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Jerry J. Phillips

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# An Evaluation of the Federal Employers' Liability Act

JERRY J. PHILLIPS\*

## INTRODUCTION

Recently, renewed attacks have been leveled at the Federal Employers' Liability Act (FELA).<sup>1</sup> These attacks contend that the Act should be replaced with some sort of federal or state no-fault workers' compensation system.<sup>2</sup> The charges leveled against FELA are that: (1) fault-based liability is against the developing trend of modern tort law and out of step with the widespread adoption of workers' compensation schemes generally for industrial injuries; (2) the results under FELA are unpredictable; (3) the process is unduly protracted; (4) the administrative costs and settlement payouts are excessive; and (5) the procedure is adversarial, fostering divisiveness between employer and employee and discouraging rehabilitation of the injured worker.

An examination of the available data indicates that these charges are either unsupported or demonstrably incorrect. FELA serves as a real and valuable incentive to promote employee safety in the railroad industry, which remains one of the most hazardous in this country. FELA's cost of operation is commensurable with that of comparable workers' compensation systems and it is not an unduly slow procedure. Its results are tailored to the individual needs and losses of the injured worker. Finally, FELA is no more adversarial

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\* W.P. Toms Professor of Law, University of Tennessee. A.B. 1956, Yale University; M.A. 1958, Cambridge University; J.D. 1961, Yale Law School.

1. 45 U.S.C. §§ 51-60 (1986).

2. See, e.g., Schwartz & 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); Havens & Anderson, *The Federal Employers' Liability Act: A Compensation System in Urgent Need of Reform*, 34 FED. B. NEWS & J. 310 (1987).

than workers' compensation programs, and probably less so. Overall, FELA is a fairer system than workers' compensation in both design and operation.

In recent years state and federal workers' compensation systems have come under a variety of substantial attacks for costliness, inadequacy of benefits and of coverage, rigidity of application, and basic unfairness.<sup>3</sup> These charges raise the fundamental question of whether or not the trend should be toward a FELA type of system, and away from workers' compensation schemes, rather than the other way around.

The railroad industry is concerned with the continued applicability of FELA to railroad injuries and occupation-related diseases because they foresee burgeoning claims for occupational injuries and diseases that may not become manifest until after employee retirement.<sup>4</sup> FELA would cover such claims, but workers' compensation would not. As will be discussed below, it is debatable whether an employer could escape tort liability for such claims. Even under a workers' compensation system, railroads may not escape liability due to developing tort exceptions to the exclusivity provisions for intentional injuries. The more fundamental issue, however, is whether the railroads *should* escape liability for such injuries. The fair answer is that they should not.

#### THE BACKGROUND AND DEVELOPMENT OF THE FEDERAL EMPLOYERS' LIABILITY ACT

The Federal Employers' Liability Act was passed in 1908,<sup>5</sup> as a means of providing a reasonably reliable tort compensation system for workers in the dominant American railroad industry, which was causing an appalling number of injuries and deaths per year. FELA preceded the wide adoption of workers' compensation systems in this country. It retained the tort characteristics of fault-based liability and compensatory damages based upon actual damages suffered, rather than upon a fixed or arbitrary scale of benefits. FELA adopted a pure comparative fault standard, except that assumption of risk was no defense in cases where the employer was guilty of negligence *per se* in violating a federal safety statute or regulation.<sup>6</sup> In 1910 FELA was amended to provide concurrent state and federal

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3. See *infra* notes 32 & 88 and accompanying text.

4. See I Ass'n of Am. R.R. Steering Committee, Federal Employers' Liability Act Study (1983) (unpublished manuscript on file with the author) [hereinafter AAR Report].

5. The Act as originally passed in 1906, 34 Stat. 232, was struck down in *Howard v. Illinois Cent. R.R.*, 207 U.S. 463 (1908), owing to the Court's finding that the Act unconstitutionally regulated intrastate commerce.

6. See 45 U.S.C. § 53.

jurisdiction and nonremovable venue in any jurisdiction where the defendant resided or did business, or where the cause of action arose.<sup>7</sup> In 1939 Congress eliminated the defense of assumption of risk, established a three-year statute of limitations, and made it a crime for any person to attempt to prevent the furnishing of information relating to the injury or death of an employee.<sup>8</sup>

In a series of decisions, notably *Rogers v. Missouri Pacific Railroad*<sup>9</sup> and *Gallick v. Baltimore & Ohio Railroad*,<sup>10</sup> the United States Supreme Court broadened and liberalized the definitions of fault and proximate cause as applied under FELA. *Rogers* held that a jury question of fault is presented if "employer negligence played any part, even the slightest, in producing the injury or death for which damages are sought."<sup>11</sup> In *Gallick* the Court ruled that a jury question of causation is presented where there is "evidence that any employer negligence caused the harm, or, more precisely, enough to justify a jury's determination that employer negligence had played any role in producing the harm."<sup>12</sup> The salutary effect of these decisions was to present a jury question of fault and causation in all but the clearest instances. As a result, FELA cases generally are decided by a panel of one's peers.

#### FELA AS A SAFETY INCENTIVE

One commentator has contended that the "railroad industry is one of the safest industries today," and that the need to provide incentives for railroads to make their industry safer by means of a FELA system of tort liability "no longer exist[s] today."<sup>13</sup> These assertions are simply not borne out by the evidence.

A current economic study of the railroad industry shows that it continues to be one of the most dangerous occupations in the American economy.<sup>14</sup> This study reports that from 1975 to 1984, "high speed and mile-long trains, hazardous commodities and drastic elimination of employees" contributed to an injury rate in the railroad industry that was "fifty percent higher than the average for the en-

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7. 45 U.S.C. § 56; 28 U.S.C. § 1445(a) (1973).

8. See 45 U.S.C. §§ 54, 56, 60.

9. 352 U.S. 500 (1957).

10. 372 U.S. 108 (1963).

11. See *Rogers v. Missouri Pac. R.R.*, 352 U.S. at 506.

12. *Gallick v. Baltimore & O.R.R.*, 372 U.S. at 116.

13. See Schwartz & Mahshigian, *supra* note 2, at 2.

14. Oldfather, FELA - Is it Time for Change? 2 (1987) (unpublished manuscript on file with the author).

tire economy.”<sup>15</sup> In addition, the study notes that almost all of the railroad crafts “work outside in all weather by day and by night on all days of the year, often on risky footing on or near moving equipment.”<sup>16</sup> The 1983 amputation rate for railroad employees, the study found, “was 58% greater than that for all U.S. industry,” and the fracture rate 114% greater.<sup>17</sup> During the 1975-1985 decade, “953 on-duty railroad employees were killed and 532,033 were injured.”<sup>18</sup> A November 1987 report of The Railway Labor Executives’ Association (RLEA) states that “[o]ver the last decade, an average of almost 49,000 rail workers have been injured *each year*,” resulting in an average per-year injury of “1 out of every 10 rail employees.”<sup>19</sup>

The railroad industry is not only a hazard to its employees, but a substantial and growing danger to the public at large as well. Ninety-five percent of the railroad accident fatalities in 1985 were sustained by nonemployees, such as motorists at railroad crossings.<sup>20</sup> A 1987 report of the Illinois Public Action Council (IPAC) states that for the decade 1976-1985 an average of 1253 non-employees were killed per year in railroad accidents.<sup>21</sup> That same report notes that approximately 25% of the 500 major rail accidents reported in the *New York Times* between 1975 and 1987 “involved toxic substances, explosives, hazardous waste or nuclear material,”<sup>22</sup> and that “[a]lmost one in ten rail cars involved in accidents now contains hazardous materials.”<sup>23</sup> Furthermore, the report states that the amount of hazardous substances “as a percentage of total rail tonnage,” is “rapidly increasing.”<sup>24</sup> The number of “rail-transported nuclear spent fuel shipments increased ten times from 1975 to 1985,” and the “Office of Technology Assessment of the U.S. Congress estimates that rail shipments of spent nuclear fuel will be involved in from one to five rail accidents per year by the year 2000.”<sup>25</sup>

Railway safety “is not covered by OSHA [Occupational Safety and Health Act]” but instead is covered by the Rail Safety Act which, according to the RLEA report, “does not provide incentives

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15. *Id.* at 1-2.

16. *Id.* at 2.

17. *Id.*

18. *Id.*

19. RAILWAY LABOR EXECUTIVES’ ASS’N, FELA - A MATTER OF RAILROAD SAFETY, INJURY COMPENSATION AND CORPORATE ACCOUNTABILITY 7, 12 (1987) (emphasis original) [hereinafter RLEA REPORT].

20. Oldfather, *supra* note 14, at 2.

21. ILL. PUB. ACTION COUNCIL, RAILROADING THE PUBLIC SAFETY 2 (1987) [hereinafter IPAC REPORT].

22. *Id.* at 15.

23. *Id.* at 2.

24. *Id.*

25. *Id.*

for compliance with safety regulations."<sup>26</sup> The report further points out that "[r]ail companies know they can be fined only if they fail to correct hazards *after* they are found by an inspector," with the result that "in 1986 the FRA [Federal Railroad Administration] imposed fines that average only about \$10 per cited defect."<sup>27</sup> The IPAC report states that the FRA "has not required strict compliance with the amended power brake rules," and that trains "regularly leave terminals with little or no inspection."<sup>28</sup> The report also states that the FRA "is ignoring the increasingly widespread failures by the railroads to report accidents and incidents as required by law."<sup>29</sup> Thus, it is apparent that governmental regulation does not function as an adequate safety incentive for the rail industry.

Nor can a no-fault workers' compensation system be relied on to provide the necessary safety incentive for the railroad industry. A recent study of the Rand Corporation Institute for Civil Justice indicates that the less the injury costs to an employer, the less inclined the employer is to correct its safety problems.<sup>30</sup> It is well documented that workers' compensation payments are generally less than tort awards, especially for the more serious injuries.<sup>31</sup> Workers' compensation premiums do not provide an adequate safety incentive to employers. Although the employers of about 80% of the nation's employees that are covered by workers' compensation are experience-rated (that is, workers' compensation premiums are based, in part, on the company's safety record), there is no indication of any substantial correlation between such ratings and increased workplace safety.<sup>32</sup> According to IPAC, the predictability of workers' compen-

26. RLEA REPORT, *supra* note 19, at 4, 13.

27. *Id.* at 13. In a letter dated June 3, 1987 to the Hon. John J. Exon, Jr., Chairman of the United States Senate Subcommittee on Surface Transportation, James R. Snyder, Chairman of the Safety Committee of RLEA, states that "out of 311,000 defects discovered by FRA inspectors in 1986, only \$3.1 million in fines were imposed last year, or about \$10 per defect." As one writer notes, because government agencies "are subject to political pressures" and may relax safety enforcement "to advance an Executive's political agenda," such enforcement should be backed up "with the strong general deterrence provided by tort law." T. Haas, *On Reintegrating Workers' Compensation and Employer's Liability* 36, 38 (1987) (unpublished manuscript on file with the author).

28. IPAC REPORT, *supra* note 21, at 23.

29. *Id.* at 19.

30. RAND CORP. INST. FOR CIV. JUST., *AN OVERVIEW OF THE FIRST SIX PROGRAM YEARS* 59 (1986).

31. See Oldfather, *supra* note 14, app. G at 72-73.

32. J. Phillips, *The Relationship Between the Tort System and Workers' Compensation - The True Cost* 7-8 (1982) (unpublished manuscript on file with author) (citing THE REPORT OF THE NATIONAL COMMISSION ON STATE WORKMEN'S COMPENSATION LAWS 96-97 (1972)).

sation payouts, whether in insurance premiums or self-insured liability, encourages the employer practice "of trading the lives of employees and low, predictable compensation benefits for short-term profit."<sup>33</sup>

The fault-based FELA system, with its compensation exceeding the typical workers' compensation award (particularly for the more serious injuries), is designed to serve as a real and present safety incentive. A recent study of the Consumer Federation of America concluded that the tort system, "[b]y assigning responsibility for actions . . . is one of the strongest mechanisms in our capitalist society for ensuring that the profit motive is pointed toward positive achievements."<sup>34</sup> The comparative fault aspect of FELA<sup>35</sup> serves as an incentive to employee safety as well.

By contrast, the Steering Committee for the Association of American Railroads (AAR) strongly advocated replacing FELA with some sort of no-fault workers' compensation scheme. Among other things, they foresaw "the burgeoning onset of occupational illness claims compensable under the FELA now sweeping the country," including a "great increase in hearing loss claims" and the increase "at an alarming rate" of "[a]sbestos-related claims."<sup>36</sup> The Steering Committee also noted "a recent rash of alarming jury awards," including "the \$58 million of judgments against the Norfolk & Western Railroad Company in the recent dioxin cleanup cases."<sup>37</sup> However, IPAC points out that the "railroads knew of these hazards for years," but "took no corrective action until lawsuits were filed against them under the FELA."<sup>38</sup> The Council also notes that work disabilities and diseases that are discovered after an employee retires or leaves the work force are not compensable under workers' compensation plans.<sup>39</sup> Such injuries are compensable, however, under FELA.<sup>40</sup>

The AAR may be mistaken in believing that tort liability can be avoided under a workers' compensation scheme for injuries from workplace dangers of which the employer was aware but took no corrective action. Such liability may fall within an intentional misconduct tort exception to the exclusive remedy provisions of workers'

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33. IPAC REPORT, *supra* note 21, at 49.

34. CONSUMER FED'N OF AM., THE BENEFITS OF THE MODERNIZATION OF THE TORT LAW IN THE CONTEXT OF THE SOCIAL MOVEMENT FOR IMPROVED SAFETY AND QUALITY IN THE NATIONAL ECONOMY 2 (1987).

35. 45 U.S.C. § 53.

36. AAR Report, *supra* note 4, at 11.

37. *Id.*

38. IPAC REPORT, *supra* note 21, at 8; *see also id.* at 45-47.

39. *See id.* at 47.

40. *Id.*

compensation law.<sup>41</sup> Furthermore, workers' compensation coverage would not avoid liability for toxic spills such as those cited by the AAR, since such claims largely involve tort liability to non-employees. In any event, the suggested motive for replacing FELA with a workers' compensation scheme must sit ill indeed with an American public that is concerned for fairness and accountability in its compensation laws.

### CRITICISMS OF FELA

#### *Monetary Cost*

One of the persistent attacks against the Federal Employers' Liability Act is that it is too expensive due to the high administrative costs and large awards. Once again, the data does not support these criticisms.

In an in-depth 1952 study of the Illinois workers' compensation system, Alfred F. Conard and his associates found to their surprise that the FELA system was significantly less expensive to operate than the state workers' compensation scheme. They found that the ratio of total cost to benefits paid under FELA was approximately one-fifth to four-fifths, while under workers' compensation the ratio was one-third to two-thirds.<sup>42</sup> Operating costs were at least 50% more expensive in every category of expenditure for workers' compensation, as compared to FELA.<sup>43</sup>

The primary reason for this disparity in costs, they concluded, was the significantly greater involvement of attorneys in workers' compensation claims as opposed to FELA claims. Conard and his associates noted that workers' compensation boards or commissions generally "frown upon an employee's appearing without counsel" because of the difficulty of the issues involved, such as defining "arising out of and in the course of employment" and the "extent of injury."<sup>44</sup> They found that attorneys were involved in only 1.6 to 5% of the FELA claims, while they were involved in 90 to 98% of the nonfatal and approximately 25% of the fatal workers' compensation claims.<sup>45</sup>

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41. See *Johns-Manville Prod. Corp. v. Contra Costa Superior Court*, 27 Cal. 3d 465, 612 P.2d 948, 165 Cal. Rptr. 858 (1980).

42. A. CONARD, R. MEHR, B. HEDGES, G. HILL, P. JOHNSON & J. LISTEN, *COSTS OF ADMINISTERING REPARATION FOR WORK INJURIES IN ILLINOIS 1-2* (1952) [hereinafter A. CONARD].

43. *Id.* at 1.

44. *Id.* at 9, 41.

45. *Id.* at 29, 32, 39; see also Oldfather, *supra* note 14, app. G at 75. "In 1975 attorneys were hired in 48% of the permanent partial disability cases, 66% of the perma-



Conard and his associates concluded that the smaller size of workers' compensation payouts relative to railroad injury payments "has a negligible effect on the higher ratio of aggregate claimants' expense in these cases."<sup>46</sup> These researchers prophetically noted that "misconceptions may not be confined to the relative costs, but may extend to many other features of both systems."<sup>47</sup>

The conclusions of this study are borne out by contemporary research in the area. The Oldfather study concluded that in 1985 the "estimated reparations costs as a percent of total operating expense were 2.2% in the inter-city bus industry and 2.4% in the rail industry."<sup>48</sup> The study found that in 1982 injury expense as a percentage of operating expense was 2.7% for the coal industry and 2.2% for railroads.<sup>49</sup> Thus, railroads compare favorably in this regard with both a relatively safe (bus) industry and a relatively dangerous (coal) no-fault workers' compensation industry.

Comparing the rate of increase of expense, adjusted for inflation, the Oldfather study found that the rail injury expense increased by 42% between 1970 and 1984, while workers' compensation expense increased by 129% during the same period.<sup>50</sup> Between 1972 and 1984 inflation-adjusted compensation and medical payments under the Longshore and Harbor Workers' Compensation Act (LHWCA) increased by 286%.<sup>51</sup> During the same period, inflation-adjusted rail injury expense increased only 34%.<sup>52</sup>

Oldfather studied a representative sample of 2645 FELA cases closed by attorneys during the 1982-1985 period. He found that 76% of these cases resulted in settlements of \$100,000 or less, and 55% settled for \$50,000 or less.<sup>53</sup> The 1985 cost to the railway industry for all injury expenses (including both employee and non-employee injuries) was 2% of total operating revenue; this compares favorably with industries that are under workers' compensation systems.<sup>54</sup> Moreover, the railroad industry has become quite profitable since deregulation in 1980;<sup>55</sup> therefore, railroad difficulties cannot be used as

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ment total disability cases and 63% of the death cases," (citing VII INTERDEPARTMENTAL WORKERS' COMPENSATION TASK FORCE, U.S. DEPT. OF LABOR, A SURVEY OF WORKERS' COMPENSATION CLOSED CLAIMS 153 (1979)).

46. A. CONARD, *supra* note 42, at 50.

47. *Id.* at 2.

48. Oldfather, *supra* note 14, app. A at 27.

49. *Id.* app. D at 49-50.

50. *Id.* app. E at 61.

51. *Id.* app. E at 62.

52. *Id.*

53. *Id.* app. I at 88. Oldfather also notes that "[o]nly 11 cases involved settlements of \$1 million or more," or .4% of all cases. *Id.*

54. *Id.* summary at 2. The percentage of FELA cases tried to verdict is 2%, as compared with 3.5% for the tort system as a whole. *Id.* app. I at 89.

55. *Id.* app. C at 38-39. During the period 1980-1985 net operating revenue of the railway industry "averaged \$2.3 billion per year," net ordinary income "averaged \$1.76

an argument against the higher payouts of FELA as opposed to a workers' compensation system.

The RLEA states that "85% of FELA cases are settled without the worker hiring a lawyer."<sup>56</sup> Only 1.1% of FELA cases are settled in court while there is a much higher percentage of litigated cases in workers' compensation cases. For example, 13% of workers' compensation cases were litigated in Mississippi while 27% were litigated in Illinois.<sup>57</sup>

The 1983 AAR study supports these cost findings. It observes that "[a]bout 85 percent of the claims closed in 1981 were settled directly between the railroads and the claimants."<sup>58</sup> Of the remaining 15% represented by attorneys, 5% were settled without suit being brought and 88% were settled before trial.<sup>59</sup> This study also notes that "[a]pproximately 4[%] of the claims" representing 58% of the total payout were settled for \$75,000 or more, while "[f]ully 88[%] of the claims were settled for less than \$25,000 and accounted for about a fifth of total payout."<sup>60</sup> These settlements were "determined primarily by the economic loss sustained by the claimant."<sup>61</sup>

The AAR study concluded that the railway industry paid out \$366 million in FELA claims in 1981, and that a simulated payout of the same claims under LHWCA, reduced to present value, would result in a payment of \$417 million.<sup>62</sup> A comparable payout under the Illinois workers' compensation program would have cost \$344 million, only 6% less than the FELA payout.<sup>63</sup>

FELA-related administrative costs for eleven selected carriers examined in the AAR study showed that these costs ranged from 11% to 31% of the actual FELA payout.<sup>64</sup> These figures suggest that operating costs are in significant part a function of railroad efficiency in administering the compensation program, rather than of the program itself.

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billion per year," and return on shareholders' equity "averaged 7.7% per year."

56. RLEA REPORT, *supra* note 19, at 5, 6. Some idea of the magnitude of workers' compensation appellate litigation can be gained by reviewing the reported workers' compensation cases in the Decennial Digest for the periods 1976-1981 and 1966-1976. For the 1976-1981 period these reports fill 1156 pages of Vol. 33; for the 1966-1976 period, they fill two thirds of Vol. 44 (1057 pages) and all of Vol. 45 (1509 pages).

57. *Id.* at 5.

58. AAR Report, *supra* note 4, at 24.

59. *Id.*

60. *Id.* at 19.

61. *Id.* at 28.

62. *Id.* at 49.

63. *Id.* at 69.

64. *Id.* at 32.

One of the repeated charges made against the FELA system is that plaintiffs' contingent attorney fees are exorbitant — according to one commentator such fees can be as high as forty percent of the FELA award.<sup>65</sup> The AAR study, however, notes the FELA practice is a limited field because the rail unions traditionally have recommended only a few well-known tort lawyers who handle FELA suits for a flat 25% contingent fee rather than the 33.3% contingent fee which is the standard in the personal injury area.<sup>66</sup>

### *Other Costs*

Critics of FELA level other charges not directly related to its monetary cost, but nevertheless challenging its efficiency as a compensation system. They contend that the process involves undue delay, discourages rehabilitation, provides improvident lump sum settlements, is divisive, and makes unpredictable awards. An examination of each of these criticisms shows that they lack factual basis and present no significant difference from a workers' compensation system; furthermore, they involve value judgments that, on balance, weigh in favor of FELA.

By the railroads' own admission, the typical length of time from date of injury to date of settlement cannot by any stretch of the imagination be considered excessive. The 1983 AAR study showed that the median time for this purpose "was nearly three months."<sup>67</sup> The median number of months from filing to disposition of a federal diversity tort claim ranges from fifteen to twenty months, according to the 1984 annual report of the Administrative Office for United States Courts.<sup>68</sup> As already noted, only a small fraction of FELA claims ever result in the filing of a suit.<sup>69</sup> Moreover, railroad workers are entitled to various sickness and disability benefits that help to cushion any delay in settlement.<sup>70</sup> In any event, delay in payment is a matter that primarily concerns claimants, and railroad employees widely support FELA rather than a workers' compensation program for railroads.

The AAR study illustrates the railroads' disbelief that the FELA compensation system discourages rehabilitation. As they frankly admit, "most workers in the rail industry can be relied upon to want to

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65. Schwartz & Mahshigian, *supra* note 2, at 9.

66. AAR Report, *supra* note 4, at 79.

67. *Id.* at 22. By contrast, the mean number of days required to settle a contested death case in workers' compensation, according to a United States Department of Labor study, "was 544 days." Oldfather, *supra* note 14, app. G at 76.

68. T. Haas, *supra* note 27, at 4 n. 23 (citing the ANNUAL REPORT OF THE DIRECTOR OF THE ADMINISTRATIVE OFFICE OF U.S. COURTS 291 (1984)).

69. See *supra* notes 58-59 and accompanying text.

70. Railroad employees are entitled to various sickness and disability benefits as a matter of course. See AAR Report, *supra* note 4, at 37-40.

return to work, rejoin their peers, and enhance their opportunities for promotion, rather than sit at home."<sup>71</sup> Their 1981 survey showed that the "vast majority" of FELA claimants, namely 89% returned to their previous jobs.<sup>72</sup> Their study also found that "[o]ver half" of the claimants in their twenties and thirties who were permanently totally disabled for railroad work took jobs elsewhere.<sup>73</sup>

In his 1952 study of the Illinois workers' compensation system, Professor Conard found that the "large majority" of employers and employees preferred payment in a lump sum to payment in the weekly installments provided by the law, and that "qualified informants estimated that 80 to 85% of cash benefits are so paid."<sup>74</sup> On the other hand, the AAR study reported that structured settlements were used in a significant number of FELA cases, particularly for cases involving settlement amounts of \$75,000 or more.<sup>75</sup> This study found the structured settlement technique to be of particular interest because "it closely resembles the central feature of no-fault compensation systems."<sup>76</sup>

Moreover, it seems that the use of a lump sum or a structured form of settlement should be based on the agreement of the parties, rather than upon a form of settlement imposed by law. It is much too rigid to assume that all claimants are incapable of managing a lump sum settlement, or that a lump sum settlement would not be preferable for claimants in some instances.

Critics of FELA contend that it encourages divisiveness between employees and employers.<sup>77</sup> Such assertions are unsupported by any evidence. It is worth noting that a number of states have found it necessary to provide a civil remedy against retaliatory discharge for filing a workers' compensation claim. A 1981 article found that eleven states provided such a remedy<sup>78</sup> and a 1986 article found that the number of jurisdictions providing such a remedy had risen to twenty-seven,<sup>79</sup> indicating that the problem is a growing one for workers' compensation claimants. If there is any validity to the un-

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71. *Id.* at 62.

72. *Id.* at 21.

73. *Id.* at 51.

74. A. CONARD, *supra* note 42, at 37.

75. AAR Report, *supra* note 4, at 20.

76. *Id.*

77. Havens & Anderson, *supra* note 2, at 314.

78. McGarry, *Retaliatory Terminations in Workmen's Compensation Cases*, 44 TEX. B.J. 617 (1981).

79. Love, *Retaliatory Discharge for Filing a Worker's Compensation Claim: The Development of a Modern Tort Action*, 37 HASTINGS L.J. 551, 554 (1986).

supported assertion that FELA claims are divisive, the substitution of a workers' compensation remedy seems unlikely to provide any solution and might make matters worse.

As previously noted,<sup>80</sup> most FELA claims are settled without the intervention of an attorney, and such cases presumably are settled amicably, creating no friction. A lawsuit typically is filed only in the cases involving serious injuries and permanent disability, where the employee often is unable to return to work with the railroad.<sup>81</sup> In such cases, there should be no continuing friction between such employees and the railroad. Most important, the claimant has a legal right to assert his claim — any refusal of the railroads to respect this right is reprehensible and should be combatted actively whenever and wherever encountered. This problem should not be evaded by an attempt to change to a workers' compensation system which will likely provide no solution to the problem anyway.

When facing unpredictable awards, the 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 a FELA claim is determined primarily by the economic loss sustained by the claimant.<sup>82</sup> A "high payment" judgment will often become the standard by which similar cases are judged in the future.<sup>83</sup> Professor Conard puts the matter more succinctly: "[w]e have no doubt that the ability of claimants to recover judgments furnishes the adjusters' measure of the fair value of [a FELA] claim."<sup>84</sup>

The Procrustean approach of workers' compensation schemes to the question of damages fails to take adequate account of the individual circumstances of each case. Professor Conard notes that relatively few workers' compensation cases can be solved by reference to the schedule.<sup>85</sup> Workers' compensation does not allow recovery for pain and suffering. Pain and suffering and diminished enjoyment of life constitute a very real item of damage. The tortfeasor who inflicts an injury should bear the burden of any uncertainty in calculating the damages associated with that injury.

There is no evidence that any significant number of meritorious FELA claims result in the denial or undercompensation of recovery. On the other hand, there is ample evidence that workers' compensation claims generate a large amount of litigation, principally over questions of the extent of damage and whether the claim "arose out

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80. See *supra* notes 58-59 and accompanying text.

81. See *supra* notes 60 & 73 and accompanying text.

82. AAR Report, *supra* note 4, at 22, 28.

83. *Id.* at 28.

84. A. CONARD, *supra* note 42, at 26.

85. *Id.* at 41.

of or in the course of employment."<sup>86</sup> It is unclear whether, or how many, meritorious workers' compensation claims result in a denial of recovery, but it is clear from the very nature of the system that a large number of such claims are significantly undercompensated.<sup>87</sup>

#### CONSIDERATIONS OF FAIRNESS

Matters of cost and efficiency in the operation of a compensation system must in all events give way to the paramount concern of fairness. When measured by the standard of fairness, it is evident that FELA clearly outdistances no-fault workers' compensation programs in this country.

Workers' compensation has come under repeated attacks for excessive rigidity, underinclusiveness of coverage, and undercompensation.<sup>88</sup> A number of tort-claim exceptions — such as intentional misconduct, the dual capacity doctrine, and third-party claims for contribution and indemnity — have developed as a reaction to the exclusive remedy provisions of workers' compensation laws,<sup>89</sup> indicating a general dissatisfaction with workers' compensation as the exclusive remedy for workplace injuries.

It has been recognized that tort litigation serves a number of valuable goals in addition to that of compensation for injury.<sup>90</sup> It promotes deterrence. It reinforces the dignity of the individual. It gives the claimant a feeling of participation in the system, and a sense of

86. See *supra* note 44 and accompanying text. Conard also notes that FELA, 45 U.S.C. § 56, allows a claimant three years after the cause of action accrues to file a claim, while the much shorter statute for workers' compensation claims shows "striking instances of inadvertent loss of claim." See A CONARD, *supra* note 42, at 49.

87. Oldfather notes that while many workers' compensation statutes "purport to award 66% of the injured worker's wage loss, most workers do not receive that amount." Oldfather, *supra* note 14, app. G at 73. Moreover, since the percentage is fixed by a ceiling based on the average weekly wage for the jurisdiction, higher paid employees are substantially penalized by this ceiling. Railroad employees are among this group of higher paid employees, since the average wage for such employees in 1985 was \$2,916 per month. *Id.* app. G at 73, 74 & 77.

88. See, e.g., J. Phillips, *supra* note 32 and authorities cited therein; DeLeon, *Workers' Compensation: A Legal System in Jeopardy*, 29 FED'N INS. COUNS. Q. 337 (1979).

89. See Rust, *New Tactics for Injured Workers*, Oct. 1987 A.B.A. J. 72; Marks, *Status of the Exclusive Workers' Compensation Remedy: Actions by Employees Against Coemployees, Employers and Carriers*, XXII TORT & INS. L.J. 612 (1987); Note, *Exceptions to the Exclusive Remedy Requirements of Workers' Compensation Statutes*, 96 HARV. L. REV. 1641 (1983).

90. See Galanter, *The Day After the Litigation Explosion*, 46 MD. L. REV. 3, 5-15 (1986); Phillips, *In Defense of the Tort System*, 27 ARIZ. L. REV. 603, 615-616 (1985); Michelman, *The Supreme Court and Litigation Access Fees: The Right to Protect One's Rights*, 1973 DUKE L.J. 1153, 1172-1173.

vindication against unjust treatment. These are values that should not lightly be discarded in our democratic society.

#### CONCLUSION

The charges that are leveled against the FELA tort system of compensation do not hold up under scrutiny. Employment in the railroad industry continues to be hazardous, and the industry is in need of the deterrent effect of a tort liability system. FELA is less expensive to administer than no-fault workers' compensation schemes. Compensation under FELA is more individualized and equitable than workers' compensation. More important, FELA is fairer in operation than workers' compensation. The question is not whether FELA should be changed to a workers' compensation system, but whether workers' compensation should be changed to a tort system like FELA.<sup>91</sup>

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91. Haas advocates making an alternative tort remedy available to workers. This has been proposed by others and is the rule in England. He notes that the *quid pro quo* rationale originally used for adopting workers' compensation in lieu of a tort remedy would hardly pass muster today, since the defenses of assumption of the risk, contributory negligence and the fellow-servant rule — which the workers' compensation statutes were designed to obviate — would have little or no vitality in tort law today. See T. Haas, *supra* note 27, at 1-2, 18-22.