

FELA and Rail Safety: A Response to Babcock and Oldfather The Role of the Federal Employers' Liability Act in Railroad Safety

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INTRODUCTION

During the last session of Congress, the railroad industry urged Congress to repeal the Federal Employers' Liability Act (FELA)¹, the law that provides compensation to railroad employees who are injured on the "job," and put railroads under the jurisdiction of the no-fault, state workers' compensation systems.² In Babcock & Oldfather, *The Role of the Federal Employers' Liability Act in Railroad Safety* (Babcock & Oldfather), the authors argue that FELA provides a greater incentive for railroads to provide a safe working environment than would the state workers' compensation systems, the systems that cover virtually all other workers. To

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1. 45 U.S.C. §§ 51-60 (1988).

2. *Hearings on the Federal Employers' Liability Act Before the Subcomm. on Transportation and Hazardous Material of the House Comm. on Energy and Commerce*, 101st Cong., 1st Sess. 46-57 (1989) (statement of William H. Dempsey, President, Association of American Railroads) [hereinafter *FELA Hearings*]. In the closing days of the 101st session of Congress, legislation was introduced repealing FELA and putting the railroad industry under the jurisdiction of the state workers' compensation systems. 136 CONG. REC. S15553 (daily ed. Oct. 17, 1990). 136 CONG. REC. H10104 (daily ed. Oct. 17, 1990).

bolster their contention that FELA is appropriate for the railroad industry, they purport to demonstrate that the industry's safety record is poor.

In fact, the two major premises of Babcock & Oldfather are incorrect. The railroad industry's safety record is far better than Babcock & Oldfather suggests and is indeed a good and consistently improving one. Moreover, FELA does not provide a superior safety incentive to no-fault systems: if anything, it is inferior. This article will address the contentions made in Babcock & Oldfather about rail safety and FELA.

BACKGROUND

Some background on FELA is useful in analyzing the substance of Babcock & Oldfather. FELA was enacted in 1906³ and, after the original statute was found unconstitutional,⁴ was reenacted in 1908.⁵ At the time of FELA's enactment, railroading was the nation's dominant industry. It played a key role in industrial expansion and employed nearly 1.7 million people.⁶ Railroading was also an extremely dangerous industry. In the year ending June 30, 1907, 4,534 railroad employees were killed and 87,644 were injured.⁷

At that point in our nation's history, the law greatly favored employers. The common law of torts, which relied on concepts of negligence, provided the remedy for on-the-job injuries and was heavily stacked against employees. In order to receive compensation, not only did an employee have to prove the employer was negligent, but contributory negligence on the part of the employee or a co-worker completely barred recovery.⁸ Further, recovery if the worker was also denied if worker knew the inherent dangers of his job and assumed the risk of those dangers by accepting the employment.⁹ By the turn of the century, there was great pressure to move away from these rigid concepts and provide more equitable protection.

When Congress undertook to enact a compensation law for railroad employees, the experience of American jurisprudence was limited to the fault-based concept of negligence. Not surprisingly, Congress utilized that concept in enacting FELA. However, in what was, for the time, for-

3. Pub. L. No. 59-219, 34 Stat. 232 (1906).

4. *Howard v. Illinois Cent. R.R.*, 207 U.S. 463 (1908).

5. Pub. L. No. 60-100, 35 Stat. 65 (1908). The Supreme Court upheld the constitutionality of the second FELA in *Second Employers' Liability Act Cases*, 223 U.S. 1 (1912).

6. Interstate Commerce Commission, *Statistics of Railways in the United States, 1908* 41 (1909).

7. *Id.* at 99.

8. *E.g.*, *Farwell v. Boston & Worcester R.R.*, 4 Metc. 49 (Mass. 1842).

9. *E.g.*, *Clark v. St. Paul & Sioux City R. Co.*, 28 Minn. 126, 9 N.W. 581 (1881); *Gibson v. Erie Ry. Co.*, 63 N.Y. 449 (1875).

ward-thinking legislation, Congress replaced the doctrine of contributory negligence with one of comparative negligence. Thus, under FELA, an employee's contributory negligence does not bar recovery, but rather, merely reduces the employee's compensation in proportion to the employee's negligence.¹⁰ Furthermore, if violation of a safety statute causes the injury, there is no reduction of the award regardless of the employee's contributory negligence.¹¹ As a result of amendments enacted in 1910, an employee may bring a FELA lawsuit, in either state or federal court, in any state where the railroad does business.¹² In 1939, further amendments eliminated the assumption of the risk doctrine in all cases.¹³

Subsequent to FELA's enactment, the individual states began adopting no-fault compensation systems as a means of providing compensation to workers injured on the job.¹⁴ The fundamental difference between workers' compensation and traditional tort law is that under the former the right to compensation is based on the connection of the injury to employment, as opposed to the notion of fault.¹⁵ Today, every state in the nation has a comprehensive and well-established workers' compensation law that covers virtually all employees other than railroad workers.¹⁶

With the passage of time, the Supreme Court has eroded the standards of negligence and causation, leaving FELA plaintiffs with a lesser burden in proving their case than in a traditional negligence action.¹⁷ In

10. 45 U.S.C. § 53 (1988).

11. *Id.*

12. Pub. L. No. 61-117, §§ 1, 6, 36 Stat. 291 (1910), codified at 45 U.S.C. § 56 (1986). If a plaintiff chooses to bring an action in state court, the defendant railroad may not have the case removed to federal court. 28 U.S.C. § 1445(a) (1989).

13. Pub. L. No. 76-382, § 1, 53 Stat. 1404 (1939), codified at 45 U.S.C. § 54 (1986).

14. Compensation systems designed to provide insurance-type benefits to injured workers had been adopted in Germany in 1884 and in England in 1897, but did not take a foothold in the United States until after FELA's enactment. 1 LARSON, THE LAW OF WORKMEN'S COMPENSATION § 5.10 (1952) [hereinafter LARSON]. Limited workers' compensation laws were enacted, and subsequently found unconstitutional, in Maryland in 1902, *Franklin v. United Rys. & Elec. Co. of Baltimore*, 2 Baltimore City Rep. 309 (1904), and in Montana in 1909. *Cunningham v. Northwestern Improvement Co.*, 44 Mont. 180, 119 P. 554 (1911). The first compulsory coverage act of a general nature was enacted in New York in 1910 and applied to certain "hazardous employments." This law was also found unconstitutional. *Ives v. South Buffalo Ry.*, 201 N.Y. 271, 94 N.E. 431 (1911). New York enacted a new law in 1913 that was ultimately upheld by the Supreme Court, *New York Central R.R. v. White*, 243 U.S. 188, 197 (1917), as were similar laws in Iowa, *Hawkins v. Bleakley*, 243 U.S. 210 (1917) and Washington, *Mountain Timber Co. v. Washington*, 243 U.S. 219 (1917). By 1920 all but eight states had adopted a workers' compensation law. In 1949, Mississippi became the last continental state to adopt such a law. After its admission to the union, Hawaii became the last state to adopt a workers' compensation law. LARSON, *supra* at § 5.30.

15. LARSON, *supra* note 14, at § 2.10.

16. U.S. Chamber of Commerce, *1989 Analysis of State Workers' Compensation Laws* (1989). See, Chart Two.

17. *Lavender v. Kurn*, 327 U.S. 645, 653 (1946); *Rogers v. Missouri Pacific R. Co.*, 352 U.S.

Rogers v. Missouri Pacific R. Co., the Court conceded that the negligence standard it applied in FELA cases was "significantly different from the ordinary common law negligence action."¹⁸ Although FELA has moved toward a no-fault law in terms of liability, tort concepts of damages remain unmodified.

While judicial interpretation of FELA has made it easier for employees to prevail, because some fault must still be proved, some injured workers, including some with severe injuries, get no compensation. Further, sometimes similarly situated workers receive vastly different amounts of compensation.¹⁹ This contrasts with the workers' compensation systems that are designed to compensate every employee who is injured on the job, without regard to fault and, within a given jurisdiction, to provide workers suffering similar losses with similar compensation.

Given that the legislatures of all fifty states, as well as Congress,²⁰ have determined that no-fault systems are the appropriate means of providing compensation to injured workers within their jurisdiction, the ques-

500, 506 (1956) *reh'g denied*, 353 U.S. 943 (1957); Gallick v. Baltimore and Ohio R. Co., 372 U.S. 108, 116 (1963). In a recent case, the Court of Appeals for the Ninth Circuit summed up as follows: "A jury's right to pass upon the question of fault and causation in FELA actions must be viewed liberally; the jury's power to engage in inferences is significantly broader than in common law negligence actions. [citation omitted] A reviewing court must uphold a verdict even if it finds only 'slight' or 'minimal' facts to support a jury's findings of negligence. [citation omitted.]" Pierce v. Southern Pacific Transp. Co., 823 F.2d 1366, 1370 (9th Cir. 1987).

18. Rogers v. Missouri Pacific R. Co., 352 U.S. at 509. There is some evidence that the Court's move to liberalize FELA through judicial interpretation was motivated by its dissatisfaction with the use of a tort law to provide recompense for work related injuries. See also, Bailey v. Central Vermont Ry., 319 U.S. 350, 354 (1943), where the Court referred to FELA as "crude, archaic, and expensive as compared with the more modern systems of workmen's compensation." Stone v. New York C. & St. L. R.R., 344 U.S. 407 (1953), (Frankfurter, J., dissenting) *reh'g denied*, 345 U.S. 914 (1953) (referring to the use of a tort system to address workplace injuries as "a wholly inappropriate procedure." Stone, 344 U.S. at 410).

19. Two cases recently brought against the Southern Pacific Railroad by employees alleging hearing loss illustrate this point. In the first case, Koehler v. Southern Pacific Transportation Company, No. 88-2972-D (105th Jud. Dist. Tex. May 1990), a 55 year old employee received a net award of about \$20,000 after the jury's award was reduced for contributory negligence and to repay unemployment payments received from the Railroad Retirement Board. Three months later, in Bernhard v. Southern Pacific Transportation Company, No. 87-5135-D (105th Jud. Dist. Tex. Aug. 1990), a case tried in the same Texas court, before the same judge and by the same lawyers, a 63 year old employee asserting the same type of claim was awarded \$340,000. Furthermore, the employee in the Koehler case missed two years of work, while the employee in Bernhard lost no time from the job and continues to work for the railroad. Letter from James L. Walker, counsel for Southern Pacific to Daniel Saphire, counsel for Association of American Railroads (November 15, 1990) (discussing verdicts in Koehler and Bernhard cases).

20. Congress enacted the Longshore and Harbor Workers' Compensation Act (LHWCA), 33 U.S.C. § 901 *et seq.* (1988) to cover maritime and other workers within its jurisdiction. Employees of the Federal government are covered by the Federal Employees Compensation Act (FECA), 5 U.S.C. § 8101 *et seq.* (1988). Both LHWCA and FECA are no-fault workers' compensation laws.

tion persists as to why one industry continues to be covered by a fault-based system like FELA. Indeed, there are numerous reasons why FELA is an inappropriate means of accomplishing the goals of a workplace compensation system, discussion of which is beyond the scope of this article. Certainly, retention of FELA cannot be supported on a safety rationale.

RAILROAD SAFETY TRENDS

Babcock & Oldfather focuses on the relation between FELA and rail safety and attempts to establish a link. As a prelude to this argument, the authors attempt to demonstrate that the railroad industry is unusually hazardous, and, presumably, therefore in need of the added safety incentive allegedly provided by FELA.

Though railroad employment is not without hazards, as is work in all heavy industries, the contention that it is unusually dangerous is not supported by the facts. In a discussion of railroad safety trends, Babcock & Oldfather offers a plethora of data on rail accidents, injuries and fatalities. While suggesting that this review of safety trends is "instructive," little insight about rail safety is provided. For the period 1982-1988, Babcock & Oldfather merely concludes that with respect to on-duty employee fatality rates "there is no consistent trend"²¹ and that on-duty employee injury rates "displayed no predictable trend."²²

Moreover, some of the data presented in Babcock & Oldfather are incorrect. For example, for the period 1978-1988, it overstates, by 214, the number of railroad employees killed on the job, and overstates by 118,917 the number of on-the-job injuries.²³

Finally, Babcock & Oldfather includes data relating to injuries to rail

21. *The Role of Federal Employers' Liability Act in Railroad Safety* [hereinafter *Babcock & Oldfather*].

22. *Id.* The real story with respect to railroad safety trends is the significant improvement experienced since 1980, the year the industry was partially deregulated by the Staggers Rail Act, Pub. L. No. 96-488, 94 Stat. 1895 (1980). Deregulation greatly improved the financial situation of the railroad industry and facilitated increased investment in safety related maintenance. Although employee casualty rates undergo year to year fluctuations, the data shows that there have been marked improvements since enactment of Staggers. For the five year period prior to enactment of Staggers, 1976-1980, the average annual employee injury rate, per million man hours, was 58.63, and the fatality rate was 0.1018. For the five years from 1985 through 1989, the injury rate averaged 37.78, and the fatality rate 0.0798. Federal Railroad Administration Accident/Incident Bulletin Calendar Year 1989, 5 (Table 1 and 17, Table 9 (1990)); Calendar Year 1983, 3 (Table 1 and 15, Table 9 (1984)); Calendar Year 1981, 3 (Table H1 and 15-16, figures 10-14 (1982)).

23. *Babcock & Oldfather*, *supra* note 21, states that "[b]etween 1978 and 1988, 988 railroad on duty employees were killed and 551,657 injured." The actual numbers were 784 and 432,740, respectively. Federal Railroad Administration, Accident/Incident Bulletin Calendar Year 1988, 17 (Table 9 (1989)), and Calendar Year 1983, 15 (Table 9 (1984)).

passengers and other non-employees. However, only employees of a railroad may seek compensation under FELA. Therefore, in the context of evaluation of a system designed to compensate railroad employees, non-employee injuries are not relevant to the issue at hand.²⁴

After several pages of discussion of Federal Railroad Administration data, Babcock & Oldfather suggests that this data may be unreliable.²⁵ They base this assertion on a General Accounting Office report released in 1989.²⁶ Analysis of the GAO report does not support the conclusion that railroad accidents and injuries are substantially underreported or inaccurate. The GAO's conclusions result primarily from its lack of understanding of the FRA reporting requirements and methodological errors in sample selection and extrapolation.

For example, the GAO conclusion that railroads underreported the total number of lost workday stems from its failure to consider all the relevant documents. Railroads are required to report lost time injuries at the end of the month in which the injury occurred. If the employee has not returned to work at the time the monthly report is filed, the railroad must estimate the number of days the employee will remain off the job. If the employee remains off the job longer than estimated, those additional days are reported to the FRA in a year-end summary. GAO did not review or acknowledge the year-end reports and, as a result, based its conclusion about lost workday reporting only on the railroads' preliminary reports. This failure largely accounts for GAO's finding in the area of lost workdays.²⁷

RAILROAD SAFETY COMPARED TO OTHER INDUSTRIES

Babcock & Oldfather goes on to compare the safety record of the railroad industry with that of other industries. In an effort to portray the railroad industry as unusually dangerous, the authors consistently compare it with light industry and white collar jobs. This proves only the obvious: that working in a heavy industry is more hazardous than sitting behind a desk. In order to make a meaningful comparison of the dangers of a heavy industry like rail, logic and fairness call for comparisons with

24. See *infra* note 37 and accompanying text.

25. Babcock & Oldfather, *supra* note 21.

26. United States General Accounting Office, *Railroad Safety, FRA Needs to Correct Deficiencies in Reporting Injuries and Accidents*, April, 1989.

27. In addition, the GAO findings on unreported injuries is exaggerated by the fact that GAO used an improper method of calculation. It is suggested that there was a 12 percent underreporting of injuries. This percentage was derived by dividing the number of unreported injuries found reportable (61) by the number of unreported injuries reviewed (520). The more appropriate percentage would have been the number of unreported injuries found reportable by the total number of reportable injuries (932) in the sample. Thus the underreporting of injuries on the segments of the railroads audited was more in the order of 6 percent.

other heavy industries. When such a comparison is made, the rail industry is not unusually unsafe, a conclusion that is supported by the data presented in Babcock & Oldfather.

Referring to Table Six (an attachment Babcock & Oldfather), which contains data on lost workdays in nine major sectors of the economy, the article states that for the 1975-1987 period "[o]n the average, the railroad injury rate was 44.6% higher than the rate for all private sector industries."²⁸ In fact, Table Six also shows that over that entire period, the railroad injury rate was consistently and significantly lower than that of the mining and construction industries. For the most recent five year period, the rail industry rate also was lower than that of the agricultural sector, and was comparable to that of the manufacturing sector.²⁹ The sectors that fare better than the railroad industry are the non-heavy industries: wholesale trade, retail trade, finance, insurance and real estate, and services.

Based on data contained in Table Seven, Babcock & Oldfather asserts that "the railroad transportation injury rate is 161.7% greater than the rate for the total economy."³⁰ This presentation is very misleading. According to Table Seven, the railroad industry experienced 157 total lost work days per 100 full time employees, compared to 60 for all industries, 49 for mining, 71 for construction and 58 for manufacturing. The source of this data is a table on pp. 44-45 of the National Safety Council, *Accident Facts* (1988 edition). This clearly states that "[t]hese rates should not be interpreted as representative of the industries listed."³¹ In fact, this particular table in *Accident Facts* is derived only from reports on National Safety Council members participating in the Occupational Safety/Health Award program.³² However, if one consults the table in *Accident Facts* which is based on data compiled by the United States Department of Labor's Bureau of Labor Statistics (BLS), a more comprehensive survey, it is clear that in comparison to other industries, the railroad industry's lost workday rate is far better than suggested in Babcock & Oldfather. In contrast to the limited and unrepresentative data contained in Table Seven of Babcock & Oldfather, the BLS data shows that the railroad lost work day rate is lower than the rate for mining; construction; manufacturing; agriculture, forestry and fishing; and transportation and public utilities.³³

28. *Babcock & Oldfather, supra* note 21.

29. For the period from 1983 through 1987, the average rate of total lost work days per 100 full time workers in the railroad industry was 84.82; in the agricultural sector it was 91.58; and in manufacturing it was 81.10. *Babcock & Oldfather, supra* note 21, at Table 6.

30. *Babcock & Oldfather, supra* note 21.

31. National Safety Council, *Accident Facts* 45 (1988 edition).

32. *Id.*

33. *Id.* at 42-43. The total lost workday rate for rail transportation in 1987 was 88.3, compared to 144.0 for mining, 135.8 for construction, 95.5 for manufacturing, 94.1 for agriculture,

Tables A and B of this article compare 1987 and 1988 injury and lost workday rates for the same industrial groups as does Table Seven of Babcock & Oldfather using BLS data. This data shows that the railroad industry falls near the middle in terms of occupational hazards. Clearly, they dispel any notion that railroad work is unusually hazardous.

Babcock & Oldfather argue that the rate of severe injuries in the railroad industry is excessively high. Based on data from the year 1983, it states that the amputation rate "is 58% greater than in the economy as a whole."³⁴ It also states the rail industry has a fracture rate of 114% greater than the economy as a whole.³⁵ Table Nine (the source of these statements) reveals that the three other heavy industries listed—mining, manufacturing and construction—all had higher amputation rates than railroading. And, with respect to fractures, the rates for the mining and construction industries were higher.

THE SAFETY IMPACT ON NON-EMPLOYEES

Babcock & Oldfather goes on to address the safety record of Amtrak, the nation's only intercity passenger railroad. This section does little to further the debate about FELA, as the data on fatalities and injuries include non-employees as well as employees. In fact, the vast majority of the fatalities are to non-employees. (For example, of 99 deaths reported in Table Ten to have resulted from Amtrak operations in 1988, none were to on-duty employees; of 101 deaths in 1987, three were to on-duty employees.)³⁶

In the context of FELA, analysis of casualties to non-employees is simply not relevant. FELA covers only employees. Non-employees injured in an Amtrak accident (or an accident involving any railroad) may not sue under FELA. Instead, they would have a remedy under state tort law, through which they would be compensated if the railroad was at fault. If FELA was replaced with the state workers' compensation systems, the rights and remedies available to non-employees would be unaffected. So, to the extent that the obligation to respond in damages provides an economic incentive for railroads to operate safely, that obligation with respect to non-employees would remain completely intact after a switch to workers' compensation.³⁷

forestry and fishing and 108.1 for transportation and public utilities. National Safety Council, *Accident Facts 42-43* (1989 ed.).

34. *Babcock & Oldfather, supra* note 21.

35. *Id.*

36. FRA, *Accident/Incident Bulletin, Calendar Year 1988, 58-59* (Table 38 (1989)). FRA, *Accident/Incident Bulletin, Calendar Year 1987, 58-59* (Table 38 (1988)).

37. Even assuming, for the sake of argument, that FELA did create a positive safety incentive with respect to employees, economics dictate that it is unlikely there would be any carry over

Babcock & Oldfather also raises the specter of rail accidents involving hazardous materials.³⁸ In point of fact, the railroad industry's record with respect to the transportation of hazardous materials is good. From 1981 through 1989, there were no deaths attributable to the transportation of hazardous materials by rail, and an average of only 68 injuries annually.³⁹

Once again, however, this issue is not relevant to a debate on the merits of FELA. If a railroad mishap involving hazardous materials caused injury to members of the general public, FELA would impose no financial penalty on the railroad. However, the railroad would be subject to serious financial accountability as a result of other laws, in addition to bearing the high costs of clean-up and loss of lading and equipment damage. It is simply erroneous to imply that but for FELA, railroads would have little incentive to consider the consequences of their transportation of hazardous materials.

In sum, the data presented in Babcock & Oldfather completely fail to make the case that the railroad industry is unusually dangerous. The only conclusions that can be drawn from the data presented in Babcock & Oldfather are that there is some degree of danger in railroad work; that it tends to be more hazardous than light industry jobs; and that it is less hazardous than many other occupations in heavy industry. None of this is startling.

SAFETY INCENTIVES

The second prong of Babcock & Oldfather's argument is that FELA provides more of an incentive to prevent injuries than does workers' compensation because the former is the more costly system. The railroads readily admit that FELA is a more costly system than is workers' compensation.⁴⁰ However, the conclusion that this results in greater safety incen-

effect on safety with respect to third parties. This is because the types of accidents that result in the majority of the injuries to non-employees, have little impact on employees. Conversely, the types of accidents that result in the majority of the employee injuries—presumably the type FELA would cause the railroads to seek to avoid—rarely impact non-employees. For example, in 1987 grade crossing accidents resulted in a substantial portion of the injuries and fatalities to non-employees (63.5%), but only a tiny fraction (0.5%) of injuries and fatalities to employees. FRA, *Accident/Incident Bulletin, Calendar Year 1987*, 24 (Table 13 (1988)). Logically, FELA would provide little incentive to reduce crossing accidents, as they give rise to very little FELA exposure.

38. *Babcock & Oldfather, supra* note 21.

39. U.S. Department of Transportation, Research and Special Programs Administration, *Annual Report on Hazardous Materials Transportation: Calendar Year 1989* Exhibit 1. In contrast to the rail industry's record, during the 1981-1989 period there were 113 deaths attributed to transportation of hazardous materials by highway, and an average of 196 injuries annually. *Id.*

40. *FELA Hearings, supra* note 2, at 48. To be sure, FELA is more costly than workers' compensation. However, it is also the case that a substantial amount of the total monies ex-

tives is simplistic in that it assumes that there are no other aspects of the two systems, or external factors, that affect industrial safety. In fact, there are many aspects of FELA, aside from costs, that cause it to be a disincentive to safety.⁴¹

To support the theory that FELA creates stronger safety incentives than workers' compensation, Babcock & Oldfather offers six FELA cases. The article claims that in each case the injured worker received far more under FELA than would have been available under workers' compensation. With respect to some of the cases, the article asserts that as a result of the large FELA award, the railroad subsequently made safety related changes to its operation.⁴²

This evidence is anecdotal, at best. Further, it is often vague, and provides no bases with which to judge the validity of the representation made about the consequences of the cases. For example, with respect to *Barrett v. Conrail*, it is stated that "a substantial settlement was reached" that "was much higher than would have been possible under workers' compensation."⁴³ There is no mention of how much was actually awarded, or how the amount that would have been payable under workers' compensation was ascertained, let alone what it would have been or even which state's law would have applied. With respect to *Barker v. Conrail*, it is asserted that "[a]s a consequence of the settlement made in this case, working conditions for train dispatchers improved significantly."⁴⁴ No evidence is offered to show that any putative change in working conditions was in any way related to the (unquantified) settlement of this case, or any other.

The sole source cited to support the conclusions proffered about the six FELA cases is a document published by the Illinois Public Action Council entitled *Railroading the Public Safety (Railroading)*. On review, it becomes apparent that the case summaries provided in Babcock & Oldfather are lifted directly, and practically verbatim, from that document, calling into question whether the authors have any familiarity with these cases. Further, *Railroading* provides no citations to any of the cases, making it difficult to check the accuracy of any of its assertions. Moreover, at a hearing before the United States Senate it was revealed that *Railroading* was funded by lawyers who bring FELA lawsuits against the railroads.⁴⁵ This revelation was hardly surprising in that the FELA bar

pended by railroads under FELA goes not to injured employees, but rather, to the lawyers that sue the railroads on their behalf, as well as to the costs of defending and administering claims.

41. See *infra* pp. 711-712.

42. Babcock & Oldfather, *supra* note 21.

43. *Id.*

44. *Id.*

45. See *Hearings to Receive Testimony on the Federal Employers' Liability Act in Relation to*

reaps substantial rewards from the system, and would be the biggest losers were a switch made to workers' compensation.⁴⁶

Babcock & Oldfather fails to offer any compelling evidence that FELA provides an incentive for a safer working environment. Empirical data on the relative effects of fault-based and no-fault compensation systems on safety is sparse.⁴⁷ However, the experience of the industry suggests that FELA may very well present obstacles to optimizing workplace safety.

Because the employee's right to be compensated for injuries is conditioned on showing the railroad was at fault, and because, conversely, the railroad can eliminate or reduce its liability by showing that the employee's negligence contributed to the injury, both parties have an economic incentive to place the blame for accidents on the other. This provides motivation to obscure the true causes of workplace accidents, and thus hinder their objective investigation. As a result, effective modifications of workplace procedures and equipment may be delayed or prevented.

This result was underscored by Amtrak Chairman, W. Graham Claytor, Jr. at a 1988 hearing before the Senate Surface Transportation Subcommittee. Chairman Claytor testified about Amtrak's efforts to improve workplace safety through the use of safety and accident prevention committees made up of employee and management representatives. These committees are responsible for monitoring compliance with safety regulations and investigating accidents. Chairman Claytor pointed out that FELA places limits on the effectiveness of these committees in accomplishing their goals:

A management member of such a committee, looking out for the department's or company's budget, may be inclined to place blame for the accident on employee error, while a labor member of the committee, realizing

Amtrak Before the Subcomm. on Surface Transportation of the Senate Comm. on Commerce, Science and Transportation, 100th Cong. 2nd Sess. 91-92 (1988) [hereinafter *Amtrak Hearings*] (colloquy between Senator Robert W. Kasten, Jr. (R. Wisc.) and Mr. Geoffrey N. Zeh, cochairman, Coalition for Safe and Responsible Railroads).

46. According to data compiled by the Association of American Railroads (AAR), FELA lawyers collected approximately \$150 million in fees out of FELA judgments and settlements in 1988. Association of American Railroads, *Report of Claim & Litigation Experience for 1988* 3-6 (1989) (on file with the author, Association of American Railroads, 50 F Street, NW, Washington, D.C. 20001). Lawyers were involved in cases accounting for 32 percent of the dollar payout of \$811 million in 1988. Assuming that the lawyer took no more than 25 percent of the award as a contingency fee, a conservative estimate, total fees of \$148 million were realized by the FELA bar. In commenting on the possibility of replacing FELA with workers' compensation, one FELA lawyer candidly admitted that "[t]he bottom line is that it [would] take away big verdicts and big attorneys fees." Himmelstein, *Railroads Find Fault in Liability Act*, LEGAL TIMES, July 11, 1988, at 6, col. 4.

47. At least one study indicates that injury rates decline when fault-based systems are replaced with strict liability systems. Chelius, *Liability for Industrial Accidents: A Comparison of Negligence and Strict Liability Systems*, 5 J. LEGAL STUDIES 293-309 (1976).

that attributing fault to the employee may result in no compensation whatsoever for the injured employee, may be just as inclined to fault the corporation. As a result, the critically important task of learning from past accidents to prevent future ones is inherently undermined and necessarily deficient. I believe that any system that encourages this result is bad public policy.⁴⁸

This aspect of FELA is not lost on rail employees. A book purporting to advise railroad employees of their rights under FELA, recommends that when filling out an accident report, rather than attempting to answer the question "what could have been done to prevent the accident," the employee merely respond that "the full extent of the carrier's negligence is unknown at this time."⁴⁹ In response to the question, "describe how the accident happened" it is suggested that the employee "says as little as possible."⁵⁰ Under a no-fault system, there would be no reason to follow such advice, as the circumstances of the accident would not affect the employee's right to compensation.

CONCLUSION

The question of whether FELA should be repealed will be debated in Congress in the coming months. The railroad industry believes that there is no justification to retain an outdated law like FELA, that exist essentially as a result of an historic anomaly. There is already growing support for this position.⁵¹ Perhaps as a result of the paucity of arguments in support of FELA, some have asserted that it provides a significant incentive for rail safety and should be retained for that reason. This is an argument with emotional appeal but, upon analysis, no factual basis. Public policy makers should see the safety issue for what it is, a red herring, and move quickly to bring the railroad industry into the twentieth century in the area of employer liability.

48. *Amtrak Hearings*, *supra* note 45, at 39 (statement of W. Graham Claytor, Jr., Chairman, Amtrak).

49. J. Blount & E. Dvorak, *JUSTICE FOR THE INJURED RAILROAD WORKER* 3 (1987).

50. *Id.*

51. The Secretary of Transportation has called for legislation to "[r]epeal the Federal Employers' Liability Act and bring Federal treatment of railroads into conformity with treatment of other modes." U.S. Department of Transportation, *MOVING AMERICA; NEW DIRECTIONS, NEW OPPORTUNITIES: A STATEMENT OF NATIONAL TRANSPORTATION POLICY STRATEGIES FOR ACTION 120* (February 1990). The Federal Courts Study Committee, a committee established by Congress and appointed by the Chief Justice to recommend ways to improve the federal court system, recommended that FELA be repealed and rail workers' be put under the jurisdiction of the state workers' compensation systems. *REPORT OF THE FEDERAL COURTS STUDY COMMITTEE* 62-63 (April 1990).

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TABLE A
OCCUPATIONAL INJURY AND ILLNESS RATES, 1987

	<u>Total cases</u>	<u>Lost workday cases</u>	<u>Lost workdays</u>
All Industries	8.3	3.8	69.9
Railroad Transportation	7.1	5.3	88.3
Agriculture, Forestry, and Fishing	11.2	5.7	94.1
Mining	8.5	4.9	144.0
Construction	14.7	6.8	135.8
Manufacturing	11.9	5.3	95.5
Durable Goods	12.5	5.4	96.8
Non-Durable Goods	11.1	5.1	93.5
Transportation and Public Utilities	8.4	4.9	108.1
Wholesale Trade-Durable Goods	6.7	3.1	49.6
Wholesale Trade-Non-Durable Goods	8.5	4.7	85.2
Retail Trade	7.8	3.3	52.9
Services	5.5	2.7	45.8

Rates are per 100 full-time workers

Source: U.S. Department of Labor, Bureau of Labor Statistics, *Occupational Injuries and Illnesses in the United States by Industry, 1988* Table 1 (1990).

TABLE B
OCCUPATIONAL INJURY AND ILLNESS RATES, 1988

	<u>Total cases</u>	<u>Lost workday cases</u>	<u>Lost workdays</u>
All Industries	8.6	4.0	76.1
Railroad Transportation	6.9	4.9	85.4
Agriculture, Forestry, and Fishing	10.9	5.6	101.8
Mining	8.8	5.1	152.1
Construction	14.6	6.8	142.2
Manufacturing	13.1	5.7	107.4
Durable Goods	14.2	5.9	111.1
Non-Durable Goods	11.4	5.4	101.7
Transportation and Public Utilities	8.9	5.1	118.6
Wholesale Trade-Durable Goods	6.7	3.2	57.4
Wholesale Trade-Non-Durable Goods	9.1	4.8	86.7
Retail Trade	7.9	3.4	57.6
Services	5.4	2.6	47.7

Rates are per 100 full-time workers

Source: U.S. Department of Labor, Bureau of Labor Statistics, *Occupational Injuries and Illnesses in the United States by Industry, 1988* Table 1 (1990).

Introduction

Volume 19, issue 2 of the *Transportation Law Journal* includes two articles on the topic of International Transportation Law. The *Denver Journal of International Law and Policy* in conjunction with the *Transportation Law Journal* solicited various articles from international legal scholars and practitioners for our joint symposium issue. We have selected these two articles for publication because they represent both the public and private sides of International Transportation Law.

The article written by Werner Ebke and George Wenglorz provides an in depth look at the European Community's liberalization of air transportation. In stark contrast, Dean Alexander has written a timely piece on maritime terrorism and the possible civil remedies which may be sought by individuals against the terrorists and the maritime carriers.

These articles serve to remind us of the importance of global transport and the legal issues involved, now and into the future.

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Symposium Editors

