

Getting the Train on the Right Track: A Modern Proposal for Changes to the Federal Employers' Liability Act

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TABLE OF CONTENTS

I. INTRODUCTION	408
II. BACKGROUND AND FELA PRINCIPLES.....	409
III. THE RUNAWAY TRAIN: REFORM EFFORTS	411
IV. THE CURRENT STATUS OF THE INDUSTRY: FELA COVERAGE IS NO LONGER CONSISTENT WITH LEGISLATIVE INTENT	413
A. <i>Traumatic Accidents No Longer Cause a Majority of Railroad Worker Injuries</i>	413
B. <i>The Causation Drift: The Standard of Causation Is No Longer Consistent with Legislative Intent</i>	414
V. THE RISE OF CUMULATIVE-TRAUMA INJURIES	419
A. <i>The Unique Legal Problems Posed by CTDs</i>	420
B. <i>The Impact of the Lower Standard of Causation on Cumulative-Trauma FELA Cases</i>	422
C. <i>The Intricacies of Proving Fault for Cumulative-Trauma FELA Claims</i>	423
VI. PROPOSAL FOR LEGISLATIVE CHANGE	426
A. <i>Employees Do Not Prefer a Remedial Scheme Like FELA</i>	427
B. <i>Railroad Workers Would Be Best Served Under a Federal Compensation System</i>	428
C. <i>Proposal for a New System of Recovery: The Railroad Employees' Compensation Act</i>	431
VII. CONCLUSION	434

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I. INTRODUCTION

Today, American industries readily accept no-fault workers' compensation as the remedy for workplace injuries.¹ Unlike most industries, however, railroad workers are not covered by state workers' compensation systems. Instead, a tort-based compensation system that requires a finding of negligence remains the sole remedy for workplace injuries suffered by interstate railroad workers.² When Congress enacted the Federal Employers' Liability Act (FELA) in 1908,³ the railroads provided one of the most dangerous working environments.⁴ By enacting the FELA, Congress intended to address traumatic injuries⁵ and to expand the rights of employees in the workplace.⁶ Now, the railroads provide a far safer working environment than they did one hundred years ago,⁷ making the FELA an antiquated system of recovery for the modern railroad workplace.

Consistent with the developments of other industries, the railroads have experienced a decline in the number of traumatic injuries.⁸ Traumatic injuries are no longer the predominant type of railroad injury, and the current trend is for railroad workers to allege a different type of injury known as cumulative-trauma disorders (CTDs). Railroad workers are increasingly alleging that repetitive activities, over the course of their career, are causing CTDs, such as osteoarthritis, carpal tunnel syndrome, and chronic back pain.⁹

1. See J. Thomas Tidd & Daniel Saphire, *The Case for Repeal of the Federal Employers' Liability Act*, (Washington Legal Foundation, Critical Legal Issues, Working Papers Series, Paper No. 23, 1988) (stating that no-fault recovery systems are routinely utilized by most American industries); Ronald J. Waicukauski, *The Federal Employers' Liability Act: As Obsolete as the Steam Engine, in SHOULD THE FEDERAL EMPLOYERS' LIABILITY ACT BE ABOLISHED?* 1, 3 (A.B.A. Tort and Insurance Practice Sec. Annual Meeting 1990) (explaining that most American workers receive injury compensation under workers' compensation statutes that do not require a finding of fault).

2. 45 U.S.C. §§ 51-60 (2006); N.Y. Cent. R.R. Co. v. Winfield, 244 U.S. 147, 151 (1917).

3. Federal Employers' Liability Act of 1908, Pub. L. No. 100, §§ 1-8 (amended 1939) (current version at 45 U.S.C. §§ 51-60).

4. Waicukauski, *supra* note 1, at 1.

5. See CSX Transp., Inc. v. Miller, 858 A.2d 1025, 1029 (Md. Ct. Spec. App. 2004) (finding that the driving force behind the creation of the FELA was the sheer number of tragic deaths caused by railroad work).

6. Tidd & Saphire, *supra* note 1, at 4-5.

7. See PETER W. FRENCH, AM. ASS'N OF RAILROADS, U.S. RAILROAD SAFETY STATISTICS AND TRENDS (2008) (noting that railroads have fewer injuries in comparison to other heavy industries).

8. See FED. R.R. ADMIN., AN EXAMINATION OF RAILROAD YARD WORKER SAFETY 43 (2001), available at <http://www.fra.dot.gov/downloads/Research/ord0120.pdf> (finding that injuries such as strains and sprains were more commonplace than traumatic injuries); U.S. DEP'T OF LABOR, NATIONAL CENSUS OF FATAL OCCUPATIONAL INJURIES IN 2007, at 1 (2008), available at <http://www.cal-osh.com/download.aspx?id=95296&LangType=1033> [hereinafter 2007 FATAL INJURIES] (finding that in 2007 the American workplace had the fewest number of fatalities since the Department of Labor began tracking workplace deaths in 1992); Ctr. for Disease Control, *Fatal Occupational Injuries—United States, 2005*, MORBIDITY & MORTALITY WKLY. REP., Apr. 6, 2007, available at <http://www.cdc.gov/mmwr/preview/mmwrhtml/mm5613a1.htm> [hereinafter 2005 FATAL INJURIES] (finding that in 2005 there was a decline in the number of workplace fatalities).

9. U.S. DEP'T OF LABOR, USDL NO. 03-138, LOST-WORKTIME INJURIES AND ILLNESSES: CHARACTERISTICS AND RESULTING DAYS AWAY FROM WORK, 2001, at 2, 7 (2003) [hereinafter LOST-WORKTIME INJURIES]; P. Vink, *Musculoskeletal Disorders*, CONSTR. SAFETY ASS'N OF ONTARIO MAGAZINE,

The FELA is not well-suited to address cumulative-trauma injuries. These types of FELA claims involve extensive expert testimony at trial¹⁰ and require a detailed review of a claimant's medical history to determine causation.¹¹ Placing cumulative-trauma injuries under the realm of FELA coverage excessively consumes judicial resources¹² and results in lengthy trials that place heavy financial burdens and risks on workers and railroads alike. This, coupled with the division among many courts about the applicable standard of causation for FELA cases, results in a more visible disparity in outcomes for cumulative-trauma claimants than for traumatic injury claimants.

This Comment proposes a solution: cumulative-trauma claims should be severed from FELA coverage and placed under a no-fault system that is designed specifically for the railroad industry. This proposal makes sense in the backdrop of the FELA's history and the redundant efforts at various points in time to reform or abolish the statute. Additionally, this proposal is sound because of the industry's current safety conditions and the unsuitable fit between cumulative-trauma injuries and negligence recovery.

II. BACKGROUND AND FELA PRINCIPLES

In 1908, the problems and needs of the railroad industry were very different than they are today. Because most of the country relied on the railroads for transportation and the westward movement of goods,¹³ the railroads were at the forefront of national attention. One of the largest industries in the country,¹⁴ the railroad industry collectively provided more than one million jobs to American workers.¹⁵ However, railroading was a dangerous job. In 1907, 4,534 railroad employees died on the job.¹⁶ The next year, the number of fatalities increased to 12,000.¹⁷ “[T]he average life expectancy of a switchman was seven years, and a

Autumn 2000, available at <http://www.elcosh.org/docs/d0400/d000418/d000418.html>.

10. See Jason M. Solomon, *Fulfilling the Bargain: How the Science of Ergonomics Can Inform the Laws of Workers' Compensation*, 101 COLUM. L. REV. 1140, 1154 (2001) (“[T]he issue of medical causation tends to turn on workers' compensation hearings—especially those involving CTDs—into a ‘battle of dueling doctors.’”).

11. As far as CTDs are concerned, testimony at trial regarding medical causation is often vague, because CTDs can be triggered by so many types of activities. See *id.* (quoting a doctor testifying in a workers' compensation hearing: “I feel that whether this repetitive trauma is considered to be a cause of her ruptured disc or not is a legal question rather than a medical one”).

12. See REPORT OF THE FEDERAL COURTS STUDY COMMITTEE 63 (1990) [hereinafter FCSC REPORT] (noting that FELA cases require a jury trial more often than other federal civil claims and that reformulating railroad injury compensation on the basis of no-fault would reduce the federal court docket).

13. Tidd & Sapphire, *supra* note 1, at 4.

14. *Id.*

15. Waicukauski, *supra* note 1, at 1.

16. Tidd & Sapphire, *supra* note 1, at 4.

17. Waicukauski, *supra* note 1, at 1.

brakeman's chance of dying from natural causes was less than one in five."¹⁸ Congress recognized the need to address these disturbing statistics.

When the FELA was enacted, there were no compensation programs for injured employees in other industries. In fact, the only measure of recovery for injured workers was the pro-industry, anti-worker common law negligence doctrine.¹⁹ Reflecting a preference to protect employers, the doctrines of contributory negligence and assumption of the risk²⁰ prevented most employees from prevailing in court.²¹ Since workers' compensation statutes were not introduced until 1910, Congress crafted the FELA based on negligence principles that courts were applying at the time.²²

In spite of this, the FELA is a system that is incongruent with traditional notions of negligence. In creating this remedy for railroad employees, Congress abolished contributory negligence as a complete bar to recovery and instead adopted the principles of comparative fault.²³ Congress also eliminated the defense of assumption of the risk²⁴ and prohibited the railroads from creating contracts with employees that exempted railroads from liability.²⁵ Finally, Congress allowed for concurrent jurisdiction of FELA claims²⁶ and created a penalty for railroads that prevented employees from providing information relating to the injury or death of a fellow employee.²⁷ While compensation schemes began to develop for employees in other industries, FELA remained the "exclusive" remedy for railroad employees.²⁸

18. Thomas E. Baker, *Why Congress Should Repeal the Federal Employers' Liability Act of 1908*, 29 HARV. J. ON LEGIS. 79, 81 (1992) (noting that by the end of the Nineteenth Century the federal government and the nation focused attention on abuses and hazards of the railroad industry).

19. Tidd & Saphire, *supra* note 1, at 4.

20. Contributory negligence is an affirmative defense for a defendant if he can demonstrate that the plaintiff's conduct fell below the accepted standard of care and was the actual and proximate cause of the injuries. RESTATEMENT (FIRST) OF TORTS § 463 (1934); *see also* Murray v. N.Y., New Haven & Hartford R.R. Co., 255 F.2d 42, 44 (2nd Cir. 1958) ("Contributory negligence . . . consists of 'conduct on the part of the plaintiff which falls below the standard to which he should conform for his own protection.'").

Likewise, assumption of the risk is an affirmative defense that can lead to dismissal of a case. The doctrine operates under the premise that a claimant cannot try to establish tort liability against a party if he consented to bear the risks of a particular activity. In the work context, employers were once able to defend themselves against tort claims by arguing that the employee assumed the risks of a job simply by taking it. Tidd & Saphire, *supra* note 1, at 5; *Amending the Federal Employers' Liability Act: Hearing on S. 1708 Before a Subcomm. of the S. Comm. on the Judiciary*, 76th Cong. 11 (1939) [hereinafter *1939 Hearing*] (statement of T.J. McGrath, General Counsel, Brotherhood of Railroad Trainmen).

21. Tidd & Saphire, *supra* note 1, at 4-5.

22. *See* Baker, *supra* note 18, at 82 (discussing the policy objectives behind the enactment of the FELA).

23. 45 U.S.C. § 53 (2006).

24. *Id.* § 54.

25. *Id.* § 55.

26. *Id.* § 56.

27. *Id.* § 60.

28. N.Y. Cent. R.R. Co. v. Winfield, 244 U.S. 147, 151-52 (1917).

III. THE RUNAWAY TRAIN: REFORM EFFORTS

*“Runaway train never going back, wrong way on a one way track, seems like I should be getting somewhere, somehow I’m neither here nor there . . . bought a ticket for a runaway train . . . little out of touch, little insane”*²⁹

Efforts to reform FELA began shortly after it was enacted.³⁰ Regardless of these efforts, the only significant changes to the FELA occurred in 1939, when Congress made recovery easier for railroad employees by abolishing the traditional defense of assumption of the risk.³¹ For almost fifty years after the 1939 amendment, the FELA remained untouched. Then, in the late 1980s, Congress held a series of hearings to determine if the FELA should be replaced by another compensation system; proponents of change repeatedly advocated for FELA’s repeal, citing numerous reasons.³²

Proponents of change argued that the FELA poses significant obstacles in the compensation process for railroad workers. First, railroad and harbor workers are the only two classes of employees that are not covered under a workers’ compensation system.³³ Second, if not settled, FELA cases take an average of five-and-a-half years to reach resolution.³⁴ Of the cases that do go to trial, approximately one-fourth do not result in a monetary award for the employee.³⁵ If an employee receives a favorable jury verdict, the damages have varied,³⁶ and twenty-five to thirty percent typically goes to attorney’s fees, administrative costs, and investigations.³⁷ In addition, railroading is a specialized trade, and

29. SOUL ASYLUM, *Runaway Train*, on GRAVE DANCERS UNION (Columbia Records 1992).

30. See MESSAGE OF THE PRESIDENT OF THE U.S. TRANSMITTING THE REPORT OF THE EMPLOYERS’ LIABILITY AND WORKMEN’S COMPENSATION COMMISSION, S. DOC. NO. 62-338, at 15 (1912) [hereinafter MESSAGE OF THE PRESIDENT] (proposing to abolish the fault-system adopted by the FELA); 1939 *Hearing*, *supra* note 21, at 24 (statement of R.V. Fletcher, General Counsel, American Association of Railroads) (arguing that workers’ compensation systems cover employees for every other industry and the FELA should be replaced with a no-fault system); FCSC REPORT, *supra* note 12, at 62 (stating that Congress should abolish the FELA and provide recovery for railroad employees under a no-fault system).

31. 1939 *Hearing*, *supra* note 20, at 10 (statement of T.J. McGrath, General Counsel, Brotherhood of Railroad Trainmen) (stating, in legislative history, that the introduced 1939 bill sought to eliminate assumption of the risk in any case where an employee’s injury is the result of negligence of the employer or a co-worker).

32. *Federal Employers’ Liability Act: Hearing Before the Subcommittee on Transportation and Hazardous Materials of the Committee on Energy and Commerce, House of Representatives*, 101st Cong. (1989) [hereinafter 1989 *Hearing*].

33. *FELA in Relation to Amtrak: Hearing Before the Subcommittee on Surface Transportation of the Committee on Commerce, Science, and Transportation, U.S. Senate*, 100th Cong. 7 (1988) [hereinafter 1988 *Hearing*] (statement of Howard M. Metzenbaum, U.S. Senator, Ohio).

34. *Id.* at 24 (statement of John H. Riley, Administrator, Federal Railroad Administration).

35. *Id.* at 23, 29; 1989 *Hearing*, *supra* note 32, at 25-26 (statement of Dan Schaefer, Member, Committee on Energy and Commerce).

36. 1988 *Hearing*, *supra* note 33, at 23 (statement of John H. Riley, Administrator, Federal Railroad Administration).

37. *Id.* at 14 (statement of Larry Pressler, Member, Subcommittee on Surface Transportation).

juries often do not understand railroad terms.³⁸ Proponents for change argued that a workers' compensation system would address each of these problems and urged Congress to adopt a no-fault recovery scheme for railroad workers.³⁹

In contrast, those who opposed repealing the FELA argued that the Act is effective, because, instead of giving fixed payments, it allows a jury to make case-by-case decisions that are more equitable than workers' compensation recovery.⁴⁰ Opponents focused on the fact that workers' compensation benefits are not as high as those awarded under the FELA and would give little guarantee that an injured worker would receive enough money to care for himself long-term.⁴¹ Opponents of repeal also stated that eighty-five percent of FELA cases are settled without going to trial,⁴² allowing the negotiation process to remain an important aspect of the relationship between railroad management and employees.⁴³ Finally, opponents argued that recovery based upon fault and the higher levels of compensation under the FELA provide more safety incentives than a workers' compensation system.⁴⁴ Although both sides of this argument received hours of attention, these hearings resulted in nothing more than long-term studies of the FELA.⁴⁵ Congress ultimately could not agree on the changes

38. 1989 Hearing, *supra* note 32, at 28 (statement of Bobby Wade Holland, Former Employee, Seaboard Coast Railroad) (explaining that railroad terms are complex, making it difficult for a jury to understand how a railroad might be liable to an employee for injuries).

39. *Id.* at 20 (statement of Joseph A. LaScala, Former Employee, Burlington Northern Railroad Co.); 1988 Hearing, *supra* note 33, at 23-27 (statement of John H. Riley, Administrator, Federal Railroad Administration).

40. See 1988 Hearing, *supra* note 33, at 97 (statement of Fred A. Hardin, President, United Transportation Union) (stating that the FELA is fair).

41. 1989 Hearing, *supra* note 32, at 127 (statement of Larry D. McFather, President, International Brotherhood of Locomotive Engineers).

42. 1988 Hearing, *supra* note 33, at 97 (statement of Fred A. Hardin, President, United Transportation Union).

43. 1989 Hearing, *supra* note 32, at 123-24 (statement of Geoffrey N. Zeh, Vice Chairman, Railway Labor Executives' Association, and President, Brotherhood of Maintenance of Way Employees). Mr. Zeh's contention is misleading, however, in light of recent precedent imposing sanctions upon a railroad for seeking additional medical examinations pursuant to a collective bargaining agreement. See *Pratt v. Union Pacific R.R. Co.*, 85 Cal. Rptr. 3d 321, 331-35 (Ct. App. 2008) (stating that FELA claims are not preempted by collective bargaining agreements pursuant to the Railway Labor Act).

44. 1989 Hearing, *supra* note 32, at 127 (statement of Larry D. McFather, President, International Brotherhood of Locomotive Engineers).

45. See generally TRANSP. RES. BD., COMPENSATING INJURED RAILROAD WORKERS UNDER THE FEDERAL EMPLOYERS' LIABILITY ACT 161-66 (1994) (finding that overall costs and the adversarial nature of FELA proceedings would be reduced by utilizing a workers' compensation system but that the data is incomplete because railroads need to improve collection of injury compensation data); U.S. GEN. ACCOUNTING OFFICE, REPORT TO THE CHAIRWOMAN, SUBCOMMITTEE ON RAILROADS, COMMITTEE ON TRANSPORTATION AND INFRASTRUCTURE, HOUSE OF REPRESENTATIVES, FEDERAL EMPLOYERS' LIABILITY ACT: ISSUES ASSOCIATED WITH CHANGING HOW RAILROAD WORK-RELATED INJURIES ARE COMPENSATED 4 (1996) [hereinafter GAO REPORT] (finding that the costs to railroads would only be reduced minimally by replacing the FELA with a workers' compensation system and that employees could potentially experience lower compensation for injuries).

that would be appropriate for the FELA, and the bills to change it did not pass into law.⁴⁶

IV. THE CURRENT STATUS OF THE INDUSTRY: FELA COVERAGE IS NO LONGER CONSISTENT WITH LEGISLATIVE INTENT

A. *Traumatic Accidents No Longer Cause a Majority of Railroad Worker Injuries*

Unlike railroad employment in the early 1900s, modern railroad jobs are not among the most dangerous in the country.⁴⁷ Each year since 1980, the railroads' safety statistics have steadily improved.⁴⁸ The number of railroad worker fatalities has not exceeded twenty-six each year since 1995.⁴⁹ Therefore, the railroad industry's safety record compares favorably to other transportation and heavy industries.⁵⁰

In 2001, the Federal Railroad Administration (FRA) conducted a four-year, in-depth analysis of railroad injuries that resulted in more than one lost work day.⁵¹ During just one year in that four-year period, railroads reported a total of 16,457 worker injuries.⁵² A majority of these injuries were relatively minor compared to those found in 1910; "sprains and strains" comprised a majority of the more recent railroad injuries.⁵³

In 2007, the railroads accomplished the best safety record in recent history.⁵⁴ Collectively, only eleven railroad workers died on the job across the country.⁵⁵ In contrast to the early 1900s, most of the 2007 fatalities and serious accidents in railroading involved trespassers.⁵⁶ In fact, each year since 1995, trespassers have accounted for the majority of railroad-related fatalities.⁵⁷

46. FED. R.R. ADMIN., *supra* note 8, at 19.

47. See Les Christie, *America's Most Dangerous Jobs*, CNN MONEY, Aug. 9, 2007, http://money.nn.com/2007/08/07/pf/2006_most_dangerous_jobs/index.htm (on file with the *McGeorge Law Review*) (stating that fishermen, pilots, loggers, iron and steel workers, refuse collectors, farmers, power linemen, roofers, drivers, and agricultural workers held the top ten most dangerous jobs in 1996).

48. FRENCH, *supra* note 7.

49. See Fed. R.R. Admin., Office of Safety Analysis, *Accident/Incident Overview*, <http://safetydata.fra.ot.gov/officeofsafety/publicsite/Query/statsSas.aspx> (last visited Dec. 22, 2009) (on file with the *McGeorge Law Review*) [hereinafter *Accident/Incident Overview*] (showing employee deaths from 1995 to September 2009).

50. See FRENCH, *supra* note 7 (comparing the railroad industry to other industries).

51. FED. R.R. ADMIN., *supra* note 8, at 1.

52. *Id.* at 37.

53. *Id.* at 43, 45.

54. FRENCH, *supra* note 7.

55. See *Accident/Incident Overview*, *supra* note 49.

56. FRENCH, *supra* note 7.

57. See *Accident/Incident Overview*, *supra* note 49.

These statistics stand in stark contrast to conditions existing at the time the FELA was enacted. From 1908 to 1910, there were 5,948 railroad worker deaths,⁵⁸ and 279 railroad workers became completely disabled on the job.⁵⁹ Of those disabled, 136 workers suffered amputations⁶⁰ and 2,462 suffered permanent partial disabilities.⁶¹ Finally, 79,613 employees suffered temporary disabilities resulting in more than two weeks away from work sites during the three-year period from 1908 to 1910.⁶² Though railroad injuries will never be totally eliminated, a comparison between the conditions as of 1910 and those that exist today indicates that the railroad industry is much safer today than it once was.⁶³

When the FELA was enacted, it was designed as a “narrow solution” for the tragic losses suffered by the industry.⁶⁴ “The impetus for the FELA was that throughout the 1870’s, 80’s, and 90’s, thousands of railroad workers were being killed and tens of thousands were being maimed annually in what increasingly came to be seen as a national tragedy, if not a national scandal.”⁶⁵ Since Congress intended to address the traumatic injuries experienced by railroad workers, the current coverage of the FELA is not consistent with legislative purpose. The FELA was not intended to make railroads the absolute “insurer of [worker] safety,”⁶⁶ yet the application of the FELA to non-traumatic injuries, combined with a lower standard of causation, has put the railroad industry in this position.

B. The Causation Drift: The Standard of Causation Is No Longer Consistent with Legislative Intent

The principles of the FELA were unheard of in 1908, a time when employers had a major advantage over their employees in the realm of litigation.⁶⁷ The FELA, as amended, was designed to place the litigants on equal footing by holding each to the burden of proving or disproving negligence.⁶⁸ In addition, Congress intended to reduce the lack of “uniformity” in case outcomes for injured railroad workers.⁶⁹

Although Congress based the FELA on negligence principles, those principles are not the same as other common law negligence claims. For

58. MESSAGE OF THE PRESIDENT, *supra* note 30, at 131.

59. *Id.* at 135.

60. *Id.*

61. *Id.* at 139.

62. *Id.* at 144.

63. See FRENCH, *supra* note 7 (stating that 2007 was the “safest year ever” for the railroad industry).

64. CSX Transp., Inc. v. Miller, 858 A.2d 1025, 1029 (Md. Ct. Spec. App. 2004).

65. *Id.*

66. *Id.* at 1031.

67. Tidd & Saphire, *supra* note 1, at 4-5.

68. 1939 Hearing, *supra* note 20, at 19 (statement of T.J. McGrath, General Counsel, Brotherhood of Railroad Trainmen).

69. N.Y Cent. R.R. Co. v. Winfield, 244 U.S. 147, 150 (1917).

example, in 1939 Congress removed assumption of the risk as a viable defense and altered contributory negligence so that it no longer acted as a complete bar to employee recovery.⁷⁰ In discussing the impact of those amendments, a member of the 1939 Committee Hearings stated, “[I]f the defense of assumed risk is abolished as proposed, the result will be that assumed risk will be no defense, contributory negligence will effect diminution of damages, and proximate cause will bar recovery altogether.”⁷¹ Hearing members encouraged Congress to define proximate cause for FELA cases.⁷² However, Congress did not make further amendments to the FELA, arguably leaving intact the common law standard of causation.⁷³

Congress has lowered the proof of negligence required in specific situations that may cause railroad injuries. By enacting the Safety Appliance Act⁷⁴ and the Locomotive Inspection Act,⁷⁵ an injured employee meets his burden of proof if he demonstrates that the railroad violated safety provisions relating to working equipment on the train.⁷⁶ If an employee is injured due to a violation of one of the safety acts, he may file a claim for compensation under the FELA.⁷⁷ For this reason, courts often read the Safety Appliance and Locomotive Inspection Acts as “amendments” and “supplements” to the FELA.⁷⁸ Consequently, each time Congress has supplanted the traditional rules of negligence for railroad employees, the changes have been specifically set forth in statute.⁷⁹

Though Congress intended for the FELA to create a system of uniformity in the treatment of railroad injuries,⁸⁰ courts across the country are deeply divided as to the standard of causation for FELA cases. The Supreme Court in *Rogers v. Missouri Pacific Railroad Co.*⁸¹ created the unique treatment of causation in FELA cases. In *Rogers*, the Court stated that “the special features of this statutory negligence action . . . make it significantly different from the ordinary common law negligence action.”⁸² Courts have interpreted the following

70. FED. R.R. ADMIN., *supra* note 8, at 19.

71. 1939 Hearing, *supra* note 20, at 38 (statement of F.M. Rivinus, General Counsel, Norfolk & Western Railroad Co.).

72. *Id.*

73. FED. R.R. ADMIN., *supra* note 8, at 19.

74. 49 U.S.C. § 20301 (2006).

75. *Id.* § 20701.

76. See *CSX Transp., Inc. v. Miller*, 858 A.2d 1025, 1034 (Md. Ct. Spec. App. 2004) (declaring that any violation of the Safety Appliance Acts is negligence per se); *Gardner v. CSX Transp., Inc.*, 498 S.E.2d 473, 478 (W. Va. 1997) (stating that the Locomotive Inspection Act imposes an absolute duty on railroads to maintain locomotives in a safe condition).

77. *Miller*, 858 A.2d at 1034.

78. *Id.*

79. *Norfolk S. Ry. Co. v. Sorrell*, 549 U.S. 158, 168 (2007).

80. *N.Y. Cent. R.R. Co. v. Winfield*, 244 U.S. 147, 150 (1917).

81. 352 U.S. 500 (1957).

82. *Id.* at 509-10.

language in the *Rogers* holding to suggest that the standard of causation in a FELA case is significantly lower than a typical negligence case:

[T]he test of a jury case is simply whether the proofs justify with reason the conclusion that employer negligence play[s] any part, even the slightest, in producing the injury or death for which the damages are sought. It does not matter that, from the evidence, the jury may also . . . attribute the result to other causes.⁸³

Nonetheless, the holding in *Rogers* must be read in the context of its procedural history. In *Rogers*, the jury awarded damages to the plaintiff based on evidence of the railroad's negligence.⁸⁴ The Supreme Court of Missouri reversed, finding that the plaintiff's evidence did not support the jury's finding of negligence.⁸⁵ The U.S. Supreme Court granted certiorari to determine if the Missouri court acted outside its bounds by making a determination that is traditionally delegated to the jury.⁸⁶ The Court's discussion focused on the test for a jury case under the FELA when numerous events trigger an injury and clarified that factual determinations are for the jury to make.⁸⁷

The *Rogers* Court acknowledged that by enacting the FELA, Congress intended for FELA cases to reach the jury "whenever fair-minded men" could determine that employer fault played "any part" in the employee's injury.⁸⁸ The test for a jury case is important to define, given that the FELA is an employee's "exclusive" remedy for work-related injuries.⁸⁹ However, any discussion of a "relaxed" standard of causation is simply absent from the *Rogers* decision. In fact, the Court recognized that once negligence is proven, "the only issue remaining is causation"⁹⁰ and foreseeability must still be proven.⁹¹ Even if the *Rogers* holding can be read to have "relaxed" the standard of causation for FELA cases, the Court did so without reference to legislative intent or precedent calling for a relaxed standard.

In fact, the earliest Supreme Court cases interpreting the FELA all upheld the proximate cause requirement and made no mention of a "relaxed" standard.⁹² In *Mondou v. New York, New Haven & Hartford Railroad Co.*, one of the earliest FELA cases, the Court focused on "proximate cause" in its analysis.⁹³ Four years

83. *Id.* at 506.

84. *Id.* at 501.

85. *Id.*

86. *Id.*

87. *Id.* at 504-06; *Norfolk S. Ry. Co. v. Sorrell*, 549 U.S. 158, 175 (2007) (Souter, J., concurring).

88. *Rogers*, 352 U.S. at 506, 508.

89. *N.Y. Cent. R.R. Co. v. Winfield*, 244 U.S. 147, 151 (1917).

90. *Rogers*, 352 U.S. at 507 n.13.

91. *Id.* at 503 (acknowledging that foreseeability is a required element under the FELA).

92. *Chesapeake & Ohio Ry. Co. v. Carnahan*, 241 U.S. 241, 245 (1916); *Mondou v. N.Y., New Haven & Hartford R.R. Co.*, 223 U.S. 1, 4-5 (1912).

93. *Mondou*, 223 U.S. at 4-5.

later, in *Chesapeake & Ohio Railway Co. v. Carnahan*, the Court reiterated that the plaintiff must demonstrate proximate cause to recover under the FELA.⁹⁴

Even where the *Rogers* holding is mentioned in later cases, courts that discuss the FELA's legislative intent are able to clarify the standard of causation.⁹⁵ For example, the court in *Holbrook v. Norfolk Southern Railway Co.* recognized that a plaintiff has a lower burden of proof under the FELA but discussed this in the context of summary judgment.⁹⁶ The *Holbrook* court acknowledged that allowing a plaintiff to prevail without requiring him to prove proximate cause would "render a railroad an insurer of its employees," which was not the intent of the FELA.⁹⁷ In *Gardner v. CSX Transportation, Inc.*, the court argued that a judgment for the plaintiff that did not require a finding of proximate cause would turn the FELA into a workers' compensation statute, a result antithetical to its legislative purpose.⁹⁸

Nevertheless, state and federal courts are divided over whether the language used in *Rogers* relaxes the standard of causation for FELA cases.⁹⁹ Resolving this division is crucial, because the FELA provides for concurrent state and federal jurisdiction.¹⁰⁰ Without resolution, railroad employees will continue to experience differing outcomes in claims for injury compensation depending on whether they file in state or federal court and whether that court applies the traditional or more relaxed standard of causation.

Recently, the railroad in *Norfolk Southern Railway Co. v. Sorrell*¹⁰¹ attempted to clarify the standard of causation for FELA claims. Despite the railroad's contention that the interpretation of *Rogers* varies throughout the country,¹⁰² the Court expressly declined to address the issue because the railroad

94. *Chesapeake & Ohio Ry. Co.*, 241 U.S. at 245.

95. *Holbrook v. Norfolk S. Ry. Co.*, 414 F.3d 739, 742 (7th Cir. 2005); *Gardner v. CSX Transp., Inc.*, 498 S.E.2d 473, 483 (W. Va. 1997).

96. *Holbrook*, 414 F.3d at 741-42.

97. *Id.* at 742.

98. *Gardner*, 498 S.E.2d at 483.

99. *Compare* *Summers v. Mo. Pac. R.R. Sys.*, 132 F.3d 599, 607 (10th Cir. 1997), *Ogelsby v. S. Pac. Transp. Co.*, 6 F.3d 603, 606 (9th Cir. 1993), *Page v. St. Louis Sw. Ry. Co.*, 312 F.2d 84, 93 (5th Cir. 1963), *Magelsky v. BNSF Ry. Co.*, 491 F. Supp. 2d 882, 887 (D.N.D. 2007), *Zarecki v. Nat'l R.R. Passenger Corp.*, 914 F. Supp. 1566, 1571 (N.D. Ill. 1996), *Beeber v. Norfolk S. Corp.*, 754 F. Supp. 1364, 1372 (N.D. Ind. 1990), *Grothusen v. Nat'l R.R. Passenger Corp.*, 603 F. Supp. 486, 488 (E.D. Pa. 1984), *Glass v. Birmingham S. R.R. Co.*, 905 So.2d 789, 796 (Ala. 2004), *and* *Hamilton v. CSX Transp. Co.*, 208 S.W.3d 272, 275 (Ky. Ct. App. 2006) (finding that the standard of causation is less than proximate cause), *with* *Churchwell v. Bluegrass Marine, Inc.*, 444 F.3d 898, 904 (6th Cir. 2006), *Dickerson v. Staten Trucking, Inc.*, 428 F. Supp. 2d 909, 915 (E.D. Ark. 2006), *Wier v. Soo Line R.R. Co.*, No. 96 C 2094, 1997 WL 733909 (N.D. Ill. 1997), *Lynch v. Decker*, No. CIV. L-91-1864, 1994 WL 902363, at *5 (D. Md. 1994), *Moore v. Chesapeake & Ohio Ry. Co.*, 493 F. Supp. 1252, 1265 (S.D. W. Va. 1980), *Snipes v. Chicago, Cent. & Pac. R.R. Co.*, 484 N.W.2d 162, 164-65 (Iowa 1992), *and* *Gardner*, 498 S.E.2d at 483 (requiring proximate cause).

100. Federal Employers' Liability Act of 1908, ch. 149, § 8, 35 Stat. 65, 66 (current version at 45 U.S.C. § 56 (2006)).

101. 549 U.S. 158 (2007).

102. *Id.* at 163-64.

failed to present the issue in its brief.¹⁰³ However, Justices Souter and Ginsburg each addressed the issue of causation in their concurring opinions. Yet, even these concurring opinions disagreed as to the impact of *Rogers* on the standard of causation under the FELA.¹⁰⁴

While the *Sorrell* majority declined to determine whether there is a “relaxed” standard of causation under the FELA, the Court’s discussion is helpful in clarifying Congress’ intent that proximate cause be the standard of causation. The Court analyzed the difference between language in section 1 and section 3 of the FELA.¹⁰⁵ The oft quoted language, “in whole or in part,” is found in section 1. The Court noted, “[t]he language ma[kes] sense in Section 1, however, to make clear that there could be recovery against the railroad even if it were only partially negligent.”¹⁰⁶ The Court then surmised that this language could “simply . . . reflect the fact that contributory negligence is no longer a complete bar to recovery,” rather than addressing the standard of causation.¹⁰⁷ This latter interpretation would be more consistent with the 1939 hearings, when Congress last amended the FELA.¹⁰⁸

The standard of causation under the FELA will continue to pose a significant obstacle in FELA cases. Most recently, CSX Transportation, on petition for writ of certiorari to the Supreme Court, requested that the Court address the standard of causation for FELA cases.¹⁰⁹ The Court declined to hear the case,¹¹⁰ failing yet again to resolve whether the standard of causation is relaxed for FELA claims. This remains an important question to railroads and employees alike. As one of the hearing members suggested in 1939, Congress will need to clarify proximate cause for FELA cases.¹¹¹ The *Sorrell* Court cautioned that the FELA “does not . . . require[] us to interpret every uncertainty in the Act in favor of employees,”¹¹² and allowing the notion of a “relaxed” standard of causation to continue would make the FELA more closely resemble a no-fault system rather than a torts-based compensation scheme. Justice Frankfurter’s opinion on this issue in 1953 remains true today:

103. *Id.* at 164-65.

104. Compare *id.* at 173 (Souter, J., concurring) (“Despite some courts’ views to the contrary, *Rogers* did not address, much less alter, existing law governing the degree of causation”), with *id.* at 178 (Ginsburg, J., concurring) (“Today’s opinion leaves in place precedent solidly establishing that the causation standard in FELA actions is more ‘relaxed’ than in tort litigation generally.”).

105. *Id.* at 170-71.

106. *Id.* at 170.

107. *Id.* at 170-71.

108. 1939 Hearing, *supra* note 20, at 38 (statement of F.M. Rivinus, General Counsel, Norfolk & Western Railroad Co.).

109. CSX Transp., Inc. v. Rivenburgh, No. 08-269, 2008 WL 2229018 (2d Cir. 2008), *petition for cert. filed*, No. 08-269, 2008 WL 4055802 (U.S. Aug. 28, 2008).

110. *Id.*

111. 1939 Hearing, *supra* note 20, at 38 (statement of F.M. Rivinus, General Counsel, Norfolk & Western Railroad Co.).

112. *Sorrell*, 549 U.S. at 171.

Under the guise of suits for negligence, the distortions of the Act's application have turned it more and more into a workmen's compensation act, but with all the hazards and social undesirabilities of suits for negligence because of the high stakes by way of occasional heavy damages, realized all too often after years of unedifying litigation.¹¹³

V. THE RISE OF CUMULATIVE-TRAUMA INJURIES

In general, the workplace has experienced a reduction in traumatic injuries suffered by workers,¹¹⁴ but a "new" type of injury, the cumulative-trauma injury, has become more prevalent.¹¹⁵ Work-related cumulative trauma disorders include: sprains, strains, tears, back pain, carpal tunnel syndrome, hernias, Reynaud's syndrome, and hearing loss. These injuries are not related to one triggering event, like a fall, but instead develop over a period of time.¹¹⁶ Cumulative-trauma injuries have become more common in industries benefiting from technological advances that result in a worker's tasks becoming smaller and more repetitive.¹¹⁷ Eventually, the completion of repetitive tasks can take a toll on the human body, producing injuries of the "muscles, nerves, tendons, soft tissue and vascular system."¹¹⁸ Industries have given much attention to the nature, causes, and prevention of CTDs because they account for more than half of all work-related illnesses.¹¹⁹

Similar to other industries, railroads have witnessed an increase in the number of cumulative-trauma injuries. The types of CTDs that impact the railroad industry include asbestos exposure, repetitive stress injuries, ballast

113. *Stone v. New York, C., & St. L. R. Co.*, 344 U.S. 407, 411 (1953) (Frankfurter, J., dissenting).

114. See *FED. R.R. ADMIN.*, *supra* note 8, at 43 (indicating that injuries such as strains and sprains were more commonplace than traumatic injuries); 2007 FATAL INJURIES, *supra* note 8, at 1 (stating that in 2007 the American workplace had the fewest number of fatalities since the Department of Labor began tracking workplace deaths in 1992); 2005 FATAL INJURIES, *supra* note 8 (showing a decline in the number of workplace fatalities in 2005).

115. See generally David J. Kolesar, *Cumulative Trauma Disorders: OSHA's General Duty Clause and the Need for an Ergonomics Standard*, 90 MICH. L. REV. 2079 (1992); Solomon, *supra* note 10, at 1140 ("[Cumulative-trauma disorder] has been called 'the No. 1 occupational hazard of the 1990s.'").

116. LOST-WORKTIME INJURIES, *supra* note 9, at 2, 7; Vink, *supra* note 9.

117. See Kolesar, *supra* note 115, at 2079 (noting how the modern assembly line breaks a worker's job into smaller and repetitive tasks).

118. Miroljub Grozdanovic, *Human Activity and Musculoskeletal Injuries and Disorders*, 9 MED. & BIOLOGY 150 (2002).

119. See U.S. DEP'T OF HEALTH & HUMAN SERVICES, MUSCULOSKELETAL DISORDERS AND WORKPLACE FACTORS: A CRITICAL REVIEW OF EPIDEMIOLOGIC EVIDENCE FOR WORK-RELATED MUSCULOSKELETAL DISORDERS OF THE NECK, UPPER EXTREMITY, AND LOW BACK 1-2 (Bruce P. Bernard ed., 1997), available at <http://www.cdc.gov/niosh/docs/97-141/> (noting that in 1995 cumulative trauma cases accounted for sixty-two percent of work-related illnesses); William J. Wiatrowski, *Occupational Injury and Illness: New Recordkeeping Requirements*, MONTHLY LAB. REV., Dec. 2004, at 15 (finding that repeated trauma illnesses accounted for a majority of the work-related illnesses reported in private industry in 2001).

injuries, hearing loss, and exposure to dust, smoke, and fumes.¹²⁰ Specifically, sprains, strains, hernias, occupational illnesses, and exposure to loud noise accounted for 2,731 of the 4,534 reported railroad injuries in 1997 and 1998.¹²¹ During those years, these injuries resulted in 179,157 lost work days.¹²² Although the Federal Railroad Administration (FRA) did not have specific reporting codes for CTDs until 1997, reports from 1990 until 2008 indicate that 3,262 railroad injuries were related to cumulative-trauma.¹²³ Further, there were approximately 50,000 hearing loss claims filed as of 1991.¹²⁴

Railroad CTD cases may also be increasing because, as the baby boomers age, the average number of railroad workers in their fifties has increased.¹²⁵ Railroad workers aged forty-five to fifty-four reported the highest number of injuries and lost work days in 1997 and 1998.¹²⁶ Whether the increase in railroad CTDs is due to the age of its workers or to the technological improvements experienced in most industries, the number of CTDs has remained dramatically higher than the number of fatalities between 1995 and 2008.¹²⁷

A. *The Unique Legal Problems Posed by CTDs*

The attention given to CTDs is largely a result of increased litigation surrounding these claims and their related costs.¹²⁸ In a majority of industries, CTDs have resulted in a higher number of workers' compensation claims.¹²⁹ While the exact costs of CTD claims are difficult to estimate,¹³⁰ the current

120. MONICA SULLIVAN, 14TH ANNUAL RAILROAD LIABILITY SEMINAR, OCCUPATIONAL CLAIMS ON SHORT LINE RAILROADS (2007), available at <http://www.batescarey.com/newsandarticles/Occupational%20Claims%206-07.pdf>; see also Jaime E. Hart et al., *Chronic Obstructive Pulmonary Disease Mortality in Diesel-Exposed Railroad Workers*, 114 ENVTL. HEALTH PERSP. 1013, 1015 (2006) (finding that diesel-exposed railroad workers have higher incidents of COPD than those with jobs that do not expose them to these hazards).

121. FED. R.R. ADMIN., *supra* note 8, at 45-53.

122. *Id.*

123. Email from Stan Ellis, Safety Data Analyst, Federal Railroad Administration, to author (Feb. 9, 2009, 2:29 AM PST) (on file with the *McGeorge Law Review*).

124. Mark F. Nowak, *Occupational Noise Exposure of Railroad Workers—Which Regulation Applies?*, 11 J.L. & COM. 39 (1991); see also Gordon Hunter, *Rail Hearing-Loss Cases Soar: 1908 Law's New Battleground Cost Railroads \$100M in 1990*, TEX. LAWYER, Sept. 9, 1991, at 31 (reporting that hearing loss cases surged in the 1990s and that most jury awards are under \$20,000).

125. FED. R.R. ADMIN., *supra* note 8, at 41; see also NAT'L RES. COUNCIL, HEALTH AND SAFETY NEEDS OF OLDER WORKERS 26 (David H. Wegman & James P. McGee eds., 2004) (stating that there is a higher number of older workers due to the aging of the "baby boomers").

126. FED. R.R. ADMIN., *supra* note 8, at 41-42 (reporting that workers aged 45 to 54 experienced 1,651 injuries and 108,104 lost work days, possibly because aging slows the healing process); see also NAT'L RES. COUNCIL, *supra* note 125, at 131 (concluding that injuries suffered by older workers are more severe and take longer to recuperate).

127. See *Accident/Incident Overview*, *supra* note 49.

128. Solomon, *supra* note 10, at 1141.

129. *Id.*

130. See *id.* at 1148-49 (stating that, until recently, workers minimized the seriousness of everyday "aches and pains," thinking of them as "natural wear-and-tear"); NAT'L RES. COUNCIL, *supra* note 125, at 128-

estimate is between \$13 billion and \$20 billion annually.¹³¹ Since the FELA is an injured railroad worker's exclusive remedy for workplace injuries, the higher number of cumulative-trauma injuries likely resulted in a greater proportion of cumulative-trauma, rather than traumatic injury, FELA claims.¹³²

In the context of negligence recovery, several issues make the higher number of CTD claims troubling. First, the legal and medical arenas do not share the same goals; the legal system focuses on isolating causal factors in order to assign liability, while the medical system focuses on identifying "all relevant factors" to provide proper treatment.¹³³ By nature, CTDs are often attributed to many different causal factors.¹³⁴ For example, biological attributes such as age, sex, genetic disposition, other diseases, and hormones can all play a role in the development of CTDs.¹³⁵ Likewise, psychosocial factors such as workload, cognitive demands, job clarity, the employee-employer relationship, shift work, educational status, and benefits also play a causal role.¹³⁶ While the increase in work-related CTD claims certainly gives credence to the notion that repetitive work may be a causal factor, "if it were the sole cause, everyone who engaged in repetitive . . . motion would suffer from [CTDs]."¹³⁷

In addition, CTD claimants may face statute of limitations problems, because CTD symptoms develop over many years.¹³⁸ Physicians lack tests that can predict the onset of CTDs, making early detection difficult.¹³⁹ At trial, the parties spend an inordinate amount of time determining the exact point at which the claimant should have known about his injuries.

30 (finding a significant underreporting of work-related illnesses and injuries); *Vibration Syndrome*, CURRENT INTELLIGENCE BULL. 38 (National Institute of Occupational Safety and Health), Mar. 29, 1983, available at http://www.cdc.gov/niosh/83110_38.html (on file with the *McGeorge Law Review*) (recognizing that many workers and physicians are unable to recognize or distinguish the symptoms of vibration syndrome from other conditions); LOST-WORKTIME INJURIES, *supra* note 9, at 7 (noting that workers may not realize that some conditions have a connection to the workplace, and may, therefore, under-report "long-term latent illnesses" caused by harmful exposures in the work environment).

131. U.S. DEP'T OF HEALTH & HUMAN SERVICES, *supra* note 119, at 1-6 (stating that NIOSH estimated the cost of CTDs at \$13 billion annually in 1996, while the AFL-CIO estimated a \$20 billion annual cost in 1997).

132. See Email from Judy Cox, Office of Railroad Safety, Federal Railroad Administration, to author (Feb. 2, 2009, 3:45 AM PST) (on file with the *McGeorge Law Review*) (stating that the FRA tracks the types of railroad injuries but does not keep numbers of any particular type of FELA claim).

133. Denis Paul Juge et al., *Cumulative Trauma Disorders—"The Disease of the 90's": An Interdisciplinary Analysis*, 55 LA. L. REV. 895, 898 (1995).

134. *Id.* at 897 (giving the example of diabetes, which may precipitate the onset of carpal tunnel syndrome); U.S. DEP'T OF HEALTH & HUMAN SERVICES, *supra* note 119, at 1-1.

135. Juge et al., *supra* note 133, at 898.

136. U.S. DEP'T OF HEALTH & HUMAN SERVICES, *supra* note 119, at 7-2.

137. Juge et al., *supra* note 133, at 898.

138. Grozdanovic, *supra* note 118, at 150.

139. Juge et al., *supra* note 133, at 897-99; *Vibration Syndrome*, *supra* note 130; Kolesar, *supra* note 115, at 2080; Felicity Barringer, *Exposed to Solvent, Worker Faces Hurdles*, N.Y. TIMES, Jan. 25, 2009, at A16, available at <http://www.nytimes.com/2009/01/25/us/25toxic.html>.

Finally, the multi-factored nature of CTDs raises important policy considerations that are not applicable or related to other work-related injuries.¹⁴⁰ First, should an employer be liable for a worker's cumulative-trauma injury if his activities outside of work contributed to the development or exacerbation of CTDs, and, therefore, make the link to work too attenuated? Second, the workers' compensation and tort systems were not intended to be "universal health and accident insurance program[s]."¹⁴¹ The limited purpose of workers' compensation has, for example, pushed several state legislatures to increase the burden of proving work-relatedness for CTD claimants.¹⁴² Should employee compensation systems be expanded to include CTDs? If so, how should the fault-based FELA play a role in this type of injury and recovery? Arguably, cumulative-trauma cases should not fall under FELA recovery, but should instead be compensated under a no-fault system for recognized railroad cumulative-trauma injuries.

B. The Impact of the Lower Standard of Causation on Cumulative-Trauma FELA Cases

The U.S. Supreme Court addressed occupational injuries under the FELA for the first time in *Urie v. Thompson*.¹⁴³ In that case, a railroad worker contracted silicosis as a result of exposure to silica dust that was blown into the cab of the train on which he was working.¹⁴⁴ The Court discussed the scope of the FELA and whether Congress intended its coverage to reach both occupational diseases and traumatic injuries.¹⁴⁵ Recognizing that the FELA was enacted primarily to address severe injuries and deaths, the Court inferred a "broad" intent to cover "every injury suffered by any employee."¹⁴⁶ Although the Court made its decision without finding support in the original language for including non-traumatic injuries,¹⁴⁷ the Court held that *all* injuries related to a railroad's negligence were covered under the FELA.¹⁴⁸ Since some CTDs are now considered "occupational diseases" suffered by railroad workers, it flows

140. See *Palsgraf v. Long Island R.R. Co.*, 162 N.E. 99 (N.Y. 1928) (declaring that proximate cause limits a party's liability to those acts that are reasonably foreseeable to avoid imposing upon a party unlimited liability).

141. Juge et al., *supra* note 133, at 900; *Consolidated Rail Corp. v. Gottshall*, 512 U.S. 532, 543 (1994) ("We have insisted that FELA 'does not make the employer the insurer of the safety of his employees while they are on duty. The basis of his liability is his negligence, not the fact that injuries occur.'").

142. Solomon, *supra* note 10, at 1161.

143. 337 U.S. 163 (1949).

144. *Id.* at 166.

145. *Id.* at 180-82.

146. *Id.* at 180.

147. *CSX Transp., Inc. v. Miller*, 858 A.2d 1025, 1037 (Md. Ct. Spec. App. 2004).

148. *Urie*, 337 U.S. at 181-82.

logically that the only cumulative-trauma claims that should be covered under the FELA are those that are proximately caused by a railroad's negligence.

On the contrary, the lower standard of causation which many courts apply for FELA cases has made the burden of proof lower for railroad workers than injured employees in other industries seeking compensation under no-fault systems.¹⁴⁹ Recovery for cumulative-trauma injuries has become more available to railroad workers covered under the FELA, even though they must prove all of the elements of negligence.¹⁵⁰ This result is largely because railroad workers may use "circumstantial evidence" to prove their cumulative-trauma cases, while workers' compensation claimants may not.¹⁵¹ The railroad employees' increased ability to receive compensation for cumulative trauma stands in stark contrast with the premise that the "basis of [FELA] liability is . . . negligence, not the fact that injuries occur."¹⁵²

C. *The Intricacies of Proving Fault for Cumulative-Trauma FELA Claims*

The gradual and multi-factored nature of CTDs makes cumulative-trauma claims poorly fit for a fault-based recovery scheme like the FELA. Frequently, CTD claims result in a "trial within a trial." Trial time is utilized to differentiate work-related causes from activities outside of the workplace that might contribute to the manifestation of cumulative injuries.¹⁵³ In addition, cumulative-trauma FELA cases follow the discovery rule,¹⁵⁴ resulting in an extensive review of the plaintiff's work and medical history to determine the exact point in time when the plaintiff knew and appreciated the nature and cause of his injuries. Furthermore, cumulative-trauma FELA cases frequently result in a battle of the experts,¹⁵⁵ prolonging trial, increasing expense, and reducing recovery for plaintiffs. Ultimately, the lower standard of causation applied by many courts and

149. Solomon, *supra* note 10, at 1156-61 (pointing out that, while a FELA plaintiff might prove causation through circumstantial evidence, a workers' compensation claimant has not met his burden of proving work-relatedness if activities outside of work might contribute to CTD).

150. *Id.* at 1158-59.

151. *Id.*

152. Consolidated Rail Corp. v. Gottshall, 512 U.S. 532, 543 (1994); *see also* Solomon, *supra* note 10, at 1158 ("Because FELA requires that plaintiffs prove all of the common-law elements of tort, but has a relaxed evidentiary standard, a FELA claim should be less difficult to prove than a common-law tort claim, yet more difficult to prove than a workers' compensation claim.").

153. *See, e.g.*, Edsall v. CSX Transp., Inc., No. 1:06-CV-389, 2007 WL 4608776 (N.D. Ind. 2007) (spending a great deal of time discussing the timing of the plaintiff's injuries).

154. *See* CSX Transp., Inc. v. Miller, 858 A.2d 1025, 1041 (Md. Ct. Spec. App. 2004) ("[T]he discovery rule fixes accrual at the time the plaintiff first becomes aware of both [1] the existence of an injury and [2] the cause of the injury.").

155. Wilcox v. CSX Transp., Inc., No. 1:05-CV-107, 2008 WL 348769 (N.D. Ind. 2008); *see also* Solomon, *supra* note 10, at 1154 (requiring multiple medical opinions to establish work-relatedness of cumulative-trauma injuries).

the lighter test for a jury case contributes to a more visible disparity in outcomes for cumulative-trauma plaintiffs than for those who experience traumatic injuries.

McNeal v. National Railroad Passenger Corp. exemplifies the difficulty in separating the causal factors of a cumulative-trauma injury.¹⁵⁶ McNeal alleged that she suffered a recurring hernia due to the repetitive lifting her job required.¹⁵⁷ However, she also had two other medical conditions unrelated to her railroad work and for which she had multiple surgeries to her abdomen.¹⁵⁸ The district court's opinion focused on an extensive review of McNeal's work injuries and medical history.¹⁵⁹ The court dismissed McNeal's case because she was unable to produce expert testimony establishing the link between her railroad work and the recurring hernia she suffered.¹⁶⁰

A comparison between *McNeal* and *Edsall v. CSX Transportation, Inc.*¹⁶¹ illustrates the disparity that can result from the application of the lighter test for an FELA jury case. Cumulative-trauma claims will always require an extensive review of a plaintiff's medical history at trial because of the need to pinpoint the exact time at which the claim began to accrue.¹⁶² Under the discovery rule, "an occupational disease claim is deemed to accrue under FELA *when the claimant becomes aware or has reason to be aware that he has been injured and is aware or has reason to be aware of the cause of his injury.*"¹⁶³

Edsall was an employee who spent almost thirty years working on the railroad.¹⁶⁴ The record was replete with references to the medical interventions he sought for repetitive stress injuries to his neck, back, wrists, and hands and for which he repeatedly expressed a belief that his railroad work was a contributing factor.¹⁶⁵ Despite the fact that the record indicated that Edsall knew for at least ten to twenty years that his railroad work may be causing his injury,¹⁶⁶ the court permitted his case to survive a motion for summary judgment. These cases demonstrate the disparity in outcomes, where, for example, McNeal was not given the benefit of the lighter test for a jury case, but Edsall was, despite the apparent expiration of the statute of limitations.

The disparity in outcomes may also be due to the availability of quality expert testimony at trial. *CSX Transportation, Inc. v. Miller* and *Wilcox v. CSX Transportation, Inc.* provide examples of the "battle of the experts" that ensues at

156. *McNeal v. Nat'l R.R. Passenger Corp.*, No. 1:05-CV-01039, 2008 WL 3851816 (N.D.N.Y. 2008).

157. *Id.* at *3.

158. *Id.* at *2.

159. *Id.* at *1-5.

160. *Id.* at *7-8.

161. No. 1:06-CV-389, 2007 WL 4608776 (N.D. Ind. 2007).

162. *Id.*; *CSX Transp., Inc. v. Miller*, 858 A.2d 1025, 1042 (Md. Ct. Spec. App. 2004).

163. *Miller*, 858 A.2d at 1042.

164. *Edsall*, 2007 WL 4608776, at *1.

165. *Id.* The court also noted that Edsall suffered a fracture to his hand from playing softball and that he would bear the burden of differentiating this cause from the impact of his work activities at trial. *Id.* at *7 n.4.

166. *Id.* at *3.

trial under cumulative-trauma FELA claims. Miller was an employee of the railroad for thirty-four years when he realized that his osteoarthritic knee would prevent him from working.¹⁶⁷ Miller worked as a yard conductor for thirteen years before he began experiencing knee pain.¹⁶⁸ Over a period of five years, he received several medical procedures, including arthroscopy and a partial knee replacement.¹⁶⁹ Miller attributed his knee problems to the large rock ballast on which he walked three to five miles a day and the repeated heavy lifting he performed throughout the day to switch and mount or dismount cars.¹⁷⁰ At trial, Miller was awarded \$1.5 million for his cumulative-trauma injuries.¹⁷¹

On appeal, one of the issues before the court was the sufficiency of evidence to establish the causal connection between Miller's work activities and his resulting knee problems.¹⁷² Miller had four expert witnesses at trial: a civil engineer, two doctors specializing in orthopedic medicine, and an ergonomist.¹⁷³ Appellate review focused on the admissibility of their testimony, the sufficiency of the opinions rendered, and whether or not each of these experts had sufficient factual bases for their opinions.¹⁷⁴ The court noted:

The causation of a progressive injury is a subject particularly appropriate for expert testimony. . . . Occupational diseases, infections, and other harm to internal tissue or organs . . . present a more esoteric question. A determination of causation [in these cases] is less possible without the aid of medical evidence. It is particularly so, as here, when there has been a significant passage of time between the exposure and the onset of the disease and where there is lacking an obvious cause and effect relationship that is within the common knowledge of laymen.¹⁷⁵

The court upheld Miller's verdict, noting that the experts sufficiently addressed work-relatedness, because there was a lack of other risk factors, such as obesity, sports activity, or significant trauma, which might have caused Miller's osteoarthritis.¹⁷⁶ While the cost of these experts was not disclosed in the appellate case, it is highly probable that the fees were extensive. Since investigative, expert, and attorney's fees are subtracted from an FELA plaintiff's damages,¹⁷⁷ Miller actually received a minimal award for his cumulative-trauma injuries.

167. *Miller*, 858 A.2d at 1039.

168. *Id.*

169. *Id.* at 1040.

170. *Id.* at 1039.

171. *Id.* at 1038.

172. *Id.* at 1055.

173. *Miller*, 858 A.2d at 1056.

174. *Id.* at 1056-76.

175. *Id.* at 1060-61.

176. *Id.* at 1058.

177. *1988 Hearing, supra* note 33, at 14 (statement of Larry Pressler, Member, Senate Subcommittee on

Yet, in *Wilcox v. CSX Transportation, Inc.*,¹⁷⁸ a thirty-year railroad employee who also alleged cumulative-trauma injuries from the railroad's use of large ballasts, was unable to use similar expert opinions to establish a causal link between his work activities and his injuries. Wilcox alleged that he developed plantar fasciitis from walking on the large ballast.¹⁷⁹

The *Wilcox* court expressly recognized that the case involved the "classic 'battle of the experts.'"¹⁸⁰ Wilcox even utilized the same expert in ergonomics who testified on behalf of Miller.¹⁸¹ Both cases attempted to rely on the expert's testimony to identify the same ergonomic risk factors posed by the use of large ballast in railroad yards, as well as the railroad's knowledge of these risks and the "available remedial measures."¹⁸² Yet the testimony was not admitted in *Wilcox* and the jury returned a verdict in favor of the railroad.

Wilcox lost the only remedy available to him. Summarizing the emotionality of this outcome, the court recognized that any FELA claimant would be "disappointed" if he lost his trial, especially since courts have applied the lighter test for a FELA jury case.¹⁸³ The application of a lighter standard of causation has made it easier for employee cases to reach the jury, but the lack of clarity about the standard of causation has produced differing results across the country for FELA cases. This disparity is particularly compounded for cumulative-trauma claimants, who rely extensively on expert testimony to establish that their injuries are connected to the workplace. While some employees have received large awards, others have received no benefits for injuries that might be connected to railroad work. The dramatic disparity in outcomes for cumulative-trauma claimants can be resolved through a different remedial scheme, using standards established by the FRA to determine work-relatedness.

VI. PROPOSAL FOR LEGISLATIVE CHANGE

I had been working for the railroad for about 9 months when the accident occurred. . . . Without knowing it . . . I stepped in some mud and meal which [was] mixed together. . . . [T]he train jerked and I lost my footing. . . . I saw those steel wheels coming at me . . . [they] caught my feet and ran over my ankles. I got caught on the back stairs of the caboose and the train drug me over the top of the switches and rail ties. I was conscious during the whole thing. . . . It wasn't until [two and a half

Surface Transportation).

178. No. 1:05-CV-107, 2008 WL 348769 (N.D. Ind. 2008).

179. *Id.* at *5.

180. *Id.* at *3 n.2.

181. Compare *Wilcox*, 2008 WL 348769, at *4, with *Miller*, 858 A.2d at 1056 (both using Dr. Robert Andres as an expert).

182. *Miller*, 858 A.2d at 1074.

183. *Wilcox*, 2008 WL 348769, at *6.

years later] that the trial began Hearing . . . that we wouldn't get a dime in compensation, we were devastated. . . . It's like a crap shoot, but the stakes are people's lives . . . I lost my legs, I lost in court, I suffered through almost 3 years of uncertainty. . . . Something has got to be changed.¹⁸⁴

The FELA has existed for too long without appropriate changes to reflect the modern railroad work environment particularly and the contemporary work environment generally. A long legislative history is replete with examples of this problem, including the disparities that are caused by the lack of change: first, there are the stories of the worker who suffered greatly, but received no compensation, while others received large awards;¹⁸⁵ next, there is the argument against placing railroad workers under state workers' compensation systems;¹⁸⁶ finally, there is discussion about an appropriate level of compensation.¹⁸⁷ Now is the right time to realize the potential for change. Recovery for cumulative-trauma injuries should be transitioned to a no-fault system operated jointly by the Department of Labor, the Federal Railroad Administration, and the Railroad Retirement Board. Putting cumulative-trauma claims under a no-fault system will allow the industry and Congress time to assess how to replace the FELA in its entirety with a no-fault system for railroad injuries.

A. Employees Do Not Prefer a Remedial Scheme Like FELA

Because Congress desired to create a system of injury compensation for railroad employees¹⁸⁸ through the FELA, worker satisfaction with this remedy should be taken into consideration. Most of the reform efforts from 1910 through the late 1980s focused on the costs of the FELA,¹⁸⁹ with little attention to employee satisfaction. The reviews of employee satisfaction show, in large part,

184. 1989 Hearing, *supra* note 32, at 12-14 (statement of Joseph A. LaScala, Employee, Burlington Northern Railroad Co.).

185. *Id.* at 53-59 (statement of William H. Dempsey, President, Association of American Railroads).

186. *Id.* at 150-53 (statement of James N. Ellenberger, Assistant Director, Department of Occupational Safety, Health, and Social Security, American Federation of Labor and Congress of Industrial Organizations) (opposing placing railroad injuries under a workmen's compensation system because benefits differ from state to state and would reduce the railroads' incentive to provide a safe workplace); *id.* at 126-27 (statement of Larry D. McFather, President, Brotherhood of Locomotive Engineers).

187. 1988 Hearing, *supra* note 33, at 8-17 (statement of Neal P. Curtin, Deputy Dir., Resources, Community, and Econ. Dev. Div., Gov't Accounting Office, accompanied by Jim Blume, Study Group Dir., and Teresa Spisak, Technical Analyst).

188. *CSX Transp., Inc. v. Miller*, 858 A.2d 1025, 1030 (Md. Ct. Spec. App. 2004).

189. See *TRANSP. RES. BD.*, *supra* note 45, at 161-66 (finding that overall costs and the adversarial nature of FELA proceedings would be reduced by utilizing a workers' compensation system but that the data is incomplete because railroads need to improve collection of injury compensation data); GAO REPORT, *supra* note 45, at 4 (finding that the costs to railroads would only be reduced minimally by replacing the FELA with a workers' compensation system and employees could potentially experience lower compensation for injuries).

that railroad employees are dissatisfied with the FELA.¹⁹⁰ Specifically, employees are not satisfied with the FELA's requirement that recovery be based on a finding of negligence.¹⁹¹ Most employees do not support a reduced award if they are found to be partially at fault and believe that compensation for work injuries should be allowed regardless of fault.¹⁹²

Though many proponents of the FELA argue that it promotes a safer railroad system,¹⁹³ none of the reviews of the FELA have explicitly shown that safety cannot be improved through another remedial scheme.¹⁹⁴ Further, most employees believe that the FELA does not promote a safer work environment and does little to provide adequate mediation for workplace injuries.¹⁹⁵ Instead, the FELA creates opposite goals in the injury compensation process, because each party must prove or disprove fault. Therefore, employees believe that the FELA actually creates barriers to effective cooperation between employees and employers to reduce safety problems.¹⁹⁶

Likewise, the FELA continues to pose significant delays in providing compensation. Most employees would like injury compensation to be "immediate," rather than delayed through the negotiation or trial processes.¹⁹⁷ A majority of employees also disagree with the disparate awards that are common throughout the industry and feel that there should be comparable awards for similar types of injuries.¹⁹⁸ Furthermore, most employees feel that the FELA has a negative impact upon the employer-employee relationship and report feeling that railroads "do not care about their employees, do not look out for their employees, and treat them as expendable."¹⁹⁹

B. Railroad Workers Would Be Best Served Under a Federal Compensation System

To date, most industries have transitioned from a recovery system based on negligence principles to no-fault recovery schemes.²⁰⁰ This transition was largely the result of negotiation between employees and employers.²⁰¹ To address the

190. Michael R. Crum et al., *Employee Attitudes About Railroad Injury Compensation*, 35 *TRANSP. J.* 15 (1995); *FED. R.R. ADMIN.*, *supra* note 8, at 110-34.

191. Crum et al., *supra* note 190, at 21.

192. *Id.*

193. *1989 Hearing*, *supra* note 32, at 121-24 (statement of Geoffrey N. Zeh, Vice Chairman, Railway Labor Executives' Association, and President, Brotherhood of Maintenance of Way Employees).

194. *TRANSP. RES. BD.*, *supra* note 45, at 8.

195. Crum et al., *supra* note 190, at 21; *FED. R.R. ADMIN.*, *supra* note 8, at 119.

196. Crum et al., *supra* note 190, at 21; *FED. R.R. ADMIN.*, *supra* note 8, at 119.

197. Crum et al., *supra* note 190, at 21.

198. *Id.* at 23; *see also 1988 Hearing*, *supra* note 33, at 42-43 (statement of W. Graham Claytor, Jr., President and Chairman of the Board, Amtrak) (giving an overview of inequitable awards).

199. *FED. R.R. ADMIN.*, *supra* note 8, at 115-19.

200. Solomon, *supra* note 10, at 1145.

201. *Id.*

uncertain recovery under the tort-based system, state legislatures provided employees with a higher probability of recovery in exchange for smaller awards.²⁰² The employer, on the other hand, waived potential defenses and assumed liability for most workplace injuries in exchange for paying lower awards.²⁰³

Since a majority of workers' compensation systems fall under the province of state control, the program requirements and benefits vary.²⁰⁴ Workers' compensation systems have some basic principles of programmatic design in common, however. Specifically, workers' compensation programs are funded through insurance programs. State legislatures determine coverage and administrative bodies develop the claims process and have jurisdiction over appeals.²⁰⁵ In general, an employee may file a workers' compensation claim if he can demonstrate the "work-relatedness" of his or her injury, a legislatively defined term.²⁰⁶ Employers obtain insurance to cover the costs of reimbursing medical treatment, lost wages, and rehabilitation.²⁰⁷ When an employee is injured, he files a claim with the insurance carrier, state fund, or employer.²⁰⁸ The entity responsible for program administration then reviews the employee's claim to determine eligibility and the level of benefits he is entitled to receive.²⁰⁹ Once eligibility is determined, an employee's benefits are usually capped at sixty-six percent of his salary.²¹⁰

Under state workers' compensation systems, a railroad employee is likely to face a multitude of problems. State workers' compensation systems are experiencing an increase in litigiousness.²¹¹ Appeals frequently arise over qualifications for workers' compensation, the amount of recovery that an employee should receive, or the rehabilitation of the worker,²¹² state administrative bodies and the courts are bogged down with the disposition of

202. *Id.* at 1145-46 (noting that, although workers must still prove "work-relatedness," the workers' compensation "bargain" limits recovery while providing a more reliable system of recovery for workers).

203. *Id.*

204. TRANSP. RES. BD., *supra* note 45, at 81; Baker, *supra* note 18, at 116; Solomon, *supra* note 10, at 1161 nn.70-71.

205. See TRANSP. RES. BD., *supra* note 45, at 83; GAO REPORT, *supra* note 45, at 16 (stating that most workers' compensation claims are resolved directly by employees and employers, or their insurance companies, and that when disputes arise, "adjudicative bodies" assist the parties in reaching agreement on various issues).

206. Solomon, *supra* note 10, at 1161; Baker, *supra* note 18, at 116, 116 n.190.

207. TRANSP. RES. BD., *supra* note 45, at 81-82.

208. *Id.* at 84 (showing that, depending on the state, employers may pay into a state fund, obtain private insurance, or be "self-insured" by paying benefits directly to the employee each time a claim arises).

209. *Id.*

210. H.R. REP. NO. 92-1441, at 3 (1972), *reprinted in* 1972 U.S.C.C.A.N. 4698, 4700; TRANSP. RES. BD., *supra* note 45, at 87 (noting in legislative history that the cap on benefits was part of the original workers' compensation "bargain" and exists to put some controls on the level of liability that employers face under no-fault systems).

211. GAO REPORT, *supra* note 45, at 16.

212. *Id.*

these appeals.²¹³ This would not be an adequate method to reduce the delay that FELA claimants face when bringing their claims before the state or federal court system.

Additionally, the increased implementation costs of workers' compensation systems have prompted employers to lobby for changes to workers' compensation eligibility and recovery.²¹⁴ The changes most relevant to this discussion include limitations by state legislatures on the types of reimbursable injuries. Most recently, this has impacted eligibility for benefits on the basis of a cumulative-trauma claim.²¹⁵ Some states have raised the standard of causation for work-relatedness to be stricter than that applied to tort claims, making cumulative-trauma claims more difficult for employees to bring successfully under no-fault systems.²¹⁶

Finally, the level of benefits existing under state and federal workers' compensation systems will not reach the level of potential damages that a jury may award a FELA claimant. Under the FELA, an employee may recover damages, including lost and future earnings, past and future medical expenses, and pain and suffering.²¹⁷ The unions have expressed concern that railroad workers would fare worse if they were placed under a state workers' compensation system, because workers' compensation benefits are capped at sixty-six percent of an employee's salary.²¹⁸ This is compounded by the fact that railroad workers are among the highest paid in heavy industries.²¹⁹

The Supreme Court established long ago that it is within Congress' commerce power to develop a compensation system for railroad workers who are actively engaged in interstate commerce.²²⁰ In fact, Congress has enacted other compensation systems for federal employees²²¹ and for longshoremen and harbor workers.²²² Designing a recovery system similar, but not identical, to these two

213. *See id.* ("In recent years, litigiousness has tended to increase in no-fault compensation schemes.")

214. *Id.*; Solomon, *supra* note 10, at 1161.

215. Solomon, *supra* note 10, at 1161; TRANSP. RES. BD., *supra* note 45, at 87.

216. Solomon, *supra* note 10, at 1161-62 (discussing the burdens of proof in state systems, which range from "clear and convincing" to rules requiring employees to show a greater degree of causation).

217. Baker, *supra* note 18, at 84.

218. 1989 *Hearing*, *supra* note 32, at 126-29 (statement of Larry D. McFather, President, International Brotherhood of Locomotive Engineers). *But see* TRANSP. RES. BD., *supra* note 45, at 164 (noting that there is no evidence to support that railroad conditions would be less safe under a workers' compensation system).

219. Bureau of Labor Statistics, Occupational Outlook Handbook, 2008-09 Edition: Rail Transportation Occupations (on file with the *McGeorge Law Review*). The higher wages of railroad employees makes recovery under the FELA more, dollar-for-dollar, than would be feasible under workers' compensation programs. Under the FELA, awards for damages can be higher, because they include "full replacement of actual wage losses and future earning potential" and the potential for an award for pain and suffering. On the other hand, under workers' compensation programs, "award levels are set by formula and depend on earnings but are limited by prescribed maximum monthly payments." TRANSP. RES. BD., *supra* note 45, at 20.

220. MESSAGE OF THE PRESIDENT, *supra* note 30, at 25-30 (referring to *Baltimore & Ohio Railroad. Co. v. Interstate Commerce Commission*, 221 U.S. 612 (1911)).

221. Federal Employees' Compensation Act, 5 U.S.C. §§ 8101-8193 (2006).

222. Longshore and Harbor Workers' Compensation Act, 33 U.S.C. §§ 901-950 (2006).

federal systems would be ideal for railroad workers. The money spent bringing and defending FELA claims could be better spent by paying higher benefits under a no-fault compensation system.²²³

C. *Proposal for a New System of Recovery: The Railroad Employees' Compensation Act*

A new remedy for railroad employee injuries should be crafted under a federal system uniquely designed for railroad employees²²⁴ and based on infrastructures already in place through the Federal Railroad Administration (FRA) and the Railroad Retirement Board (RRB).²²⁵ The remedy should be entitled: the Railroad Employees' Compensation Act (RECA). Because railroad employees sometimes travel across state lines, this type of system is necessary to achieve uniform recovery.²²⁶ A federal program would allow for administrative efficiency, could decrease the use of judicial resources, could reduce time and costs involved at trial,²²⁷ and would place oversight with an administrative body familiar with the railroad industry.²²⁸ Further, the new remedial program should not be based upon fault and should be governed jointly by the Department of Labor (DOL),²²⁹ the FRA,²³⁰ and the RRB.²³¹

223. H.R. REP. NO. 92-1441, at 5 (1972), *reprinted in* 1972 U.S.C.C.A.N. 4698, 4700 (noting that Congress utilized a similar line of reasoning to increase payment under the Longshore and Harbor Workers' Compensation Act).

224. See U.S. R.R. RET. BD., AN AGENCY OVERVIEW 2 (2010), *available at* <http://www.rrb.gov/pdf/opa/overview.pdf> (describing how, throughout history, Congress has created programs uniquely for railroad workers many times); Baker, *supra* note 18, at 81 (noting that Congress has treated the railroads differently from other industries because of the important role they assumed in the country's economy and the fact that federal grants of land supported railroad growth).

225. 135 CONG. REC. 18,020-22 (daily ed. Aug. 2, 1989) (statement of Sen. Kasten) (proposing a new remedial scheme for railroad workers giving entitlement to benefits under the Railroad Retirement Act of 1974, the Railroad Unemployment Insurance Act, and the Social Security Act).

226. U.S. R.R. RET. BD., *supra* note 224, at 2 (stating that insurance programs for railroad workers are favorable for minimizing the likelihood that a worker traveling across state lines will not be penalized because he is not covered under the state in which his injury occurred).

227. See FCSC REPORT, *supra* note 12, at 3 (noting that a FELA case requires a jury trial more often than other federal civil claims and that reformulating railroad injury compensation on the basis of no-fault would reduce the federal court docket).

228. 1989 Hearing, *supra* note 32, at 28 (statement of Bobby Wade Holland, Former Employee, Seaboard Coast Railroad) (noting that juries frequently do not understand "railroad language").

229. 5 U.S.C. §§ 8101-8193 (2006); 33 U.S.C. §§ 901-950 (2006) (stating that the DOL administers the two federal compensation acts, the Federal Employees' Compensation Act, and the Longshore and Harbor Workers' Compensation Act).

230. 49 U.S.C. § 103(a) (2006) (stating that the Federal Railroad Administration is responsible for the oversight and design of railroad safety laws).

231. U.S. R.R. RET. BD., *supra* note 224, at 1 (noting that the Railroad Retirement Board implements retirement, unemployment, disability, and sickness benefits and is uniquely designed for railroad workers to address programmatic flaws in the social security system).

An administrative body should regulate the RECA in a fashion similar to the RRB.²³² Under this design, the President of the United States, pursuant to his executive powers,²³³ should appoint the following RECA Board members: one member each from the FRA, RRB, and DOL, one member recommended by the railroads, and one member recommended by the unions.²³⁴ Each of these members will manage a unique need of the program. To illustrate, the member from the FRA will bring the expertise needed to design a compensation program that is focused on improving safety.²³⁵ The member from the RRB will bring experience and special knowledge of railroad insurance programs.²³⁶ The member from the DOL will also provide programmatic input based on the inner-workings of other federal compensation programs.²³⁷ Further, members representing the railroads' and employees' interests are necessary to promote positive employer-employee relationships.

Congress should create an insurance program whereby railroads pay into a general fund²³⁸ to finance RECA benefits. Like the railroad retirement benefits, the RECA benefits should be based on a "two-tiered" approach.²³⁹ First, the formulas for injury compensation under the FECA and the Longshore and Harbor Workers' Compensation Act should provide a method for the Board to formulate scheduled benefits.²⁴⁰ Second, to account for the higher wages generally earned by railroad employees, particularly those with longevity, the formula should be based on a national average of railroad wages.²⁴¹

To reflect the goals of both the unions and the railroads, recovery available under the RECA should not be capped at the sixty-six-percent level implemented in other no-fault systems. Instead, the RECA should allow for recovery of one hundred percent of a railroad employee's wages. The ability to recover the higher level of compensation would reflect the "bargain" of other no-fault systems. By allowing the railroad employee to receive one hundred percent of his lost wages, he would give up the additional damages available to him under the FELA²⁴² and

232. U.S. R.R. RET. BD., *supra* note 224, at 4.

233. U.S. CONST. art. II, § 2, cl. 2.

234. See MESSAGE OF THE PRESIDENT, *supra* note 30, at 11 (outlining how members of the Sutherland Commission were designated).

235. 1989 Hearing, *supra* note 32, at 121 (statement of Geoffrey N. Zeh, Vice Chairman, Railway Labor Executives' Association, and President, Brotherhood of Maintenance of Way Employees).

236. U.S. R.R. RET. BD., *supra* note 224, at 1.

237. 5 U.S.C. §§ 8101-8193 (2006); 33 U.S.C. §§ 901-950 (2006).

238. U.S. R.R. RET. BD., *supra* note 224, at 2.

239. *Id.*

240. 33 U.S.C. § 908 (2006); U.S. DEP'T OF LABOR, PUBLICATION CA-810, INJURY COMPENSATION FOR FEDERAL EMPLOYEES 53 (1999), available at <http://www.dol.gov/owcp/dfec/regs/compliance/agencyhb.pdf>; see also MESSAGE OF THE PRESIDENT, *supra* note 30, at 68 (proposing a schedule of compensation).

241. Bureau of Labor Statistics, *supra* note 219; see also MESSAGE OF THE PRESIDENT, *supra* note 30, at 15, 18-19 (recommending replacement of the FELA with a no-fault system with scheduled benefits based upon an employee's pay and degree of personal injury).

242. Baker, *supra* note 18, at 84; see also H.R. REP. NO. 92-1441, at 3 (1972), reprinted in 1972

the right to sue under the FELA. The railroad, however, would accept liability in all cumulative-trauma cases (and pay wages and medical expenses) in exchange for not having to defend against such claims at trial. Finally, benefits under the RECA should be reviewed annually to ensure that the compensation level continues to reflect the average wage of railroad employees.²⁴³

Equally important, the RECA should allow an employee to receive compensation for those CTDs known to the railroad industry and that meet the FRA's test for determining work-relatedness.²⁴⁴ According to the FRA rules, "an injury or illness [is] work-related if an event or exposure in the work environment either discernibly caused or contributed to the resulting condition."²⁴⁵ Under this test, employees have the benefit of a presumption of work-relatedness, so long as the injury does not fall within one of several exceptions:²⁴⁶ the employee was on railroad premises for non-work purposes; the injury is due entirely to conditions outside the workplace; the injury results entirely from leisure activities or participation in non-work-related medical programs; the injury arises uniquely from "eating, drinking, or preparing food . . . for personal consumption"; the injury results from the completion of "personal tasks" and grooming not related to work; the employee suffers from "the common cold or flu" or a mental illness not induced by working conditions; or the injury results during an employee's commute.²⁴⁷ These exceptions should remain intact and are necessary to limit the scope of a railroad's potential liability for cumulative-trauma injuries. In addition, the FRA's test for work-related hearing loss, musculoskeletal disorders, and occupational tuberculosis should remain intact.²⁴⁸

Finally, a railroad employee will have the right to appeal a decision by the RECA Board in situations where his injury was determined to be non-work-related. The appeal process will mirror that applied to the Railroad Retirement Act and the Railroad Unemployment Insurance Act.²⁴⁹ Specifically, an employee should have the right to appeal a decision relating to compensation or schedule of

U.S.C.C.A.N. 4698, 4700; TRANSP. RES. BD., *supra* note 45, at 87 (noting that Congress increased the level of recovery for longshore and harbor workers to ensure that they received adequate benefits).

243. See H.R. REP. NO. 92-1441, at 3 (1972), *reprinted in* 1972 U.S.C.C.A.N. 4698, 4700 ("[A]n annual redetermination . . . will allow any increase in the national average weekly wage to be reflected by an appropriate increase in compensation payable under the Act.").

244. See Juge et al., *supra* note 133, at 900-01 (noting that under most workers' compensation statutes, an employee will only be able to recover for a CTD if he can demonstrate that the disorder is one that is "peculiar" to his employment).

245. FED. R.R. ADMIN., FRA GUIDE FOR PREPARING ACCIDENT/INCIDENT REPORTS ch. 6, at 6 (2003), available at <http://safetydata.fra.dot.gov/officeofsafety/ProcessFile.aspx?doc=guidefinal050403.pdf>.

246. *Id.*

247. *Id.* ch. 6, at 7-8.

248. *Id.* ch. 6, at 33, 35.

249. R.R. Ret. Bd. Form HA-2 (2-98), Filing Appeals Under the Railroad Retirement Act and the Railroad Unemployment Insurance Act, available at <http://www.rrb.gov/pdf/ha2.pdf> (last visited Feb. 8, 2010) (on file with the *McGeorge Law Review*).

benefits directly to the Board within sixty days from the date of the Board's initial determination of ineligibility.²⁵⁰ The RECA Board should appoint a hearing officer with specialized knowledge of railroading to hear the appeal.²⁵¹ Moreover, if none of these processes result in a satisfactory outcome, the employee may seek review in the federal courts as a last resort.²⁵²

VII. CONCLUSION

The original purpose of the FELA was to address the traumatic injuries suffered by railroad workers across the country. Today, the railroads have improved working conditions so drastically that traumatic injury is no longer the predominant type of injury suffered by railroad workers. Despite Congress' reluctance through the years to make necessary amendments to the FELA, the courts lowered the standard of causation for FELA cases, thereby paving a path of recovery for the railroad worker more similar to no-fault compensation than the traditional concepts of negligence. For this reason alone, the current application of FELA principles is no longer consistent with legislative intent.

Even if Congress is not willing to recognize how the lower standard for causation has departed from legislative intent, the application of the statute to cumulative-trauma injuries is further evidence of the deviation from its original purpose. By removing foreseeability from the determination of fault and applying a "relaxed" standard of causation for FELA claims, the courts have created conditions for railroad workers to obtain recovery for cumulative-trauma injuries that are more favorable than recovery possibilities in industries that fall under no-fault compensation systems. Without foreseeability, railroads face the potential of unlimited liability for cumulative-trauma injuries.

In 2008, the Federal Railroad Administration announced new reporting rules for railroad occupational injuries,²⁵³ moving towards a more concrete definition of "work-relatedness" for the physical ailments of railroad workers. Prior to the new reporting rules, railroads and their workers have struggled to determine work-relatedness of cumulative-trauma injuries in expensive litigation under the FELA. Determining on a case-by-case basis whether a back injury, carpal tunnel syndrome, or hearing loss is "work-related" for purposes of FELA compensation does not promote safety and does not result in a fair compensation system for either party.

The FRA's new rules, combined with the existing infrastructures of the FRA and the RRB, can be the driving forces to implement the Railroad Employees'

250. *Id.*

251. *Id.*

252. *Id.*; see also MESSAGE OF THE PRESIDENT, *supra* note 30, at 54-55 (noting that an employee should retain the Seventh Amendment right to trial by jury, even though his claim was first reviewed by a specialized "tribunal").

253. 49 C.F.R. § 225 (2008).

Compensation Act. The RECA is an opportunity to apply a new method of recovery for the types of injuries that are most unlike traumatic injuries. Furthermore, the RECA creates an opportunity for the interests of all parties—railroads, unions, and employees alike—to be adequately represented. Now is the time for Congress to get the train on the right track. Cumulative-trauma claims should be severed from the FELA and replaced with a no-fault compensation system.