On the Tracks

Helping Injured Railroad Workers

Paul Bovarnick

By Paul Bovarnick
OTLA Guardian

If you know that a hog head, a car toad and a switch frog are not amphibians[1], you either work for a railroad or sue them for a living. The following is written for those who do neither, but think they might, some day in the future.

Employees of interstate railroads[2] are not subject to any state or federal workers compensation laws. Instead, railroad employees who are injured at work have only one remedy, the Federal Employers Liability Act (FELA), 45 USC § 51, *et seq*. The 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 . . . for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, . . . or other equipment.

In many ways the FELA is plaintiff friendly. However, it can be a treacherous swamp for the uninitiated.

The law pertaining to FELA cases is unique.[3] For example, the question of whether equipment is "in use" concerns a term of art particular to the FELA and is often critical to the outcome of a case. Understanding the law is essential to handling a FELA case.

When the FELA was enacted by Congress in 1908, railroads employed more than a million workers and were among the most dangerous industries in the country. Indeed, at the turn of the century, the average life expectancy of a railroader was around seven years. In response, Congress designed the FELA to "shift part of the 'human overhead' of doing business from employees to their employers." *Tiller v. Atlantic Coast Line R. Co.*, 318 U.S. 54, 58 (1943).

The FELA dramatically departed from the common law of torts:

> To further [the Act's] humanitarian purposes, Congress did away with several common-law tort defenses that had effectively barred recovery by injured workers. . . . (the FELA) abolished the fellow servant rule, rejected the doctrine of contributory negligence in favor of . . . comparative negligence, prohibited employers from exempting themselves from [the] FELA through contract, and . . . abolished the assumption of risk defense.

Norfolk & Western Ry. v. Ayers, 538 U.S. 135, 145 (2003).

In addition, railroads were made strictly liable for injuries caused by violations of state and federal safety rules, without regard for the plaintiff's negligence, 45 USC § 53. Among those are certain defects to locomotives, 49 USC § 20701, *et seq.*, and freight cars, 49 USC § 20301, *et seq.* The FELA also abolished joint and several liability. *See, Norfolk & Western Ry. v. Ayers, supra*., at 165-166. The FELA also confers jurisdiction on any state or federal court where the defendant railroad "shall be doing business." 45 USC § 56

The FELA's most important departure from common law was that it abolished the doctrine of "proximate cause." Congress did not replace proximate cause with duty and foreseeablitiy, as we have done in Oregon. *See, Fazzolari v. Portland*

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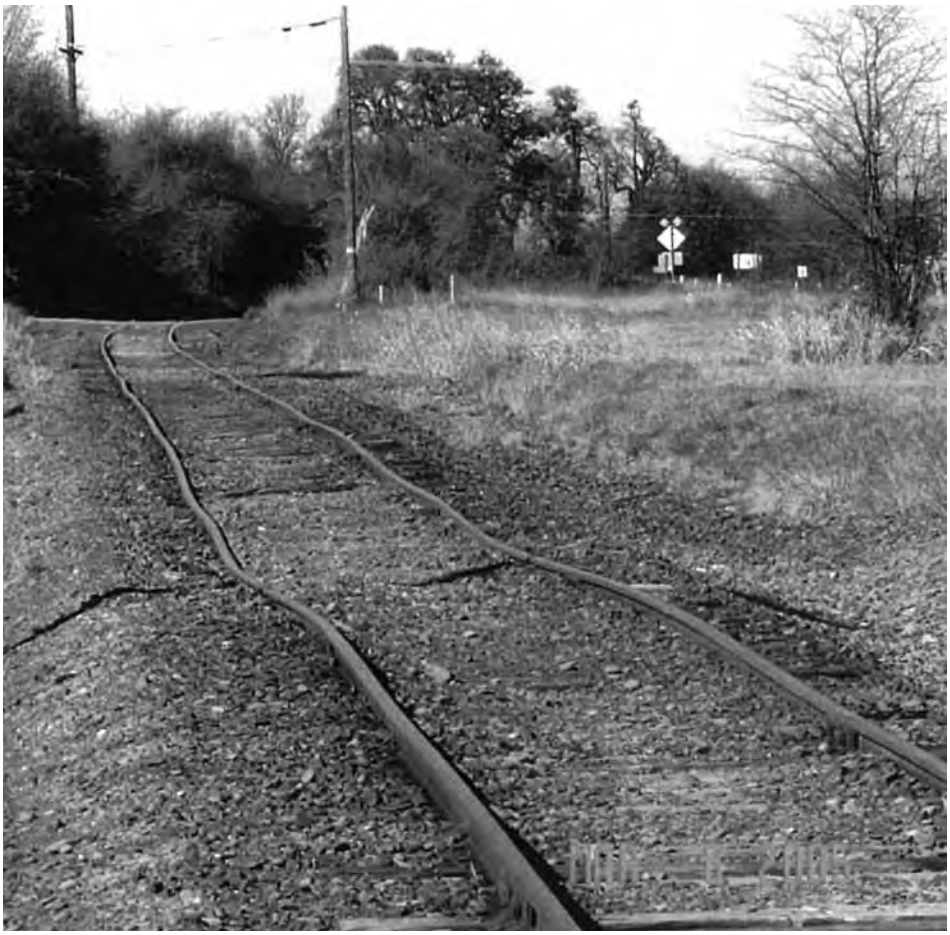
School Dist., 303 Ore. 1 (1987). Instead, "the test of a jury case [under the FELA] is simply whether . . . employer negligence played any part, even the slightest, in producing the injury." *CSX Transp., Inc. v. McBride*, 131 S. Ct. 2630, 2638, fn 2 (2011). In *McBride* the Supreme Court held that FELA juries should be instructed that a defendant railroad "caused or contributed to" a railroad worker's injury "if [the railroad's] negligence played a part–no matter how small–in bringing about the injury." *Id.,* at 2644. [Citations omitted.]

All aboard

Mastering the law is only half the battle. Understanding the law is of little benefit to practitioners who are not well-versed in the practical aspects of railroading.

One of the parts of the case where an understanding of railroading comes into play is damages. Like all plaintiffs, FELA plaintiffs have an obligation to mitigate their damages. However, the mitigation options available to FELA plaintiffs who are long-time railroad employees vary dramatically according to their railroad craft and their seniority. We recently achieved a settlement for a signal maintainer. My client had suffered injuries in Pasco, Washington, and Tulsa, Oklahoma, and at the time of the settlement, he was in Gillette, Wyoming. None of these venues were particularly plaintiff-friendly. Happily, we learned that my client could use his seniority to bump into a job in Great Falls, Montana, which would have also given us venue there. Great Falls juries have a long history of empathizing with injured railroad workers. So when the railroad learned that my client could bump into Great Falls, they hastily gave us a most generous settlement. Understanding the contract and its relationship to damages, not to mention venue, helped us improve the value of the case.



Poorly maintained track is often a source of safety issues and derailments, leading to injuries.

Virtually all non-management positions are covered by a collective bargaining agreement, and there are different agreements for different crafts. Locomotive engineers have an agreement that is different from conductors, and their agreement is different from machinists. Each agreement applies seniority in different ways, and each has a different way for calculating pay. So, for example, in another case, my client, an engineer with more than thirty years of seniority and no other skills, suffered a disabling ankle injury. He was offered a job as a clerk. His job as an engineer and the clerk's job were covered by different collective bargaining agreements. Had my client taken the clerk's job, he would have had no seniority and he would have been exposed to the same conditions that injured him in the first place.

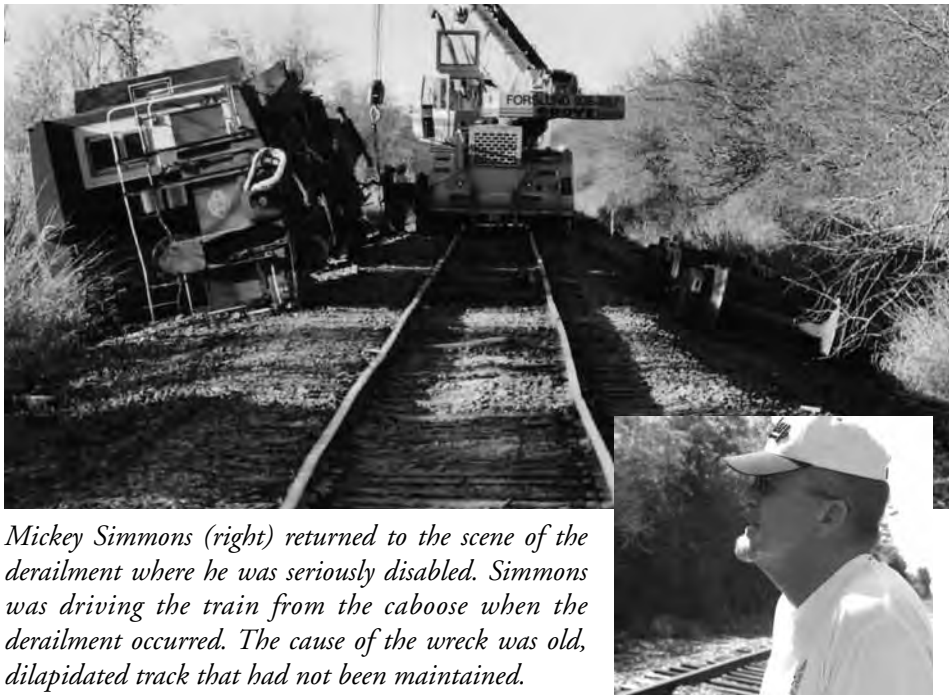
The Railroad Retirement Act (RRA) also presents traps for the unwary. Disabled railroaders with at least 10 years of railroad service may be eligible for a disability pension. However, taking a job outside of the railroad industry or receiving a jury award for future lost wages may disqualify a disabled plaintiff from receiving RRA benefits. Particularly for serious, disabling injuries, a FELA lawyer must understand the relationship between damages, the Railroad Retirement Act, the client's craft and the applicable collective bargaining agreements.

For me, the real fun in FELA work is mastering the railroading. To begin with, railroading is steeped in history. Did you know that in the early 20th century the predecessors to the Union Pacific and Burlington Northern Santa Fe each raced to build a rail line along the Deschutes from the Columbia River to Bend? Tempers ran high, and the two competing railroads shot at each other and used dynamite to blow up the other's tracks.[4]

Did you know that steam locomotives

could only run 100 miles without stopping for water and coal? Many towns in the West, from Pasco to Pocatello, exist only because the railroads needed a place to stop. And even today, railroad titles reflect the fact that the transcontinental railroads were built by former officers in the Union Armies. Officials are still called "road masters," "train masters," "road foremen," or "superintendents."

Essential to handling FELA cases is understanding the technology, which is both archaic and modern. Good examples of the sometimes uneasy relationship between the old and the new are two cases we handled recently.



Mickey Simmons (right) returned to the scene of the derailment where he was seriously disabled. Simmons was driving the train from the caboose when the derailment occurred. The cause of the wreck was old, dilapidated track that had not been maintained.

Old rail

Mickey Simmons was a Navy veteran who retired from the Navy to Albany. He got a job as a locomotive engineer and switchman with the Portland and Western Railroad. The Portland and Western owns much of the track in the Willamette Valley once owned by the Southern Pacific and the Burlington Northern. Its track is old, and its procedures are, to be frank, sometimes a little screwy. On the day he was injured, Simmons was working as an engineer. However, he was not sitting in the cab of his locomotive. Instead, he was in the caboose of his train, using a remote control device to run the train. Because there was no place to sit in the caboose, he was sitting on a kitchen chair, looking out the back door of the caboose as the locomotive pushed the train down the track. As his train traveled down the track, the track beneath the train fell apart because it was more than one hundred years old. Mickey's train derailed and he suffered disabling injuries when he was thrown violently about the caboose.

The track was so bad that the speed limit for the track was five miles per hour. Unfortunately, the electronic data recorder (EDR), a sort of black box for locomotives, showed that my client was speeding. Luckily for this case, I knew that the EDR is calibrated according to wheel size. We were able to raise enough questions about when and where the wheel had been measured to undercut the EDR's value for the defense.

In another recent case that went to trial, the question was whether a coupler was defective. The coupler is what links each railroad car to the car in front and behind. The coupler's design is more than 100 years old. It is iron, is operated manually and has four moving parts. In order to uncouple cars, switchmen must pull a cut lever, which is a steel rod attached to the coupler. When the switchman pulls the cut lever, it moves the four parts, which are supposed to stay open, allowing the cars to uncouple. It often doesn't work as designed. So when my client, Wally Kawasaki, pulled the cut lever he found that the coupler would not stay open unless he held onto it while the cars uncoupled. Holding onto a moving train is never a great idea, but it is commonly done. Kawasaki was injured when the train jerked while he held onto the cut lever. While jurors concluded that the venerable device was defective, they also found that my client was 100 percent negligent. Fortunately, the railroad was

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A defective coupler was at the center of one injured railroad worker case. The coupler is what links each railroad car to the car in front and behind. The coupler's design is more than 100 years old. It is iron and has four moving parts that don't always cooperate.

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strictly liable for its violation of the Safety Appliance Act, which governs couplers. Kawasaki recovered his damages without any reduction for comparative negligence.

Final word

As with virtually everything that lawyers do, FELA practice has become increasingly specialized. It requires a solid familiarity with not only the law, but also the practices of an unusual business. Practicing FELA law can be quite entertaining, but like railroading itself, it requires knowledge and understanding of the industry.

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[1] They are, in order, locomotive engineer, freight car repair man, and the rail construct that permits the wheels of a train to move onto a turnout.

[2] An interstate railroad is a railroad which ships and receives cars in interstate commerce. An interstate railroad need not operate in more than one state.

[3] The Jones Act, which applies to maritime workers, applies many of the same principles as the FELA. 46 USC § 688.

[4] If you've visited the Maryhill Museum you've visited a piece of railroad history. Maryhill was built by Samuel Hill, a lawyer who became wealthy working for James Hill, who was the president of the Great Northern and one of the two tycoons building the dueling lines along the Deschutes. The GN would later merge with three other railroads to become the Burlington Northern, which merged with the Santa Fe to become today's BNSF.