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FELA REVISITED*

by

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Some schemes of social legislation can live too long. They cannot be revitalized by amendments or additions. The signs are many that the Federal Employers' Liability Act is that kind of statute.

Fifty years ago Congress tried to reach farther with FELA than the judges were willing to follow.¹ Abolishing the fellow-servant rule and adding comparative negligence to some work-injury cases affecting railroad employees does not smack now of drastic social legislation. Originally FELA included more than those two ideas,² but they were, and they still are, the heart of the scheme. In 1908 the Court warned Congress to restrict this remedial tort statute to instances where railroad workmen were engaged in interstate commerce when they were hurt.³ Thereafter in a second statute Congress reduced the scheme to satisfy the Court's demands.⁴ Then the Court decided that interstate commerce in the second statute meant transportation,⁵ and that the scheme of comparative negligence did not include instances where the carrier's defense was the assuming of a risk.⁶

Nowadays we know that the regulatory powers of Congress over interstate commerce are comprehensive. Congress can regulate employment relations in

* Much has been written on the Federal Employers' Liability Act. Recently a Symposium on the statutes and the case law was published in Volume 18 of Law and Contemporary Problems. Several papers on the subject are published in Volume 36 of the Cornell Law Quarterly. In this comment I am supplementing two of my articles, and I am borrowing from Professor Beale for the title. See Beale, *Haddock Revisited* (1926) 39 HARV. L. REV. 417.

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¹ The First Federal Employers' Liability Act was enacted on June 11, 1906. 34 STAT. 232.

² Even under the Act of 1908 a violation of safety appliance regulations was like statutory negligence, and assumption of risk was not a defense. Cf. Act of April 22, 1908, c. 149, sec. 4, 34 STAT. 66; 45 U.S.C. §54 (1952); Tait, *Making Democracy Safer for Railway Servants—How Toilers on Rails Broadened the Constitution*, 10 GEO. WASH. L. REV. 272 (1942).

³ The Employers' Liability Cases, 207 U.S. 463 (1908).

⁴ The Second Act was approved on April 22, 1908. 35 STAT. 65. See 45 U.S.C. §51 *et seq.* (1952). This statute was upheld in the Supreme Court. The Second Employers' Liability Cases, 223 U.S. 1 (1912).

⁵ *Shanks v. Delaware, Lack & West R.*, 239 U.S. 556 (1916). See Justice Van Devanter's well known quotation on p. 558: "the true test of employment in such commerce is, was the employee at the time of the injury engaged in interstate transportation or in work so closely related to it as to be practically a part of it." See Sutherland, J., in *Chicago & N.W. v. Bolle* 284 U.S. 74, 78-79 (1931).

⁶ *Toledo, St. L. & W. R. v. Allen*, 276 U.S. 165 (1928); *Delaware, Lack. & West R. v. Koske*, 279 U.S. 7 (1929). See Butler, J., in *Delaware, Lack. & West R. v. Koske* on p. 11: "Defendant was not bound to maintain its yard in the best or safest condition; it

transportation and in the production of goods for interstate commerce.⁷ Within ten years after Congress enacted the second Federal Employers' Liability Act the Supreme Court upheld workmen's compensation.⁸ In the compensation cases constitutional objections related rather to limitations of due process on plenary state powers than to the scope of delegated powers over areas of commerce, but the Court did permit state legislatures to reach far with schemes of social legislation. The judges hedged a bit when they decided that legislatures could not bring longshoremen or harbor workers under a state compensation program,⁹ but they clinched the case for a comprehensive work-injury statute in 1922 and 1923. State compensation schemes, the Court said, do not depend on contract,¹⁰ and they do not have to be restricted to hazardous occupations.¹¹

During the years between 1917 and 1923 the judges were adding legalisms¹² to the story of FELA. When a railroad workman was engaged in interstate transportation at the time of his injury, he had to sue for damages in tort under the federal act. That was the thesis of *New York Central Railroad v. Winfield*,¹³ and it is a doctrine to be reckoned with today. The pinpoint test for transportation and interstate commerce at the time of injury was biting into the possibilities for relief under FELA. But that biting did leave open to state regulation under compensation schemes a substantial number of railroad work-injury cases.¹⁴

had much freedom in the selection of methods to drain its yard and in the choice of facilities and places for the use of its employees. Courts will not prescribe standards in respect of such matters or leave engineering questions such as are involved in the construction and maintenance of railroad yards and the drainage systems therein to the uncertain and varying judgment of juries."

⁷ The National Labor Relations Act: 49 STAT. 449 (1935); Labor Board v. Jones & Laughlin, 301 U.S. 1, 34 (1937); Santa Cruz Co. v. Labor Board, 303 U.S. 453 (1938); The Fair Labor Standards Act: 52 STAT. 1060 (1938); United States v. Darby, 312 U.S. 100 (1941); Kirschbaum Co. v. Walling, 316 U.S. 517 (1942).

⁸ On the same decision day in March, 1917, the Court upheld the limited compulsory statute of New York (*New York Central R. v. White*, 243 U.S. 188); the voluntary pressure scheme of Iowa (*Hawkins v. Bleakly*, 243 U.S. 210); and the compulsory class insurance compensation statute of Washington State (*Mountain Timber Co. v. Washington*, 243 U.S. 219).

⁹ *Southern Pacific Co. v. Jensen*, 244 U.S. 205 (1917). Much of the sting has been removed from Jensen. There is a federal compensation statute now for longshoremen and harbor workers [44 STAT. 1424 (1927), 33 U.S.C. §901 *et. seq.* (1952)] and difficulties in allocating an injured harbor worker to the right program, state or federal, where there is a possibility of doubt, have been resolved by the Court in *Davis v. Department of Labor* [314 U.S. 244 (1941)].

¹⁰ *Cudahy Co. v. Parramore*, 263 U.S. 418 (1923). See Sutherland, J., on p. 423: "Workmen's Compensation legislation rests upon the idea of status, not upon that of implied contract; that is, upon the conception that the injured workman is entitled to compensation for an injury sustained in the service of an industry to whose operations he contributes his work as the owner contributes his capital—the one for the sake of the wages and the other for the sake of the profits."

¹¹ *Ward & Gow v. Krinsky*, 259 U.S. 503 (1922).

¹² A legalism is a doctrinal development or statutory interpretation on the level of judge-made law. It is a policy choice with a restrictive effect. Literally it is consistent with the taught law, but the choice could have been different. Usually lawmen are sophisticated enough to reconcile legalisms with the traditions about government of laws.

¹³ 244 U.S. 147 (1917).

¹⁴ See Miller, *Workmen's Compensation for Railroad Employees*, 2 LOYOLA L. REV. 138, 152-153 (1944).

Thirty years after the second act was passed Congress tried to erase some of the legalisms which the Court had developed. In 1939 the act was amended to relieve litigants from the pinpoint test and to extend the area of comparative negligence to all instances of affirmative defenses.¹⁵ Basically the scheme of the statute remained the same. Literally Congress did not touch the *Winfield* doctrine. Congress increased substantially the quantity of instances in which plaintiffs could be successful. Although that is a long way from workmen's compensation, perhaps most injured railroad workmen have been happier under the amended statute than they would be under compensation. When a workman has a good tort case the prize can be high.

The trends in the case law since 1939 have pointed to expansive interpretations.¹⁶ This is true especially in the assumption-of-risk cases.¹⁷ If the risks of railroading can be reduced, the Court has held, there is evidence of negligence.¹⁸ Comparisons of fault between a plaintiff's conduct and the non-feasances or mis-feasances of the company's personnel must be resolved by the fact-finders.¹⁹ The Court has accepted as sufficient instances depending on circumstantial factors which it would have rejected before 1939.²⁰

Literally under the 1939 amendment it is vital to inquire only whether some of the duties of the injured employee have pertained to the furthering of interstate commerce. Abolishing the pinpoint test has reduced inquiry into what the employee was doing when he was injured.²¹ It has been obvious to the judges that the amendment of 1939 was intended to be remedial. Many more plaintiffs and more classes of plaintiffs have been successful since 1939 than in the years before,²² but the judges are still groping to discover the boundaries of the pro-

¹⁵ Act of August 11, 1939, 53 STAT. 1404; 45 U.S.C. § 51 *et seq.* (1952).

¹⁶ See *Edwards v. Baltimore & O. R.*, 131 F. (2) 366 (C. A. 7th, 1942); *Erwin v. Pennsylvania R.*, 36 F. Supp. 936 (E.D.N.Y. 1941); *Maxies v. Gulf, M. & O. R.*, 358 Mo. 1190, 219 S. W. (2) 322, 10 A. L. R. (2) 1273 (1949). See Miller, *An Interpretation of the Act of 1939 (FELA)*, 18 L. & C. P. 241, 245-246 (1953).

¹⁷ *Tiller v. Atlantic Coast Line R.*, 318 U.S. 54 (1943).

¹⁸ *Wilkerson v. McCarthy*, 336 U.S. 53 (1948); *cf. Sadowski v. Long Island R.*, 292 N. Y. 448, 55 N. E. (2) 497 (1944). This standard is a long step from absolute liability. Sometimes verdicts are directed for carriers, and judgments for carriers are affirmed. See *Herdman v. Pennsylvania R.*, 25 L. W. 4117 (1957); Miller, *An Interpretation of the Act of 1939 (FELA)*, 18 L. & C. P. 241, 246 (1953).

¹⁹ *Wilkerson v. McCarthy*, 336 U.S. 53 (1948). Of immediate interest are four cases decided in the Supreme Court on February 25, 1957. In three of the cases decisions of intermediate courts adverse to the employees' claims were reversed. In one case an adverse decision was affirmed. In the three cases the Court reversed judgments for the carriers because there was evidence of negligence on both sides. The Court said that only the jury could reduce the evidence through comparisons of fault into verdicts for or against the carriers. Reversed: *Rogers v. Missouri Pac. R.*, 25 L. W. 4113; *Webb v. Illinois Central R.*, 25 L. W. 4116; *Ferguson v. Moore-McCormack Lines Inc.*, 25 L. W. 4118 (Jones Act). Affirmed: *Herdman v. Pennsylvania R.*, 25 L. W. 4117.

²⁰ Before 1939: *Coogan v. Chicago, M. & St. P. Ry.* 271 U.S. 472 (1926). After 1939: *Bailey v. Central of Vermont Ry.*, 319 U.S. 350 (1943); *Tennant v. Peoria & Pekin U. R.*, 321 U.S. 29 (1944).

²¹ See *Atlantic Coast Line R. v. Meeks*, 30 Tenn. App. 520, 208 S.W. (2) 355 (1947) cert. denied, 336 U.S. 827 (1948).

²² See Miller, *An Interpretation of the Act of 1939 (FELA)*, 18 L. & C. P. 241, 245-246 (1953); Miller, *Workmen's Compensation for Railroad Employees*, 2 LOYOLA L. REV. 138 154-155 (1944); *cf. cases cited in n. 15, supra.*

gram. What kinds of railroad employees are included in the statute, and how does this extending of the scheme affect the processing of claims for compensation under state law?

A reading of the 1939 amendment to include almost all railroad employees is not inconsistent with the text. Nevertheless, the story of the case law under the statute suggests something different, although lawmen generally will concede that Congress can prescribe some kind of work-injury program for all employees of interstate railroads whenever it chooses. The specter of *Winfield* has been hanging over judges to make them cautious. A broad reading of the 1939 Act will cut into the compensation area unless the judges are willing to confine the *Winfield* doctrine to the case law of the period before 1939.

Certainly under the 1939 amendment it is not important to determine whether a trainman was engaged in interstate commerce when he was hurt. No longer is it necessary to find out, for example, whether he was switching interstate or intrastate cars.²³ Under the clause of the first section with the broad language "any part of whose duties shall be in the furtherance of interstate or foreign commerce", all railroaders employed by interstate carriers can qualify as plaintiffs. In one of the first state court cases decided after 1939 the New York Court of Appeals concluded that the amendment was devised to cover back of shop employees.²⁴ Those are the men who work with tools and supplies and machines that are used in the servicing of railroad equipment. It is well recognized now that railroaders, back of shop employees and workmen engaged on new installations are covered under the statute as it stands.²⁵ But there are many other railroad employees, such as custodians, clerks, solicitors and all kinds of white-collar workers, including officials of the railroads. There are some cases where these other kinds of employees have been successful as plaintiffs or have been denied compensation. The list is not long and the principal question is still unanswered: how big is FELA?

Among those other injured employees are the following: a tie inspector who was injured when he fell from a loading platform while he was inspecting ties,²⁶ a traveling freight solicitor in the white-collar class,²⁷ a waybill pickup boy,²⁸ an

²³ See *Erwin v. Pennsylvania R.*, 36 F. Supp. 936 (E.D.N.Y. 1941). Under the old law, see *Harrington v. Industrial Commission*, 96 Utah 32, 83 P. (2) 270 (1938), on rehearing, 96 Utah 544, 88 P. (2) 548 (1939).

²⁴ *Baird v. New York Central R.*, 299 N.Y. 213, 86 N.E. (2) 567 (1949), *rev'g* *Baird v. New York Central R.*, 274 App. Div. 577, 86 N. Y. S. (2) 54 (3d dept. 1948).

²⁵ Back of shop employees: *Edward v. Baltimore & O. R.*, 131 F. (2) 366 (C.A. 7th, 1942); *Baird v. New York Central R.*, *supra* n. 23; *Maxies v. Gulf, Mobile & O. R.*, 358 Mo. 1100, 219 S. W. (2) 322, 10 A. L. R. (2) 1273 (1949); *Jordan v. Baltimore & O. R.*, 135 W. Va. 183, 62 S. E. (2) 806 (1950). Railroaders: this is the obvious category including almost everyone engaged in transportation; see, for example, *Missouri Pac. R. v. Fisher*, 206 Ark. 705, 177 S. W. (2) 725 (1944). New construction: *Agostino v. Pennsylvania R.*, 50 F. Supp. 726 (E. D. N. Y. 1943); but *cf. Moser v. Union Pac. R.*, 65 Idaho 479, 147 P. (2) 336 (1944) (where court interpreted the new amendment strictly to save a workman's claim for compensation). And see *Shelton v. Thompson*, 148 F. (2) 1 (C.A. 7th, 1945) (plaintiff was a storehouse custodian).

²⁶ *Erickson v. Southern Pacific Co.*, 39 Cal. (2) 374, 246 P. (2) 642 (1952).

²⁷ *Kettner v. Industrial Comm.*, 258 Wis. 615, 46 N. W. (2) 833 (1951).

²⁸ *Bowers v. Wabash R.*, 246 S.W. (2) 535 (Mo. App. 1952).

assistant timekeeper who worked in the general offices where he inspected all of the company's payrolls,²⁹ a woman clerk in a freight yard office³⁰ and a clerk in charge of the blueprint files for all of the structures and equipment on the company's lines.³¹ The cases about the traveling freight agent and the waybill pickup boy were compensation claims. Both employees were victims in traffic accidents. In both cases state court judges decided against the claimants because of the *Winfield* doctrine. *Winfield* did not suggest caution to these judges. They read much into the new amendment, and they let *Winfield* crush the claimants' chances.³² In the other instances the courts read the 1939 amendment generously to help the injured employees. All of them had *prima facie* cases sufficient to support claims for damages in tort.

There is language in some of the opinions to suggest a broad interpretation to include almost all railroad employees.³³ Usually the judges concede that Congress has not covered every railroad employee.³⁴ Sometimes it is more than a concession. "A train does not travel on a freight claim." So said Judge Yankwich in *Holl v. Southern Pacific Company*³⁵ when he decided against a plaintiff who was a file clerk in the freight claims department of the company's general offices. She had been injured while she was being extricated from a stalled elevator in the office building. Of course the corollary of this decision is that a person like this plaintiff may qualify as a compensation claimant if employees in her class are covered under a state statute and if time has not run against the processing of her claim.

The most important case on the list is the one about the file clerk who was the custodian of the railroad's blueprints. That case reached the United States Supreme Court.³⁶ It represents the Court's one contribution to the case law in

²⁹ *Straub v. Reading Co.*, 220 F. (2) 177 (C. A. 3d, 1955).

³⁰ *Lillie v. Thompson*, 332 U.S. 459 (1947) *rev'g* *Lillie v. Thompson*, 162 F. (2) 716 (C. A. 7th, 1947); *Lillie v. Thompson*, 173 F. (2) 481 (C. A. 6th, 1949).

³¹ *Reed v. Pennsylvania R.*, 351 U.S. 502 (1956) *rev'g* *Reed v. Pennsylvania R.*, 227 F. (2) 810 (C. A. 3d, 1955).

³² The instances are many in which back of shop employees have been denied compensation. *Baird v. New York Central R.*, 299 N. Y. 213, 86 N. E. (2) 567 (1949); *Trucco v. Erie R.*, 353 Pa. Super. 320, 45 A. (2) 20 (1946); *Reader v. Pennsylvania R.*, 113 Ind. App. 518, 49 N. E. (2) 387 (1945); *Albright v. Pennsylvania R.*, 183 Md. 421, 37 A. (2) 870 (1944); *Williams v. Chicago, R. I. & P. Ry.*, 155 Kan. 813, 130 P. (2) 596 (1942); *Southern Pacific Co. v. Ind. Acc. Comm.*, 19 Cal. (2) 271, 120 P. (2) 880 (1942).

³³ See *Biggs, C. J.*, dissenting in *Reed v. Pennsylvania R.*, 227 F. (2) 810, 814: "As was pointed out by the Superior Court of Pennsylvania . . . the amending language is very comprehensive, so inclusive indeed that most railroad employees come within its scope." Such a result may be unfortunate (quaere: because of *Winfield*?) but seems to have been the intention of Congress."

³⁴ The plaintiff's lawyer conceded in the *Reed* case that the amended statute does not include all railroad employees. Perhaps it is significant that the list of cases is short where railroad employees are neither railroaders nor back of shop workmen. Lawyers have hesitated to claim too much.

³⁵ 71 F. Supp. 21 (N. D. Calif. 1947).

³⁶ *Reed v. Pennsylvania R.*, 351 U.S. 502 (1956).

this area.³⁷ The plaintiff worked in the general offices of the Pennsylvania Railroad in Philadelphia. The blueprints were plans for buildings, machines and rolling stock located at many places on the company's lines. The clerk was injured in her office when a cracked window pane was blown upon her during a high wind. Her case was presented on the theory that her employer had not afforded her a safe place to work. The trial judge and the majority in the court of appeals decided against the plaintiff's case on jurisdictional grounds.³⁸ She could not qualify under FELA, and there was not the required diversity of citizenship for a common law tort action in a federal court.

The Supreme Court reversed the judgment of the court of appeals. In one of his last cases Mr. Justice Minton wrote the opinion of the court. It was obvious to the majority of five that a plaintiff under FELA does not have to be a railroader or a shop employee. Although Congress could have included all railroad employees under the statute, Mr. Justice Minton agreed that this act is not open to that interpretation. Nevertheless, the amendment was directed toward something more than the abolishing of the pinpoint transportation test. Although furtherance of commerce does not include everything which interstate railroad employees may do, the Court decided that such commerce does include duties which relate to the keeping of the system's blueprints. Perhaps the Court could not have given a different kind of answer, but this is an administrative decision. It solves the plaintiff's problem in this case. Perhaps it indicates something of a probable trend. It does not afford a general measure for all cases.

Mr. Justice Frankfurter dissented and he was joined by Justices Reed and Harlan.³⁹ They were concerned about the effects of the *Winfield* doctrine and the trend toward expansive interpretation. Because of *Winfield* they wanted to be cautious about extended coverage of railroad employees under the amendment of 1939. They would have restricted the amendment to those employees only who are affected by the hazards of the railroad business. The answer to this objection is one which cannot be developed here. It has been explored at length in other publications.⁴⁰ The effects of *Winfield* must be confined to the case law of the era before 1939 or the remedial effects of the amendment will be drastically reduced.

There is no easy solution for these problems of interpretation. The meaning of the Act of 1939 as to scope and coverage of possible claimants has been conditioned by the anticipated effects of *Winfield*, and it has not been easy to persuade judges that the *Winfield* doctrine can be confined to the 1939 case law.⁴¹ After

³⁷ *Lillie v. Thompson* was a Supreme Court case (332 U.S. 459) but counsel did not argue the question of scope nor did the Court discuss it.

³⁸ *Reed v. Pennsylvania R.*, 227 F. (2) 810 (C. A. 3d, 1955).

³⁹ Mr. Justice Burton dissented also for the reasons stated in the court of appeals.

⁴⁰ Miller, *An Interpretation of the Act of 1939 (FELA)* 18 L. & C. P. 241, 251, 254 (1953); Miller, *Workmen's Compensation for Railroad Employees*, 2 LOYOLA L. REV. 138, 154-156 (1944).

⁴¹ The trend of the case law is one-sided. Except in Illinois [*Thompson v. Industrial Commission*, 380 Ill. 386, 44 N.E. (2) 19 (1942)] in South Carolina [*Boyleston v. Southern Ry.*, 211 S. C. 232, 44 S. E. (2) 537 (1947)] and in a dissent in a New York

eighteen years judges are still working to discover the limits of the wider area of the remedial statute, and they are trying to solve the problem of scope through a case-by-case kind of administrative routine. It is a kind of routine on which some lawmen thrive. Nevertheless, hairline distinctions and fine analogies about interstate transportation and assumption of risk generated enough dissatisfaction among lawmen of an earlier day that Congress enacted a remedial amendment. On the whole the courts have responded well in administering the amended statute to reduce the legalisms which were potent before 1939. That Congress supposed the remedial effects of the amendment would be available for more railroad employees is obvious from a reading of the text and a reading of the committee reports. That we are still having to struggle through another set of legalisms⁴² after a remedial amendment was adopted can mean that the whole scheme is out of date.

Perhaps the area for adjustments and accommodations through statutory interpretation of FELA is too unimportant to solicit much creative thinking toward doctrinal development. The problems suggested by the legalisms of FELA are common in other areas of tort. The fault concept as a basis for social responsibility in an industrial society is obsolete. Lawyers have lived with the fictions and incongruities of the taught law of torts because the cruelties of the system are tempered practically by doctrines like *respondeat superior* and *res ipsa loquitur*, and by conditions like risk-shifting and administrative measuring through the jury system.

Some day lawmen will have to reach for alternatives to fault in the casualty field. Imaginative men will develop casualty adjustment schemes with trial routines sufficient to satisfy conventional requirements in state constitutions about trial by jury.⁴³ In the work-injury field a system is ready for re-shaping to the railroad business. Workmen's compensation is conventional. For many lawyers and many clients FELA as we know it serves useful functions, but we are beginning to develop a new round of legalisms which we shall need legislation to reduce. With *Winfield* in the background, remedial additions by amendment are impossible. The statutory changes must be drastic. In this area that means workmen's compensation for railroad employees.⁴⁴

Appellate Division [Heffernon, J., in *Wright v. New York Central R.*, 263 App. Div. 461, 33 N. Y. S. (2) 531, 532 (1942)] all of the judges who have considered the problem are agreed that the effects of *Winfield* must follow any extension of FELA. See Miller, *An Interpretation of the Act of 1939 (FELA)*, 18 L. & C. P. 241, 243-244.

⁴² The vice in the new round of legalisms is the *Winfield* doctrine. Paradoxically a generous interpretation in the interest of injured employees as plaintiffs under the Act can hurt the same kinds of employees who seek compensation under a state law.

⁴³ Cf. EHRENZWEIG, *FULL AID INSURANCE FOR THE TRAFFIC VICTIM* (1954) (an ingenious proposal for casualty problems in one area, including a voluntary insurance program with supplementary legislation).

⁴⁴ For other reasons than those suggested in this comment Mr. Justice Frankfurter would substitute a compensation scheme for FELA. See his dissent in the three cases of February 25, 1957 (see n. 16 *supra*) in 25 L. W. 4119.