a corporate defendant with contacts so substantial it was rendered at home in a forum other than its place of incorporation or principal place of business.<sup>94</sup> The defendant in *Perkins v. Benguet Mining Company*<sup>95</sup> moved to Ohio from the Philippines during World War II.<sup>96</sup> Overseeing the company's activities from Ohio, the corporation's temporary principal place of business was in Ohio, essentially rendering it at home.<sup>97</sup> The inquiry of in-forum contacts thus became "whether [the] corporation's 'affiliations with the State are so "continuous and systematic" as to render it essentially at home in the forum State."<sup>98</sup> Aside from the *Perkins* defendant satisfying the modern inquiry, the Supreme Court has yet to find a corporation essentially at home in a state other than its place of incorporation and principal place of business.<sup>99</sup>

Assertion of general jurisdiction can only be justified under the notion that "justice requires a certain and predictable place" where a corporation can be reached for claims to be filed against it.<sup>100</sup> Under the FELA and under Montana law, BNSF's contacts with Montana are not so continuous and systematic as to render it essentially at home, and to assert general personal jurisdiction would violate BNSF's due process rights. It would put an unreasonable burden on BSNF to defend suit in Montana where it is not at home nor does it do substantial business to render it essentially at home.<sup>101</sup> BNSF is incorporated in Delaware with its principal place of business in Texas.<sup>102</sup> BNSF does have six percent of its track in

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corporation is fairly regarded as at home." (identifying domicile, place of incorporation, and principal place of business as paradigm bases for the exercise of general jurisdiction)).

<sup>91</sup> Meir Feder, *Goodyear, "Home" and the Uncertain Future of Doing Business Jurisdiction*, 63 S.C. L. REV. 671, 675 (2012).

<sup>92</sup> *Daimler AG v. Bauman*, \_\_\_ U.S. \_\_\_, 134 S. Ct. 746, 760 (2014).

<sup>93</sup> *Id.* \_\_\_ U.S. at \_\_\_, 134 S. Ct. at 760, 749 (citing *Goodyear*, 564 U.S. at 924).

<sup>94</sup> *Id.* \_\_\_ U.S. at \_\_\_, 134 S. Ct. at 755–56, 761 n.19.

<sup>95</sup> 342 U.S. 437 (1952).

<sup>96</sup> *Id.* at 448.

<sup>97</sup> *Id.*

<sup>98</sup> *Daimler*, \_\_\_ U.S. at \_\_\_, 134 S. Ct. at 761.

<sup>99</sup> *See id.*; *Perkins*, 342 U.S. at 448.

<sup>100</sup> *See* Feder, *supra* note 91, at 693.

<sup>101</sup> *See Int'l Shoe Co. v. Wash.*, 326 U.S. 310, 317 (1945).

<sup>102</sup> *Tyrrell v. BNSF Ry. Co.*, 373 P.3d 1, 3 (Mont. 2016).

Montana and about five percent of its workforce in Montana but those percentages would hardly render a corporation “essentially at home.”<sup>103</sup> The small ratio of a workforce being present in a state and doing business in a state are immediately distinguishable from the facts presented in *Perkins*.<sup>104</sup> Further, extension of the Court’s analysis in *Tyrrell* would make BNSF subject to unlimited jurisdiction in every state it operates, which is neither certain nor predictable for BNSF.<sup>105</sup>

“A corporation that operates in many places can scarcely be deemed at home in all of them. . . .”<sup>106</sup> The main takeaway from *Daimler* is that in-state contacts must be compared to a corporation’s nationwide contacts, and substantial contacts themselves do not render a corporation at home.<sup>107</sup> Because BNSF’s contacts with Montana are fairly minimal compared to its presence throughout the nation, BNSF’s contacts are insufficient for it to be at home in Montana, and—as the dissent opined—“that is where the analysis of this case should come to end.”<sup>108</sup>

The majority is of the opinion that *Daimler* is not “novel law” because it merely upheld *Goodyear*.<sup>109</sup> While *Daimler* did uphold *Goodyear*, it also notably dictated what makes contacts so continuous and systematic as to render a corporation at home.<sup>110</sup> The majority claimed that *Daimler* is not applicable because it addressed events occurring outside the United States, and BNSF did not cite cases that support preclusion of state court jurisdiction.<sup>111</sup> However, *Daimler* clears up the ambiguity of what continuous and systematic affiliations of the defendants are, and there is no evidence indicating the rule would not apply to railroad corporations in the United States.<sup>112</sup> The majority concluded, “Congress drafted the FELA to make a railroad ‘at home’ for jurisdictional purposes wherever it is ‘doing business.’”<sup>113</sup> Although Congress may have drafted the FELA for this purpose, the majority does not advise what constitutional standard makes a railroad “essentially at home” to comport with the Due Process Clause.<sup>114</sup> The majority further stated, “Our own

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<sup>103</sup> See Opening Br. of BNSF Ry. Co. at 4, Apr. 15, 2015, Cause No. DA 14-0826; see also *Tyrrell*, 373 P.3d at 8.

<sup>104</sup> See *Perkins v. Benguet Mining Co.*, 342 U.S. 437 (1952); *Daimler AG v. Bauman*, \_\_\_ U.S. \_\_\_, 134 S. Ct. 746, 761 n.19 (2014).

<sup>105</sup> See Feder, *supra* note 91, at 694 (The doing business standard approach “permit[s] potential plaintiffs a panoply of fora from which they can choose the most plaintiff-friendly.”)

<sup>106</sup> *Daimler*, \_\_\_ U.S. at \_\_\_, 134 S. Ct. at 762 n.20.

<sup>107</sup> See *Daimler*, \_\_\_ U.S. at \_\_\_, 134 S. Ct. at 762 n.20; Monestier, *supra* note 84, at 254.

<sup>108</sup> *Tyrrell*, 373 P.3d 1, 11 (2016) (McKinnon, L. dissenting).

<sup>109</sup> *Id.* at 6 (majority opinion).

<sup>110</sup> *Daimler*, \_\_\_ U.S. at \_\_\_, 134 S. Ct. at 760 (“With respect to a corporation, the place of incorporation and principal place of business are ‘paradig[m] . . . bases for general jurisdiction.’”).

<sup>111</sup> *Tyrrell*, 373 P.3d at 6.

<sup>112</sup> See *Daimler*, \_\_\_ U.S. at \_\_\_, 134 S. Ct. at 760.

<sup>113</sup> *Tyrrell*, 373 P.3d at 6 (citing *Balt. & Ohio R.R. Co. v. Kepner*, 314 U.S. 44, 49–50 (1941)).

<sup>114</sup> See *id.* at 12 (McKinnon, L. dissenting) (the cases cited by the majority “do not so much as mention the Due Process Clause or general jurisdiction. Nor have the cases ever been cited by the United States Supreme Court or any other court—until now—for any proposition remotely related to general jurisdiction.”).

precedent on this issue is consistently clear and consonant with the U.S. Supreme Court’s interpretation of 45 U.S.C § 56”; however, the U.S. Supreme Court has never considered the relationship between the FELA and general jurisdiction.<sup>115</sup> Moreover, Congress does not set the standard of assessing due process. The standard is set by the Constitution—not the language of an Act. Therefore, there is nothing to suggest that the Supreme Court would allow a lesser due process standard to be applied to railroad employers.<sup>116</sup>

### C. Future Impact on Railroads’ Due Process

When determining if general jurisdiction exists under a federal act or state law, the court must look at the constitutionality of asserting jurisdiction over a defendant and not just the statutes. Prior the *Daimler* decision, it is possible that the rule requiring contacts so “continuous and systematic” as to render a defendant “essentially at home” could be interpreted vaguely.<sup>117</sup> However, *Daimler* specifically addressed the issue of general jurisdiction and upheld a clear rule for determining where a corporation is “essentially at home.”<sup>118</sup> Language drafted by Congress does not supersede the applicability of the Due Process Clause, and the Supreme Court has not implied that railroad defendants should have a different due process standard.<sup>119</sup>

Even though the majority holds the Supreme Court has a “century” of precedential interpretation of 45 U.S.C. § 56 and “decades of consistent” decisions,<sup>120</sup> it does not cite one corporate general jurisdiction case or FELA general jurisdiction case.<sup>121</sup> Moreover, the Supreme Court has only decided four general jurisdiction cases involving corporate defendants—none of which address the FELA.<sup>122</sup> Thus, it is unpersuasive to conclude that a case specifically addressing general personal jurisdiction is not applicable to FELA cases.<sup>123</sup> Now that a definitive test to determine if a corporation is “essentially at home” has been set forth, Montana should apply *Daimler* in all future general personal jurisdiction determinations, including those under the FELA.<sup>124</sup> Failure to do so creates

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<sup>115</sup> See *Perkins v. Benguet Mining Co.*, 342 U.S. 437 (1952); *Helicopteros Nacionales De Columbia v. Hall*, 466 U.S. 408 (1984); *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915 (2011); *Daimler*, \_\_\_ U.S. \_\_\_, 134 S. Ct. 746 (2014).

<sup>116</sup> See *Tyrrell*, 373 P.3d at 12–13.

<sup>117</sup> See *Int’l Shoe Co. v. Wash.*, 326 U.S. 310, 317 (1945); *Goodyear*, 564 U.S. at 919.

<sup>118</sup> *Daimler*, \_\_\_ U.S. at \_\_\_, 134 S. Ct. at 751.

<sup>119</sup> See *Tyrrell v. BNSF Ry. Co.*, 373 P.3d 1, 13 (Mont. 2016) (McKinnon, L. dissenting).

<sup>120</sup> *Id.* at 7 (majority opinion).

<sup>121</sup> See e.g., *Perkins v. Benguet Mining Co.*, 342 U.S. 437 (1952); *Helicopteros Nacionales De Columbia v. Hall*, 466 U.S. 408 (1984); *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915 (2011); *Daimler AG v. Bauman*, \_\_\_ U.S. \_\_\_, 134 S. Ct. 746 (2014).

<sup>122</sup> See *Perkins*, 342 U.S. 437; *Helicopteros*, 466 U.S. 408; *Goodyear*, 564 U.S. 915 (2011); *Daimler*, \_\_\_ U.S. \_\_\_, 134 S. Ct. 746 (2014).

<sup>123</sup> See *Tyrrell*, 373 P.3d at 6.

<sup>124</sup> See *Daimler*, \_\_\_ U.S. at \_\_\_, 134 S. Ct. at 751.

overly broad assertions of general jurisdiction and leads to forum shopping and unpredictable results for railroads like BNSF<sup>125</sup>

While the Court held “that the FELA is to be given a liberal construction in favor of injured railroad employees so that it may accomplish humanitarian and remedial purposes,”<sup>126</sup> applying *Daimler* to FELA cases does not disfavor railroad employees. It may limit the number of states a claim can be brought in, but it does not take away the humanitarian or remedial purpose of the FELA. In the cases at issue, the plaintiffs would still have at least three viable options to bring their claims under the *Daimler* standard: the state where the injury occurred, Delaware, and Texas.<sup>127</sup>

When considering general jurisdiction, states courts must rely on *Daimler* to determine whether or not the exercise of personal jurisdiction over a railroad comports with the Due Process Clause.<sup>128</sup> It would be “unacceptably grasping” to subject railroads to general jurisdiction based on the “doing business” standard alone, unless the Supreme Court holds a different standard for railroad defendants.<sup>129</sup> If the courts do not ensure the exercise of jurisdiction over railroad companies comports with the Due Process Clause, railroad defendants will continue to be hauled in to improper court systems.

## VI. CONCLUSION

In the words of Justice McKinnon, “A defendant does not forfeit liberty or have a diminished liberty interest merely because the plaintiff brings a FELA action. Nor does a defendant forfeit constitutional protection by operating a railroad.”<sup>130</sup> When assessing jurisdiction under the FELA or under a state long-arm statute, courts must not forgo constitutional considerations. Whether the defendant is a railroad company, car dealership, or tire manufacturer the Due Process Clause still requires that the “essentially at home” standard must be met before a court may assert jurisdiction.<sup>131</sup>

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<sup>125</sup> Monestier, *supra* note 84, at 258.

<sup>126</sup> *Labella v. Burlington N.*, 595 P.2d 1184, 1186 (Mont.1979) (citing *Urie v. Thompson*, 337 U.S. 163, (1949)).

<sup>127</sup> See *Daimler*, \_\_\_ U.S. at \_\_\_, 134 S. Ct. at 760, 749 (citing *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915, 924 (2011)).

<sup>128</sup> See *Tyrrell*, 373 P.3d at 8.

<sup>129</sup> *Id.* at 9 (McKinnon, L. dissenting) (quoting *Daimler*, \_\_\_ U.S. at \_\_\_, 134 S. Ct. 761).

<sup>130</sup> *Id.* at 12.

<sup>131</sup> *Id.*; see also *Daimler*, \_\_\_ U.S. \_\_\_, 134 S. Ct. 746; *Goodyear*, 564 U.S. 915.