

NJ Transit Must Face Injury Suit Under New Law: 3rd Circ.

By [Linda Chiem](#)

Law360 (August 21, 2019, 5:54 PM EDT) -- New Jersey Transit must face a rail worker's injury suit in light of a new state law dismantling the public transit operator's sovereign immunity as an "arm of the state" in certain disputes, the Third Circuit said Wednesday.

A three-judge panel of the federal appeals court issued a summary order reversing a district court's June 2018 decision dumping James Flakker's Federal Railroad Safety Act suit against [NJ Transit](#). The lower court determined that NJ Transit had sovereign immunity under the 11th Amendment based on controversial Third Circuit precedent at the time.

But the state's newly enacted New Jersey Transit Corporation Employee Protection Act — which explicitly bars NJ Transit from asserting sovereign immunity as a defense in FRSA and other rail worker lawsuits — now [voids the district court's finding](#), the panel said Wednesday. So, Flakker's suit will be remanded for further proceedings.

"In light of the passage of the act, NJ Transit no longer possesses sovereign immunity from the FRSA claim Flakker asserted against NJ Transit," the panel said.

The New Jersey Transit Corporation Employee Protection Act, which Gov. Phil Murphy signed into law on June 26, waives NJ Transit's sovereign immunity related to claims under the Railway Labor Act, the Federal Employers Liability Act, the Railroad Retirement Act, the Railroad Retirement Tax Act, the Railroad Unemployment Insurance Act, as well as federal railroad safety laws, whistleblower laws, discrimination laws, and the Interstate Commerce Act.

The law was the product of intense lobbying by attorneys representing injured NJ Transit workers who sought to remedy the effects of the Third Circuit's precedential January 2018 ruling in [Karns v. Shanahan](#) . The attorneys and proponents of the legislation argued that Karns unjustly deprived basic worker protections to NJ Transit employees who were hamstrung from collecting damages for on-the-job injuries.

In Karns, a divided panel determined that NJ Transit was entitled to 11th Amendment immunity as an "arm of the state." Karns was a civil rights case involving a pair of Christian ministers who claimed they were wrongfully arrested by NJ Transit officers for purportedly trespassing because they were preaching on the train platform without permits. Yet the ruling had a damaging impact on numerous railroad worker injury lawsuits against NJ Transit, which [leveraged](#) Karns as the ultimate shield against injury claims, the lawyers have said.

Flakker, a NJ Transit railroad foreman, alleged he was retaliated against for reporting an injury. He told the Third Circuit that U.S. District Judge Mark E. Kearny's decision last year validating NJ Transit's immunity, based on Karns, would trigger "[catastrophic ramifications](#)" for workers and passengers, according to court documents.

In another case that also relied on the Karns precedent, the Third Circuit this January [nixed an \\$824,000 jury award](#) to Quitman Robinson, a NJ Transit maintenance worker who was injured on the job and sued the public transit operator under the Federal Employers Liability Act. Robinson moved for an en banc rehearing in February.

The New Jersey district court also recently breathed new life into scores of NJ Transit worker suits, which had been put on hold pending the Third Circuit appeals in Flakker and Robinson, in light of the new state law.

U.S. Chief District Judge Freda L. Wolfson on July 12 lifted a stay that had been imposed on approximately 70 Federal Employers' Liability Act and Federal Railroad Safety Act lawsuits in the district court while the Third Circuit mulled over the sovereign immunity issue. Because of the new state law, it was unnecessary to wait for a Third Circuit ruling, Judge Wolfson said.

Lawrence A. Katz of [Coffey Kaye Myers & Olley](#), who served as special counsel for Flakker, Robinson and other plaintiffs on the 11th Amendment issues against NJ Transit, said in a statement to Law360 that they're pleased that the cases can now move forward.

"Today's order from the Third Circuit, reversing the district court decision in Flakker and remanding it for further proceedings, is the culmination of several years of work by the rail unions, their counsel and this office to minimize the negative impact of Karns and to restore to NJT's rail employees those rights provided by Congress that had been erroneously

eliminated," Katz said. "This will promote railroad safety for the employees, passengers and others coming into contact with NJT trains."

A NJ Transit spokeswoman declined to comment.

Circuit Judges Kent A. Jordan, Joseph A. Greenaway Jr. and Richard L. Nygaard sat on the panel.

Flakker is represented by Samuel J. Rosenthal of [Barish Rosenthal](#) and Lawrence A. Katz, Robert E. Myers and Michael J. Olley of Coffey Kaye Myers & Olley.

NJ Transit is represented by Jonathan B. Peitz, Adam K. Phelps and Robert J. McGuire of the [New Jersey Attorney General's Office](#).

The case is James Flakker v. New Jersey Transit Rail Operations, case number [18-2572](#), in the [U.S. Court of Appeals for the Third Circuit](#).