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FELA REVISITED

JERRY J. PHILLIPS*

INTRODUCTION

In 1988 I wrote an article¹ evaluating the effectiveness of the Federal Employers' Liability Act (FELA or the Act)² as a system of deterrence and compensation for railroad injuries, as contrasted with administrative schemes of safety regulation and compensation. I undertook this study in response to persistent criticisms of the FELA³ and repeated attempts on the part of the railroad industry to have the Act repealed and replaced by a program similar to a workers' compensation system.

The criticisms were that the FELA is excessively costly, slow, unpredictable, and divisive.⁴ I found none of these criticisms to be supported by the available evidence.

One interesting argument against the FELA was that the railroads have become a relatively safe industry,⁵ so that a tort-based system of compensation is no longer necessary to provide a safety incentive. I found no evidence to support the argument that the railroads are safe. I found considerable evidence to the contrary, to support the conclusion that the railroads continue to be a hazardous industry.⁶ But even if railroads have become relatively safe over the course of the twentieth century, this trend may well be owing to the safety incentive provided by the FELA, above and beyond the technical safety improvements otherwise effected in the industry.⁷ If the safety incentive of the Act were removed, the hazardousness and injury rate of railroads might well increase.

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1. Jerry J. Phillips, *An Evaluation of the Federal Employers' Liability Act*, 25 SAN DIEGO L. REV. 49 (1988).

2. 45 U.S.C. §§ 51-60 (1988).

3. See Phillips, *supra* note 1, at 49 n.2 (citing Victor E. Schwartz & Liberty Mahshigian, *The Federal Employers' Liability Act, a Bane for Workers, a Bust for Railroads, a Boon for Lawyers*, 23 SAN DIEGO L. REV. 1 (1986); Arnold I. Havens & Anthony A. Anderson, *The Federal Employers' Liability Act: A Compensation System in Urgent Need of Reform*, 34 FED. B. NEWS & J. 310 (1987)).

4. See Phillips, *supra* note 1, at 55-61.

5. See Schwartz & Mahshigian, *supra* note 3, at 2.

6. Phillips, *supra* note 1, at 51-53.

7. *Id.* at 54.

Another objection that has been leveled against the FELA is that it is anomalous today, when almost all other industrial accidents in this country are compensated under workers' compensation schemes.⁸ This objection has validity, however, only if no-fault workers' compensation is superior to the FELA compensation plan: there is, however, no persuasive evidence that it is. On the contrary, the spiraling costs of workers' compensation schemes, the intense politicization of the subject and structure of workers' compensation, widespread dissatisfaction with the inadequacy of compensation payments under workers' compensation, nagging doubts about its efficacy as a system of deterrence, and substantial indication of widespread fraud, abuse, and waste within its administration,⁹ lead to serious doubts not only as to whether workers' compensation is a better system than the FELA, but whether in fact it may on balance be a significantly worse system.

The criticisms of the FELA continue,¹⁰ and a federal committee has undertaken an in-depth study of the question of whether the Act should be replaced by an administrative scheme like workers' compensation.¹¹ It seemed an appropriate time, therefore, to revisit the subject of my earlier study, to see if the conclusions in that study are still valid. My review of the current evidence leads me to believe that my prior conclusions remain valid and, if anything, have been further substantiated by the passage of time. Perhaps an equally important question, then, is why the attacks upon the FELA continue.

I. THE EVIDENCE

There may be no better source of information as to the state of affairs in the railroad industry than that provided by the industry itself. If such information were prepared for public relations purposes, its reliability would be questionable. A study by the Association of American Railroads in 1991,¹² however, was compiled for

8. Maritime employees, however, are covered under the FELA by the Merchant Marine Act (the Jones Act). See 46 U.S.C. app. § 688 (1988).

9. See generally Gary T. Schwartz, *Waste, Fraud, and Abuse in Workers' Compensation: The Recent California Experience*, 52 MD. L. REV. 983 (1993).

10. See, e.g., Thomas E. Baker, *Why Congress Should Repeal The Federal Employers' Liability Act of 1908*, 29 HARV. J. ON LEGIS. 79, 84 (1992) (arguing that "[a]lthough the societal, industrial, and legal environments at the turn of the century warranted the enactment of the FELA, the current societal, industrial, and legal environments do not justify the statute's continued existence").

11. See Schwartz, *supra* note 9, at 995. Professor Schwartz is a member of the committee. *Id.*

12. Association of American Railroads, 1990 Report of Claim & Litigation Experience (1991) (on file with author) [hereinafter *AAR Report*].

internal use and there is no reason to doubt its accuracy.

The study offers a number of revealing insights. In 1990, the total FELA payout by railroads was \$877.4 million (an eleven percent increase over the previous year), representing 2.9 percent of gross operating revenues.¹³ The study notes, however, that “[d]espite the increase in payout the exposure base indices continued to decline. In 1990, the number of employees decreased 2.45%, total man hours worked decreased 3.56%, and miles of road decreased 2.72%.”¹⁴

The increase in payouts from 1989 to 1990 resulted not so much from increased lawsuits, but from an increase in payment of claims where no lawsuit was filed. The lawsuit payout in 1990 was \$477.9 million, a seven percent increase from 1989, while the payout in that year for claims not resulting in lawsuits was \$399.5 million, a seventeen percent increase from 1989.¹⁵

The relationship between the number of lawsuits and the payout amount is striking. According to the study, there were 46,901 nonlitigated claims disposed of—with or without payment—compared to 5,729 disposed of after a suit had been filed.¹⁶ That is to say, while claims for which no lawsuit was filed accounted for only about forty-six percent of the *money* paid out by railroads over employee injuries, they amounted to more than eighty-nine percent of the *number* of all such cases. Stated the other way around, lawsuits, which accounted in number for less than eleven percent of total claims made, represented fifty-five percent of the total payout. Thus, lawsuits galvanized the payout process and set the trend for the fair value of FELA claims.

The average FELA payout for 1990, including both lawsuits and nonlitigated claims, was \$25,851. The average nonlitigated payout in that year—not counting claims disposed of without any payment at all—was \$14,161, while the average litigated payout was \$83,419.¹⁷ These figures illustrate the catalytic effect of lawsuit claims on the overall payout.¹⁸ They also demonstrate that the claims, whether resulting in a lawsuit or not, are on the average modest in amount. Moreover, the average lawsuit payout dropped by 11.19% from 1989 to 1990, and the average payout for lawsuits

13. *Id.* at 1-5.

14. *Id.*

15. *Id.*

16. *Id.* at 2-9.

17. *Id.* at 2-8.

18. *See Phillips, supra* note 1, at 60.

and nonlitigated claims dropped by 20.22% during the same period.¹⁹

If occupational illness claims—defined for purposes of this study as hearing-loss and asbestos-injury claims²⁰—are excluded, the average payout figures rise significantly—to \$21,954 per nonlitigated claim, \$143,144 per lawsuit claim, and \$43,750 per claim overall.²¹ This difference is explainable—according to the study—by the fact that occupational-illness claims, whether litigated or not, “have settled for far less than non-occupational cases.”²² The lion’s share of the occupational-illness claims was represented by hearing loss as opposed to asbestos claims. In 1990, for example, approximately 30,000 hearing-loss claims were filed, as compared to about 1,200 asbestos claims for the same period.²³

Thus, it can be seen that lawsuits provide an upper pressure on the amount of FELA payouts. Also, whether the payouts are analyzed in terms of lawsuits, claims not resulting in lawsuits, all claims, or claims not including occupational illnesses, the FELA payouts on the average are not large compared to personal injury damages in other contexts.²⁴

The railroads pay significant amounts of non-FELA claims. In 1990, for example, total employee-claim payouts amounted to \$877,431,702, while railroad-crossing payouts for that year amounted to \$87,302,627, and a third category described by the study as “miscellaneous payouts” amounted to \$70,883,640.²⁵ Thus, railroad-crossing claims equaled nearly ten percent, and miscellaneous claims about eight percent, of the FELA claims. The miscellaneous and crossing categories are presumably tort claims,²⁶ which would not be eliminated by the adoption of a workers’ compensation type of scheme for employee injuries. Moreover, the size of the crossing claims illustrates the continuing hazardous nature of railroads as a transportation industry. These crossing claims also raise an equitable issue, suggesting that there is no reason to treat

19. See *AAR Report*, *supra* note 12, at 2-8.

20. *Id.* at 1-5.

21. *Id.* at 3-9.

22. *Id.*

23. *Id.* at 3-3.

24. See Phillips, *supra* note 1, at 60. “[T]he railroad industry itself admits that recovery of lost wages is the central issue in the majority of FELA claims, and that the total settlement value of an FELA claim is determined primarily by the economic loss sustained by the claimant.” *Id.*

25. *AAR Report*, *supra* note 12, at 4-1.

26. It is possible that these figures also include administrative fines and contract claims. See Phillips, *supra* note 1, at 52-53.

railroad employee injuries differently from non-employee injuries. If tort liability is the preferred method for establishing liability, it should apply to both categories of claims.

As noted in the introduction, not all has been a bed of roses—even from the employer perspective—in the realm of workers' compensation. It is by no means clear that employers, let alone employees, would benefit from a changeover from the FELA to a no-fault workers' compensation system in the railroad industry. The cost of workers' compensation has been steadily and dramatically rising during the past decade and more.²⁷ Workers' compensation has become a politicized subject, and there is evidence of widespread fraud, abuse, and waste in the system.²⁸ Moreover, a perennial concern has been the undercompensation of injured employees in workers' compensation payouts. All of these factors argue against changing from the FELA to a workers' compensation scheme for compensating railroad employee injuries.

A growing area of coverage for workers' compensation recovery involves injuries resulting in mental disability. While the earlier cases required the presence of some physical injury either causing or resulting from the mental injury, the modern trend is to allow compensation for pure mental injury that is shown to be job-related.²⁹ While most courts require that the mental injury result from a sudden, traumatic event or from extraordinary employment stress, there is a trend—at least in California—to allow workers' compensation recovery for pure mental injury resulting from ordinary job stress, even when the employee is especially susceptible to such injury.³⁰

It is evident that workers' compensation claims for pure mental distress constitute a potential for a large increase in the number and size of such claims in our stressful society. It is as yet unclear whether recovery for job-related pure mental distress will be extended to FELA claims. In view of the trend toward recovery in this regard under workers' compensation, however, it seems unlikely that such recovery will be denied under the FELA.

27. See, e.g., Robert Pear, *Health-Care Plan May Cover Injuries on Jobs and Roads*, N.Y. TIMES, May 7, 1993, at A1; *Employees Make Fewer Claims for More Money*, CHRISTIAN SCI. MONITOR, May 5, 1993, at 8.

28. See generally Schwartz, *supra* note 9.

29. See 1B ARTHUR LARSON, THE LAW OF WORKER'S COMPENSATION § 42.21 (1991).

30. Schwartz, *supra* note 9, at 1008.

II. THE NATURE OF THE CONTROVERSY

The usual objections to the FELA—slowness, costliness, unpredictability, and divisiveness—do not appear to be valid criticisms of the Act. The basis for the attacks must therefore lie elsewhere.

Why does railroad management seek the repeal of the FELA? It seems apparent that they believe payouts, as well as overall costs, under a workers' compensation scheme would be significantly less than under the FELA. It hardly seems likely that they would so vigorously advocate a change if they thought the cost of workers' compensation would be more than the cost of FELA compensation. If they believe that a workers' compensation scheme would, on the whole, be more beneficial or fairer to railroad employees than the FELA, the demonstration of this conclusion is not apparent, and railroad management has done an exceedingly poor job in trying to make it apparent. Moreover, management may well be incorrect in believing that the costs of administering a workers' compensation scheme would be less than the costs of administering the FELA, especially in view of the spiraling costs of workers' compensation.

There is some indication that railroad management believes, or believed, that recovery for occupational illnesses would be less likely under workers' compensation than under the FELA.³¹ If so, there appears to be no basis for this belief. While the amount of recovery may be less under workers' compensation than under the FELA, it is by no means clear that the likelihood of recovery will be less under one or the other.

It is noteworthy that railroad *employees* generally find the FELA to be a satisfactory method of injury compensation. Indeed, if they did not, the Act would have been repealed long ago and replaced by a workers' compensation scheme, because the railroad industry has tried repeatedly to bring about such a change, almost from the inception of the FELA. It is the railroad employees, through their union representatives, who have stood in the way of such a repeal.³²

Why do railroad employees prefer to retain the FELA, rather than switch to a workers' compensation scheme? Apparently they believe the payouts under the FELA are on the whole more generous and fairer than they would be under a workers' compensation administrative scheme. The evidence appears to bear them out on this point.

31. See Phillips, *supra* note 1, at 54.

32. See Baker, *supra* note 10, at 90-92.

The assumed virtue of a workers' compensation system is its automatic payout, without regard to proof of employer fault. Proof of employment causation (injury arising out of and in the course of employment) is another matter, however, since a great deal of workers' compensation claims—especially those involving occupational diseases—are vigorously contested by employers on this point. Under the FELA, on the other hand, the requirements for proving both fault and causation have been attenuated, so that it is likely that the FELA plaintiff can satisfy these elements in most of the cases where the non-FELA plaintiff would not be able to establish liability under a workers' compensation scheme.³³ Pure comparative fault and the liberal choice of venue rules are also features that make the FELA an attractive remedy to railroad employees.³⁴

A feature of the FELA that should be given significant weight is its accident-deterrent effect in providing an incentive to safety. Presumably, workers' compensation liability also provides a safety incentive, but probably not as great an incentive as tort liability because of the potentially greater amount of exposure under the FELA.³⁵ A society should act with great caution in altering an established institution of proven workability such as the FELA, especially where that institution provides an apparently strong safety incentive to a hazardous activity such as the railroad industry.

CONCLUSION

The burden of proof should be on the proponents of change to prove the desirability of change. The railroad industry has not carried this burden in its efforts to obtain repeal of the FELA. The Act provides a system of individualized justice that appears to work well. It provides fair, and not excessive, compensation. It likely provides a greater employer incentive to safety than workers' compensation. As the adage goes: If it ain't broke, don't fix it.

33. *Id.* at 51; GUIDO CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES 32-33 (1982).

34. See Phillips, *supra* note 1, at 50-51.

35. See *id.* at 53-54.