IT'S ABOUT TIME: Modernizing the Federal Employers' Liability Act of 1908

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Under the Federal Employers' Liability Act ("FELA"), lawyers win and everyone else loses. Essentially, FELA fails on two accounts: time and money. FELA is the exclusive remedy for claims by railroad employees against employers for injuries suffered on the job; it supersedes all state laws.[1] While one study showed that almost 99% of FELA cases are settled and 85% are settled without the help of an attorney,[2] if not settled, FELA cases take an average of five-and-a-half years to be resolved.[3] Moreover, when Congress reviewed FELA in 1988 for possible repeal, the administrator of the Federal Railroad Administration testified that almost a quarter of all employees who went to trial with claims of $500,000 or more actually received no compensation.[4] Of those employees who did receive a judgment, between 25 and 31% of their judgments went to attorney's fees.[5]

Because of these shortcomings, many scholars and politicians have been calling for reform or repeal of FELA practically since its inception.[6]

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1. 45 U.S.C. § 51 (2012); *see also* New York Cent. R.R. Co. v. Winfield, 244 U.S. 147, 148–49, 154 (1917) (holding that the liability of interstate carriers for injuries to employees is so fully covered by FELA as to prevent any award under New York's Workmen's Compensation Act).

2. Jerry J. Phillips, *An Evaluation of the Federal Employers' Liability Act*, 25 SAN DIEGO L. REV. 49, 57 (1988) (citing RAILWAY LABOR EXECS. ASS'N, FELA—A MATTER OF RAILROAD SAFETY, INJURY COMPENSATION AND CORPORATE ACCOUNTABILITY 7, 12 (1987)).

3. *The Federal Employers' Liability Act (FELA) in Relation to Amtrak: Hearing Before the Subcomm. on Surface Transp. of the S. Comm. on Commerce, Sci., and Transp.*, 100th Cong. 24 (1988) [hereinafter *FELA in Relation to Amtrak*] (statement of John H. Riley, Administrator, Federal Railroad Administration).

4. *Id.* at 23.

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

6. *E.g.*, *Federal Employers' Liability Act: Hearing Before the Subcomm. on Transp. and Hazardous Materials of the H. Comm. on Energy and Commerce*, 101st Cong. 1 (1989) [hereinafter 1989 Hearing] (statement of Thomas A. Lukin, Member, Committee on Energy and Commerce); *FELA in Relation to Amtrak*, *supra* note 3, at 22; *Amending the Federal Employers' Liability Act: Hearings on S. 1708 Before a Subcomm. of the S. Comm. on the Judiciary*, 76th Cong. 11 (1939) [hereinafter 1939 Hearing]; MESSAGE OF THE PRESIDENT OF THE UNITED STATES

However, proponents of FELA argue that the criticisms are unfounded. Proponents claim that because FELA is based on the tort liability system, it provides a deterrent effect.[7] Additionally, FELA is less expensive than workers' compensation schemes, and compensation under FELA is more individualized.[8] Despite this debate and the constant critiques of FELA, Congress has failed to reform FELA in the over 100 years it has been law or even address the two main problems with FELA: time and money.[9]

This article discusses how shortcomings of FELA—the enormous costs to both sides and the great amount of time that claims take to be resolved—cause FELA's failure to serve the interests of both the injured employees seeking compensation and the railroads that employ them.

Section I provides an overview of FELA and how it developed. Section II addresses the main problems that critics of FELA have claimed persist. Section III critiques the proposed solution of completely repealing FELA in favor of workers' compensation. Section IV discusses a more viable option than workers' compensation that could solve FELA's main problems of cost and time.

I. OVERVIEW OF THE FEDERAL EMPLOYERS' LIABILITY ACT

At the end of the nineteenth century railroad work was extremely dangerous. In 1888, over 2,000 railroad workers were killed in service and over 20,000 were injured on the job.[10] A switchman's life expectancy was only seven years in 1893,[11] and the chances of a railroad worker being injured

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TRANSMITTING THE REPORT OF THE EMPLOYERS' LIABILITY AND WORKMEN'S COMPENSATION COMMISSION, S. DOC. NO. 62-338, at 14–15 (1912) [hereinafter MESSAGE OF THE PRESIDENT]; REPORT OF COMMISSION TO INVESTIGATE THE MATTER OF EMPLOYEES' LIABILITY AND WORKMEN'S COMPENSATION, S. DOC. NO. 62-338, at 15 (1912) [hereinafter REPORT OF COMMISSION]; Thomas E. Baker, *Why Congress Should Repeal the Federal Employers' Liability Act of 1908*, 29 HARV. J. ON LEGIS. 79, 115–16 (1992); Melissa Sandoval Greenidge, *Getting the Train on the Right Track: A Modern Proposal for Changes to the Federal Employers' Liability Act*, 41 MCGEORGE L. REV. 407, 411 (2010).

7. Phillips, *supra* note 2, at 62.

8. *Id.*

9. Bills in both houses were introduced in the 1990s to repeal FELA, but no law was passed. H.R. 5853, 101st Cong., 136 CONG. REC. E3301 (1990) (introduced by Rep. Robert W. Whitaker, R-Kan.); S. 3214, 101st Cong., 136 CONG. REC. S15,558 (1990) (introduced by Sen. Robert W. Kasten, Jr., R-Wis.).

10. A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENT 5486 (Richardson ed., 1897).

11. Melvin L. Griffith, *The Vindication of a National Public Policy under the Federal Employers' Liability Act*, 18 L. & CONTEMP. PROBS. 160, 163 (1953).

on the job in 1904 were one out of thirty.[12] There were 281,645 casualties in the year 1908 alone.[13] In a message to Congress regarding railroad employees, President Harrison proclaimed: "It is a reproach to our civilization that any class of American workmen should in the pursuit of a necessary and useful vocation be subjected to a peril of life and limb as great as that of a soldier in time of war."[14] As the railroad lines covered more and more ground and crossed more and more states, state regulation of the railroads became chaotic, and uniformity in the state laws was impossible because regulation lacked any national oversight.[15] Therefore, an injured employee's exclusive remedy was through common law tort.[16] At the time, workers' compensation was still a new idea, and it was not widely accepted until 1917.[17]

In order to ease recovery for injured railroad workers and to address the inevitable issue of lack of uniformity in state regulation, Congress passed the first version of FELA in 1906.[18] However, the Supreme Court found that version of FELA unconstitutional.[19] In response, Congress enacted the current version of FELA,[20] which the Supreme Court subsequently upheld as constitutional under the Congress's Commerce Clause power in *Mondou v. New York, New Haven, & Hartford Railroad Co.*[21] The Supreme Court recently recounted Congress' reasoning behind FELA: "Cognizant of the physical dangers of railroading that resulted in the death or maiming of thousands of workers every year, Congress crafted a federal remedy that

12. Arnold I. Havens & Anthony A. Anderson, *The Federal Employers' Liability Act: A Compensation System in Urgent Need of Reform*, 34 FED. B. NEWS & J. 277, 310 (1987) (citing 13 INTERSTATE COMMERCE COMM'N, INTERSTATE COMMERCE ACCIDENT BULLETIN 9 (1904)).

13. CSX Transp., Inc. v. McBride, 131 S.Ct. 2630, 2636 (2011) (citing S. REP. NO. 61-432, at 2 (1910)).

14. A COMPILATION OF MESSAGES AND PAPERS OF THE PRESIDENT, *supra* note 10, at 5486.

15. *See* Griffith, *supra* note 11, at 162.

16. *See e.g.*, Chicago & Alton R.R. Co. v. Few, 15 Ill. App. 125, 126 (1884) (injured employee suing railroad company for injuries sustained through company's negligence); Corson v. Maine Cent. R.R. Co., 76 Me. 244, 245 (1884) (injured employee suing employer railroad company for negligence).

17. *See* New York Cent. R.R. Co. v. White, 243 U.S. 188, 209 (1917) (upholding New York's state workers' compensation statute as constitutional and not in violation of the 14th Amendment).

18. Act of June 11, 1906, ch. 3073, Pub. L. No. 59-219, 34 Stat. 232.

19. Howard v. Illinois Cent. R.R. Co., 207 U.S. 463, 504 (1908) (holding that the parts of the statute that were beyond Congress's power under the Commerce Clause were too intertwined with the parts that were within Congress's constitutional power).

20. 45 U.S.C. § 51 (2012).

21. 223 U.S. 1, 54 (1912).

shifted part of the 'human overhead' of doing business from employees to their employers."[22]

As enacted, FELA supersedes all state laws, and is the exclusive remedy for injured railroad workers.[23] So while a FELA action may be brought in state court, state courts are required to apply federal substantive law in adjudicating FELA claims.[24] FELA provides that:

> Every common carrier by railroad while 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, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee . . . 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 . . . or other equipment.[25]

FELA is a system based on fault but with a statutory scheme that distinguishes it from common law tort.[26] The standard for fault required is easier to satisfy than common law negligence claims.[27] In order to establish liability under FELA, a railroad worker need only demonstrate that a railroad's negligence played a part—no matter how small—in bringing about the injury, as opposed to satisfying the common law proximate cause standard.[28] The duty of a railroad is to provide a reasonably safe place to work for its employees.[29] FELA, based on fault, is therefore also unlike workers' compensation schemes, which allow employees to recover for injuries regardless of the fault of their employer.[30] Liability under FELA is predicated

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22. Consolidated Rail Corp. v. Gottshall, 512 U.S. 532, 542 (1994).
23. New York Cent. R.R. Co. v. Winfield, 244 U.S. 147, 152–53 (1917).
24. St. Louis Sw. Ry. Co. v. Dickerson, 470 U.S. 409, 411 (1985).
25. 45 U.S.C. § 51 (2012).
26. *Id.* §§ 51–60.
27. *Id.* § 51.
28. CSX Transp., Inc. v. McBride, 131 S. Ct. 2630, 2634 (2011). Because FELA states that a railroad is liable for an employee's injury or death "resulting in whole or in part from" the railroad's negligence, the act does not incorporate the proximate cause standard developed for common-law tort actions. *Id.*
29. Ackley v. Chicago & N. W. Transp. Co., 820 F.2d 263, 267 (8th Cir. 1987); Ragsdell v. S. Pac. Transp. Co., 688 F.2d 1281, 1283 (9th Cir. 1982).
30. Baker, *supra* note 6, at 116. All fifty states have established workers' compensation schemes based upon a no-fault system with four basic features: "(1) an employee who suffers a work-related injury or illness is automatically entitled to benefits; (2) benefits are based on lost wages and medical expenses; (3) an administrative agency oversees the system; and (4) rehabilitation is a specific part of the program." *Id.*

upon negligence, but Congress also passed the Safety Appliance Act, which establishes safety standards for some railroad equipment,[31] and the Locomotive Inspection Act, which provides for inspection and safety standards of the locomotives.[32] A violation of either the Safety Appliance Act or the Locomotive Inspection Act relieves an employee of the burden of proving negligence, and the employee must only prove causation, *i.e.*, that the injury resulted from the violation of either Act.[33]

Congress intended FELA to benefit railroad employees. For this reason, it expressly abrogated several defenses that would have been available to the railroad-employer at common law such as assumption of risk, the contributory negligence bar, and the fellow-servant rule.[34] Nonetheless, while an employee's contributory negligence does not bar a claim under FELA, the statute provides that "damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee."[35] Moreover, like common law torts, there must also still be some evidence of foreseeability of injury for the plaintiff to prevail in a FELA case.[36] Thus, an employee must prove that the railroad, with the exercise of due care, could have reasonably foreseen that the particular condition could cause injury.[37]

The measure of damages in FELA claims is set by federal common law, regardless of whether the claim is brought in federal or state court.[38] Unlike workers' compensation schemes where damages are capped based on lost wages and medical expenses,[39] FELA imposes no cap on damages, and a FELA plaintiff is entitled to recover for all past, present, and probable future harm attributable to the defendant's conduct, including pain, suffering, and mental anguish.[40] A FELA plaintiff can recover special damages for past and future lost wages, medical expenses, and general damages for pain and suffering, but punitive damages and loss of consortium claims are not

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31. 49 U.S.C. § 20302 (2012).

32. 49 U.S.C. § 20701 (2012).

33. O'Donnell v. Elgin, J. & E. Ry. Co., 338 U.S. 384, 390–91 (1949); Coray v. S. Pac. Co., 335 U.S. 520, 522–23 (1949); Brady v. Terminal R. Ass'n of St. Louis, 303 U.S. 10, 15 (1938); Horibin v. Providence & Worcester R.R. Co., 352 F. Supp. 2d 116, 117 n.2 (D. Mass. 2005).

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

35. 45 U.S.C. § 53 (2012).

36. Green v. River Terminal Ry. Co., 763 F.2d 805, 809–10 (6th Cir. 1985).

37. Davis v. Burlington N., Inc., 541 F.2d 182, 185 (8th Cir. 1976).

38. Norfolk & W. Ry. Co. v. Liepelt, 444 U.S. 490, 493 (1980); Mich. Cent. R.R. Co. v. Vreeland, 227 U.S. 59, 67 (1913).

39. Baker, *supra* note 6, at 116.

40. Marchica v. Long Island R.R. Co., 31 F.3d 1197, 1208 (2d Cir. 1994); *see also* Heinz v. Lehigh Valley R.R. Co., 344 F. Supp. 1131, 1132 (E.D. Pa. 1972); Denver & Rio Grande W. R.R. Co. v. Lloyd, 364 P.2d 873, 875 (Colo. 1961); Kirkland v. Seaboard Coast Line R.R. Co., 196 S.E.2d 11, 12–13 (Ga. 1973).

permitted.[41] Under FELA, because there is no cap, damage awards for injured employees can be much higher than under workers' compensation, giving the employers a greater incentive for safety.[42]

II. CRITICISM OF FELA

Nearly since its inception, FELA has faced heavy critique from scholars and politicians alike.[43] The most common and primary criticisms of FELA are: (1) overwhelming cost from attorneys' fees and administrative costs; (2) divisiveness created between employee and employer because of the requirement that the employee establish some level of negligence on the part of the employer; (3) unpredictable damage awards due to the absence of caps and payment schedules; and (4) delay in the award of settlement and payment because of the amount of time a FELA claim takes to be fully adjudicated or settled.[44]

This section will discuss each of these allegations in turn, all of which have some merit and would need to be addressed by any meaningful reform efforts.

A. Cost

Inefficiency due to the massive overhead of transaction costs is one of the most prevalent criticisms of FELA claims.[45] For example, in 1981, of the $460 million in FELA costs for railroads, 30% went to transaction costs, with $70 million going to attorneys of the employees and $67 million going to costs for defending and investigating FELA claims.[46]

Attorneys bringing FELA claims on behalf of employees almost exclusively work on a contingent fee basis, so their payment comes out of the damages awarded to the employee.[47] While contingent fees are arguably essential for access to the courts,[48] critics of FELA point out the problem is

41. Gary F. Easom, *FELA: An Overview*, BRIEF, Fall 1997, at 49, 53.
42. Phillips, *supra* note 2, at 54.
43. *See* Havens & Anderson, *supra* note 12, at 312–15.
44. *See, e.g.*, *Id.*; Baker, *supra* note 6, at 92–115.
45. Baker, *supra* note 6, at 105.
46. Victor E. Schwartz & Liberty Mahshigian, *Federal Employers' Liability Act, a Bane for Workers, a Bust for Railroads, a Boon for Lawyers*, 23 SAN DIEGO L. REV. 1, 9 (1986).
47. *Id.*; Baker, *supra* note 6, at 107.
48. For an in-depth discussion of the importance of the contingency fee system in permitting access to the courts for plaintiffs, see Kristin A. Porcu, *Protecting the Poor: The Dangers of Altering the Contingency Fee System*, 5 SUFFOLK J. TRIAL & APP. ADVOC. 149, 149 (2000) ("The contingency fee system developed from a once illegal practice to an essential element of the

that attorneys for employees have contingent fees as high as 40%.[49] Therefore, even when employees have a legitimate claim and finally receive an award for damages, almost half of the award goes to the attorney rather than the injured employee.

Litigation itself is costly as well.[50] In federal court, just like in state court, there are court costs, filing fees, investigation expenses, medical examination fees, deposition and other discovery expenses, expert witness fees, and other expenses.[51] Just like attorneys' fees, these costs add to the overly burdensome cost of litigation in federal courts.

Critics most often blame the high costs of FELA claims on the fact that employees must prove negligence on the part of the employer,[52] whereas a traditional workers' compensation scheme does not require that employees prove any negligence of their employer.[53] Because of the negligence requirement, critics state that FELA claims tend to be overly litigated, forcing employees to spend time and money in discovery and in litigation proving the railroad's fault.[54] Defense counsel for the railroad, paid on an hourly basis, must also spend time trying to show that the railroad was not at fault or that the employee was actually the one at fault.[55] Therefore, no matter who ends up winning the case, the cost of time and money is substantial to both sides.

B. Divisiveness

While more of an intangible cost, critics of FELA also assert that litigation over FELA claims creates unnecessary divisiveness between the injured employees and the railroads because each side must allege the fault of the other.[56] The fault basis and other elements of a FELA claim create

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American legal system that allows people who could not otherwise afford an attorney to gain access to the courts."); *see also* In re Abrams & Abrams, P.A., 605 F.3d 238, 245 (4th Cir. 2010) ("[C]ontingency fees provide access to counsel for individuals who would otherwise have difficulty obtaining representation.").

49. Schwartz & Mahshigian, *supra* note 46, at 9.

50. Baker, *supra* note 6, at 107.

51. *Id.*

52. *Id.* at 109; Havens & Anderson, *supra* note 12, at 313; Schwartz & Mahshigian, *supra* note 46, at 9–10.

53. *See* Baker, *supra* note 6, at 116 and accompanying text.

54. Havens & Anderson, *supra* note 12, at 313 ("Coupled with the prospect of almost limitless recovery, the requirement to establish some degree of negligence increases the reliance on, and likelihood of, legal representation and thereby contributes to the high level of FELA transaction costs.").

55. *See* Schwartz & Mahshigian, *supra* note 46, at 10.

56. Baker, *supra* note 6, at 109; Havens & Anderson, *supra* note 12, at 314 ("The fault-based character of FELA, the ability of contributory negligence to reduce FELA awards, and the fellow-servant doctrine which holds the rail carrier responsible for acts of its employees, invite

disharmony between the employee and the employer. Therefore, rather than working together to determine the actual cause of the injury and improve workplace safety, both sides focus their attention on assessing blame.[57] The actual cause of the injury might then be undiscovered and unsolved.[58] The unnecessary divisiveness may prevent an otherwise capable and skilled employee from returning to work for that employer as well.[59]

The highly adversarial nature of a FELA claim pits employer and employee against each other. The railroad is afraid of huge, multimillion-dollar verdicts, and the employee is afraid of being disabled and without any compensation.[60]

Another problem is that there are situations when there may be no fault. In those circumstances, FELA places incentives upon injured employees to embellish, lie, and modify the facts of the injury in order to recover.[61] An employee who then lies in order to get some recovery creates even more divisiveness with the management of the railroad.[62]

C. Unpredictable Damage Awards

Under FELA, if an employee proves negligence and that negligence played any part in causing the injury, then the railroad must answer in damages.[63] Similar to common law tort, there is no scale for measuring money damages recoverable under FELA, and each case must be considered upon its own particular facts.[64] In *Metcalfe v. Atchison, Topeka & Santa Fe Railway Co.*,[65] the Tenth Circuit outlined the standard for determining whether a jury award for damages under FELA is excessive: "[A]bsent an award so excessive or inadequate as to shock the judicial conscience and to raise an irresistible inference that passion, prejudice, corruption or other improper cause invalidated the trial, the jury's determination of the fact is

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conspiracy among employees and foster an atmosphere of hostility and suspicion."); Schwartz & Mahshigian, *supra* note 46, at 11.

57. Schwartz & Mahshigian, *supra* note 46, at 11.

58. *Id.*

59. *See id.* ("FELA requires the employee and employer to engage in lengthy, costly, and hostile litigation.").

60. Baker, *supra* note 6, at 109.

61. Eugene W. Herde, *FELA—Should It Be Abolished?*, 17 THE F. 407, 408 (1981).

62. *Id.*

63. 45 U.S.C. § 51 (2012); CSX Transp., Inc. v. McBride, 131 S.Ct. 2630, 2643 (2011).

64. Hill v. Terminal R.R. Ass'n of St. Louis, 216 S.W.2d 487, 493–94 (Mo. 1948).

65. 491 F.2d 892 (10th Cir. 1974).

considered inviolate."[66] Therefore, according to critics of FELA, damage awards are random and unpredictable, even for the exact same injury.[67]

One study in 1986 looked at four railroad employees who each suffered the loss of a leg in a job-related accident.[68] Even though they had suffered practically the exact same injury, one employee received $2,000,000,[69] one received $1,125,000,[70] one received $500,000,[71] and the fourth received $450,000.[72] Meanwhile, in a separate study, two railroad employees who both suffered traumatic amputations of both legs further demonstrate the problem of unpredictable damage awards.[73] One employee received $7,000,000 in FELA damages, and the second received no award at all.[74]

Essentially, critics proclaim, "the FELA is a system of extremes."[75]

D. Delay in Award

According to most critics, an effective compensation system should quickly process claims and distribute benefits or awards to injured employees.[76] However, because of the employees' reasonable fear of receiving no award, and the railroad's reasonable fear of paying an overly excessive award, claims are heavily litigated, preventing the quick distribution of payment.[77] When payment is delayed, employees could face bankruptcy caused by the inability to work and therefore earn money to pay

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66. *Id.* at 898 (quoting Barnes v. Smith, 305 F.2d 226 (10th Cir. 1962)).

67. Baker, *supra* note 6, at 101; Havens & Anderson, *supra* note 12, at 313; Schwartz & Mahshigian, *supra* note 46, at 7.

68. Havens & Anderson, *supra* note 12, at 313.

69. Garcia v. Burlington N. R.R. Co., 597 F. Supp. 1304, 1304 (D. Colo. 1984).

70. Kelly v. Illinois Cent. Gulf R.R. Co., 552 F. Supp. 399, 399 (W.D. Mo. 1982).

71. Flanigan v. Burlington N. R.R., Inc., 632 F.2d 880, 882 (8th Cir. 1980).

72. Rediker v. Chi., Rock Island & Pac. R.R. Co., 571 P.2d 70, 72 (Kan. Ct. App. 1977); *see also* Havens & Anderson, *supra* note 12, at 313.

73. Havens & Anderson, *supra* note 12, at 313.

74. *Id.*

75. Baker, *supra* note 6, at 103. Baker explains further:

> The FELA is a system of extremes. On the employee's side the worst extreme is to be injured seriously or even to be disabled, to suffer the attendant delay and costs of litigation, and in the end to be 'zeroed' by some jury—to take nothing, not even one dollar in compensation for the injury. On the industry's side, FELA claim payments represent an ever-escalating and relatively uncontrollable cost of doing business. Including damage awards, administration, and defense expenses, the FELA costs the railroad industry about $1 billion annually, approximately 3.6% of gross revenues.

Id. at 103–04.

76. *See id.* at 101.

77. *Id.* at 101–02.

expenses and possibly medical bills.[78] According to one scholar, "[t]he result is lengthy investigations, protracted settlement negotiations, and often extensive trial proceedings followed by successive levels of appeal."[79] In the instances where a case is not settled, FELA cases take an average of over five and a half years to be resolved.[80]

Even if the claim is settled, or the trial is quick, the employee is guaranteed compensation only when the process is complete or has been completed, unlike workers' compensation where payment usually must begin within thirty days of the employee reporting the injury.[81] Also unlike workers' compensation schemes, FELA is based upon tort law, and so even when there is an award it is a one-time payment, possibly years after the injury occurred.

A 1987 study looked at the average time it took to resolve FELA cases that end in settlement, not trial, in both Maryland and Pennsylvania.[82] That study found that the average time to settle a FELA claim was ten months in Maryland and fourteen months in Pennsylvania.[83] Meanwhile, in the workers' compensation systems of both of those states, the injured employees would have received benefits within thirty days.[84]

III. THE FAILURES OF A FULL CHANGE TO WORKERS' COMPENSATION

FELA, as a compensation system for railroad employees, seems anomalous today when virtually every other employee in the nation is covered by state workers' compensation statutes.[85] However, even if that is true, the fact that other industries use workers' compensation schemes is irrelevant if those systems are not better than FELA at compensating injured railroad workers. A complete repeal of FELA, and institution of workers' compensation for railroad workers, can only be justified if that would solve the most often cited shortcomings of FELA. There is simply not enough

78. *Id.* at 102 ("For a wage earner without a steady paycheck, facing mortgage payments and other family living expenses, the delay in delivery of compensation under the FELA can make a drastic difference.").

79. *Id.* at 101.

80. *FELA in Relation to Amtrak*, *supra* note 3, at 24.

81. Baker, *supra* note 6, at 102.

82. Havens & Anderson, *supra* note 12, at 314 & 316 n.86 (citing Arnold I. Havens & Anthony A. Anderson, A Comparison between the Federal Employers' Liability Act and State Workers' Compensation Plans in Maryland and Pennsylvania (rev. ed. June 15, 1987) (unpublished manuscript)).

83. *Id.* at 314.

84. *Id.*

85. *See, e.g.*, GA. CODE, § 34-9-1 (2014) (defining an "employee" as "every person in the service of another under any contract of hire or apprenticeship, written or implied"); 77 PA. CONS. STAT. § 1 (2014); 820 ILL. COMP. STAT. 305/1 (2014).

evidence that institution of workers' compensation would solve those problems.[86]

A. Cost

Proponents of workers' compensation for railroad workers assert that it would be much cheaper than FELA, because under FELA fault must be litigated, and under workers' compensation fault is not considered.[87]

However, an in-depth study was conducted in 1952 comparing the cost of the Illinois workers' compensation system with that of FELA.[88] Through that study, the authors came to the surprising conclusion that FELA was significantly *less* expensive to operate than the Illinois workers' compensation scheme.[89] They found that operating costs of workmen's compensation are at least one and a half times higher than FELA.[90] The study has been attacked, most fervently by the Illinois Industrial Commission on the grounds that the "degree of disparity in relative costs may have been overstated,"[91] but the overall conclusion of the report has not been shown invalid.[92] The study showed a significantly greater involvement of attorneys in workers' compensation claims.[93] While workers' compensation attorneys need not litigate fault, there are often the heavily contested matters of the "arising out of and in the course of . . . employment"[94] requirement and of the actual extent of the injury. Therefore, the study found that attorneys were involved in only 1.6% to 5.0% of the FELA claims, while they were involved in 90% to 98% of the nonfatal and approximately 25% of the fatal workers' compensation claims.[95] Workers' compensation attorneys, like FELA attorneys, also work on a contingent fee basis, and the median contingency

86. *See generally* Phillips, *supra* note 2; Jerry J. Phillips, *FELA Revisited*, 52 MD. L. REV. 1063, 1064 (1993).

87. Baker, *supra* note 6, at 108; Havens & Anderson, *supra* note 12, at 314.

88. ALFRED F. CONARD ET AL., COSTS OF ADMINISTERING REPARATION FOR WORK INJURIES IN ILLINOIS: A PILOT STUDY IN COMPARING COSTS UNDER DIFFERENT SYSTEMS OF REPARATION, APPLIED TO THE FEDERAL EMPLOYERS' LIABILITY ACT, AND THE ILLINOIS WORKMEN'S COMPENSATION ACT 1 (1952).

89. *Id.*

90. *Id.* at 2.

91. Alfred F. Conard, et al., Book Note, *Costs of Administering Reparations for Work Injuries in Illinois*, 66 HARV. L. REV. 1552, 1552 (1953) [hereinafter *Book Note*] (citing *Letter from Ill. Indus. Comm'n*, April 1, 1953).

92. *Id.*

93. CONARD ET AL., *supra* note 88, at 29.

94. 820 ILL. COMP. STAT. ANN. 305/1 (b)(3) (West 2012).

95. CONARD ET AL., *supra* note 88, at 29.

fee is 33%,[96] which means in 50% of the cases, 33% or more of an employee's recovery under workers' compensation goes to his or her attorney.

The cost of workers' compensation systems has in fact gone up dramatically,[97] and is not a viable option to avoid the costs of FELA. From 1983 to 1993, the cost of a workers' compensation claim nearly tripled.[98] Significantly, as litigation and medical costs have increased, the proportion of benefits actually paid to the workers has decreased under workers' compensation.[99] So, even though the amount of total benefits paid has increased, the amount paid to the employee has not.[100] Therefore, under workers' compensation, claimants may pay more in transaction costs than they do under a FELA claim, while FELA provides an opportunity for a larger payout. Accordingly, any argument for a shift to workers' compensation based upon the cost of FELA is without merit, because workers' compensation schemes have been found as or more costly than FELA, and FELA still provides the opportunity for an award that fully compensates the injured employee.[101]

B. Divisiveness

Another main problem critics of FELA assert is that FELA creates a significant division between employee and employer, because it forces finger

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96. Steven T. Densley, *Contingent Fees: Should They Be Limited in Personal Injury Cases That Settle Early?*, 17 UTAH B.J. 6, 8 (2004).

97. *See* Richard W. Palczynski, *Coping with the Crisis: Examining Workers' Compensation*, 93 BEST'S REV. 69, 69 (1992); Cecily Raiborn & Dinah Payne, *The Big Dark Cloud of Workers' Compensation: Does it Have a Silver Lining?*, 44 LAB. L.J. 554, 554 (1993); Emily A. Spieler, *Perpetuating Risk? Workers' Compensation and the Persistence of Occupational Injuries*, 3 HOUS. L. REV. 119, 130–40 (1994).

98. Raiborn & Payne, *supra* note 97, at 554. The enormous raise in costs of workers' compensation is tied to the cost of medical care, and the medical cost component of workers' compensation benefits is approximately 50% of the total workers' compensation costs. *Id.* at 556. In addition, most workers' compensation systems allow employees to use any doctor of their choice, and require the employer to pay whatever charges are assessed. *Id.* One study showed that the "average hospital stay for back injuries claimed under workers' compensation was often 10% to 50% longer than for similar non-workers' compensation injuries." *Id.* In addition to the raise of medical costs, the number of insurance companies willing to offer coverage for workers' compensation is also declining, causing the cost to increase even more. *Id.* Cost also has increased due to the increase in litigation. *Id.* at 557. In California, for example, 44% of workers' compensation cases end up attached to a lawsuit, and many start out as lawsuits. *Id.* Moreover, the original concept of workplace injury has evolved to include many work-related injuries which are difficult to disprove such as repetitive stress, soft-tissue injuries, and mental trauma. *Id.*

99. Spieler, *supra* note 97, at 139.

100. *Id.*

101. CONARD ET AL., *supra* note 88, at 29.

pointing.[102] However, workers' compensation is no less divisive. Although fault is not at issue in workers' compensation, each side heavily disputes the other issues, namely whether the injury arose out of and in the course of employment, the extent of the injury, and what constitutes an accidental injury.[103] In fact, many states have found it necessary to implement a civil remedy against retaliatory discharge for filing a workers' compensation claim.[104]

Most significantly, as the costs of implementing a workers' compensation award have skyrocketed,[105] the amount of litigation has severely increased for workers' compensation claims.[106] Alarmingly, as costs have continued to rise under workers' compensation, the workplace has not seen an increase in safety, which suggests that employers are not taking the steps necessary to protect their employees, which in turn may lead to even more divisiveness.[107]

Another problem with workers' compensation is that, because of the lack of a fault requirement, there are often incidents of fraud, abuse, and waste in the system.[108] Cases of fraud and abuse will lead to even more divisiveness than anything else, because either the employee or the employer, whichever is the victim of fraud, will understandably be very upset and unfairly prejudiced.

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102. Havens & Anderson, *supra* note 12, at 314.

103. *See, e.g.*, McSpadden v. Big Ben Coal Co., 288 N.W.2d 181, 183 (Iowa 1980) (disputing the extent of the injury, whether the plaintiff could prove an occupational disease, and the defendant's discovery motion); Wood v. Safeway, Inc., 121 P.3d 1026, 1028 (Nev. 2005) (disputing whether a sexual assault arose out of and in the course of employment); Johannesen v. N.Y. City Dep't of Hous. Pres. & Dev., 638 N.E.2d 981, 983 (N.Y. 1994) (disputing the term "accidental injury" and whether the employee's condition of asthma precluded recovery).

104. *See* ALA. CODE § 25-5-11.1 (1984) ("No employee shall be terminated by an employer solely because the employee has instituted or maintained any action against the employer to recover workers' compensation benefits . . . ."); S.C. CODE ANN. § 41-1-80 (West 1986) ("No employer may discharge or demote any employee because the employee has instituted or caused to be instituted, in good faith, any proceeding under the South Carolina Workers' Compensation Law . . . ."); TEX. LAB. CODE ANN. § 451.001 (West 1993) ("A person may not discharge or in any other manner discriminate against an employee because the employee has: (1) filed a workers' compensation claim in good faith . . . .").

105. For a discussion of the reasons behind the raise in benefits costs, see *supra* note 99 and accompanying text.

106. Spieler, *supra* note 97, at 138.

107. *Id.* at 122–23.

108. *See generally* Gary T. Schwartz, *Waste, Fraud, and Abuse in Workers' Compensation: The Recent California Experience*, 52 MD. L. REV. 983 (1993).

C. Unpredictable Damage Awards

Perhaps the best argument in support of workers' compensation systems is that it provides more predictable and reliable damage awards. Unlike FELA, most workers' compensation systems provide fixed payment, payment schedules, caps on damages, and other ways to make calculation of damages more manageable and more standardized.[109]

However, unlike FELA, workers' compensation does not allow for the full level of damages which the injured employee may have suffered.[110] An injured employee under workers' compensation trades off proving an employer's negligence for a lower possible recovery. For this reason, proponents of FELA argue that FELA is actually more fair, because it allows the jury to make case-by-case decisions that are more equitable and in line with the employee's actual injury.[111] In contrast, workers' compensation schemes fail to "take adequate account of the individual circumstances of each case."[112] Workers' compensation also does not allow for recovery of pain and suffering, a very real damage suffered by the injured employee in many cases.[113]

Therefore, it is likely that many injured employees actually end up being undercompensated through traditional workers' compensation schemes.[114] So while they are less likely to receive zero payment, they are not capable of receiving full payment.

D. Delay in Award

Unlike workers' compensation schemes, under FELA, the injured employee is assured payment only when the dispute is resolved.[115] For any individual living paycheck to paycheck, immediate recovery is essential, and workers' compensation would seem to better accomplish that goal, because

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109. *See, e.g.*, Spieler, *supra* note 97, at 192–201 (explaining how employers attempt to set scheduled rates).

110. Phillips, *supra* note 2, at 60 ("approach of workers' compensation schemes to the question of damages fails to take adequate account of the individual circumstances of each case"). For example, workers' compensation does not allow recovery of pain and suffering, and the payment schedules perfectly fit very few cases. *Id.*

111. *FELA in Relation to Amtrak*, *supra* note 3, at 97 (statement of Fred A. Hardin, President, United Transp. Union) (stating that FELA is more fair for employees of the railroad than workers' compensation would be).

112. Phillips, *supra* note 2, at 60.

113. *Id.*

114. Theodore F. Haas, *On Reintegrating Workers' Compensation and Employers' Liability*, 21 GA. L. REV. 843, 879 (1987).

115. Baker, *supra* note 6, at 101.

payment from the employer is generally required to begin within thirty days of a claim being filed.[116] However, more FELA claims settle, and very few actually proceed to trial as compared to workers' compensation claims which are more often litigated, meaning the final resolution of the matter may take longer under workers' compensation.[117]

There is no disputing that workers' compensation provides initial payment earlier.[118] From the employee's perspective, workers' compensation seems to be best in this respect. However, since workers' compensation claims are more often litigated, and often result in undercompensation, railroad employees largely oppose repealing FELA.[119] On the other hand, employers may find that, under workers' compensation systems, they are forced to begin payment before any investigation into the matter has been completed or the claims have been fully flushed out. Perhaps because of this system of payment before investigation, fraud has become pervasive in workers' compensation systems.[120]

E. Other Problems

While there seems to be little evidence that workers' compensation solves any of the problems seen most often with FELA, it also poses its own unique, additional problems as a compensation scheme. Besides the potential for fraud and abuse[121] previously discussed, and the massive increase in costs in

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116. Havens & Anderson, *supra* note 12, at 314.

117. Phillips, *supra* note 2, at 57 (citing RAILWAY LABOR EXECUTIVES' ASS'N, FELA—A MATTER OF RAILROAD SAFETY, INJURY COMPENSATION AND CORPORATE ACCOUNTABILITY 7, 12 (1987)). Only 1.1% of FELA cases were litigated, where 13% of Mississippi workers' compensation cases were litigated, and 27% were litigated in Illinois. *Id.*

118. Havens & Anderson, *supra* note 12, at 314.

119. It is worth noting that it is employees who actually have opposed a repeal of FELA and similarly oppose the institution of workers' compensation for railroad employees. *FELA in Relation to Amtrak*, *supra* note 3, at 97 (Statement of Fred A. Hardin, President, United Transportation Union). FELA was, after all, originally instituted only to benefit the workers. *See* A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENT, *supra* note 10, at 5486.

120. For a more thorough discussion of the pervasiveness of fraud in the workers' compensation system see Schwartz, *supra* note 108, at 987–93. In that article, Schwartz examines an episode of the news program *60 Minutes*. *Id.* at 988 (citing *60 Minutes* (CBS television broadcast Apr. 12, 1992) (transcript v. 24, no. 30)). During that episode, a reporter posed as an injured employee. The reporter was then approached by a capper, a person who works for a workers' compensation firm. *Id.* at 989. After taking her to the firm, the reporter was advised that she should claim a lower-back injury. *Id.* at 990. The reporter was then referred to multiple different doctors, and she ended up with a diagnosis of lower-back injury and major depression caused by her employment, even though she told the doctors she was feeling fine. *Id.*

121. Schwartz, *supra* note 108, at 987.

recent years,[122] workers' compensation also might fail as a deterrent method.[123] As costs of litigating and paying damages under workers' compensation greatly increase for employers, there still has not been an increase in safety, and this has come to be seen by many as a daunting paradox.[124] FELA does appear to have many problems, most notably cost and time, but nonetheless, railroad work has become significantly less dangerous since its inception.[125]

IV. A LESS DRASTIC, MORE PRACTICAL SOLUTION TO FELA'S PROBLEMS

A. Outline of the Solution

Rather than allowing FELA claims to be heavily litigated, which costs both the railroads and their employees too much on court costs and attorney fees, and can prevent employees from even bringing a claim, there is a better option. Mandatory arbitration would speed the process up, prevent lengthy appeals, and allow workers to be paid earlier. Therefore, in order to alleviate the problems of cost, divisiveness, unpredictable damage awards, and delay in payment, railroads and their employees should be required to use mandatory arbitration.

In order to institute mandatory arbitration, Congress should pass a licensing statute requiring it. As a condition of licensing that railroads already have to undergo,[126] both workers and railroads would have to agree to arbitrate any claims occurring from a worker's injury from the job. Arbitration would be the sole remedy for an injured railroad employee, and courts would give the utmost deference to the arbitrator's decision on appeal. Congress already has been shown to have the power under the Commerce Clause to regulate railroads and has done so for decades.[127] Payment for the arbitration would come indirectly from Congress in the form of salaries for

122. Spieler, *supra* note 97, at 130.

123. *Id.* at 121–23.

124. *Id.*

125. There were 281,645 casualties in the year 1908 alone for railroad employees. CSX Transp., Inc. v. McBride, 131 S.Ct. 2630, 2636 (2011) (citing S. REP. NO. 61-432, at 2 (1910)). However, in the year 2012, there were only 3,961 total injuries, and only 16 of those were fatalities. *Accident/Injury Overview for 2012*, FED. RAILROAD ADMIN. OFFICE OF SAFETY ANALYSIS, http://safetydata.fra.dot.gov/OfficeofSafety/default.aspx (follow "1.11: One year Accident/Incident Overview" hyperlink; then search "All" railroads, "Calendar Year" type of report—with a start month of January, an end month of December for the year 2012).

126. 49 U.S.C. § 20135 (2012).

127. Mondou v. New York, New Haven, & Hartford R.R. Co., 223 U.S. 1, 54 (1912).

arbitrators and tax relief for the railroads to pay for the other litigation expenses, which would lessen the burden on both sides and avoid the appearance or actuality of impropriety by having one side bear all the cost.

In choosing arbitrators, there needs to be input from both the unions and the railroads in order to select arbitrators that would not be biased one way or the other, ensuring fairness. However, the first step is creating a pool of arbitrators to choose from that are knowledgeable about railroads. One of the current problems with FELA litigation is the complexity of railroad work, with which juries tend to be unfamiliar.[128] Therefore, the possible arbitrators would come from the Federal Railroad Administration,[129] and the Railroad Retirement Board.[130] From those federal administrative agencies, the employee and the railroad would each get to choose two members and a fifth member would then be chosen by the other four arbitrators already chosen.

Once arbitration begins, the fault-based system is retained as it was under FELA.[131] The fault based system is important because of the frequency with which traumatic railroad injuries occur, even now that the railroad is a much safer place to work. A fault-based system allows employees to recover the full value of their injuries. This system also incentivizes both employees and railroads to be careful, maintaining the deterrent effect so important to the current version of FELA. While there is still some divisiveness inherent in a fault-based system, the use of arbitration would speed up resolution of the claim and the arbitrators could take a more active role in the resolution, causing less divisiveness than usually would occur under the current FELA.

The arbitration decisions would then be practically final.[132] While either side could appeal the arbitration decision, courts would give the utmost deference to the decision, thereby preventing further costly litigation except in the rare case where the arbitrators were clearly erroneous, fraudulent, or extremely biased. Finality of decisions is essential to address the most important problems of cost and delay in awards. If decisions were easily

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128. *Hearing Before the Subcommittee on Transportation and Hazardous Materials of the Committee on Energy and Commerce, House of Representatives*, 101st Cong. at 28 (1989) (statement of Boddy Wade Holland, Former Employee, Seaboard Coast Railroad) (explaining that juries do not understand the railroad language and terms).

129. *See* 49 U.S.C. § 103(a) (2012).

130. Railroad Retirement Act of 1974, 45 U.S.C. § 231f (2012).

131. 45 U.S.C. § 51 (2012).

132. The Supreme Court has upheld the constitutionality of arbitration agreements. Circuit City Stores, Inc. v. Adams, 532 U.S. 105, 122–23 (2001). "[A] party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum." *Id.* at 123 (quoting Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 628 (1985)).

appealed, then arbitration would simply be adding another step in the line, similar to some workers' compensation statutes.

B. Policy Behind Solution

Mandatory arbitration is especially well-suited to address the cost and time of litigation, the two main issues that confront both FELA and workers' compensation. The Supreme Court and scholars widely hold that mandatory arbitration reduces the time and cost of litigation.[133] While certainly not a perfect solution, instituting mandatory arbitration would better address the main problems that persist under both FELA and workers' compensation.

1. Cost

The majority of both legal practitioners and scholars believe that arbitration is generally less expensive than litigation.[134] A survey of in-house attorneys showed that almost 60% believe arbitration is less expensive than litigation.[135] While in some ways the railroads would have to pay more, because they would have to take on some of the cost of the arbitration[136] and cede the possibility of summary judgment,[137] overall costs would decrease under mandatory arbitration. For example, because arbitration is an alternative to litigation and not a form of litigation, the extensive discovery process and expensive discovery disputes "can be avoided in favor of limited exchange of documents, witness lists and depositions,"[138] which the arbitrators could then oversee.

The arbitrators, with the expertise and training gained from working at Federal Railroad Administration or the Railroad Retirement Board, would better understand the complex nature of railroad work than would a jury or even a workers' compensation commission. Through that expertise, further

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133. *Circuit City*, 532 U.S. at 122–23; Michael T. Burr, *The Truth About ADR: Do Arbitration and Mediation Really Work?*, 14 CORP. LEGAL TIMES 44, 45 (2004); Craig C. Martin et al., *Mandatory Arbitration for Employee Benefit Claims*, 59 EMP. BENEFIT PLAN REV. 10, 10 (2005); Christine L. Newhall, *Benefits and Opportunities in Mediation and Arbitration*, 74 CPA J. 62, 63 (2004).

134. *See supra* note 133 and accompanying text.

135. Burr, *supra* note 133, at 45.

136. Circuit City Stores, Inc. v. Adams, 279 F.3d 889, 894 (9th Cir. 2002); Cole v. Burns Int'l. Sec. Servs., 105 F.3d 1465, 1468 (D.C.Cir. 1997).

137. William B. Werner et al., *Phantom Benefits: Reconsidering Mandatory Employment Arbitration*, 46 CORNELL HOTEL & REST. ADMIN. Q. 363, 363 (2005).

138. Newhall, *supra* note 133, at 62–63.

time would be saved, and the arbitrators would be more efficient at solving and preventing further disputes.[139]

The biggest cost saver, however, would be in the amount of time saved through finality of the arbitrator's decision and quick resolution of arbitration disputes.[140] A final and binding decision by the arbitrator saves both parties from the exorbitant cost of disputing issues on appeal. Due to the expertise of the arbitrators, appeal would usually be unnecessary anyway, because their expertise would make their conclusions more reliable than a jury's conclusions, which could be based on a false understanding of railroad work. Crucial also is the fact that arbitration generally resolves disputes more quickly, which means less money spent on expenses and legal fees.[141] Through arbitration, parties avoid the potential backlog of the courts, and are able to schedule hearings as soon as possible.[142] In fact, the same survey of in-house practitioners also found that nearly 80% of them believe that arbitrated disputes are resolved faster than litigated disputes.[143]

2. Divisiveness

Because of the informal and less structured nature of arbitration as compared to litigation, arbitration is often less divisive.[144] Therefore, it may be more likely that parties continue their employment relationship.

The expert arbitrators can also contribute to making the arbitration less divisive. Not only are the arbitrators experts that can more easily resolve disputes in a fair and equitable manner, but also arbitrators are given more freedom to use creative methods of resolution. For example, one arbitrator ordered the parties to go out for a walk together, and they came back with an acceptable resolution.[145]

Arbitration is still a form of dispute resolution, however, so some divisiveness is unavoidable.

3. Unpredictable Damage Awards

While the arbitrators would still be applying the same principles of law as FELA, because of their expertise and experience dealing with railroad

139. *Id.* at 63.
140. Burr, *supra* note 133, at 45.
141. *Id.*
142. Newhall, *supra* note 133, at 63.
143. Burr, *supra* note 133, at 45.
144. Newhall, *supra* note 133, at 63.
145. Burr, *supra* note 133, at 46.

employees' injury claims, their damage awards would more likely redress the actual injury suffered. In fact, arbitrators currently are viewed as negating the possibility of a "runaway jury" as they are much less likely to award excessive damages, and are more likely to award damages for the actual injury suffered by the employee.[146] Therefore both the employee and the employer can feel more comfortable knowing that the actual injury is more likely to be compensated, no more and no less.

Arbitration, however, does effectively eliminate punitive damages, which can be a big drawback for an employee.[147] Since punitive damages are not permitted under FELA anyway, and tort law is meant only to make a person whole again, the loss of a "runaway jury" awarding punitive damages seems apt, especially since an arbitrated action is easier and cheaper to bring by an injured employee, causing more suits to be brought against the railroad.

4. Delay in Award

As discussed previously,[148] arbitration resolves claims much quicker due to avoiding court backup, using informal hearings and expert arbitrators, and a final and binding decision by the arbitrators.[149] Therefore, because of the quick final resolution, any damages are necessarily awarded much more quickly than currently under FELA or under workers' compensation.

5. Unique Problems of Arbitration

While arbitration appears better suited to address the main shortcomings that plague both FELA and workers' compensation schemes, arbitration is not without drawbacks.[150] First, mandatory arbitration involves cost-shifting

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146. Werner, *supra* note 137, at 367.

147. Burr, *supra* note 133, at 46.

148. *See supra* Part IV(b)(1).

149. *See* Burr, *supra* note 133, at 45–46.

150. For a deeper discussion of the concerns with arbitration, see generally Owen M. Fiss, *Against Settlement*, 93 YALE L.J. 1073 (1984). Fiss argues that viewing litigation as only dispute resolution of the single dispute "trivializes the . . . dimensions of lawsuits and mistakenly assumes judgment to be the end of the process." *Id.* at 1082. He says that a judge's duty is not only to declare which party is right, but also to remain involved in the dispute as a lawsuit is often only the beginning. *Id.* at 1082–83. Fiss also heavily criticizes alternative dispute resolution ("ADR") for "leaving justice undone"; he explains that peace is not the only goal, but also there is an element of justice in adjudication. *Id.* at 1085–86. Most importantly, Fiss points out that ADR misses the public purpose of litigation and adjudication: "to bring a recalcitrant reality closer to our chosen ideals." *Id.* at 1089. However, this article does not purport to fully address the deeper issues; I only purport to have created a solution for FELA's main issues that would likely find support in today's environment and overall support for arbitration. "The task of setting out the

not currently present under FELA, forcing the employer to bear some costs of arbitration, where in court the costs would be shared. However, the amount employers save from quicker, cheaper resolutions of claims, and more predictable damage awards will most likely outweigh the other costs as it has in other mandatory employment arbitration.[151] Additionally, under this modernization of FELA, Congress would be bearing some of the cost instead of the parties.

Second, because of the cost-shifting required in arbitration, employees can more easily bring claims against the railroad. The expert arbitrators are better equipped to determine the merits of a claim quickly, most likely preventing the majority of meritless claims and only allowing for claims with merit which FELA was originally created to provide for.

Third, recently arbitration has come under attack as becoming "the new litigation."[152] Some scholars note that because of the increased case load that arbitration is undertaking, it begins to look more and more like a court trial with the same problems, costs, and delays.[153] However, most of the critiques seem to focus on the low quality of the arbitrators,[154] which is an issue avoided here with the use of administrative officials who are already familiar with the railroads and who are chosen by each side in order to resolve the dispute.

Fourth, arbitration only has the potential to address the problems with FELA. If not crafted well, arbitration could end up being more costly, more time consuming, and more divisive. However, many scholars support arbitration as a means to reduce costs and divisiveness, and increase the speed and consistency of awards,[155] which are the main shortcomings of FELA. Therefore, if constructed in a way to address those problems, mandatory arbitration would likely be successful.

Fifth, mandatory arbitration has been attacked, most significantly, under the "public justice critique."[156] This critique "is founded on the underlying principle that society as a whole benefits from public exposition of the

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fundamentals of a system of justice is daunting, and I will not purport to do anything but commence this important project." Sternlight, *infra* note 156 at 1666.

151. Burr, *supra* note 133, at 45.

152. Thomas J. Stipanowich, *Arbitration: The "New Litigation,"* 2010 U. ILL. L. REV. 1, 5.

153. *Id.* at 6.

154. *Id.* at 5.

155. *See supra* note 133.

156. Jean R. Sternlight, *Creeping Mandatory Arbitration: Is it Just?*, 57 STAN. L. REV. 1631, 1661–65 (2005).

law."[157] When disputes are resolved in private settings, such as under mandatory arbitration, there is neither public access nor precedent created which is especially disconcerting to critics of arbitration when the subjects handled affect public interests.[158] However, precedent is actually still created by arbitrators' decisions in what is called "collective arbitral wisdom,"[159] and because of the expertise of the arbitrators in this system, their decisions would more likely be consistent. Additionally, "formal litigation is not necessary to achieve distributive . . . , substantive, [or procedural] justice" concerns, and all of those can be met through mandatory arbitration.[160] Most importantly, the formal litigation fails to address the "individuals' interest in a speedy, low-cost, potentially private decisionmaking process."[161] In fact, "the expense, slow speed, and high cost of our formal litigation system" beg the question of whether the formal litigation system causes injustice itself for those "who either cannot access the system or are dragged through it at high cost."[162]

Given that arbitration is not without its shortcomings and criticism, this article does not embrace arbitration as a fix-all solution; rather, mandatory arbitration simply would establish substantial, positive reform and modernization for FELA. Mandatory arbitration establishes that reform, and solves many of FELA's most critical problems, in a way Congress has failed to do so, and in a way workers' compensation is not organized to accomplish.

C. Constitutionality

The Supreme Court has long held that Congress has the power to regulate the railroad industry under the Commerce Clause.[163] The Court has also upheld mandatory arbitration provisions in the employment context and even praised them for their benefits.[164] In 1947, Congress also enacted the Federal Arbitration Act, expressing their support for mandatory arbitration contracts:

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157. *Id.* at 1661. For an examination of how the public adjudicative system has benefits for society, see generally Judith Resnik, *Failing Faith: Adjudicatory Procedure in Decline*, 53 U. CHI. L. REV. 494 (1986).

158. Sternlight, *supra* note 156, at 1664.

159. W. Mark C. Weidemaier, *Arbitration and the Individuation Critique*, 39 ARIZ. L. REV. 69, 103 (2007) (quoting Richard C. Reuben, *Constitutional Gravity: A Unitary Theory of Alternative Dispute Resolution and Public Civil Justice*, 47 UCLA L. REV. 949, 1063–64 (2000)).

160. Sternlight, *supra* note 156, at 1669.

161. *Id.*

162. *Id.* at 1669–70.

163. Mondou v. New York, New Haven, & Hartford R.R. Co., 223 U.S. 1, 54 (1912) (upholding FELA as a constitutional exercise of Congress' power under the Commerce Clause).

164. Circuit City Stores, Inc. v. Adams, 532 U.S. 105, 123 (2001) ("Arbitration agreements allow parties to avoid the costs of litigation, a benefit that may be of particular importance in

> A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.[165]

Therefore, the possible amendment to FELA discussed in this article would likely be upheld as a lawful exercise of Congress' power under the Commerce Clause to regulate the railroad industry, and it could not be challenged by railroad employees as other mandatory arbitration provisions for employees have long been upheld.[166]

V. CONCLUSION

The bare fact is that FELA is an ancient system, created in 1908, that needs to be modernized, but change cannot just be for the sake of change. Any real, productive change must practically address the major critiques of FELA: cost, divisiveness, unpredictable damage awards, and delay in awards. Unfortunately, workers' compensation does not seem capable of providing a genuine solution to those problems, and instead scholars heavily critique workers' compensation for its own unique and ever developing issues, especially cost.[167]

Turning to arbitration is not a perfect solution. But if crafted correctly, as outlined above, with a focus on the major shortcomings of FELA described in this paper, arbitration has great potential to decrease significantly the effect of those shortcomings. Perhaps just as importantly, arbitration is a solution that both sides, the railroads and the railroad employees, can embrace.

Since its inception, scholars and politicians alike have derided FELA and debated over its repeal or reform.[168] However, over a century has passed, and

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employment litigation, which often involves smaller sums of money than disputes concerning commercial contracts. These litigation costs to parties (and the accompanying burden to the courts) would be compounded by the difficult choice-of-law questions that are often presented in disputes arising from the employment relationship.").

165. 9 U.S.C. § 2 (2012).

166. *See Circuit City*, 532 U.S. at 123.

167. *See supra* Part III.

168. *Supra* note 6 and accompanying text.

despite the fact that the debate over FELA comes to Congress regularly,[169] no substantial reform has passed. Therefore, not only would mandatory arbitration best address FELA's problems with cost, divisiveness, unpredictable damage awards, and delay in awards, but also mandatory arbitration would finally end the debate and allow the passing of substantial reform. FELA is an early twentieth-century statute that is desperately in need of modernization, and that modernization can come through mandatory arbitration.

169. *See* 1989 Hearing, *supra* note 6; 1939 Hearing, *supra* note 6; MESSAGE OF THE PRESIDENT, *supra* note 6; REPORT OF COMMISSION *supra* note 6; *FELA in Relation to Amtrak*, *supra* note 3.