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# The Federal Employers' Liability Act, a Bane for Workers, a Bust for Railroads, a Boon for Lawyers

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*In 1908, when the American rail transportation system was still developing and the railroad industry was the largest employer in America, Congress enacted the Federal Employers' Liability Act (FELA). The FELA made it easier for interstate railroad employees to prove a negligence claim against their employer. Reform in other areas of workplace injury rejected tort law and turned to workers' compensation. Unlike workers' compensation systems, recovery under the FELA requires lengthy and unpredictable litigation. An inordinate amount of the costs under the FELA goes to legal fees and administration. It also breeds hostility and antagonism between employer and employee.*

*This Article demonstrates the FELA is outdated and counterproductive to its original purposes. It calls for repeal of the statute. The authors argue workers' compensation mechanisms are more suitable for railroad workplace injuries.*

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The views expressed in this Article are those solely of the authors and are not intended to reflect views or opinions of any clients of the firm of Crowell & Moring.

## INTRODUCTION

The Federal Employers' Liability Act (FELA)<sup>1</sup> is an anomaly in the law of torts. It is, at least in theory, a statute which provides compensation for railroad employees injured at work when the railroad is at fault. Created at a time when the concept of no-fault workers' compensation schemes was in its early stages in the United States, it was thought to be a major breakthrough for the legal rights of injured employees. The development of workers' compensation law, however, makes the FELA both archaic and unnecessary. Today, the FELA is a hapless hybrid. The Supreme Court almost entirely eliminated the requirement of proving employer fault, yet the FELA remains a tort statute requiring tort litigation and imposing tort damages.<sup>2</sup>

The major factors leading to the enactment of the FELA were the absence of any other source of compensation for injured railroad employees, the need to provide incentives for railroads to make their industry safer, and the need to calm labor unrest related to the high injury and death rate among railroad employees. These factors no longer exist today. A number of government programs, as well as private insurance programs, are available for disabled persons. In addition, all fifty states have workers' compensation schemes to provide wage-loss compensation for injured employees. The railroad industry is one of the safest industries today. As compared to the 11,839 railroad employees killed in 1907, only forty railroad employees were killed on duty in 1984.<sup>3</sup>

Not only is the FELA no longer necessary, but it is counter-productive to its original purposes and falls short of the goal of providing a swift and efficient method of adequately compensating injured railroad employees. Judicial recognition of the inadequacy of a fault-based compensation system for injured railroad employees resulted in erosion of the fault standard of liability, creating unfairnesses to the railroads. The unpredictability of recovery, difficulties in assessing damages, and lengthy litigation in civil actions brought under the FELA make the system unfair and inadequate for injured railroad employees as well. The high administrative costs of the FELA make the system inefficient. Furthermore, the FELA creates adversarial

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1. 45 U.S.C. § 51 (1982).

2. Punitive damages may not be awarded in FELA cases. *See, e.g., Kozar v. Chesapeake and Ohio Ry. Co.*, 449 F.2d 1238, 1240-43 (6th Cir. 1971).

3. Federal Railroad Administration, *Certain Railroad Employee Fatalities Investigated by the Federal Railroad Administration Calendar Year 1984*, REPORT OF THE U.S. DEP'T OF TRANSP. (June 1985). The 1984 figure does not include employee fatalities that occurred as a result of train derailments, collisions, or rail-highway crossing accidents. *See also Elkind, Should the Federal Employers' Liability Act be Abolished?*, 17 FORUM 415, 416 (1981).

relationships between employers and employees, as the employee attempts to prove employer fault to recover compensation and the employer seeks to show the employee was negligent in order to reduce the damage award.

### ENACTMENT OF THE FELA

To understand the inadequacies of the FELA as a compensation scheme today, it is necessary to understand the climate and environment surrounding its enactment. The railroad industry was a very different industry in 1908 than it is today. Then, railroad transportation was the most important form of both passenger and freight surface transportation. The railroad industry was the largest employer in the United States. The country was making a major westward movement; creation of an expansive and sound rail transportation system was vital. There was an oversupply of labor, unions were virtually nonexistent, and modern concepts of work-related disability were unknown.<sup>4</sup> Railroad work was dangerous and railroad employees suffered one of the highest accident rates in history.<sup>5</sup> In 1907, one trainman was injured out of every eight employees and one was killed out of every 125 employees.<sup>6</sup> In that year, there were 11,839 fatalities among the well over one million railroad employees.<sup>7</sup> Labor became discontent and put pressure on Congress to enact some type of compensation scheme for injured railroad employees and their families.

Although only a few states had enacted workers' compensation statutes at that time,<sup>8</sup> railroad labor was calling for a no-fault compensation program.<sup>9</sup> The railroads opposed a no-fault compensation system, but finally were forced to accept a tort statute requiring proof of fault.<sup>10</sup>

The 1908 Federal Employers' Liability Act adopted a pure com-

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4. Herde, *FELA—Should It Be Abolished?*, 17 FORUM 407, 410 (1981).

5. *Id.* at 409.

6. Elkind, *supra* note 3, at 418.

7. *Id.*

8. See W.P. KEETON, D. DOBBS, R. KEETON & D. OWEN, PROSSER AND KEETON ON THE LAW OF TORTS 572-73 (5th ed. 1984).

9. Elkind, *supra* note 3, at 415.

10. The first FELA, Pub. L. No. 59-219, 34 Stat. 232 (1906), was found unconstitutional because it attempted to regulate purely intrastate activities. *Howard v. Illinois Cent. R.R.*, 207 U.S. 463 (1908). The FELA was reenacted in 1908, in a form which would regulate only interstate railroad activities. See Pub. L. No. 60-100, 35 Stat. 65 (1908) (codified at 45 U.S.C. § 51 (1982)).

parative negligence standard,<sup>11</sup> established that the railroad employee's negligence does not reduce his damages in cases where the injury was caused by violation of an employee safety statute,<sup>12</sup> and eliminated the assumption of risk defense in cases involving violation of employer safety statutes.<sup>13</sup> In 1910, Congress amended the Act to allow concurrent state and federal jurisdiction for FELA cases.<sup>14</sup> The amendment also expanded the venue provisions to allow plaintiffs to file suit in any jurisdiction where the defendant resided or did business, or where the cause of action arose.<sup>15</sup> In 1939, Congress eliminated the assumption of risk defense for all cases,<sup>16</sup> extended the limitations period to three years,<sup>17</sup> and added provisions to prevent interference with any person attempting to provide information on a FELA claim.<sup>18</sup>

#### EVOLUTION OF THE FELA TO A NO-FAULT COMPENSATION STATUTE

The Supreme Court's early approach to the FELA was to apply traditional fault rules and traditional rules of evidence in determining whether to submit cases to the jury.<sup>19</sup> In early cases, courts did not view the Act as a loss compensation mechanism, but regarded it in terms of true tort law goals: to provide incentives for railroads to exercise greater care and to provide recovery if railroad negligence was responsible for an injury.<sup>20</sup> Later, however, the Supreme Court eroded the standards of proof in FELA cases by focusing on one phrase in the statute establishing liability for injury or death "[r]esulting in whole or in part from the negligence of" the employer.<sup>21</sup>

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11. Pub. L. No. 60-100, § 3, 35 Stat. 65, 66 (1908) (codified at 45 U.S.C. §§ 52, 53 (1982)). The FELA has a "pure" comparative negligence provision, meaning that an employee may recover even if his negligence was greater than that of the railroad.

12. Pub. L. No. 60-100, § 3, 35 Stat. 65, 66 (1908) (codified at 45 U.S.C. § 53 (1982)).

13. Pub. L. No. 60-100, § 4, 35 Stat. 65, 66 (1908) (codified as amended at 45 U.S.C. § 54 (1982)).

14. Pub. L. No. 61-117, §§ 1, 6, 36 Stat. 291 (1910) (codified at 45 U.S.C. § 56 (1982)).

15. Pub. L. No. 61-117, §§ 1, 6, 36 Stat. 291 (1910) (codified as amended at 28 U.S.C. § 1445(a) (1982)).

16. Pub. L. No. 76-382, §§ 1, 4, 53 Stat. 1404 (1939) (codified at 45 U.S.C. § 54 (1982)).

17. Pub. L. No. 76-382, § 2, 53 Stat. 1404 (1939) (codified at 45 U.S.C. § 56 (1982)).

18. Pub. L. No. 76-382, §§ 3, 10, 53 Stat. 1404, 1404-1405 (1939) (codified at 45 U.S.C. § 60 (1982)).

19. See Steinberg, *The Federal Employers' Liability Act and Judicial Activism: Policymaking by the Courts*, 12 WILLAMETTE L.J. 79, 80 (1975).

20. *Id.* at 80-82; see, e.g., *Gulf, Mobile & N. R.R. v. Wells*, 275 U.S. 455 (1928).

21. 45 U.S.C. § 51 (1982).

First, in the 1946 decision of *Lavender v. Kurn*,<sup>22</sup> the Supreme Court adopted the position that even though the jury verdict involved speculation and conjecture, that fact is insufficient grounds for reversal. The Court stated reversal is justified only "[w]here there is a complete absence of probative facts to support" the jury's conclusion.<sup>23</sup>

Then, in 1957, the Supreme Court emphatically broke with precedent in its landmark *Rogers v. Missouri Pacific Railroad*<sup>24</sup> decision. There, the Court held to raise a jury question of negligence under the FELA requires only evidence of the "slightest" negligence by the railroad.<sup>25</sup> The Court reaffirmed its new position in subsequent decisions.<sup>26</sup> Thus, FELA cases require less proof of negligence than ordinary tort actions. In fact, the test of a jury case under the FELA is like the "scintilla" rule: a jury verdict need only be based on a scintilla of evidence.<sup>27</sup>

In addition, the Supreme Court adopted a less stringent causal requirement for FELA cases than the common law proximate cause requirement. In its famous *Gallick v. Baltimore & Ohio Railroad*<sup>28</sup> opinion, the Supreme Court stated the test of a jury verdict is whether "[e]mployer negligence had played *any* role in producing the harm."<sup>29</sup> There, a railroad employee working near a stagnant, vermin-infested pool of water on railroad property suffered an insect bite which became infected and ultimately resulted in the amputation of both legs. The employee alleged the railroad was negligent in maintaining a stagnant, vermin-infested pool of water where insects gathered. The state court reversed the judgment of the trial court because there was no direct evidence that the existence of the unidentified bug had any connection with the stagnant and infested pool; therefore, the chain of causation was too tenuous to support a conclusion of liability.<sup>30</sup> Reversing the state court, the Supreme

22. 327 U.S. 645 (1946).

23. *Id.* at 653.

24. 352 U.S. 500, *reh'g denied*, 353 U.S. 943 (1957).

25. *Id.* at 506.

26. *See* *Webb v. Illinois Cent. R.R.*, 352 U.S. 512, *reh'g denied*, 353 U.S. 943 (1957); *Ferguson v. Moore-McCormack Lines*, 352 U.S. 521 (1957); *Moore v. Terminal R.R. Ass'n of St. Louis*, 358 U.S. 31 (1958); *Inman v. Baltimore & Ohio R.R.*, 361 U.S. 138 (1959); *Harris v. Pennsylvania R.R.*, 361 U.S. 15 (1959).

27. *See* Steinberg, *supra* note 19, at 83-84; Comment, *Federal Employers' Liability Act—Certiorari Practice—Review of the Sufficiency of Evidence*, 6 VILL. L. REV. 549, 559 (1961).

28. 372 U.S. 108 (1963).

29. *Id.* at 116.

30. *Gallick v. Baltimore & Ohio R.R.*, 173 N.E.2d 382 (Ohio Ct. App. 1961),

Court found the jury properly could find a causal relationship between the railroad's negligence and the employee's injuries.<sup>31</sup>

The Court then went on to broaden the interpretation of the foreseeability requirement under the FELA. Regardless whether the railroad could have foreseen the employee's "mishap or injury," the jury's findings of negligence in maintaining the filthy pool of water were sufficient to satisfy the foreseeability requirement. Because the jury found the railroad knew the accumulation of the pool of water would attract bugs and vermin to the area, it was clear to the Court the jury found the increased likelihood of an insect biting an employee working near the pool to be foreseeable to the railroad.

The net effect of these decisions is that the Supreme Court moved the FELA closer to a strict liability statute. If any evidence of negligence by the railroad exists, the jury must have a chance to consider the case. Thus, trial judges have less power to direct verdicts for defendants and the chances of overturning a verdict are slim.<sup>32</sup>

The Supreme Court's liberal interpretation of the FELA evokes much criticism. Critics charge the transformation of the FELA from a fault liability statute into a risk distribution statute is an abuse of judicial authority. They also assert moving the FELA closer to a no-fault compensation system is a task for the legislature, not the judiciary.<sup>33</sup> In fact, it has been stated that "[t]he Court has engaged in judicial legislation of the first order; the Court has imposed its social and economic values upon the nation."<sup>34</sup>

This judicial transformation of the FELA into a close relative of a no-fault compensation statute has not, however, been attended by a corresponding transformation of the compensation base. Tort damage rules continue to apply to FELA cases. In effect, the Court has attempted to subject railroads to the same no-fault liability other employers are subject to under state workers' compensation statutes, but has failed to accord the railroads the limited damages that are part of the bargain for no-fault liability in workers' compensation schemes.

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*rev'd*, 372 U.S. 108 (1963). The Ohio Supreme Court refused further appellate review, making the intermediate court decision the final judgment of the state courts. 172 Ohio St. 488, 178 N.E.2d 597 (1961).

31. *Gallick*, 372 U.S. at 117.

32. Comment, *supra* note 27, at 558-59.

33. See Corso, *How F.E.L.A. Became Liability Without Fault*, 15 CLEV.-MAR. L. REV. 344, 355 (1966); Comment, *supra* note 27, at 566; see also *Bailey v. Central Vt. Ry.*, 319 U.S. 350 (1943) (Roberts J. & Frankfurter J., dissenting) (as Congress has decided not to enact a workers' compensation law for railroad employees, the Court should not strain the law of negligence to accord compensation where the employer is without fault).

34. Steinberg, *supra* note 19, at 90.

## INADEQUACIES OF THE FELA AS A COMPENSATION MECHANISM FOR INJURED RAILROAD EMPLOYEES

Unfairnesses to injured railroad employees matches the unfairness resulting to the railroads from judicial conversion of the FELA to a no-fault tort statute. The FELA fails to live up to its goals of providing fair and adequate compensation to injured employees. In contrast to a workers' compensation scheme which awards benefits according to a pre-established schedule according to the type of injury, the extent of disability, and the needs of the employee, recoveries under the FELA are unpredictable and inconsistent. Two workers suffering the same injury may receive varying recoveries depending on the existence of employer negligence, the negligence of the worker, the sympathy evoked for the worker, and other factors entering into a jury's determination. For example, in cases involving the loss of one leg, one employee was awarded two million dollars,<sup>35</sup> another employee was awarded \$1,125,000,<sup>36</sup> another employee was awarded \$500,000,<sup>37</sup> and yet another employee was awarded \$450,000.<sup>38</sup> In other cases, employees unable to prove any negligence on the part of the railroad may recover no compensation for the loss of a leg.

The inability of some injured employees to bring successful tort actions highlights the FELA's inadequacy as a workers' compensation mechanism. In actual practice, benefits outside of the FELA system exist for injured employees so that employees who lose their FELA actions are not left penniless. Railway employers sometimes make advances to injured employees for medical expenses while a FELA claim is pending, even though no judgment obligating them to do so exists.<sup>39</sup> Railroad employees also receive benefits under other acts, which help compensate them for their injuries.<sup>40</sup> Nonetheless, the present FELA system, with its markedly uneven damage awards, is inequitable for injured employees.

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35. *Garcia v. Burlington N. R.R.*, 597 F. Supp. 1304 (D. Colo. 1984).

36. *Kelly v. Illinois Cent. Gulf R.R.*, 552 F. Supp. 399 (W. D. Mo. 1982).

37. *Flanigan v. Burlington N., Inc.*, 632 F.2d 880 (8th Cir. 1980).

38. *Rediker v. Chicago, Rock Island & Pac. R.R.*, 1 Kan. App. 2d 581, 571 P.2d 70 (1977), *cert. granted*, 435 U.S. 922, *cert. dismissed*, 435 U.S. 982 (1978).

39. One commentator states railway employers commonly pay some compensation for medical expenses and lost wages even in cases where they are found faultless. See A. LARSON, *THE LAW OF WORKMEN'S COMPENSATION* 16-83, § 91.76 (1984).

40. *Id.* See generally Railroad Unemployment Insurance Act, Ch. 680, 52 Stat. 1094 (1938), (current version codified at 45 U.S.C. §§ 351-367 (1982)) (provides sickness benefits).



Difficulties in assessing damages in tort cases make the FELA inadequate as a workers' compensation mechanism. Inability to fully ascertain the precise impact of an injury or disease makes it difficult to accurately determine future lost earnings in civil actions. Determining residual earning capacity may be difficult for jurors. Juries may have difficulty assessing pain and suffering in FELA cases because they often cannot relate to the type of injuries involved in railroad work (for example, occupational disease). Juries have difficulty determining present value for damage awards in FELA cases.<sup>41</sup> In contrast to workers' compensation cases, the injured worker's own negligence reduces the amount of compensation he receives in FELA cases.<sup>42</sup> In fact, many courts use the phrase "miscarriage of justice" in referring to the adequacy or inadequacy of damage awards in FELA cases.<sup>43</sup>

Other problems with the tort system in general, while not unique to FELA cases, add to the problems inherent in the FELA system. Because most plaintiff lawyers operate on a contingent fee basis, injured employees may have difficulty persuading attorneys to agree to take their cases where the chances of recovery are unclear. To the other extreme there is often intense solicitation of injured employees by attorneys. Unions often provide their members with lists of designated attorneys approved to represent employees in FELA lawsuits.<sup>44</sup> Often, union lawyers receive notice of a railroad injury before the local claim agent and sometimes even before the injured employee reaches the hospital and receives the necessary medical care.<sup>45</sup> The argument exists that the FELA encourages injured employees to submit to *needless surgery* just to objectively demonstrate the existence of injury in a civil action.<sup>46</sup> The civil action also serves as a disincentive to rehabilitation of injured workers. Generally, in tort actions the chances of winning a large jury verdict may be greater if the claimant incurred a large amount of lost wages and medical expenses. Thus, no incentive exists for injured employees to pursue rehabilitation which could get them back to work after a

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41. See *St. Louis Southwestern Ry. Co. v. Dickerson*, 105 S. Ct. 1347 (1985).

42. The negligence of the employee does not reduce his damages where the FELA claim is based on the employer's violation of a safety statute. 45 U.S.C. § 53 (1982); see *Beimert v. Burlington N., Inc.*, 726 F.2d 412 (8th Cir.), *cert. denied*, 104 S. Ct. 2659 (1984) (employee's negligence may not reduce damages where the FELA claim is based on the employer's violation of the Safety Appliance Act, unless the employee's negligence was the sole cause of injury).

43. See, e.g., *Ham v. Consolidated Rail Corp.*, 582 F. Supp. 906 (E.D. Pa. 1983), *aff'd*, 729 F.2d 1447 (3d Cir. 1984) (mem.).

44. The practice of FELA litigation is a specialized area of law, and the railroad unions employ, or place under contract, many lawyers specifically to handle FELA claims. See *Herde*, *supra* note 4, at 411.

45. *Id.* at 412.

46. *Id.*

short period.

Furthermore, recipients of lump sum awards in tort cases lack experience with managing and investing large amounts of money. Consequently, they often waste or lose money needed for their own medical expenses. In addition, a single damage award in a FELA action does not take into account the possibility the disability may deteriorate and the employee might need additional compensation or medical care, or the possibility the disability may improve and the employee could return to work. Moreover, injured employees must engage in lengthy litigation before they can receive any compensation for their immediate needs. Workers' compensation systems provide immediate and long-term medical care, and compensation is based on a disability rating that may change in response to changes in the employee's condition.

#### ADMINISTRATIVE COSTS OF THE FELA

The administrative costs of the FELA further illustrate that it is an inefficient and archaic system for compensating injured workers. An excessive amount of FELA payout goes to attorneys who litigate FELA claims. Recent studies show that of the \$460 million in FELA costs in 1981, approximately thirty percent went to transaction costs; \$70 million went to attorneys of the claimants and \$67 million went to costs for defending and investigating FELA claims.<sup>47</sup> Unlike workers' compensation schemes which cap the fees of claimants' attorneys and do not deprive the claimant of necessary benefits,<sup>48</sup> the contingent fee for claimant attorneys in FELA cases may be as high as forty percent of the FELA award. Although the contingent fee system may be necessary to provide legal representation for injured persons who otherwise might be unable to afford counsel, the goal of adequately compensating injured employees for lost wages, medical care, and rehabilitation is not served when forty percent of the needed money goes to the legal costs of bringing a tort action.

The fact that the FELA system remains, at least in some degree, a fault based system contributes to much of the legal and other transactional costs of the system. In fact, Arthur Larson, a well-known

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47. See Johnston, *The Federal Law That Didn't Work*, ENTERPRISE MAG., Apr. 1985, at 19, 20.

48. See, e.g., ALA. CODE § 25-5-90 (1975); ARIZ. REV. STAT. ANN. § 23-1069 (1983); DEL. CODE ANN. tit. 19, § 2350 (1979); ILL. ANN. STAT. ch. 48, § 138.16a (Smith-Hurd Supp. 1984-85); LA. REV. STAT. ANN. § 23-1141 (West 1964 & Supp. 1983); MINN. STAT. ANN. § 176.081 (West Supp. 1985); W. VA. CODE § 23-5-5 (1985).

authority in the area of workers' compensation law, states:

When all this has been said, a reminder is still in order that FELA is not a true nonfault statute, that the employer is not an insurer of its employees' safety, and that the "practical problem" of presenting a negligence case still remains. The need for this warning is substantiated by the fact that, for one reason or another, an (sic) FELA plaintiff still sometimes fails to make his case, in spite of all the ways in which his path has been smoothed by recent cases. For example, on the same day the Supreme Court handed down the *Rogers* case, with its marked easing of the plaintiff's task, it also affirmed a directed verdict for the defendant in *Herdman v. Pennsylvania Railroad* on the ground that there must be at least some probative facts in the record to support an allegation of negligence.<sup>49</sup>

Attorneys for claimants spend much time and effort seeking to obtain evidence showing some fault on the part of the employer. Defense counsel, paid on the basis of time spent and expenses incurred, spend time and effort trying to show the injured employee was at fault. Eliminating proof of fault completely from the compensation scheme would reduce investigative and litigation costs for both sides. Attorneys for claimants would be unable to justify forty percent contingent fees and defense costs would be reduced. For example, in workers' compensation systems, the issue is not who was at fault in causing a workplace accident, but whether the accident arose out of the employment. One commentator even suggests a comprehensive social insurance program would best serve the goal of compensating injured railroad employees.<sup>50</sup>

Railroads and injured employees are not the only parties bearing the high administrative costs of the FELA system. The costs pass on to shippers who use the railroad transportation system. Rail transportation reflects the cost of FELA payouts, which makes rail transportation costlier than it otherwise would be and reduces the ability of the railroad industry to compete with other transportation industries. The increased costs to shippers who use rail transportation ultimately pass on to consumers in the form of higher prices for goods. Elimination of these excessive administrative costs would be a major benefit arising from replacement of the FELA by a fair and efficient workers' compensation scheme. The goal would be to reduce administrative costs as much as possible so a larger portion of the insurance premium dollar would go to injured railroad employees.

#### THE FELA SYSTEM IS COUNTERPRODUCTIVE TO THE GOAL OF PROMOTING A SAFE AND PRODUCTIVE WORK ENVIRONMENT

Although the railroad industry is much safer today than it was in 1908 and is now one of the safest transportation industries, it is im-

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49. Larson, *supra* note 39, at 16-488-489, § 91.77.

50. H.R.J. Res. 127, 36 Stat. 884 (1910).

portant to remember the major reasons for enactment of the FELA: to increase railroad safety and to improve labor relations. The FELA has become counterproductive to these goals.

First, the concept of fault has no place in a system designed to enhance workplace safety. The claimant's need to prove some fault on the part of the railroad and the railroad's interest in proving employee fault as a defense focus attention away from an objective determination of the actual cause of an injury—elimination of which would improve workplace safety—and focuses attention on finger pointing and blame. Consequently, the actual cause of an accident may go undiscovered and unremedied. Thus, the system can detract from the goal of producing a safer workplace.

The system also detracts from the Act's original goal of stabilizing labor relations. The adversarial nature of the FELA system pits employee against employer at a time when both should be striving to achieve the same objective. The injured employee is in need of medical care and assistance in recovering his health so he may return to work and engage in gainful employment. The employer loses the services of a well-trained employee who is vital to a productive workplace. Rather than creating divisiveness between the employee and employer at this time, an adequate system should provide immediate compensation for medical expenses and lost wages, and assistance in rehabilitation. Instead, the FELA requires the employee and employer to engage in lengthy, costly, and hostile litigation.

#### EFFORTS AT DISMANTLING THE FELA

Shortly after enactment of the FELA in 1908, attention was given to the possibility of replacing it with a non-fault type of workers' compensation system for railroad employees. In 1910 Congress created a commission chaired by Senator Sutherland, known as the "Sutherland Commission," to study the problem of statutory remedies for injured railroad employees.<sup>51</sup> The Sutherland Commission concluded the FELA did not offer an adequate remedy for injured railroad employees, especially as compared to workers' compensation schemes being developed by the states.<sup>52</sup> It recommended a bill to provide compensation in the form of annual payments as an exclusive remedy for injured employees of railroads engaged in interstate

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51. REPORT OF COMMISSION TO INVESTIGATE THE MATTER OF EMPLOYEES' LIABILITY AND WORKMEN'S COMPENSATION, S. Doc. No. 338, 62d Cong., 2d Sess. (1912).

52. See Miller, *The Quest For a Federal Workmen's Compensation Law for Railroad Employees*, 18 LAW & CONTEMP. PROBS. 188, 190-91 (1953).

commerce.<sup>53</sup> President Taft submitted the Sutherland Commission Report to Congress in 1912, expressing hope the bill would pass. Both the House and the Senate passed the bill with different language, but the bill died in the conference committee.<sup>54</sup> One commentator noted that the bill died in the conference committee because representatives of railroad labor unions could not agree on the terms of the bill.<sup>55</sup>

Over the next several years, railroad labor unions differed in their positions on replacing the FELA with a workers' compensation system for injured railroad employees. In 1922 Samuel Gompers, President of the American Federation of Labor, established a committee to study workers' compensation laws.<sup>56</sup> In 1923, the committee reported there should be a federal workers' compensation law for persons engaged in interstate commerce.<sup>57</sup> Several bills to repeal the FELA, leaving railroad employees' claims to state workers' compensation laws, or to replace the FELA with a federal workers' compensation system, were introduced but died in committee.<sup>58</sup>

In 1949, at the seventy-second annual meeting of the American Bar Association, the House of Delegates adopted a resolution proposing that the FELA shall not apply to railroad injuries occurring in any state having a workers' compensation act.<sup>59</sup> The House of Delegates of the American Bar Association adopted a similar resolution in 1964.<sup>60</sup>

Judicial criticism of the FELA reflects the difficulty in applying a negligence-based tort statute to employment accident situations legislatively assigned to no-fault compensation schemes for almost all other industries. Supreme Court justices from all shades of the political spectrum criticize the FELA. For example, a conservative jurist, Mr. Justice Frankfurter, concurring in *Tiller v. Atlantic Coast Line Railway*,<sup>61</sup> commented on the confusion in eliminating the assumption of risk defense while continuing to apply a negligence standard. He stated:

But the 1939 amendment left intact the foundation of the carrier's liability—negligence. Unlike the English enactment which, nearly fifty years ago, recognized that the common law concept of liability for negligence is archaic and unjust as a means of compensation for injuries sustained by employees under modern industrial conditions, the federal legislation has retained negligence as the basis of a car-

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53. *Id.* at 191.

54. *Id.*; see also 48 CONG. REC. 2228 (1912).

55. Miller, *supra* note 52, at 191.

56. *Id.* at 194.

57. *Id.* at 195.

58. *Id.* at 198-204.

59. See 74 A.B.A. ANN. REP. 108-09 (1949).

60. See 89 A.B.A. ANN. REP. 386 (1964).

61. 318 U.S. 54 (1943) (Frankfurter, J., concurring).

rier's liability. For reasons that are its concern and not ours, Congress chose not to follow the example of most states in establishing systems of workmen's compensation not based upon negligence.<sup>62</sup>

A liberal jurist, Justice Douglas, writing the majority opinion in *Bailey v. Central Vermont Railway, Inc.*,<sup>63</sup> called the FELA "[c]rude, archaic, and expensive as compared with the more modern systems of workmen's compensation."<sup>64</sup> A moderate jurist, Justice Jackson, dissenting in *Wilkerson v. McCarthy*,<sup>65</sup> criticized the majority for continuing to "[p]ay lip service to the doctrine that liability in these cases is to be based only upon fault."<sup>66</sup> He argued that if the Court considered reform of the FELA into a no-fault statute appropriate, then it should not deny that it was doing so.<sup>67</sup>

Justice Frankfurter repeated his criticism of the FELA in his concurring opinion in *Urie v. Thompson*.<sup>68</sup> Commenting on the extension of the FELA to an occupational disease claim brought by a railroad employee, Justice Frankfurter stated:

At the risk of wearisome reiteration it is relevant to say again that the common-law concept of negligence is an antiquated and uncivilized basis for working out rights and duties for disabilities and deaths inevitably due to the conduct of modern industry. In the conscious or unconscious endeavor not to have the human cost of industry fall with cruel injustice upon workers and their families, the law of negligence gives rise to endless casuistry. *So long as the gamble of an occasional heavy verdict is not replaced by the security of a modern system of insurance, courts must continue to apply the notion of negligence in situations for which it was never intended.* Therefore, if a claim is made that an injury is causally related to a carrier's failure to maintain standards of care appropriate for employment on a railroad, the Federal Employers' Liability Act entitles an employee to establish that claim to a jury's satisfaction.<sup>69</sup>

He commented again on the "[i]njustices and crudities inherent in applying the common law concepts of negligence to railroading" in his dissenting opinion in *Stone v. New York, Chicago & St. Louis Railroad*:<sup>70</sup>

Under the guise of suits for negligence, the distortions of the Act's application have turned it more and more into a workmen's compensation act, but with all the hazards and social undesirabilities of suits for negligence be-

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62. *Id.* at 71.

63. 319 U.S. 350 (1943).

64. *Id.* at 354.

65. 336 U.S. 53 (1949) (Jackson, J., dissenting).

66. *Id.* at 76.

67. *Id.*

68. 337 U.S. 163 (1949) (Frankfurter, J., concurring).

69. *Id.* at 196 (emphasis added).

70. 344 U.S. 407 (Frankfurter, J., dissenting), *reh'g denied*, 345 U.S. 914 (1953).

cause of the high stakes by way of occasional heavy damages, realized all too often after years of unedifying litigation.<sup>71</sup>

The call for dismantling the FELA, while not universal, comes from a wide variety of sources. Labor unions disagreed on this issue, with some favoring retention of the FELA and some, at times, calling for its repeal.<sup>72</sup> The American Bar Association voiced its position favoring the abandonment of the FELA for state workers' compensation remedies. Since the last ABA resolution proposing repeal of the FELA was over twenty years ago, one can only speculate what position the ABA would take today. Finally, the judiciary, the one group most involved in administering the FELA system, consistently expresses its discontent with the FELA system.

### CONCLUSION

The FELA has become an outdated, unfair, and inefficient mechanism for handling railroad employee compensation claims. Since its enactment in 1908, state and federal workers' compensation statutes have provided remedies for persons injured in the course of employment. The goal of workers' compensation schemes is to provide swift and certain recovery of needed compensation for lost wages and medical expenses. In contrast, the FELA requires injured railroad employees to engage in lengthy litigation for the mere possibility of a successful tort claim. Damages in FELA cases are uncertain and awards for any given type of injury may be completely inconsistent.

Judicial conversion of the liability standards embodied in the statute transformed the FELA to almost a no-fault compensation system. Unlike employers subject to predetermined schedules of liability under workers' compensation laws, railroads face unlimited tort damages. In short, the railroads have the worst of both worlds.

But so do employees. They are subject to radically different levels of awards for the same injury. They are also subject to delay in setting those awards. They are hurt by a system that neither encourages nor provides for rehabilitation. Perhaps worst of all, the process causes alienation between the worker and his employer.

Society as a whole suffers also. A disproportionate amount of the money paid out in the FELA system goes to legal and investigative costs in administering the system rather than to injured employees. The adversarial nature of FELA litigation emphasizes blame instead of identifying the cause of an accident and improving safety in the

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71. *Id.* at 411.

72. *See, e.g.*, Resolution on Federal Employer's Liability Act, 1950 PROC. OF THE 29TH NAT'L CONVENTION OF THE BROTHERHOOD OF RAILROAD TRAINMEN 489 (opposing a compensation plan); Doak, *The Attitude of the Railroad Brotherhoods Toward Workmen's Compensation and the Reasons for Such Attitude*, 564 U.S. DEP'T OF LABOR, BUREAU OF LABOR STATISTICS BULL. 53 (1932) (favoring workers' compensation).

workplace.

The FELA is out of step with modern means of compensating persons injured in the workplace. It is an antiquated mechanism no longer serving the purposes for which it was enacted. It does not promote railroad safety, it does not foster good labor relations, and it is inadequate as a workers' compensation mechanism. For years, the judiciary complained it is unable to apply the concept of negligence to situations for which it was never intended, such as workplace accidents. For this reason, courts have been forced to convert the FELA into something resembling a workers' compensation mechanism. Now it is time for Congress to listen and to take action long overdue.



