Consistent Evidence Involving Engineering Issues Railroading ABC's: the FELA Claim

Lyle Griffin Warshauer
Warshauer Poe & Thornton, P.C.
Atlanta, Georgia

In 1908 Congress passed the Federal Employers' Liability Act, 45 U.S.C. § 51. The FELA is a railroader's best guarantee of safety on the job site. In 1889, prior to the passage of the FELA, the chance of a railroad man dying a natural death was only one in five. During the course of just that one year the railroad caused over 2,000 deaths and over 20,000 injuries. The average life expectancy for a brakeman was only about six years from his date of hire on the railroad. The statistics were obviously abysmal and something had to be done to protect these workers. The result was the FELA. While stricter safety laws and ever-improving equipment have vastly improved railroad safety over the past 100 years,[1] it remains one of the most dangerous jobs in America, and the FELA remains an important means of protecting these workers.

An FELA claim is a unique action, however, and one would be ill-advised to go into such a lawsuit without a better understanding of the nature of the Act giving rise to the claim, and some of its distinctive provisions with respect to both liability and damages.

I. A Summary of the FELA

The FELA provides:

> Every common carrier by railroad engaging in commerce between any of the several states . . . shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce . . . for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or 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.

The FELA is a broad remedial statute that is to be construed liberally in order to effectuate its purpose. *Consolidated Rail Corp. v. Gottshall*, 512 U.S. 532, 543, 114 S.Ct. 2396 (1994).

---

[1] The Federal Railroad Administration, Office of Safety Analysis, maintains statistics on all railroad related incidents. Their records demonstrate a declining trend in the number of injuries, including fatalities; however, these still vary from year to year with some periodic increases in the number of incidents reported. See http://safetydata.fra.dot.gov/OfficeofSafety/Default.asp for all of the Agency's safety information including accidents and incidents, inspections and highway-rail crossing data.

The FELA and the decisions construing the FELA constitute the controlling federal law governing the issues raised in the pleadings of an action brought under this federal law. *Brown v. Western Ry. of Alabama*, 338 U.S. 294, 70 S.Ct. 105 (1949); *Arnold v. Panhandle and Santa Fe Ry. Co*., 353 U.S. 360, 77 S.Ct. 840 (1957); *Maynard v. Durham and Southern Railroad Co*., 365 U.S. 160, 81 S.Ct. 561 (1961). It should be noted, however, that an FELA action may be filed in federal or state court, and the railroad cannot remove an action filed in state court, where jurisdiction and venue are otherwise appropriate there. 28 U.S.C. § 1445(a).

The purpose of the FELA is to provide workers a safe place to work, and to compensate them when they are injured as a result of their employer's failure to provide an appropriately safe place to work. While a railroad employer is not the insurer of the safety of its employees, it has a significant to duty to act reasonably to provide for a safe place to work. A safe work place includes the following: safe and adequate tools, lighting, walkways, assistance, time, and -- often the most important, safe and adequate training and instruction. If a railroad carelessly fails to provide this federally mandated safe place to work, and that failure contributes, *in whole or in part*, to an injury, then the railroad is liable for *all damages* caused by its negligence. The FELA is the exclusive legal vehicle for railroad workers to recover for personal injury or death.

Furthermore, the railroad's duty to its employees is non-delegable. *Shenker v. Balt. & Ohio R.R. Co.,* 374 U.S. 1, 7, 83 S.Ct. 1667 (1963) That means that a railroad will be liable for injuries that occur on private tracks and switches; at motels where the men are required to stay between jobs; in taxis that transport the men from place to place, whether owned by the railroad or not; while using defective equipment of other railroads or other entities; and the railroad will be responsible for the mistakes of its contractors. There are no claims against co-workers or supervisors; instead, every claim must be brought against the railroad itself.

In contrast to workers' compensation statutes, which provide for payment of benefits regardless of fault by the employer, the FELA is a fault-based statute. Therefore, recovery is premised on proof of the Railroad's negligence. Negligence can be established the usual way by showing a lack of reasonable care; or by establishing that the railroad violated a safety statute or regulation in which case the railroad is absolutely liable – even in the absence of carelessness.

Usually, for a railroad to be liable for injuries to its workers, the plaintiff must show that the railroad knew or should have known of the danger that caused him to be injured. Negligent conduct can be anything from ignoring an unsafe walkway to failing to lubricate a switch. The railroad will be liable for the carelessness of all employees or supervisors, if that conduct contributed in any way to an employee's injuries.

Some aspects of railroading are so critical to safety that a railroad will be liable even in the absence of carelessness if a worker is injured as a result of the violation of the Safety Appliance Acts. Thus, in addition to negligence, the FELA also establishes strict liability when certain federal acts regulations are violated.

The Safety Appliance Acts provide for strict liability against the railroad if the worker is injured, in whole or in pat, by:

- a locomotive that is in any way deficient or unsafe;
- any failure of a grab iron or side ladder;
- any inefficiency in a hand brake;
- a defect in the train line brakes;
- a failure of any part of an automatic coupler to operate correctly; or
- any violation of a Federal Safety Regulation.
-

49 U.S.C. 20302(a). The FSAA does not create an independent cause of action; FELA, however, allows employees injured by violations of the FSAA to sue for damages. *Crane v. Cedar Rapids & Iowa City Ry. Co*., 395 U.S. 164, 166 (1969).

20302. General requirements:

(a) General. - Except as provided in subsection (c) of this section and section 20303 of this title, a railroad carrier may use or allow to be used on any of its railroad lines -
(1) a **vehicle** only if it is equipped with -
(A) **couplers coupling automatically by impact**, and capable of being uncoupled, without the necessity of individuals going between the ends of the vehicles;
(B) secure sill steps and **efficient hand brakes**; and
(C) secure ladders and running boards when required by the Secretary of Transportation, and, if ladders are required, secure handholds or grab irons on its roof at the top of each ladder;
(2) except as otherwise ordered by the Secretary, a **vehicle** only if it is equipped with secure grab irons or handholds on its ends and sides for greater security to individuals in coupling and uncoupling vehicles;
(3) a **vehicle** only if it complies with the standard height of drawbars required by regulations prescribed by the Secretary;
(4) a locomotive only if it is equipped with a power-driving wheel brake and appliances for operating the train-brake system; and
(5) a **train** only if -
(A) enough of the vehicles in the train are equipped with **power or train brakes** so that the engineer on the locomotive hauling the **train** can control the **train's** speed **without the necessity of brake operators using the common hand brakes** for that purpose.

It is important to note, as illustrated by the highlighted portions quoted above, that 49 U.S.C. § 20302 makes clear distinctions between the safety equipment required on ***trains*** versus equipment required on ***vehicles***. This distinction is important because recovery for deficiencies in equipment on *trains* will only be permitted when the train is deemed "in use." However, there is no such distinction for equipment required on railroad *vehicles.* A "train," as defined by the United States Supreme Court in *United*

Sates v. Seaboard Airline Railroad, 361 U.s. 78, 80, 80 S.Ct. 12, 14-15, 4 L. Ed.2d 25 (1959), is a collection of cars being pulled by a locomotive. A single railroad car, on the other hand, is a "vehicle" as are several other types of rail equipment including track cars, and cranes, among others. *E.g., Baltimore & O. Ry. Co. v. Jackson*, 353 U.S. 325, 332, 77 S.Ct. 842, 847, 1 L.Ed.2d 862 (1957). Congress originally used the word "car" in the FSAA that applied to hand brakes and automatic coupler devices. 45 U.S.C. §§ 2 and 11. In 49 U.S.C. §20302, the term "vehicle" was substituted, broadening the reach of the statute.

Further, as noted above, Federal Safety Regulations, issued by the Federal Railway Administration, impose certain requirements on railroads, the violation of which may result in strict liability. The Federal Railroad Safety Act's ("FRSA") stated purpose, "is to promote safety in every area of railroad operation." 49 U.S.C. § 20101. In enacting the FRSA, Congress authorized the Secretary of Transportation to "prescribe regulations and issue orders for every area of railroad safety." 49 U.S.C. § 20103(a). For example, the railroad must ensure proper drainage at and around the track, and must control vegetation adjacent to the track. 49 C.F.R. § 213.103. When it fails to do so, whether its failure amounted to negligence or not, the railroad will be liable for an injury that ensues. Significantly, the FRA's regulations do not serve to limit the remedial nature of the FELA, but rather give it additional bite. 45 U.S.C. § 54a.

Regulations promulgated by OSHA will impose similar obligations on railroads when those requirements relate to railroad functions. *Pratico v. Portland Terminal Co.,* 783 F.2d 255 (1st Cir.1985) (holding regulation under the Occupational Safety and Health Act with respect to operation and maintenance of jacks was applicable to railroad employer where regulations promulgated under the Federal Railroad Safety Act did not cover the procedure and equipment to be used, including the lifting of journal boxes with jacks).

A. The Fundamentals

The first fundamental principle that controls the disposition of all issues under the FELA concerns the quantum of proof necessary for the submission of the issues in the case to the jury. That rule is this: The issues of a case arising under the FELA must be submitted to the jury if there is evidence "of any probative value" showing that some negligence of the railroad caused, in any part, the injuries for which damages are being sought, even if such a conclusion must necessarily be based upon speculation and conjecture. *Lavender v. Kurn*, 327 U.S. 645, 66 S.Ct. 740 (1949).

Next is the controlling judicial interpretation of the statutory words set forth in the above quoted sections, namely, "in part". On this point, the United States Supreme Court has held that a case must be submitted to the jury if a conclusion can be reached with reason from the evidence that the railroad employer's negligence "played any part, even the slightest, in producing" the injuries for which damages are sought. It makes no difference, moreover, if the evidence will support other or contrary conclusions denying liability. The leading case announcing and setting forth this controlling principle, which

has been applied and followed consistently, is that of *Rogers v. Missouri-Pacific Railroad Co*., 352 U.S. 500, 77 S.Ct. 443 (1957).

The *Rogers* case involved a trackman injured when a passing train fanned some burning weeds causing plaintiff to react thereby losing his footing in a walkway area. The walkway area was described in the court's opinion as "loose . . . and sloping" instead of the usual flat surface giving firm footing for workmen. This loose and sloping condition was a basis for negligence, which the Court held caused in whole or in part the injury to the plaintiff.

Further in the opinion the *Rogers* Court more importantly refuted the term of *proximate* cause as being an improper test in an FELA action and then defined the test for a jury issue as:

> [W]hether the proof justifies with reason the conclusion that employer negligence played any part, even the slightest, in producing the injury...
> *Rogers v. Missouri-Pacific Railroad Co*., 352 U.S. at 507.

Thus, the controlling test for a jury case is whether there is evidence of any probative value that some negligence of the railroad "played any part, even the slightest, in producing" the injuries for which damages are sought. *Gallick v. Baltimore & Ohio Railroad Co.*, 372 U.S. 108. The jury should be charged accordingly on the issue of causation. *DeLima v. Trinidad Corporation*, 302 F.2d 585 (2nd Cir. 1962) at pp. 587, 588.

Still another important principle has been applied by the United States Supreme Court in cases arising under the Act. The employer railroad has a continuing duty at all times and at all places of employment to exercise due care to furnish its employee with a reasonably safe place to work and reasonably safe equipment in performing the job or operation. That duty becomes more imperative as the risk increases. *Patton v. Texas and Pacific Ry. Co*., 179 U.S. 568; *Bailey v. Central Vermont Railroad Co.*, 319 U.S. 350; *Blair v. Baltimore & Ohio Railroad Co*; 323 U.S. 600 and *Wilkerson v. McCarthy*, 336 U.S. 53.

Of particular importance in many cases is the Federal Rule of Unitary Negligence, which must be applied in determining whether the railroad has fulfilled its duties imposed upon it under the law. In determining whether those duties have been fulfilled and whether or not the railroad was negligent, the jury may view the railroad's conduct as a whole and may consider all of the facts and circumstances as a whole. *Union Pacific Railroad Co. v. Hadley*, 246 U.S. 300; *Bailey v. Central Vermont Railroad Co.*, 319 U.S. 350; *Blair v. Baltimore & Ohio Railroad Co.,* 323 U. S. 600; *Arnold v. Panhandle and Santa Fe Rv. Co.,* 353 U.S. 360. This principle was perhaps best expressed by the great Justice Holmes in the case of *Union Pacific Railroad Company v. Hadley,* 246 U.S. 330, at p. 332:

> On the question of its negligence the defendant undertook to split up the charge into items mentioned in the declaration as constituent elements and to ask a ruling as to each. But the whole may be greater than the sum of its parts, and the court was justified in leaving the general question to the jury if it thought that the defendant should not be allowed to take the bundle apart and break the sticks separately, and if the defendant's sticks separately, and if the defendant's conduct viewed as a whole warranted a finding of neglect. Upon that point there can be no question.

This principle has been consistently applied by the United States Supreme Court. For example, refer to the case of *Blair v. Baltimore & Ohio Railroad Co*., 323 U.S. 600, supra. at p. 604:

> The duty of the employer "becomes more imperative as the risk increases." Bailey v. Central V.R. Co., 319 U.S. 350, 352, 353. See also Tiller v. Atlantic C.L.R. Co., 318 U.S. 54, 67. The negligence of the employer may be determined by viewing its conduct as a whole. Union Pac. R. Co. v. Hadley, 246 U.S. 330, 332, 333. And especially is this true in a case such as this, where the several elements from which negligence might be inferred are so closely interwoven as to form a single pattern, and where each imparts character to the others.

II. Contributory Negligence and Assumption of the Risk

Some of the usual defenses in a tort case will not apply in an action brought under the FELA. It is important to understand the distinctions, because these will apply in an FELA case regardless of whether the action is filed in state court, or it is a diversity action in federal court.

A. Contributory Negligence

The FELA applies a "pure" comparative negligence standard. The worker's own careless conduct, if any, will serve to reduce his damages according to his degree of fault. It makes no difference if the plaintiff's own conduct is determined to be more than half of the cause of his injuries. He can still recover against the railroad if the railroad's conduct played *any part* in contributing to the injury. If, however, the worker is injured because of a defective safety appliance or the railroad is shown to have violated one of the many federal safety regulations, the worker's own negligence is irrelevant and will not serve to reduce his damages.

As with all cases, contributory negligence in an FELA claim is an affirmative defense and, as such, the burden of proving that claim, by a preponderance of the evidence, is upon the Defendant who must establish that the Plaintiff was "negligent;" that such negligence was a "legal cause" of the Plaintiff's own damage.

B. Assumption of the Risk

Regardless of what caused the injury, Congress has mandated that the railroad is barred from claiming that the worker should not recover because he or she assumed the risk by working in a known dangerous industry or work site. The principle is so important that it is actually reiterated in some of the regulations pertaining to the use of the of railroad equipment. "An employee of a railroad carrier injured by a vehicle or train used in violation of [federal safety regulations] does not assume the risk of injury resulting form the violation, even if the employee continues to be employed by the carrier after learning of the violation." 45 U.S.C. § 20302.

It is mandatory that the Defendant railroad not be permitted to interject into the case the forbidden defense of assumption of risk under the guise of contributory negligence. In cases arising under the Federal Employers' Liability Act, the 1939 Amendment removed as a matter of law the defense of assumption of risk and every vestige of it. 45 U.S.C.§ 54. *Tiller v. Atlantic Coast Line R. Co.* 318 U.S. 54. Contributory negligence presents the issue of whether the plaintiff performed his duties with reasonable care under all the facts and circumstances present, while assumption of risk involves the knowledge of plaintiff that he performed his job under circumstances, which he well may have known to involve risks. Knowledge of such a risk on the part of the plaintiff is not contributory negligence, but involved the assumption of risk, which doctrine has absolutely been abolished as a defense under the Act. In this case, the Defendant railroad must be prevented from arguing that Plaintiff should be barred from recovery because he knowingly undertake the dangerous task of operating a switch which had excessive lost motion due to improper maintenance and the aforementioned "jerry rig".

As noted above, every vestige of assumption of risk was to be obliterated by the 1939 Amendment to 45 U.S.C. § 54. *Tiller v. Atlantic Coast Line R. Co.*, 318 U.S. 54, 58, 63 S. Ct. 444, 446-447 (1943). Although an instruction on assumption of risk is not usually to be given, *see, generally, Clark v. Burlington Northern*, 726 F.2d 448, 452 (8th Cir. 1984), where there is evidence which could allow a jury to find assumption of risk a preventative charge should be given. *Bylar v. Wabash Railroad*, 196 F. 2d 9, 13 (8th Cir. 1952); *Koshorek v. Pennsylvania Railroad Company*, 318 F2d 364, 369-370 (3rd Cir. 1963); *Ford v. Louisville & N. R. Co.*, 355 Mo. 362, 196 S.W. 2d 163, 169 (1946); *Harp v. Illinois Central Gulf R. Co.*, 55 Ill. App. 3d 822, 370 N.E. 826, 829 (1977); *see also*, *Atlantic Coastline Railroad Company v. Smith,* 107 Ga. App. 384 (1963); *Southern Railway Company v. Miner,* 196 Ga. App. 183 (1990).

As courts have often noted, even lawyers are sometimes confused by theories of contributory negligence and assumption of risk. *See Southern Railway Company v. Miner,* 196 Ga. App. 183 (1990). A charge advising the jury that Plaintiff did not assume the risk will prevent this confusion.

C. Sole Proximate Cause is Not a Defense

In the event the Railroad is unable to prove contributory negligence in the usual sense, the Defendant will likely attempt to show that the Plaintiff is the sole cause of his injuries. Even where there is some evidence that the plaintiff's own conduct contributed to the injury, as a matter of law, his conduct cannot be deemed the sole cause.

The defense of sole proximate cause is looked upon with disfavor by the courts. *Almendarez v. Atchison, Topeka & Santa Fe Railway Co.*, 426 F.2d 1095, 1098 (5th Cir. 1970). A sole cause or sole proximate cause defense is an effort to engraft common law principles onto the FELA. *Almendarez, supra*, at 1097. This is inappropriate because under the FELA railroads are held to a much higher standard than under the common law. *Rogers v. Missouri Pacific Railroad Co.*, 352 U.S. 500 (1957); *Urie v. Thompson,* 337 U.S. 163 (1949). The liberal standards of the FELA are "an avowed departure from the rules of the common law." *Sinkler v. Missouri Pacific Railroad Co.*, 356 U.S. 326 (1958).

This departure from the common law is particularly apparent in the area of causation. Again, under the FELA, causation is established if the railroad's conduct "played any part, even the slightest, in producing" the injury. *Rogers v. Missouri Pacific Railroad Co.*, 352 U.S. 500 (1957). Indeed, under the FELA causation can be established "when there is proof, even though entirely circumstantial, from which the jury may with reason make that inference." *Rogers,* 352 U.S. at 508. In the face of this standard of causation, a defense which focuses on the plaintiff's conduct as the sole cause or the sole proximate cause of the injury has a great likelihood of being confusing or misleading. This is especially true in a strict liability case, where the Defendant railroad is prohibited from arguing that the Plaintiff's negligence should be considered. Sole proximate cause serves only to insert this illegal defense where it cannot be inserted.

A good explanation of why sole proximate cause jury instructions are viewed with disfavor by the courts was given in *Paige v. S. Louis Southwestern Railway Co.*, 349 F.2d 820 (5th Cir. 1965). That Court explained:

> [O]rdinarily in FELA cases there is really no place for this issue in the jury submission . . . this effort to cross examine the jury . . . leads only to confusion and a proliferation of metaphysical terms scarcely understandable to the most astute scholar. . . .
> Of course the substantive law recognizes that if the negligence of the employee is the sole cause of the injury or death, there is no liability. This is sometimes spoken of as the employee's contributory negligence being the sole proximate cause, but this is both an inaccurate use of the term "contributory" and seems to be wholly unnecessary since a jury, honestly determining that the injured employee's actions were the sole cause of injury, necessarily finds

> (either on a general charge or by special interrogatories) that no act of the railroad, even though found to be negligent, played any part in bringing about the injury. . . . We ought to avoid those practices which "distract the jury's attention from the simple issue of whether the carrier was negligent and whether that negligence was the cause, in whole or in part, of the plaintiff's injury."

349 F.2d 826-287 (citations omitted).

Common sense further dictates against allowing any argument concerning sole proximate cause. If a condition on the work site is shown to be dangerous, or a piece of equipment is proven to be defective, it cannot be said that the plaintiff's conduct, alone, caused his injuries at that site or on that equipment. If he would not have been injured but for the fact that something was unsafe, he cannot be said to have unilaterally caused his injury. Accordingly, his conduct alone cannot be the sole cause of his injury.

III. Causation is Relaxed

For an FELA plaintiff to establish causation, he merely needs to show that the Defendant's wrongful conduct was a cause "in part." On this point, the United States Supreme Court has held that a case must be submitted to the jury if a conclusion can be reached with reason from the evidence that the railroad employer's negligence "played any part, even the slightest, in producing" the injuries for which damages are sought. It makes no difference, moreover, if the evidence will support other or contrary conclusions denying liability. *Rogers v. Missouri-Pacific Railroad Co*., 352 U.S. 500 (1957), *supra*, is the leading case on this issue.

Despite the law on causation, summary judgment motions are still filed in virtually all FELA cases. It is a rare case that should ever result in summary judgment; however, despite the strength of the law cited above, you will still see courts ruling in the railroad's favor. These are factually specific inquiries and it is important to raise every fact in dispute to combat these arguments and demonstrate that a jury issue exists.

IV. Emotional Injuries

Emotional injuries are recoverable under the FELA, but not in every instance. In *Consolidated Rail Corporation v. Gottshall*, 512 U.S. 532, 114 S.Ct. 2396 (1994), the Court tackled the problem of what a plaintiff must show to recover for emotional injuries by balancing the FELA's broad remedial purpose of compensating railroaders against the fear of frivolous or trivial emotional claims flooding the courtrooms. The Court's primary concern was making sure that legitimate emotional claims were compensated through the FELA. Because the FELA does not speak directly to the issue of negligent infliction of emotional distress, the Court had to look to the common law. After considering three possible tests – (1) the physical impact test, (2) the zone of danger test, and (3) the relative bystander test – the Court determined that the zone of danger test was applicable to FELA claims.

The *Gottshall* Court adopted the zone of danger test for several reasons. It first recognized that the zone of danger test was viable at the time the FELA was enacted in 1908 and is still a relevant test today. 512 U.S. at 555. More importantly, "[t]he zone of danger test also is consistent with FELA's central focus on physical perils." *Id*. The Court explained that:

> a worker within the zone of danger of physical impact will be able to recover for emotional injury caused by fear of physical injury to himself, whereas a worker outside the zone will not. Railroad employees thus will be able to recover for injuries – physical and emotional – caused by the negligent conduct of their employers that threatens them imminently with physical impact.

Id. at 556. The Court made it very clear that actual physical impact is not required and that emotional injuries can be recovered for even "close calls." "We see no reason, however, to allow an employer to escape liability for emotional injury caused by the apprehension of physical impact simply because the fortuity that the impact did not occur." *Id*.

Still, the railroads have not rolled over on the issue of emotional injuries, and have continued their attempts to pick away at the *Gattshall* holding so as to limit workers' rights of recovery in these matters, by imposing additional restrictions upon situations where liability will be imposed. *See, e.g,, Norfolk S. Ry. Co. v. Sorrell*, 127 S.Ct. 799 (2007) (discussing limitations, including the need to demonstrate physical injury, that courts have placed on a plaintiff's ability to recover for negligent infliction of emotional distress).

V. Damages

The tradeoff for having to prove fault is that the FELA allows for the recovery of actual damages. In addition to actual economic damages, including lost wages (actual wages, not a "formulaic" standard for benefits), lost benefits (which in railroading are very valuable) and unpaid medical expenses, FELA plaintiffs are entitled to recover general damages as well. Pain and suffering and all of its component parts are considered in every FELA case. The economics can be very substantial, because railroaders earn good wages.[2] The amount of wages that can be recovered is the net present value of the gross past, present, and future lost wages after federal and state taxes are deducted.

An FELA plaintiff is entitled to damages for pain and suffering and the nature, extent and duration of the injuries incurred and the consequences therefrom. This includes, of course, any mental or emotional damage or disorder. Also, the art of railroading is something that is unique, and a long-time railroad man will be able to

---

[2] The average wage for a railroader in 2005 was $65,618. With benefits, the total compensation for the average worker that year was $90,716. *See* www.ewgateway.org/datacenter/STLRegData/Trans/FreightRRStats/freightrrstats.htm

recover not only for the actual lost earnings from the job, but the loss of self that goes along with no longer being able to do something that he has enjoyed for years, and the worry over not being able to provide for his family as a result.

Such damages, as proved by the evidence, should be awarded for the past, that is, from the date of the injuries to the date of trial, and for the future.

It should be pointed out that the requirement of finding the present value of future loss of earnings and fringe benefits does not apply to future pain and suffering, and the jury should be so instructed. *Waterman Steamship Corp. v. Rodriquez*, 290 F. 2d 175 (1st Cir. 19610); *Torres v. Hamburg-Americka Line*, 353 F.Supp. 1276 (D. Puerto Rico 1972); *Culley v. Pennsylvania R. Co.*, 244 F. Supp. 710 (D. Del. 1965); *Hanson v. Reiss Steamship Co*., 184 F. Supp. 545; *Texas & Pacific Rv. Co. v. Buckles*, 232 F. 2d 257 (5th Cir. 1956); *Chicago & N.W.Ry. Co. v. Candler*, 282 F. 881 (8th Cir. 1922); and *Taylor v. Denver & Rio Grande Western R. Co.*, 438 F. 2d 351 (10th Cir. 1971).

A. Damages *Not* Recoverable Under the FELA

Because the FELA is designed primarily to compensate the worker, claims for loss of consortium are not allowed. Further, regardless of how careless, or even intentional, the railroad is in causing an injury, the FELA does not allow punitive damages to be imposed against the railroad. This is important to note because often the conduct of the railroad – in attempting to cover of the facts, by firing the worker for reporting the injury, or having its officials testify almost completely falsely at trial, will be rather egregious and the temptation will be to argue that the railroad ought to be punished. This will invoke error into the case. [CITE] However, rest assured that juries tend to levy a degree of punishment in their awards, even if it is not spelled out as such. Just be sure you don't *ask for* a verdict intended to punish the railroad, either directly or by an impassioned argument that crosses the line.

B. Death Claims

Death cases have value under the FELA as well, but it is important to note that because the statute is entirely compensatory, the value of a death claim is dependent upon a showing of dependency. The law is designed to compensate survivors to the extent they have suffered an economic loss, not just an emotional one. Therefore, where there are no survivors who were economically dependent upon the injured worker, there will likely be little or no damages recoverable. Adult children are not usually allowed to recover except in situations where there is no dependent spouse and no minor children; and when permitted to recover at all, the limitations pertaining to pecuniary loss of those persons still apply.

The damages recoverable in a death case do include pre-death pain and suffering, lost economic support, and lost parental guidance to minor children.

VI. Time Limits

All claims against railroads for damages under the FELA must be brought within three years of when the worker first knew, or should have known, about his injury and its relationship to his railroad work. In the case of a catastrophic event like an amputation or a death, calculating this date is easy enough – three years from the date of the incident. For injuries like worn out knees or backs, or loss of hearing, the time begins to run when the worker first puts two and two together and figure out that his problems are caused by his unsafe workplace.

Further, there are many instances where a state law claim or claims will be appropriate in conjunction with the claim brought under FELA, and it is important to note that the limitation period for those claims may be substantially less.

VII. Railroad Retirement Coverage

Not only are railroaders not subject to the limitations of workers' compensation statues, but they also are not limited to social security benefits upon retirement. There is a retirement system unique to railroad workers that provides for benefits after periods of service. If the employee has less than 120 months of service, he will be limited to social security. If the employee has up to 240 months of service, he will be entitled to his railroad retirement benefits if he qualifies for social security. After 240 months, he will get railroad retirement benefits if he can longer do his craft for the railroad. Finally, with 360 or more months of service, the employee will be entitled to the maximum railroad retirement benefits automatically upon retirement.

A. Existence of RRB Benefits Recoverable is Not Admissible

The fact that the plaintiff may have received railroad retirement payments (past, present and future) is inadmissible for any reason and must be excluded from evidence. Under the controlling decisions of the United States Supreme Court, the receipt of or the availability of collateral benefits and any reference thereto are not admissible for any purpose in an action under the Federal Employers' Liability Act. *Eichel v. New York Central R. Co.*, 375 U.S. 253; *Tipton v. Socony Mobile Oil Co.*, 375 U.S. 34; *Caughman v. Washington Terminal Co*., 345 F.2d 434. The law supporting this exclusion is both procedural and substantive.

Defendant also cannot argue that Plaintiff malingered from work because he was receiving RRB disability payments, or that he intends in the future to malinger from work in order to receive such payments. First, such an argument would be inappropriate in this case, where the Plaintiff has sought the best medical care possible and has attempted to return to gainful employment.

Secondly, evidence of disability payments to show malingering is inadmissible as a matter of law in FELA cases. Traditionally, the collateral source rule prohibited admission of disability payments to offset damages in torts cases. *See e.g. Tipton v. Socony Mobil Oil Co., Inc.,* 375 U.S. 34, 37 (1963). In *Eichel v. New York Cent. R.R.,* the Supreme Court held that in FELA cases, the rule also prohibits such admissions to show malingering because of the substantial likelihood of a prejudicial impact. 375 U.S. 253, 255 (1963). Further, these admissions would "violate the spirit of [FELA] if the receipt of disability benefits under the Railroad Retirement Act . . . were considered as evidence of malingering." *Id.; Page v. St. Louis S. W. Ry. Co.,* 349 F.2d 820, 822 (5th Cir. 1965) ("Tipton and Eichel reflect a strong policy against the use of such collateral source evidence in FELA").

Defendant may argue that this Court has discretion to admit disability payments as evidence of malingering under precedent from the Fifth Circuit decision in *Bourque v. Diamond M. Drilling Co.* 623 F.2d 351, 354 (5th Cir. 1980). But in that case, the court did not admit any payments as evidence of malingering. Its interpretation of *Eichel* indicates that "evidence of disability payments was not admissible 'for the purpose of impeaching the testimony of petitioner as to his motive for not returning to work and as to the permanency of his injuries.'" *Bourque* 623 F.2d at 354 (quoting *Eichel* at 254-255) (emphasis added).

This latter holding is consistent with the majority of circuits, which hold that such evidence is inadmissible as a matter of law. *See Fuhrman v. Reading Co.,* 439 F.2d 10, 14 (3d Cir. 1971) ("[Admission] of the plaintiff's disability pension . . . from the Railroad Retirement Board should not take place");. *see Schroeder v. Pennsylvania R.R. Co,* 397 F.2d 452, 456-57 (7th Cir. 1968) ("The "smell" of insurance or workmen's compensation must be presumed to affect a jury adversely to a plaintiff's cause."); *see Vanskike v. ACF Industries, Inc.,* 665 F.2d 188, 200 (8th Cir. 1981) ("collateral source payments [are] inadmissible *per se*"); *see Green v. Denver & Rio Grande W. R.R. Co.*, 59 F.3d 1029, 1033 (10th Cir. 1995) ("collateral source rule prohibits admission of RRA disability benefits in a FELA case"); *see Caughman v. Washington Terminal Co.,* 345 F.2d 434, 436 (D.C. Cir. 1965) ("[W]e are constrained to hold it was prejudicial error to receive evidence of sums received . . . from the Railroad Retirement Board"); *see Finley v. National R.R. Passenger Corp.,* 1 F.Supp. 2d 440, 443 (E.D. Penn. 1998) ("[E]vidence of plaintiff's receipt of pension benefits is prejudicial as a matter of law"); *see also Sheehy v. S. Pac. Transp. Co.*, 631 F.2d 649, 652 (9th Cir. 1990) ("[T]he discretion normally applicable to admit all relevant evidence of collateral benefits is greatly limited in FELA cases"). Accordingly, admissions of disability payments to show malingering are prohibited as a matter of law.

Admission of disability payments is likely to be unfairly prejudicial. According to the Supreme Court, the "receipt of collateral social insurance benefits involves a substantial likelihood of prejudicial impact." *Eichel v. New York Cent. R.R. Co.*, 375 U.S. 253, 255 (1963). This danger is so profound that it may persist despite court instructions. For instance, in *Tipton v. Saucony*, the Supreme Court held "the jury was led to place

undue emphasis on the availability of compensation benefits in determining the ultimate question" despite the trial court's instructions otherwise. 375 U.S. 34, 37 (1963).

Disability payments are at best weakly probative. Simply receiving disability payments cannot justify an inference of malingering. As the Supreme Court held "other evidence having more probative value" than receipt of benefits should be used to show malingering. *Eichel v. New York Cent. R.R. Co.*, 375 U.S. 253, 255 (1963) (emphasis added). As another court specified, "methods by which malingering can be established, includ[e] expert and non-expert witnesses and 'secret motion pictures' taken of the plaintiff revealing activity inconsistent with his claim of disability." See *Lang v. Lakeshore Exhibits Inc.,* 305 Ill. App. 3d 283, 289 (Ill. App. Ct. 1999).

Accordingly, the plaintiff's disability payments are inadmissible because "the likelihood of misuse by the jury clearly outweighs the value of this evidence." *Eichel v. New York Cent. R.R. Co.*, 375 U.S. 253, 255 (1963) (emphasis added); see also *Sheehy v. Southern Pac. Transp. Co.*, 631 F.2d 649, 652 (9th Cir. 1990); *Finley v. National R.R. Passenger Corp.*, 1 F.Supp. 2d 440, 443 n.2 (E.D. Penn. 1998) (Even if courts have discretion to balance the probative value and prejudicial effect, the balance tips to inadmissibility).

VIII. Income Tax on An FELA Award

If such a jury charge is requested, the jury can be instructed that the lump sum award for personal injuries or wrongful death is not subject to federal income tax. *Norfolk & Western Ry. Co. v. Liepelt,* 444 U.S. 490 (1980). The jury should be told that "any amounts it allows for damages shall not be subject to income tax, and therefore, it should neither add nor subtract for income tax in arriving at your verdict."

The wage loss that is recoverable in an FELA case is net wage loss - not gross wage loss. Usually, the plaintiff will offer the testimony of an expert economist to assist the jury in reaching this figure. However, there is sometimes an effort by some railroad lawyers to attempt to confuse the court about the definition of "net wages" to be used in wage loss calculations. This is unnecessary as the formula is simple. Net wages, for purposes of calculating wage loss in an FELA action, are gross wages less state and federal income taxes and any employment related expenses that will not be incurred by virtue of being unable to work. Defendant railroads also improperly seek to deduct Railroad Retirement taxes.

The Defendant railroad must be prohibited from attempting to inject into the trial, through the guise of attempting to adjust net wage loss, the issue of railroad retirement taxes. The railroad retirement system is a railroad worker's equivalent to the social security system. *Eichel v. N.Y. Central R.R. Co.,* 375 U.S. 253 (1963). While similar in its effect, providing retirement pensions for railroad workers, it is vastly different in its operation. Unlike social security, railroad workers and employers pay tax at a higher rate. This rate is broken down into tiers. Tier I, in and of itself, operates just like social security. A flat rate is paid in equal shares by the employee and the employer and

benefits are received upon retirement. The amount of benefits received on retirement is equivalent to social security. Tier II, however, is what differentiates railroad retirement tax from social security. It actually operates like a private pension plan. An employee makes a contribution in the form of a tax and the employer makes a much larger co-payment on behalf of the employee. If the railroad worker has worked a sufficient number of years, (20 years), he is entitled to Tier II benefits. If he has not worked a sufficient number of years, all Tier II benefits are, in most cases, lost. If he works beyond the twenty-year threshold, all funds in the form of railroad retirement taxes accumulate, entitling him to even higher retirement benefits in the form of an annuity.

If a worker is injured and can no longer work, he sheds the burden of paying his contribution to the retirement fund but also the benefit of a much larger co-payment from his employer under Tier II. His shedding of the burden of payment into the fund of his Tier I retirement tax is counter balanced by the equivalent loss of his employer's co-payment. In addition, he also loses the accumulated retirement funds he would have drawn as an annuity if he had been able to work until normal retirement age. Thus, these taxes are not considered in calculating net wage loss as there is no effect to the actual future income stream.

One of the most succinct discussions concerning the introduction of Railroad Retirement tax is by the Georgia Court of Appeals in *CSX Transp., Inc. v. Levant*, 200 Ga. 856, 859-60 (1991). In *Levant,* the court held that such evidence is properly excluded and should not be deducted from future income. Under *Levant,* the evidence is inadmissible. Likewise here, when offered for the same reasons, it should be held to be inadmissible.

An argument that the Railroad Retirement taxes, both Tier I and Tier II, should be deducted from lost future income requires the plaintiff to shoulder the burden of paying the tax without adding back the counterbalancing benefits of the higher retirement pension or the higher employer co-payments.

In *Norfolk & Western Ry. Co. v. Liepelt,* 444 U.S. 490, 495 n. 7 (1980), the Supreme Court cautioned:

> That is not to say, however, that the introduction of such evidence must be permitted in every case. If the impact of future income tax in calculating the award would be *de-minimus,* introduction of the evidence may cause more confusion than it is worth.

This same reasoning aptly describes why you should avoid the issue in the first place. As the net result of the impact on the income stream lost by the plaintiff would be zero (or actually in favor of the Defendant if Tier II benefits were calculated), they should not be included in his calculations of net wage loss.

In *Maylie v. National Railroad Passenger Corp.,* 791 F.Supp. 477, (E.D. Pa. 1992) the railroad argued that railroad retirement tax be deducted in reaching the net wage loss. The court, in a well-reasoned opinion, rejected this argument:

> I do not find the social security cases compelling[.] [U]nder the circumstances presented in this case, plaintiff's income should not be reduced by the amount of railroad retirement taxes that he would have been required to pay had he not been injured and continued working. Railroad retirement taxes are paid into a fund from which railroad retirement benefits are paid out. *See* 45 U.S.C. §231n(a). Had plaintiff continued working until the age of sixty-two, and had plaintiff remained in defendant's employ during that time, he would have been eligible for an annuity upon his retirement paid from the fund into which his railroad retirement taxes had been paid. *See* U.S.C. §231(a)(1)(ii). It is undisputed that plaintiff is entitled to recover the value of lost future fringe benefits. *Cf. Jones & Laughlin Steel Corp. v. Pfeifer,* 462 U.S. 523, 534 & n.12, 103 S.Ct. 2541, 2549 & n.12, 76 L.Ed.2d 768 (1984)(lost fringe benefits "should be included in an ideal evaluation of the worker's loss;" these may include inter alia, retirement and pension plans)...It would be inappropriate to deduct from plaintiff's lost salary taxes that, in effect, represented plaintiff's contribution toward a pension without including as an item of damages, the value of that pension as an item of damages, it was not error to refuse to reduce plaintiff's lost wages by the amounts he would have had to pay in railroad retirement taxes. *Id.* at 487-88.

Likewise it would be inappropriate to deduct the plaintiff's railroad retirement taxes s long as the plaintiff does not seek to introduce the Tier II annuity benefits.

In both *Norfolk & Western v. Chittum*, 251 Va. 408, 468 S.E.2d 877 (1996), cert. denied U.S. (1996), and *Norfolk Southern Railway Co. v. Perkins*, 224 Ga. App. 552, 481 S.E.2d 545 (1997), the courts agree that the correct formula to derive net wages is indeed gross wages less state and federal income taxes.

IX. Conclusion

There are a myriad of issues that can come up in an FELA action that are simply beyond the time constraints of this paper. Nothing is said here about preemption, for example, which has become a *huge* issue in FELA actions of all types. Suffice it to say that these claims are very vigorously defended – usually by extremely competent defense counsel, on behalf of a very sophisticated industry that has as its goal to reduce at all costs any and all reports of injury. Because the damages can be so high, the industry fights hard against having to pay these claims. However, with a good bit of hard work

and creativity, you can do a lot of good for the fine men who work in the industry and find themselves out for the during as a result of a preventable injury.