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## The Federal Employer's Liability Act (FELA)

In 1908, Congress enacted the Federal Employer's Liability Act (FELA)<sup>n1</sup> to provide compensation for injuries to the employees of railroads, which were then the largest employer in the United States. The FELA was part of a series of acts passed at the turn of the century to protect railroad workers. The other major pieces of legislation are the Boiler Inspection Act<sup>n2</sup> and the Safety Appliance Act.<sup>n3</sup> If an employee alleges that his or her injury results from a violation of the Boiler Inspection Act or the Safety Appliance Act, he or she may bring an action under the FELA.<sup>n4</sup>

According to one commentator, three major factors led to the enactment of the FELA: 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 rates among railroad employees.<sup>n5</sup> While the purposes of the act include the protection of the safety and health of railroad employees and the promotion of measures to prevent injury,<sup>n6</sup> Justice William O. Douglas said simply that the act was designed "to put on the railroad industry some of the cost for the legs, eyes, arms and lives which it consumed in its operations."<sup>n7</sup> Although there have been repeated calls for the repeal or substantial modification of the FELA since it was first enacted,<sup>n8</sup> those calls have been unsuccessful. Instead, the Supreme Court has liberalized recovery under the act and held that the act should be construed in favor of plaintiffs.<sup>n9</sup>

Although the FELA was enacted because of congressional dissatisfaction with the traditional common law limitations on the duty of an employer to its employees,<sup>n10</sup> the act is not a workers' compensation statute nor does it make a railroad an insurer of its employees' safety.<sup>n11</sup> The FELA retains the fault requirements of the tort system. Thus, a plaintiff must prove that the railroad was in some way negligent and that the railroad's negligence was the proximate cause of his injuries. The failure to present such proof must result in a directed verdict in favor of the railroad.<sup>n12</sup>

### [1]—Exclusive Remedy

The FELA is the exclusive remedy for damages for the death or injury of a covered railroad employee.<sup>n13</sup> Thus, a plaintiff has no remedy under state law.<sup>n14</sup> The FELA also invalidates any "contract, rule, regulation or device whatsoever" designed to exempt a railroad from liability under the act.<sup>n15</sup> The Supreme Court has held that an employee cannot agree to accept the benefits of a relief fund instead of pursuing a claim for damages under the act.<sup>n16</sup> However, in a FELA action, a railroad may set off any amount contributed to insurance, relief benefits, or indemnity that may have been paid for the injury or death that is the subject of the suit.<sup>n17</sup>

The fact that a railroad employee might have a valid grievance under the Railroad Labor Act (RLA) does not preclude the employee from bringing a FELA action. In *Aitchison, Topeka & Santa Fe Ry. Co. v. Buell*,<sup>n18</sup> the railroad argued that, since the injury resulted from conduct that was subject to the collective-bargaining agreement, the employee's sole remedy was through arbitration under the RLA. The Court, however, unanimously rejected that argument, saying that "[t]he fact that an injury otherwise compensable under the FELA was caused by conduct that may have been subject to arbitration under the RLA does not deprive an employee of his opportunity to bring a FELA action for damages."<sup>n19</sup>

### [2]—Requirements for Recovery Under FELA

The basis of liability under the FELA is set out in § 51 of the act:

Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering

injury while he is employed by such carrier in such commerce, or, in the case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any officers, agents, employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.<sup>n20</sup>

Before an injured railroad employee can recover damages, he or she must satisfy the four-part test for coverage under § 51: (1) the defendant must be a "railroad" within the meaning of the FELA; (2) the railroad must be a "common carrier;" (3) the railroad must be "engaged in interstate commerce"; and (4) the employee must have been injured "while he is employed by such carrier in such commerce."

**[a]—"Railroad"**

In order to recover under the FELA, the injured employee must show that the defendant was a "railroad" within the meaning of the act. Courts have held that street railway companies and urban rapid transit systems do not come within the meaning of the act while ordinary railroads are included under the FELA.<sup>n21</sup> Courts have held also that a "railroad" does not include: express companies;<sup>n22</sup> companies maintaining railroads for their own use;<sup>n23</sup> sleeping car companies;<sup>n24</sup> and a company leasing refrigerator cars to railroads.<sup>n25</sup>

**[b]—"Common Carrier"**

Section 51 of the FELA requires that the railroad be a "common carrier." One court has defined a "common carrier" as:

one who holds himself out to the public as engaged in the business of transportation of persons or property from place to place for compensation, offering his services to the public generally. The distinctive characteristic of a common carrier is that he undertakes to carry for all people indifferently, and hence is regarded in some respects as a public servant.<sup>n26</sup>

**[c]—"Engaged in Interstate Commerce"**

A railroad that is a common carrier must also be "engaged in interstate commerce." One problem for courts has been to determine when a railroad, such as an intrastate commuter rail service, is engaged in interstate commerce. Courts have held that such a railroad is engaged in interstate commerce if its intrastate activities are an integral part of a continuous movement of goods or passengers across state lines.<sup>n27</sup>

**[d]—Employee Engaged in Interstate Commerce**

At the time of the injury, the plaintiff must have been an "employee" engaged in interstate commerce or foreign commerce. According to the Supreme Court, the FELA uses the terms "employer," "employee," and "employed" in their natural sense<sup>n28</sup> and the Restatement (Second) of Agency provides guidelines for the analysis of employment issues.<sup>n29</sup>

The FELA does not cover independent contractors<sup>n30</sup> or their employees.<sup>n31</sup> Although it is impossible to lay down any hard-and-fast rules to distinguish between employees and independent contractors, the Illinois Appellate Court has set out a number of factors to aid in making the decision. Among the factors are: the right to control the manner, details, and method by which the work is done; the method of payment; the right to discharge; the skill required of the work; and the furnishing of material, tools, and equipment. The control, or right to control, of the manner of doing the work is the most important factor.<sup>n32</sup> It is the *right* to control rather than actual control that is the principal test.<sup>n33</sup>

In some cases, a railroad employee may be injured while he or she is a "borrowed employee" of the railroad, while he or she is acting for two employers at the same time, or while the employee of a company that was, in turn, employed by the railroad.<sup>n34</sup> In order to establish employment under the FELA, the Supreme Court looks to who had the "control or right to control" of the employee, even though he or she was nominally employed by someone else.<sup>n35</sup> The plaintiff bears the burden of proving employee status.<sup>n36</sup>

In order to meet the test of the FELA, it is not necessary that the employee actually was engaged in interstate commerce at the time of the injury. According to the Supreme Court, the test of the act is whether any part of the employee's duties furthered interstate commerce in any way or "directly or closely and substantially" affected interstate commerce.<sup>n37</sup> Thus, a railroad employee engaged in the construction of new rail cars furthered the railroad's interstate commerce and was entitled to bring an action under the FELA.<sup>n38</sup> The same day that it decided *Gileo*, the Supreme Court also held that

an office employee whose job involved filing tracings for blueprints of railroad equipment was covered by the FELA.<sup>n39</sup>

### [3]—Negligence as the Basis of Recovery

The FELA is not a workers' compensation statute. "The basis of liability under the Act is and remains negligence."<sup>n40</sup> The act does not define negligence but leaves it to the courts. The Supreme Court has defined negligence in the same way that courts have defined common law negligence: "the lack of due care under the circumstances; or the failure to do what a reasonable and prudent man would ordinarily have done under the circumstances of the situation; or doing what such a person under the existing circumstances would not have done."<sup>n41</sup> Thus, a plaintiff must show a breach of the duty created by the act,<sup>n42</sup> which is based on a showing of reasonable foreseeability of harm<sup>n43</sup> and a causal connection between the breach and the injury.<sup>n44</sup> Expert testimony is generally required to prove a causal connection between an accident and an injury "unless the connection is a kind that would be obvious to laymen, such as a broken leg from being struck by an automobile."<sup>n45</sup>

Almost every FELA complaint contains allegations of the breach of one of three duties by the railroad: to provide tools and equipment that are safe and suitable for the job;<sup>n46</sup> to provide adequate help for the employee; and to furnish employees a safe place to work.<sup>n47</sup> Courts have also held that the duty imposed upon railroads by the FELA includes the duty to assign employees to work for which they are reasonably suited<sup>n48</sup> and the duty to protect employees from foreseeable crimes committed by strangers.<sup>n49</sup> An important method of establishing a breach of the duty is through the use of state and federal railroad safety laws and regulations.<sup>n50</sup>

Although a plaintiff must establish all of the elements in a common law negligence action,<sup>n51</sup> a series of Supreme Court decisions in the 1940s and 1950s relaxed the negligence and causation standards and made it easier for a plaintiff to recover than in an ordinary common law negligence action. In *Rogers v. Missouri Pacific Railway Co.*,<sup>n52</sup> the Supreme Court stated:

Under this statute the test of a jury case is simply whether the proofs satisfy with reason the conclusion that employer negligence played any part, even the slightest, in producing the injury or death for which damages are sought. It does not matter that, from the evidence, the jury may also with reason, on grounds of probability, attribute the result to other causes, including the employee's contributory negligence. Judicial appraisal of the proofs to determine whether a jury question is presented is narrowly limited to the single inquiry whether, with reason, the conclusion may be drawn that negligence of the employer played any part at all in the injury or death. Judges are to fix their sights primarily to make that appraisal and, if the test is met, are bound to find that a case for the jury is made out whether or not the evidence allows the jury a choice of other probabilities. The statute expressly imposes liability upon the employer to pay damages for injury or death due "in whole or in part" to its negligence.<sup>n53</sup>

The "slight negligence" test articulated in *Rogers* also is used by Illinois state courts.<sup>n54</sup> Causation under this test is whether the railroad's negligence played any part, however small, in the plaintiff's injury.<sup>n55</sup> In addition, the plaintiff can use the *res ipsa loquitur* doctrine in a FELA action.<sup>n56</sup> However, compliance with another federal statute may preempt an FELA negligence claim. In *Waymire v. Norfolk & Western Railway Co.*,<sup>n57</sup> the United States Court of Appeals for the Seventh Circuit held that, to the extent that the FELA was inconsistent with the Federal Railroad Safety Act (FRSA) on issues of train speed and warning devices at grade crossings, the FRSA superceded the FELA.

In a FELA action, the jury has the dominant role in determining liability. In *Gallick v. Baltimore & Ohio Railroad*,<sup>n58</sup> the Supreme Court held that the test of a jury verdict is whether "[e]mployer negligence has played any role in producing the harm." In *Lavender v. Kurn*,<sup>n59</sup> the Supreme Court stated:

It is no answer to say that the jury's verdict involved speculation and conjecture. Whenever facts are in dispute or the evidence is such that fair-minded men may draw different inferences, a measure of speculation is required on the part of those whose duty it is to settle the dispute by choosing what seems to them to be the most reasonable inference. Only when there is a complete absence of probative facts to support the conclusion reached does a reversible error appear.<sup>n60</sup>

A number of cases have raised the question of the scope of "injuries" for which a railroad employee may recover. These include the usual common law range of physical injuries<sup>n61</sup> and occupational diseases caused by long-term exposure so long as they were foreseeable<sup>n62</sup> and arose out of the employment.<sup>n63</sup> The injury need not result from a

single event but may be caused by stress or a series of events over a period of time.<sup>n64</sup> Injuries suffered by an employee while engaged in activities outside the scope of his or her employment are excluded from coverage under the FELA.<sup>n65</sup> In addition, a railroad is not liable for injuries caused by the willful or intentional acts of its employees that are outside the scope of their employment.<sup>n66</sup> While a railroad may be negligent where an employee is assaulted by a fellow employee within the scope of employment,<sup>n67</sup> a railroad is not negligent for the retention of the assailant unless it had knowledge of the violent propensities of the assailant.<sup>n68</sup>

The FELA is silent as to whether negligent infliction of emotional distress is compensable under the Act. In *Consolidated Rail Corp. v. Gottshall*,<sup>n69</sup> the Supreme Court held that the FELA sometimes permits recovery for negligent infliction of emotional distress. Following the approach of a number of states, including Illinois, the Court adopted the "zone of danger" test to define the scope of liability. According to this test, plaintiffs who suffer a physical impact as a result of a defendant's negligent conduct, or who are placed in immediate risk of physical harm of that conduct may recover for their emotional distress. Applying the *physical impact* part of the test, the Court in *Metro-North Commuter R.R. v. Buckley*<sup>n70</sup> held that it does not include physical contact with a substance that might cause a disease at a later time. Thus, a worker, who was exposed to a carcinogen (asbestos dust) while working for a railroad but showed no signs of any disease, could not recover for negligent infliction of emotional distress until he manifests symptoms of a disease. However, in *Norfolk & Western Ry. Co. v. Ayers*,<sup>n70.1</sup> the Supreme Court applied *Gottshall* and *Buckley* in an FELA action and held that a railroad worker who suffered from asbestosis also could recover mental distress damages resulting from his fear of developing cancer. Applying *Gottshall* and the Seventh Circuit's decision in *Lancaster v. Norfolk & Western Railway Co.*,<sup>n71</sup> the Illinois Supreme Court held, in *Wilson v. Norfolk & Western Railway Co.*,<sup>n72</sup> that, in an FELA action, intentional infliction of emotional distress must stem from physical contact or the threat of physical contact.

#### **[4]—Venue**

The FELA gives an injured worker the option of bringing an action in state or federal court, in the district where the accident occurred, where the plaintiff resides, or where the defendant will be doing business at the time of commencing such action.<sup>n73</sup> The doctrine of the forum non conveniens is applicable in FELA cases.<sup>n74</sup> If a FELA action is filed in state court, the state cannot impose burdens that it does not impose on other civil actions.<sup>n75</sup> In addition, a FELA action filed in state court generally cannot be removed to federal district court.<sup>n76</sup>

#### **[5]—Applicable Law**

In a FELA action, federal law governs all matters of a substantive nature.<sup>n77</sup> Substantive law issues include whether a plaintiffs' attorneys may conduct ex parte interviews with the railroads' employees regarding facts incident to the claim;<sup>n78</sup> whether there is sufficient evidence to submit a case to a jury in state court;<sup>n79</sup> what constitutes negligence;<sup>n80</sup> the measure of damages;<sup>n81</sup> and the review of the size of a jury verdict.<sup>n82</sup>

While state law governs procedural matters if the case is tried in state court,<sup>n83</sup> the Supreme Court has stated that "strict local rules of pleading cannot be used to impose unnecessary burdens upon rights of recovery authorized by federal statutes" and that it is the duty of the court "to construe the allegations of this complaint ourselves in order to determine whether petitioner has been denied a right of trial granted him by Congress."<sup>n84</sup> Determining which issues are substantive and which are procedural continues to trouble courts.

#### **[6]—Defenses to a FELA Action**

The FELA abolished the common law defenses of the fellow-servant rule<sup>n85</sup> and assumption of risk.<sup>n86</sup> However, contributory negligence remains a defense in FELA actions.<sup>n87</sup> The FELA applies "pure" comparative negligence, which reduces the amount of an employee's damages in "proportion to the amount of negligence attributable to such employee."<sup>n88</sup> Thus, contributory negligence is a complete bar to recovery only if the plaintiff's fault constituted the sole proximate cause of his or her injury.<sup>n89</sup> However, if the railroad violated the Boiler Inspection Act<sup>n90</sup> or the Safety Appliance Act,<sup>n91</sup> any contributory negligence is ignored and does not reduce the plaintiff's damages.<sup>n92</sup> Although a railroad is entitled to have the jury instructed in contributory negligence if there is any evidence in the record to support the theory,<sup>n93</sup> the burden is on the railroad to produce evidence of the employee's lack of due care.<sup>n94</sup> If the railroad fails to produce evidence of the plaintiff's lack of due care, it is reversible error to give a contributory negligence instruction.<sup>n95</sup>

Railroads often argue that employees' violations of internal safety rules constitute contributory negligence rather than assumption of risk. Conversely, employees frequently contend that their conduct that led to the injury was assumption of risk and not contributory negligence.<sup>n96</sup> Courts have held that evidence of the violation of company safety rules is

admissible as evidence of contributory negligence.<sup>n97</sup>

Courts often find it difficult to decide whether particular fact situations constitute contributory negligence or assumption of risk. The Illinois Supreme Court has stated that assumption of risk is based upon an "employee's voluntary, knowledgeable acceptance of a dangerous condition that is necessary for him to perform his duties," while contributory negligence is "a careless act or omission on the plaintiff's part tending to add new dangers to conditions that the employer negligently created or permitted to exist."<sup>n98</sup> Thus, a railroad employee "who enters the workplace for a routine assignment in compliance with the orders and directions of his employer or its supervising agents, who by such entry incurs risks not extraordinary in scope, is not contributorily negligent, but rather is engaging in assumption of risk."<sup>n99</sup>

In *Uhrhan v. Union Pacific R.R. Co.*,<sup>n100</sup> the Illinois Supreme Court held that the test for contributory negligence involves consideration of whether the employee added to already existing dangers by his conduct. In *Uhrhan*, the employee claimed that he was injured while walking on a railroad's right of way and was caused to fall by debris on the ground. The employee claimed that his conduct amounted to assumption of risk while the railroad argued that he was contributorily negligent. In deciding whether the employee's conduct was contributory negligence, the Illinois Supreme Court held that three matters deserved consideration by the jury: an alleged rule violation by the employee; an alleged failure by the employee to check his work area for hazards before switching operations began; and an alleged failure to use a lantern to look down at the ground before moving alongside the train in order to discover unknown hazards. Since none of the matters involved a voluntary, knowledgeable acceptance of a dangerous situation by the employee, they did not constitute assumption of risk. Aside from the rule violation, the claimed misconduct on the part of the employee was his failure to attempt to discover dangers, not an acceptance of an already known danger.<sup>n101</sup>

#### [7]—Statute of Limitations

The statute of limitations requires a plaintiff to file a claim within three years from the day the cause of action accrued.<sup>n102</sup> In the case of traumatic injuries, where the symptoms are such that the plaintiff immediately knows the event that caused the injury, the cause of action accrues at the occurrence of the injury.<sup>n103</sup> In cases where the symptoms are not manifested immediately, the cause of action does not accrue until the plaintiff is aware or should have been aware of the condition.<sup>n104</sup> In addition, a railroad is equitably estopped from raising the statute of limitations if intentional or negligent misrepresentations by it or its agents caused the plaintiff not to bring the action within the three-year period.<sup>n105</sup>

#### [8]—Damages Under FELA

Unlike workers' compensation acts, there is no statutory limitation on damages in the FELA. Among the damages recoverable in a FELA action are: past and future medical services;<sup>n106</sup> lost earnings and lost earning capacity;<sup>n107</sup> past and future pain and suffering;<sup>n108</sup> and psychological damage.<sup>n109</sup>

In the case of the death of a railroad employee, a FELA action may be brought for the benefit of designated survivors<sup>n110</sup> if they suffered pecuniary loss as a result of the death.<sup>n111</sup> The damages recoverable are those recoverable in an ordinary survival action. The survivors of a deceased railroad employee may also bring a wrongful death action.

Courts have held that there are a number of categories of damages that are not authorized by the FELA: punitive damages;<sup>n112</sup> loss of consortium;<sup>n113</sup> prejudgment interest;<sup>n114</sup> funeral expenses; and attorney's fees.<sup>n115</sup> In addition, the jury must reduce future damages to their present value.<sup>n116</sup>

The assessment of damages is a question of fact for the jury and an appellate court should not substitute its judgment for that of the jury.<sup>n117</sup> An arbitration decision, resulting from an action filed under the Railway Labor Act, finding that an employee was fit to return to work and upholding his termination did not have a preclusive effect in the employee's FELA action for future lost wages, benefits, and earning capacity from the date of discharge.<sup>n118</sup>

#### [9]—Instruction on Taxability

If the plaintiff introduces evidence at trial of his or her income at the time of the accident, it is evidence of gross income. *Section 61 of the Internal Revenue Code* defines gross income as income from whatever source derived, unless otherwise specifically excluded. However, § 104(a)(2) of the Code provides that damages for "personal injury or sickness" are not included as gross income even if those damages replace earnings that would have been taxable. The defendant gets no credit for the tax windfall even though the plaintiff will be better off financially than he would have been with no injury at all. This raises two questions: (1) Should evidence of the effect of taxes on the decedent's past and estimated

future earnings be taken into account in determining lost earning capacity? and (2) Should the trial court instruct the jury that its award of damages for personal injury will not be subject to income taxation? In *Norfolk & Western Railway Co. v. Liepelt*,<sup>n119</sup> the Supreme Court held that, in FELA actions, juries should be instructed on the nontaxability of damage awards under FELA.

#### FOOTNOTES:

(n1) Footnote 1. 45 U.S.C. §§ 51-60 . The FELA passed by Congress in 1906 regulated all railroads in the United States. However, the Supreme Court held that it was unconstitutional since Congress could not regulate intrastate commerce. *The Employers' Liability Cases*, 207 U.S. 463 (1908).

(n2) Footnote 2. 45 U.S.C. §23 . For a discussion of recovery under the Act, see *McGuinn v. Burlington Northern R.R. Co.*, 848 F. Supp. 827 (N.D. Ill. 1994) .

(n3) Footnote 3. 45 U.S.C. § 20101 et. seq. *Debiasio v. Illinois Central R.R.*, 52 F.3d 678 (7th Cir. 1995) ; *Magna Trust Co. v. Illinois Central R.R. Co.*, 313 Ill. App. 3d 375, 728 N.E.2d 797 (5th Dist. 2000) . In *Norfolk & W. Ry. Co. v. Hiles*, 516 U.S. 400, 116 S. Ct. 890, 134 L. Ed. 2d 34 (1996) , the Supreme Court held that a railroad employee may not recover under the Safety Appliance Act without demonstrating that a drawbar was "defective."

(n4) Footnote 4. *Norfolk & W. Ry. Co. v. Hiles*, 516 U.S. 400 at fn. 11 (1996) ; *Crane v. Cedar Rapids & Iowa City Ry. Co.*, 395 U.S. 164 (1969) ; *McGinn v. Burlington Northern R.R. Co.*, 102 F.3d 295 (7th Cir. 1996) ; *Debiasio v. Illinois Central R.R.*, 52 F.3d 678 (7th Cir. 1995) ; *Taluzek v. Illinois Cent. Gulf R. Co.*, 255 Ill. App. 3d 72, 626 N.E.2d 1367 (1st Dist. 1993) .

(n5) Footnote 5. Schwartz (with Mahshigan), *The Federal Employers' Liability Act, A Bane for Workers, A Bust for Railroads, A Boon for Lawyers*, 23 U. SAN DIEGO L. REV. 1, 2 (1986).

(n6) Footnote 6. *Chapman v. Union Pac. R.R.*, 467 N.W.2d 388 (Neb. 1991) .

(n7) Footnote 7. *Wilkerson v. McCarthy*, 336 U.S. 53, 68 (1949) .

(n8) Footnote 8. See Baker, *Why Congress Should Repeal the Federal Employers' Liability Act of 1908*, 29 HARV. J. LEGIS. 79 (1992) and Havens and Anderson, *The Federal Employers' Liability Act: A Compensation System in Urgent Need of Reform*, 34 FED. B. NEWS & J. 310 (1987).

(n9) Footnote 9. *Gallick v. Baltimore & Ohio R. Co.*, 372 U.S. 108 (1963) .

(n10) Footnote 10. *Rogers v. Missouri Pacific Ry.*, 352 U.S. 500 (1957) .

(n11) Footnote 11. *Wilkerson v. McCarthy*, 336 U.S. 53, 61-62 (1949) .

(n12) Footnote 12. *Brooks v. Brennan*, 255 Ill. App. 3d 260, 625 N.E.2d 1188 (5th Dist. 1994) .

(n13) Footnote 13. *Erie Railroad Co. v. Winfield*, 244 U.S. 170 (1917) ; *Felton v. Southeastern Pennsylvania Transp. Authority*, 757 F. Supp. 623 (E.D. Pa. 1991) . See *Starks v. Northeast Ill. Regional Commuter RR. Corp.*, 245 F. Supp. 2d 896 (2003) (employee's negligent and intentional infliction of emotional distress claims were not preempted by the FELA).

(n14) Footnote 14. *Winfree v. Northern Pacific R. Co.*, 227 U.S. 296 (1913) .

(n15) Footnote 15. 45 U.S.C. § 55 ; *Downs v. Baltimore & Ohio R. Co.*, 345 Ill. App. 118, 102 N.E.2d 537 (1st Dist. 1951) .

(n16) Footnote 16. *Philadelphia, Balt. & Wash. R. Co. v. Schubert*, 224 U.S. 603 (1912) .

(n17) Footnote 17. 45 U.S.C. § 55 .

(n18) Footnote 18. *Atchison, Topeka & Santa Fe Ry. Co. v. Buell*, 480 U.S. 557, 107 S. Ct. 1410, 94 L. Ed. 2d 563 (1987) .

(n19) Footnote 19. *Atchison, Topeka & Santa Fe Ry. Co. v. Buell*, 480 U.S. 557, 564 (1987) .

(n20) Footnote 20. 45 U.S.C. § 51 .

(n21) Footnote 21. *Washington Ry. & Elec. Co. v. Scala*, 244 U.S. 630 (1917) ; *Felton v. Southeastern Pennsylvania*

*Trans. Auth.*, 952 F.2d 59 (3d Cir. 1991) ; *Ferguson v. Philadelphia Trans. Co.*, 205 F.2d 520 (3d Cir. 1953) ; *McKenna v. Washington Metro. Area Transit Auth.*, 679 F. Supp. 7 (D. D.C. 1986) .

(n22) Footnote 22. *Wells Fargo & Co. v. Taylor*, 254 U.S. 175 (1920) .

(n23) Footnote 23. *Pickney v. Oro Dam Constructors*, 441 F.2d 806 (9th Cir. 1971) ; *Ciaccio v. New Orleans Public Belt R.*, 285 F. Supp. 373 (E.D. La. 1968) .

(n24) Footnote 24. *Robinson v. Baltimore & Ohio R. Co.*, 237 U.S. 84 (1915) .

(n25) Footnote 25. *Edwards v. Pacific Fruit Express Co.*, 390 U.S. 538 (1968) .

(n26) Footnote 26. *Kieronski v. Wyandotte Terminal R. Co.*, 806 F.2d 107, 108 (6th Cir. 1986) . See *Wurster v. Riverport Railroad, LLC*, — F. Supp. 2d — (N.D.Ill. 2003) (insufficient evidence that defendant railroad was operating as a common carrier).

(n27) Footnote 27. *Kach v. Monessen Southwestern Ry. Co.*, 151 F.2d 400 (3d Cir. 1945) . For a discussion of the cases dealing with this issue, see *Strykowski v. Northeast Illinois Regional Commuter R.R. Corp.*, 1994 U.A. App. LEXIS 16236 (7th Cir. 1994) .

(n28) Footnote 28. *Robinson v. Baltimore & Ohio R. Co.*, 237 U.S. 84, 97 (1915) .

(n29) Footnote 29. *Kelley v. Southern Pacific Co.*, 419 U.S. 318 (1974) .

(n30) Footnote 30. *Chicago, R. I. & P. R. Co. v. Bond*, 240 U.S. 449 (1916) .

(n31) Footnote 31. *Downs v. Baltimore & Ohio R. Co.*, 345 Ill. App. 118, 102 N.E.2d 537 (1st Dist. 1951) .

(n32) Footnote 32. *Downs v. Baltimore & Ohio R. Co.*, 345 Ill. App. 118, 102 N.E.2d 537 (1st Dist. 1951) .

(n33) Footnote 33. *Kelley v. Southern Pacific Co.*, 419 U.S. 318 (1974) ; *Byrne v. Pennsylvania R. Co.*, 262 F.2d 906 (3d Cir. 1958) .

(n34) Footnote 34. *Kelley v. Southern Pacific Co.*, 419 U.S. 318, 324 (1974) .

(n35) Footnote 35. *Kelley v. Southern Pacific Co.*, 419 U.S. 318, 324 (1974) .

(n36) Footnote 36. *Turpin v. Chicago, Burlington & Quincy R. Co.*, 403 S.W.2d 233 (Mo. 1966) .

(n37) Footnote 37. *Southern Pacific Co. v. Gileo*, 351 U.S. 493, 498–499 (1956) . See *Duncan v. Union Pacific Railroad Co.*, 195 F. Supp. 2d 1074 (N.D. Ill. 2002) (employee, working in another state as part of his job, who drowned in a motel swimming pool after work, was engaged in a purely private activity that did not further the railroad's needs).

(n38) Footnote 38. *Southern Pacific Co. v. Gileo*, 351 U.S. 493 (1956) .

(n39) Footnote 39. *Reed v. Pennsylvania R. Co.*, 351 U.S. 502 (1956) .

(n40) Footnote 40. *Wilkerson v. McCarthy*, 336 U.S. 53, 69 (1949) (Douglas, J., concurring). See *Mikus v. Norfolk & W. Ry. Co.*, 312 Ill. App. 3d 11, 726 N.E.2d 95 (1st Dist. 2000) . *Myers v. Illinois Cent. R.R. Co.*, 323 Ill. App. 3d 780, 753 N.E.2d 560 (4th Dist. 2001) (the basis for liability under the FELA is the employer's negligence, not merely the fact that an employee is injured on the job).

(n41) Footnote 41. *Tiller v. Atlantic Coast Line R. Co.*, 318 U.S. 54, 67 (1943) .

(n42) Footnote 42. *Gaines v. Illinois Cent. R. Co.*, 23 F.3d 1170 (7th Cir. 1994) ; *Fulk v. Illinois Central R.R. Co.*, 22 F.3d 120 (7th Cir. 1994) ; *Moore v. Atchison, T. & S.F. Ry.*, 28 Ill. App. 2d 340, 171 N.E.2d 393 (1st Dist. 1960) .

(n43) Footnote 43. *Gallick v. Baltimore & Ohio R. Co.*, 372 U.S. 108 (1963) . For a discussion of foreseeability in FELA actions, see *Williams v. National Railroad Passenger Corp.*, 161 F.3d 1059 (7th Cir. 1998) .

(n44) Footnote 44. *Brooks v. Brennan*, 255 Ill. App. 3d 260, 625 N.E.2d 1188 (5th Dist. 1994) . Under 45 U.S.C. § 51 , a railroad has liability for any injury or death resulting in whole or in part from the negligence of the railroad. *Rogers v. Missouri Pacific Ry.*, 352 U.S. 500 (1957) . For a discussion of the testimony of a medical expert on causation in FELA cases, see *Hahn v. Union Pacific R. Co.*, 352 Ill. App. 3d 922, 816 N.E.2d 834 (5th Dist. 2004) .

(n45) Footnote 45. *Schmaltz v. Norfolk & W. Ry. Co.*, 896 F. Supp. 180, 182 (N.D. Ill. 1995) . In *Dukes v. Illinois Cent.*

R.R., 934 F. Supp. 939 (N.D. Ill. 1996) , the court considered the impact of *Daubert v. Merrell Dow Pharm.*, 509 U.S. 579 (1993) , on the requirement that plaintiff establish that his carpal tunnel syndrome was the result of his work. The court held that the *Daubert* guideposts require that medical testimony on causation be based on a sound factual and scientific basis to be admissible.

(n46) Footnote 46. *Campbell v. Chesapeake & O. Ry. Co.*, 36 Ill. App. 2d 276, 183 N.E.2d 736 (1st Dist. 1962) ; *Wawryszyn v. Illinois Central R. Co.*, 10 Ill. App. 2d 394, 135 N.E.2d 154 (1st Dist. 1956) .

(n47) Footnote 47. *Williams v. National Railroad Passenger Corp.*, 161 F.3d 1059 (7th Cir. 1998) ; *McGinn v. Burlington Northern R.R. Co.*, 102 F.3d 295 (7th Cir. 1996) ; *Hall v. Chicago & North Western Railway Co.*, 5 Ill. 2d 135, 125 N.E.2d 77 (1955) ; *Mikus v. Norfolk & W. Ry. Co.*, 312 Ill. App. 3d 11, 726 N.E.2d 95 (1st Dist. 2000) ; *Ficken v. Alton & S. Ry. Co.*, 291 Ill. App. 3d 635, 685 N.E.2d 1 (5th Dist. 1996) ; *Lewis v. Norfolk & W. Ry. Co.*, 269 Ill. App. 3d 483, 646 N.E.2d 1378 (5th Dist. 1995) . An employee who alleges that his or her injuries resulted from the failure to use reasonable care in furnishing a safe place to work may pursue both a labor grievance under the Railway Labor Act ( 45 U.S.C. § 151 et seq. ) and an action for damages under FELA. See *Atchison, Topeka & Santa Fe Ry. Co. v. Buell*, 480 U.S. 557, 107 S. Ct. 1410, 94 L. Ed. 2d 563 (1987) . In *Darrough v. CSX Transp. Inc.*, 321 F.3d 674 (7th Cir. 2003) , the court held that railroads must provide a "reasonably safe" place to work, not the "safest possible work environment." See also *McDonald v. Northeast Illinois Regional Commuter R.R. Corp.*, 249 F. Supp. 2d 1051 (N.D.Ill. 2003) (jury question whether railroad was negligent in failing to remove snow from its coach shop); *Childress v. National Railroad Passenger Corp.*, 2004 U.S. Dist. LEXIS 25702 (N.D. Ill. 2004) (employee stated a claim for failure to provide a safe working place).

(n48) Footnote 48. *Fletcher v. Union Pacific R. Co.*, 621 F.2d 902 (8th Cir. 1980) . See *Frieri v. CSX Transp. Inc.*, — F. Supp. 2d—, 2003 U.S. Dist. LEXIS 18883 (N.D.Ill. 2003) (summary judgment denied since jury could find it was foreseeable that the field work assignment could cause knee injury).

(n49) Footnote 49. *Lillie v. Thompson*, 332 U.S. 459, 68 S. Ct. 140, 92 L. Ed. 73 (1947) ; *Reardon v. Peoria & Pekin Union Railway Co.*, 26 F.3d 52 (7th Cir. 1994) .

(n50) Footnote 50. See Mann, *Introduction of Federal and State Regulations in FELA Cases*, Reference Materials (ATLA/National College of Advocacy) 1994 Annual Convention, 617. See also *Martinez v. Burlington Northern and Santa Fe Ry. Co.*, 276 F. Supp. 2d 920 (N.D.Ill. 2003) .

(n51) Footnote 51. *Richardson v. Missouri Pacific R. Co.*, 677 F.2d 663 (8th Cir. 1982) ; *Dawson v. Elgin Joliet & Eastern Ry. Co.*, 266 Ill. App. 3d 329, 640 N.E.2d 661 (3d Dist. 1994) .

(n52) Footnote 52. *Rogers v. Missouri Pacific Ry.*, 352 U.S. 500 (1957) .

(n53) Footnote 53. *Rogers v. Missouri Pacific Ry.*, 352 U.S. 500, 506-507 (1957) . See also *Williams v. National Railroad Passenger Corp.*, 161 F.3d 1059 (7th Cir. 1998) ; *Fulk v. Illinois Central R.R. Co.*, 22 F.3d 120 (7th Cir. 1994) .

(n54) Footnote 54. *Hanson v. Consolidated Rail Corp.*, 282 Ill. App. 3d 373, 668 N.E.2d 98 (1st Dist. 1996) ; *Pry v. Alton & S. R.R.*, 233 Ill. App. 3d 197, 598 N.E.2d 484 (5th Dist. 1992) ; *Hildebrand v. Baltimore & Ohio R. Co.*, 41 Ill. App. 2d 217, 190 N.E.2d 630 (4th Dist. 1963) . See also *Myers v. Illinois Cent. R.R. Co.*, 323 Ill. App. 3d 780, 753 N.E.2d 560 (4th Dist. 2001) (plaintiff who fails to prove that the employer's negligence played a part, even the slightest, in the injury will lose on summary judgment).

(n55) Footnote 55. *Dunn v. Conemaugh & Black Lick R.*, 267 F.2d 571 (3d Cir. 1959) .

(n56) Footnote 56. *Jesionowski v. Boston & M. R. Co.*, 329 U.S. 452 (1947) . For a discussion of the applicability of the doctrine in FELA cases, see *Robinson v. Burlington Northern R. Co.*, 131 F.3d 648 (7th Cir. 1997) .

(n57) Footnote 57. *Waymire v. Norfolk & W. Ry. Co.*, 218 F.3d 773 (7th Cir. 2000) . *Myers v. Illinois Cent. R.R. Co.*, 323 Ill. App. 3d 780, 753 N.E.2d 560 (4th Dist. 2001) (the court declined to follow *Waymire* and held that the FRSA does not preempt a claim brought under FELA).

(n58) Footnote 58. *Gallick v. Baltimore & Ohio R. Co.*, 372 U.S. 108, 83 S. Ct. 659, 9 L. Ed. 2d 618 (1963) .

(n59) Footnote 59. *Lavender v. Kurn*, 327 U.S. 645, 66 S. Ct. 740, 90 L. Ed. 916 (1946) .

(n60) Footnote 60. *Lavender v. Kurn*, 327 U.S. 645, 653 (1946) . See *Kossmann v. Northeast Ill. Regional Commuter R. Corp.*, 211 F.3d 1031 (7th Cir. 2000) ; *Williams v. Northeast Ill. Regional Commuter R. Corp.*, 2002 U.S. Dist. LEXIS

11908 (June 27, 2002) ; *Keane v. Northeast Ill. Regional Commuter R. Corp.*, 2002 U.S. Dist. LEXIS 14835 (August 6, 2002) .

(n61) Footnote 61. Most FELA cases involve damage claims for back injuries, knee injuries, hearing loss, or head injuries. For a summary of jury verdicts and settlements between April 1993 and March 1994, including a number of cases from Illinois, see Laska, *Damages Review: FELA Cases in 1994*, I Reference Materials (ATLA/National College of Advocacy) 1994 Annual Convention, 559.

(n62) Footnote 62. *Byram v. Illinois Central R. Co.*, 172 Iowa 631 (1915) .

(n63) Footnote 63. *Gallick v. Baltimore & Ohio R. Co.*, 372 U.S. 108 (1963) ; *Del Raso v. Elgin J. & E.-R. Co.*, 84 Ill. App. 2d 344, 228 N.E.2d 470 (1st Dist. 1967) .

(n64) Footnote 64. *Urie v. Thompson*, 337 U.S. 163 (1949) ; *Fowkes v. Pennsylvania R. Co.*, 264 F.2d 397 (3d Cir. 1959) .

(n65) Footnote 65. *Chicago, R. I. & P. R. Co. v. Bond*, 240 U.S. 449 (1916) .

(n66) Footnote 66. *Hoyt v. Thompson*, 174 F.2d 284 (7th Cir. 1949) .

(n67) Footnote 67. *Lancaster v. Norfolk & W. Ry. Co.*, 773 F.2d 807 (7th Cir. 1985) ; *Tatham v. Wabash R. Co.*, 412 Ill. 568, 107 N.E.2d 735 (1952) .

(n68) Footnote 68. *Biggs v. Terminal R.R. Ass'n of St. Louis*, 110 Ill. App. 3d 709, 442 N.E.2d 1353 (5th Dist. 1982) ; *Tatham v. Wabash R. Co.*, 412 Ill. 568, 107 N.E.2d 735 (1952) .

(n69) Footnote 69. *Consolidated Rail Corp. v. Gottshall*, 512 U.S. 532, 114 S. Ct. 2396, 129 L. Ed. 2d 427 (1994) .

(n70) Footnote 70. *Metro-North Commuter R.R. v. Buckley*, 521 U.S. 424, 117 S. Ct. 2113, 138 L. Ed. 2d 560 (1997) .

(n71) Footnote 70.1. *Norfolk & Western Ry. Co. v. Ayers*, 538 U.S. 135, 123 S. Ct. 1210, 155 L. Ed. 2d 261 (2003) .

(n72) Footnote 71. *Lancaster v. Norfolk & W. Ry. Co.*, 773 F.2d 807 (7th Cir. 1985) .

(n73) Footnote 72. *Wilson v. Norfolk & W. Ry. Co.*, 187 Ill. 2d 369, 718 N.E.2d 172 (1999) .

(n74) Footnote 73. 45 U.S.C. § 56 ; *Missouri ex rel. Southern Ry. Co. v. Mayfield*, 340 U.S. 1, 5 (1950) .

(n75) Footnote 74. *Rogers v. Gateway Western Ry. Co.*, 254 Ill. App. 3d 567, 626 N.E.2d 318 (5th Dist. 1993) ; *Lowe v. Norfolk & W. Ry. Co.*, 124 Ill. App. 3d 80, 463 N.E.2d 792 (5th Dist. 1984) . See also *Casillas v. Chicago & North Western Transp. Co.*, 1995 U.S. Dist. LEXIS 14099 (N.D. Ill. 1995) .

(n76) Footnote 75. *Missouri ex rel. Southern Ry. Co. v. Mayfield*, 340 U.S. 1, 5 (1950) .

(n77) Footnote 76. 28 U.S.C. § 1445(a) .

(n78) Footnote 77. *Pryor v. National R.R. Passenger Corp.*, 301 Ill. App. 3d 628, 703 N.E.2d 997 (5th Dist. 1998) .

(n79) Footnote 78. *Harper v. Missouri Pacific R.R. Co.*, 264 Ill. App. 3d 238, 636 N.E.2d 1192 (5th Dist. 1994) .

(n80) Footnote 79. *Brady v. Southern*, 320 U.S. 476, 64 S. Ct. 232, 88 L. Ed. 239 (1943) .

(n81) Footnote 80. *Urie v. Thompson*, 337 U.S. 163, 69 S. Ct. 1018, 93 L. Ed. 1282 (1949) ; *Brown v. Chicago & North Western Transp. Co.*, 162 Ill. App. 3d 926, 516 N.E.2d 320 (1st Dist. 1987) .

(n82) Footnote 81. *Norfolk & W. Ry. Co. v. Liepelt*, 444 U.S. 490, 100 S. Ct. 755, 62 L. Ed. 2d 689 (1980) .

(n83) Footnote 82. *Donovan v. Penn Shipping Co.*, 429 U.S. 648, 97 S. Ct. 835, 51 L. Ed. 2d 112 (1977) .

(n84) Footnote 83. *Pryor v. National R.R. Passenger Corp.*, 301 Ill. App. 3d 628, 703 N.E.2d 997 (5th Dist. 1998) .

(n85) Footnote 84. *Brown v. Western Ry.*, 338 U.S. 294, 70 S. Ct. 105, 94 L. Ed. 100 (1949) .

(n86) Footnote 85. 45 U.S.C. § 51 ; *Devine v. Chicago, R. I. & P. R. Co.*, 266 Ill. 248, 107 N.E. 595 (1914) . For a discussion of the history and current status of the fellow-servant rule, see *Pomer v. Schoolman*, 875 F.2d 1262 (7th Cir. 1989) .

(n87) Footnote 86. 45 U.S.C. § 54 ; *Tiller v. Atlantic Coast Line R. Co.*, 318 U.S. 54 (1943) ; *Russell v. National Railroad Passenger Corp.*, 189 F.3d 590 (7th Cir. 1999) .

(n88) Footnote 87. The Illinois Supreme Court has defined contributory negligence as "a careless act or omission on the plaintiff's part tending to add new dangers to conditions that the employer negligently created or permitted to exist." *Uhrhan v. Union Pacific R.R. Co.*, 155 Ill. 2d 537, 538, 617 N.E.2d 1182, 1187 (1993) .

(n89) Footnote 88. 45 U.S.C. § 53 . See *Norfolk & W. Ry. Co. v. Earnest*, 229 U.S. 114 (1914) ; *Wilson v. Missouri Pac. R.R.*, 169 Ill. 2d 170, 661 N.E.2d 282 (1996) ; *Schadel v. Iowa Interstate R.R. Ltd.*, 381 F.2d 671 (7th Cir. 2004) (railroad was responsible for the full amount of conductor's injuries, reduced only by the amount of his contributory negligence).

(n90) Footnote 89. *Taylor v. Illinois Central R. Co.*, 8 F.3d 584 (7th Cir. 1993) ; *Scaggs v. Consolidated Rail Corp.*, 6 F.3d 1290 (7th Cir. 1993) ; *Ottley v. St. Louis, San Francisco R. Co.*, 232 S.W.2d 966 (1950) .

(n91) Footnote 90. 45 U.S.C. § 23 .

(n92) Footnote 91. 45 U.S.C. § 1 . However, in FELA actions for violation of the Federal Safety Appliance Act, courts have permitted railroads to assert the misaligned drawbar defense under § 2 of that Act. 45 U.S.C. § 2 . In *Albin v. Illinois Cent. R.R.*, 277 Ill. App. 3d 50, 660 N.E.2d 994 (4th Dist. 1995) , the appellate court affirmed application of the defense. According to the court, the evidence was sufficient for the jury to find for the railroad where the first coupling attempt failed but the second succeeded; where the coupler functioned properly on other occasions; where the railroad worker received prior training; and where the method of manual coupling was a common practice in the industry.

(n93) Footnote 92. 45 U.S.C. § 53 ; *Southern R. Co. v. ADM Milling Co.*, 294 S.E.2d 215 (N.C. 1982) .

(n94) Footnote 93. *Wilson v. Missouri Pac. R.R.*, 169 Ill. 2d 170, 661 N.E.2d 282 (1996) , *Uhrhan v. Union Pacific R.R. Co.*, 155 Ill. 2d 537, 617 N.E.2d 1182 (1993) . However, in *Luther v. Norfolk & W. Ry. Co.*, 272 Ill. App. 3d 16, 649 N.E.2d 1000 (5th Dist. 1995) , the railroad's mere disbelief of the plaintiff's testimony was not sufficient to reach the jury on the issue of contributory negligence.

(n95) Footnote 94. *Wilson v. Missouri Pac. R.R.*, 169 Ill. 2d 170, 661 N.E.2d 282 (1996) ; *Pruett v. Norfolk & W. Ry. Co.*, 261 Ill. App. 3d 29, 632 N.E.2d 652 (5th Cir. 1994) .

(n96) Footnote 95. *O'Ryan v. CSX Transp., Inc.*, 255 Ill. App. 3d 214, 626 N.E.2d 374 (5th Dist. 1993) .

(n97) Footnote 96. *Uhrhan v. Union Pacific R.R. Co.*, 155 Ill. 2d 537, 617 N.E.2d 1182 (1993) ; *Green v. Union Pacific Ry. Co.*, 269 Ill. App. 3d 1075, 647 N.E.2d 1092 (5th Dist. 1995) .

(n98) Footnote 97. *Wilson v. Norfolk & W. Ry. Co.*, 109 Ill. App. 3d 79, 440 N.E.2d 238 (5th Dist. 1982) .

(n99) Footnote 98. *Uhrhan v. Union Pacific R.R. Co.*, 155 Ill. 2d 537, 548, 617 N.E.2d 1182, 1187 (1993) (citing *Taylor v. Burlington Northern R.R. Co.*, 787 F.2d 1309, 1316 (9th Cir. 1986) ).

(n100) Footnote 99. *Taylor v. Burlington Northern R.R. Co.*, 787 F.2d 1309, 1316 (9th Cir. 1986) .

(n101) Footnote 100. *Uhrhan v. Union Pacific R.R. Co.*, 155 Ill. 2d 537, 617 N.E.2d 1182 (1993) .

(n102) Footnote 101. *O'Ryan v. CSX Transp., Inc.*, 255 Ill. App. 3d 214, 626 N.E.2d 374 (5th Dist. 1993) . See also *Wilson v. Missouri Pac. R.R.*, 169 Ill. 2d 170, 661 N.E.2d 282 (1996) (issue of contributory negligence arises only after a jury has found defendant's negligence was the proximate cause of plaintiff's injuries; jury did not reach the question of contributory negligence because it found that defendant was not negligent).

(n103) Footnote 102. 45 U.S.C. § 56 . See *Tolston v. National Railroad Passenger Corp.*, 102 F.3d 863 (7th Cir. 1996) ; *Huett v. Illinois Central Gulf R.R. Co.*, 268 Ill. App. 3d 494, 644 N.E.2d 474 (5th Dist. 1994) .

(n104) Footnote 103. *Felix v. Burlington Northern, Inc.*, 355 F. Supp. 1107 (D. Minn. 1973) .

(n105) Footnote 104. *Urie v. Thompson*, 337 U.S. 163, 69 S. Ct. 1018, 93 L. Ed. 1282 (1949) ; *Billingsley v. Norfolk S. Ry. Co.*, 1994 U.S. Dist. LEXIS 7250 (N.D. Ill. 1994) . See *Norris v. Burlington Northern Santa Fe*, — F. Supp. 2d—, 2003 U.S. Dist. LEXIS 5592 (N.D. Ill. 2003) .

(n106) Footnote 105. *Fravel v. Pennsylvania R.*, 104 F. Supp. 84 (D. Md. 1952) ; *Mumpower v. Southern Ry.*, 270 F. Supp. 318 (W.D. Va. 1967) .

(n107) Footnote 106. *Rogers v. Chicago & N.W. Transp. Co.*, 59 Ill. App. 3d 911, 375 N.E.2d 952 (5th Dist. 1978) . See *Schultz v. Northeastern Ill. Regional Commuter*, 201 Ill. 2d 260, 775 N.E.2d 964 (2002) (if injury resulted from preexisting condition, damages are available only for the aggravation of the preexisting condition).

(n108) Footnote 107. *Raines v. New York Cent. R.R.*, 51 Ill. 2d 428, 283 N.E.2d 230 (1972) ; *Bean v. Norfolk & W. Ry. Co.*, 84 Ill. App. 3d 395, 405 N.E.2d 418 (5th Dist. 1980) .

(n109) Footnote 108. *Gruenthal v. Long Island R.R.*, 393 U.S. 156, 89 S. Ct. 331, 21 L. Ed. 2d 309 (1968) .

(n110) Footnote 109. *Walker v. Soo Line R.R. Co.*, 208 F.3d 581 (7th Cir. 2000) .

(n111) Footnote 110. 45 U.S.C. § 51 .

(n112) Footnote 111. *Ferak v. Elgin J. & E. Ry.*, 55 Ill. 2d 596, 304 N.E.2d 619 (1973) ; *Jensen v. Elgin, Joliet & E. R. Co.*, 24 Ill. 2d 383, 182 N.E.2d 211 (1962) .

(n113) Footnote 112. *Padilla v. Consolidated Rail Corp.*, 119 Misc. 2d 569 (N.Y. 1983) .

(n114) Footnote 113. *Howes v. Baker*, 16 Ill. App. 3d 39, 305 N.E.2d 689 (1st Dist. 1973) .

(n115) Footnote 114. *Kozar v. Chesapeake & O. R.R.*, 449 F.2d 1238 (6th Cir. 1971) .

(n116) Footnote 115. *Norfolk & W. Ry. Co. v. Liepelt*, 444 U.S. 490, 100 S. Ct. 755, 62 L. Ed. 2d 689 (1980) .

(n117) Footnote 116. *Crabtree v. St. Louis-San Francisco Ry.*, 89 Ill. App. 3d 35, 411 N.E.2d 19 (5th Dist. 1980) .

(n118) Footnote 117. *Luther v. Norfolk & W. Ry. Co.*, 272 Ill. App. 3d 16, 649 N.E.2d 1000 (5th Dist. 1995) .

(n119) Footnote 118. See *Kulavic v. Chicago & Illinois Midland Ry. Co.*, 1 F.3d 507 (7th Cir. 1993) .

(n120) Footnote 119. *Norfolk & W. Ry. Co. v. Liepelt*, 444 U.S. 490, 100 S. Ct. 755, 62 L. Ed. 2d 689 (1980) .

# FELA

## The Federal Employers' Liability Act

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# A Matter of Accountability, Fairness, Efficiency and Safety

**A**s it nears its 100th anniversary, the Federal Employers' Liability Act (FELA) is as important, relevant and vital as ever, advancing corporate accountability, ensuring fairness and justice for railroad workers, maximizing efficiency, and saving lives, while imposing no burdens on taxpayers.

Part and parcel with FELA's success, the time-tested, court-approved Designated Counsel system ensures quality legal representation for railroad workers injured on the job while speeding the resolution of claims, minimizing transaction costs and relieving the court system of unnecessary cases.

Simply put, as an injury compensation system, FELA is far superior to the alternative: no-fault, government-run Workers' Compensation.

## ***FELA works because it:***

- Promotes accountability by requiring rail employees to prove employer responsibility for their injuries.
- Advances safety for all — workers, passengers and the public — in one of the most dangerous industries in America, by creating a direct financial incentive for rail companies to reduce injuries.
- Ensures fairness by tailoring each award to meet the unique needs and family responsibilities of injured workers, while maintaining consistency from state to state.
- Maximizes efficiency and minimizes costs through a process in which 75 percent of cases do not involve a lawyer, between 75 and 80 percent of all settlements do not involve litigation, and less than 2 percent of all FELA cases reach a jury verdict.
- Speeds compensation to injured railroad employees through immediate short-term benefits and timely processing of claims.
- Is a private system operating without unnecessary government intrusion or expense, especially with regard to administrative costs paid by the railroads, not the taxpayers.

**The Federal Employers' Liability Act was designed to put on the railroad industry some of the cost of the legs, arms, eyes and lives which it consumed in its operation.**

— Supreme Court Justice  
William O. Douglas

## **FELA Case Facts**

- 75 percent of FELA claims do not involve an attorney.
- 75-80 percent are settled without filing a lawsuit.
- Less than 2 percent reach a jury verdict.

For years, the railroad industry has sought to evade accountability for worker safety by switching from FELA to no-fault Workers' Compensation. But independent analysts, from the U.S. General Accounting Office to the Transportation Research Board, have found that this would have minimal, if any, impact on the rail companies' surging bottom lines. It would, however, burden the public with more dangerous railroads and higher taxpayer expenses, and subject workers to greater costs, longer delays, and unfair "cookie-cutter" worker compensation systems.

## A Proud History

Working on the railroads has always been a dangerous occupation. In 1893 alone, 1,657 railroad workers were killed on the job and another 18,000 were injured. Eight years later, 2,675 railroad workers were killed and 41,000 injured. By 1908, 4,500 rail workers died and nearly 88,000 were injured.

In response to these skyrocketing rates of carnage along the nation's tracks, Congress enacted the Federal Employers' Liability Act (FELA) that very same year.

**Tort law is intended to further twin purposes: deterrence of unsafe practices and compensation for injuries. By those measures, the F.E.L.A. is irreproachable.**

— Bruce E. Fein  
Former Associate Deputy Attorney General

FELA was ingeniously designed to achieve two goals simultaneously — provide injured rail workers or their survivors with fair compensation, and save lives by creating a financial incentive for rail companies to improve safety. And it was crafted to meet the unique circumstances of the rail industry and the unique needs of rail employees.

FELA has succeeded in significantly reducing the number of rail employees injured or killed on the job due to employer negligence. However, rail work remains among the most dangerous in America and FELA's strong incentives must be maintained.

### ***How FELA Works***

Under FELA, railroad workers who suffer job-related injuries — including occupational diseases and illnesses — file a claim against their employers for compensation. They must document that their employer's negligence caused or contributed to their injuries. However, this requirement is waived if the employer violated safety regulations — another strong safety incentive.

In 75 to 80 percent of all cases, the claim is settled between the employer and employee without the need for legal action — *and in most instances, without the involvement of a lawyer.*

In less than two of every 10 cases, a settlement is not reached and the employee files a lawsuit under FELA in federal or state court. (Such action must be taken within three years of the injury or the discovery of an occupational disease.) Even then, the vast majority — more than 90 percent — are settled without going to trial. *And less than two percent of all cases result in a jury verdict.*

Compensation under FELA is tailored to fit the circumstances of each case and each injured worker. Awards may reflect the worker's lost wages and benefits, rehabilitation costs, other economic costs, such as future employment prospects, pain and suffering, and family obligations. However, they cannot include punitive damages.

The individualized formula for determining awards is consistent across the country, not subject to the drastic variations in fixed award amounts between states that characterize the Workers' Compensation system. This is particularly important because rail workers often cross state lines in performing their duties.

Because FELA is a "comparative liability" statute, awards can be reduced according to the employer's degree of negligence. For example, if a railroad company was 50 percent responsible for a worker's injury, compensation will be 50 percent of the employee's lost wages and other considerations as described above.

While most claims are resolved in a timely manner, injured rail workers who are unable to work are entitled to immediate short-term compensation through the Railroad Retirement Board while their FELA claims are pending.

### ***How the Designated Counsel System Works***

The time-tested, Court-approved Designated Counsel System guarantees that the one-in-four injured railroad workers who need an attorney to pursue their FELA claims receive quality representation at the lowest possible cost.

In the years after FELA was enacted in 1908, few railroad employees could afford legal representation. The railroad companies knew this and often tied up FELA claims in court, forcing many injured workers to drop their cases.

In response, the Brotherhood of Railroad Trainmen decided in 1916 to designate attorneys to represent injured workers so that all who needed legal representation could receive it. The other rail unions soon followed suit and the Designated Counsel System was born.

Creation of the Designated Counsel System was especially important because FELA is a highly specialized area of the law. By pre-screening attorneys, unions ensure that only those with ample expertise and experience in FELA law represent their members. Without the Designated Counsel System, it would be hard for injured workers to find appropriate legal counsel on their own. Just hiring any attorney would not do; that would be like having a general practitioner perform open heart surgery.

#### **The Designated Counsel System:**

- ▶ Ensures that all injured rail workers who need an attorney receive the highest-quality legal representation at the lowest possible cost.
- ▶ Pre-screens attorneys for expertise and experience in highly specialized FELA law.
- ▶ Caps contingency fees at the below-market 25 percent of recovery.
- ▶ Leaves injured rail workers free to hire any attorney of their choosing.
- ▶ Has withstood the test of time and been approved by the U.S. Supreme Court.

As the Designated Counsel System raised the quality of legal representation, FELA awards increased commensurately during the early and middle part of the 20th century. The railroad companies fought back by filing multiple legal challenges to the Designated Counsel System.

A landmark case, filed originally in 1959 against the Brotherhood of Railroad Trainmen, made its way to the Supreme Court. Ruling in 1964, the nation's highest court upheld a union's right to advise injured workers to obtain legal counsel, and affirmed that specific attorneys may be recommended in accordance with the First and Fourteenth Amendments.<sup>1</sup>

Under the Designated Counsel System, injured railroad workers are free to hire any attorney of their choosing. Designated counsel are recommended, but not required.

Qualified attorneys who agree to serve as designated counsel also agree to take cases on contingency — meaning they only receive fees if they win cases and the injured worker assumes no risk. Their fees are capped at 25 percent of any recovery — well below the standard 33 percent or higher fee that is customary with other personal injury cases.

## Saving Lives

FELA is the strongest safety law in an industry that has been among the most unsafe in America.

**[The FELA] was one of the things that drove us to our current safety program of bringing the workers at the very bottom level into the program along with top management ... Our activity there led us to a formal quality program because of the success we have had in reducing accidents, reducing injuries, and consequently, the potential for FELA claims.**

— Chairman, Norfolk Southern Railroad  
1991 Congressional Testimony

FELA does not impose unlimited liabilities on the rail carriers. Rather, they have the power to reduce their FELA costs. Because they only pay compensation under FELA when they are at fault — or when they have violated safety regulations — they can save money under FELA by improving their safety procedures and protections. That is exactly what many have done. In 1992, for example, CSX Corporation reported that its safety program reduced FELA costs by \$22 million.

FELA has also empowered the rail companies to address chronic occupational illnesses and injuries, ranging from hearing loss to asbestos and silica-related diseases, as evidence grew of their harsh impact. For example, as noise levels in the workplace skyrocketed, and workers subsequently lost their hearing, these claims grew to 50 percent of all FELA cases filed by the early 1990s. The industry responded swiftly, providing hearing protection equipment to their employees. Railroads saved FELA costs and workers saved their hearing. It was a win/win solution made possible by FELA's unique structure.

<sup>1</sup> *Brotherhood of Railroad Trainmen v. Virginia*, Ex. Rel. Virginia State Bar, 377 U.S. 1 (1964).

Changing FELA to no-fault Workers' Compensation would remove one of the strongest safety incentives within the rail industry. The cost would be measured not just in dollars, but in human lives.

And not just rail employees' lives are at stake. So are the lives of rail passengers and the public at large. Freight railroads often carry large quantities of hazardous substances — and they are a potential target for terrorists. Now is not the time to take actions that would weaken America's rail safety.

### ***Saving Taxpayer Dollars***

FELA saves tax dollars in two ways:

- As a privately-run system, FELA's administrative costs are paid for by the railroad companies; by contrast, taxpayers fund the administrative costs associated with Workers' Compensation.
- Workers compensated under FELA are far less likely to need government assistance than those receiving Workers' Compensation.

FELA provides railroad workers injured or made ill due to the fault of their employer with full replacement of actual lost wages and future earnings potential, full recovery of medical costs and rehabilitation, and recovery for pain and suffering — compensation that can even continue after the injured worker reaches retirement age.

Because FELA's compensation is tailored to each injured employee's unique circumstances, it helps some injured workers receive the rehabilitation they need to regain good employment. And for those who cannot work again, it meets all of their needs, allowing them to live without being a burden on the taxpayers. By contrast, the cookie-cutter approach of Workers' Compensation inevitably leaves many injured or disabled workers living in poverty, relying on food stamps and other government programs just to survive.

### ***Saving Transaction Costs***

As noted, three of every four employees filing FELA claims never hire an attorney. They incur no significant costs, while the railroad companies' FELA claims systems minimize administrative expenses.

In cases where an injured rail worker does hire an attorney, it involves no up-front costs for the rail employee, no expense if the claim is unsuccessful, and contingency fees capped at a below-market 25 percent in the event the worker does receive compensation. Even under these circumstances, since less than 2 percent of cases go to trial and verdict, transaction costs for the rail companies are also minimal.

And because of the Designated Counsel system, in which attorneys are pre-screened for FELA expertise, competence and experience, railroad workers know that they are receiving the best possible representation at a minimal cost — in a situation where the attorney's and client's interests are fully aligned.

By contrast, a worker filing a claim under Workers' Compensation is more likely to need an attorney and to pay a *higher cost* in legal and other fees.

# FELA vs. Workers' Compensation

## A POINT-BY-POINT COMPARISON

If FELA was repealed, injured rail workers would enter into the state government-run, taxpayer-supported, no-fault worker's compensation system. A point-by-point comparison between FELA and Workers' Compensation shows that FELA comes out on top every time!

	FELA	WORKERS' COMPENSATION
<b>Accountability</b>	<b>YES.</b> FELA's foundation is built on the principle of accountability. Injured workers must prove employer negligence to receive compensation. If the employer was partially responsible, the worker receives partial compensation.	<b>NO.</b> By definition, there is no accountability in no-fault Workers' Compensation. Even if the employer was not responsible, the employee must be paid.
<b>Safety</b>	<b>YES.</b> FELA is the rail companies' primary financial incentive to invest in safety and reduce workplace injuries and illnesses. As a result, workers, passengers and the public are safer.	<b>NO.</b> Workers' Compensation provides no incentive for employers to maximize safety. Whether a company acts responsibly or not has no impact on its costs.
<b>Reasonable compensation</b>	<b>YES.</b> The amount of compensation is tailored to each worker's unique circumstances and individual needs. Compensation under FELA includes lost wages and benefits, medical costs, rehabilitation expenses, lost future employment prospects, pain and suffering, and family obligations.	<b>NO.</b> Compensation is based on arbitrary, inflexible "cookie-cutter" formulas. For example, loss of a limb is worth a fixed dollar amount no matter the circumstances. Workers' Compensation does not fully cover lost wages, and it does not take into account lost future employment prospects, rehabilitation expenses, pain and suffering, or family obligations.

**FELA****WORKERS' COMPENSATION****Fairness**

**YES.** FELA's individualized formula for determining appropriate compensation is the same no matter where the injury took place or who the employer is.

**NO.** Compensation varies radically across state lines — which railroad workers routinely cross in the line of duty. For example, compensation for loss of an arm at the shoulder is \$301,323 in Illinois but only \$43,150 in Colorado. Weekly income benefits for total disability range from \$1,103 in Iowa to \$331 in Mississippi. Totally disabled workers in Connecticut receive \$909/week, yet if they lived across the border in New York state, they would receive less than half — \$400/week. And in half of the states, disabled workers can receive nothing because their meager Workers' Compensation benefits are offset by Social Security, unemployment compensation, employer pension plan and disability insurance payments.

**Rehabilitation**

**YES.** FELA compensation covers the costs of rehabilitation, which not only helps injured rail workers improve the quality of their lives; it also helps many return to work.

**NO.** Workers' Compensation's "cookie-cutter" formula does not provide for the costs of rehabilitation. Many injured workers who could be rehabilitated never work again.

**Retiree benefits**

**YES.** Compensation under FELA continues for as long as the claimant lives, including retirement years.

**NO.** Benefits under Workers' Compensation cease when the injured worker reaches retirements age. This usually leaves Social Security as the only source of income.

**Taxpayer burden**

**NO.** The railroads pay for FELA's administrative costs. And because FELA compensation is so comprehensive, injured or disabled workers under FELA rarely if ever need public assistance.

**YES.** Workers' Compensation is administered by state governments and paid for with taxpayer dollars. And because compensation is often inadequate, injured workers frequently find themselves living in poverty and needing additional public assistance.

	<b>FELA</b>	<b>WORKERS' COMPENSATION</b>
<b>Adversarial process</b>	<b>NO.</b> Ninety-nine of every 100 FELA cases is settled without going to court. Three of every four rail workers filing FELA claims never even hire an attorney.	<b>YES.</b> Workers' Compensation is far more litigious. A 2003 study found that 44 percent of Missouri workers filing claims were represented by attorneys. In New York State, attorneys were hired in 39 percent of all cases, 50 percent of indemnity award cases and 77 percent of permanent partial disability, according to a 2002 study. In Ohio indemnity claims, attorneys were involved 50 percent of the time.
<b>Swift response</b>	<b>YES.</b> An injured worker automatically receives temporary benefits through the Railroad Retirement Board while his or her FELA claim is pending. While claims are usually processed in a timely manner, the worker always receives immediate assistance.	<b>NO.</b> Workers' Compensation provides no temporary benefits while claims are being processed. With contested cases taking between 26 and 30 months to resolve, on average, this can mean more than two years without benefits; in some states, it can take four years to receive compensation.
<b>High-quality, low-cost legal assistance</b>	<b>YES.</b> The Designated Counsel system ensures that injured workers have access to attorneys pre-screened for experience and expertise in FELA, who work on contingency (meaning no fees if the case is unsuccessful), and who charge below-market fees capped at 25 percent of compensation.	<b>NO.</b> Injured workers filing claims under Workers' Compensation are on their own when it comes to finding a competent attorney and negotiating fees, which often reach or exceed 33 percent
<b>Appropriate for railroad work</b>	<b>YES.</b> FELA was specifically designed to improve safety and compensate injured workers in one of the most dangerous industries in America. Despite improvements, railroad work remains hazardous, and FELA continues to be the appropriate system for workers' compensation for the rail industry.	<b>NO.</b> Workers' Compensation is a "one-size-fits-all" system that is inappropriate for the danger, lack of safety enforcement, and other unique aspects of railroad work. It would be like trying to fit a square peg in a round hole.

# Management Myths vs. Railroad Realities

The railroad companies have been waging a campaign to repeal FELA and replace it with state-run Workers' Compensation, under the erroneous impression that such a move would save them money. Here are the myths put forward by the industry, and the realities of how FELA works for railroad workers, taxpayers, the public and even the companies themselves.

**MANAGEMENT MYTH: FELA awards are excessive.**

**RAILROAD REALITY:** FELA settlements — more than 98 percent of which never reach a jury verdict — are entirely reasonable. They reflect the cost of lost wages and future earnings opportunities, medical and rehabilitation expenses, pain and suffering, and family obligations. And there are no punitive damages permitted under FELA.

**MANAGEMENT MYTH: FELA damages railroad company profitability and competitiveness.**

**RAILROAD REALITY:** Independent organizations that have studied this question — including the U.S. General Accounting Office and the Transportation Research Board — have determined that switching from FELA to state-run Workers' Compensation would produce no significant change to the railroads' bottom line. The GAO also found that smaller railroads had lower FELA costs per employee-hour worked than larger railroads and that FELA liability insurance was available and affordable for smaller railroads. In addition, most railroad companies are highly profitable under FELA. For example, in 2003, Burlington Northern and Santa Fe Railroad's revenues were up nearly 11 percent, according to *Time Magazine*, which talked of the company's "surge in business" and cited its success as "proof that America's railroads are back on track."

**MANAGEMENT MYTH: FELA is a relic of the past and outdated. Workers' Compensation is a modern and better system.**

**RAILROAD REALITY:** FELA was designed to meet the needs of railroad workers and their employers. Nearly 100 years after its founding, it works as intended, producing tangible safety improvements that protect workers' lives, and providing individually tailored, reasonable compensation for injuries. Workers' Compensation is actually older — it was introduced as a social experiment in the 1880s in Germany. Its inflexible, "cookie-cutter" benefit formulas, its unfair disparities from state to state, and its abandonment of any pretense of accountability make it the wrong system for the railroad industry — and, many experts agree, the wrong system for workers in other industries, too. Most state officials believe Workers' Compensation is broken and solutions are elusive.

**MANAGEMENT MYTH: FELA is a "lottery." Some injured workers make out like bandits, while others get nothing.**

**RAILROAD REALITY:** Workers' Compensation is the true lottery. If a worker loses an arm in Illinois, he or she receives \$301,323. But if the accident takes place in Colorado, compensation is one-seventh — \$43,150. By contrast, under FELA, injured railroad workers receive true justice. So long as their

employer either violated safety regulations or is at fault for the injury — even partially — they get compensation. While tailored to their individual needs and circumstances, compensation under FELA is uniform across state lines and entirely predictable, with more than 98 percent of claims settled without the need for a judge's or jury's verdict.

**MANAGEMENT MYTH:** FELA is unfair to workers because the burden is on them to prove their employer was at fault, whereas under Workers' Compensation any workplace-related injury will be covered.

**RAILROAD REALITY:** In order to receive compensation under FELA, the worker has to show that the employer bears some degree of fault for the injury or illness. Under FELA's "comparative negligence" statute, the award to the injured worker reflects the percentage by which the railroad company is responsible. However, the employee receives full compensation if the employer violated a safety regulation. Virtually all injured workers filing FELA claims receive at least some compensation as a result. The underlying principle is accountability — if the railroad company is responsible it pays, and if not, it doesn't. This is critical to ensuring that FELA improves the safety of all railroad workers and results in fewer claims because there are fewer injuries or illnesses.

**MANAGEMENT MYTH:** Railroad workers wouldn't need to hire lawyers under a shift from FELA to Workers' Compensation.

**RAILROAD REALITY:** Actually, they would be more likely to have to hire an attorney. Three of every four FELA claimants resolve their cases without an attorney. By contrast, various recent studies show that in many states, workers' compensation claimants hire attorneys between 40 percent and 50 percent of the time.

**MANAGEMENT MYTH:** FELA is a needlessly adversarial system, one with high legal and administrative costs.

**RAILROAD REALITY:** FELA is far less adversarial than Workers' Compensation. Between 75 and 80 percent of all FELA cases are settled without litigation. Less than 2 percent of all cases go all the way to a jury verdict. Three quarters of all FELA claims that are filed are handled without the involvement of an attorney. The opposite is true with regard to Workers' Comp claims — nationwide, roughly 50 percent of all Workers' Comp claimants retain an attorney and in some states the rate is as high as 90 percent. And under FELA, administrative costs associated with claims are paid by the railroads, while under Workers' Compensation, those costs are paid by the taxpayers.

**MANAGEMENT MYTH:** Railroads should not be treated differently from other industries; there are other occupations as or more dangerous that are covered by Workers' Compensation.

**RAILROAD REALITY:** The railroad industry is different and it requires a law — FELA — designed for its unique attributes. Most notably, rail safety is not covered by the agency responsible for the safety of most workplaces — the U.S. Occupational Safety and Health Administration (OSHA). Instead, the railroads are subject to separate rail safety laws undermined by a weak penalty structure that is ineffectual at deterring violations. FELA's unique ability to ensure accountability in rail safety is all the more critical at a time when railroads ship hazardous materials and are even at risk of terrorist attacks.

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