



# American Tort Reform Association

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Testimony of Sherman Joyce

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*Before*

**The United States House of Representatives  
Committee on Transportation and Infrastructure**

***“The Impact of Railroad Injury, Accident, and Discipline  
Policies on the Safety of America’s Railroads”***

Thursday, October 25, 2007

Good Morning Chairman Oberstar, Ranking Member Mica, and Members of the Committee.

My name is Sherman Joyce, President of the American Tort Reform Association (ATRA).

ATRA was co-founded in 1986 by the American Medical Association and the American Council of Engineering Companies. It is the only national organization exclusively dedicated to reforming the civil justice system.

Since that time, ATRA has been working to bring greater fairness, predictability and efficiency to America's civil justice system. These efforts have resulted in the enactment of state and federal laws that make the system fairer for both plaintiffs and defendants. ATRA's membership is diverse and includes nonprofits, small and large companies, as well as state and national trade, business, and professional associations. A representative list of members supporting ATRA is available on our Web site, [www.atra.org](http://www.atra.org).

ATRA's area of expertise is not running a railroad. Instead, our area of focus and experience is the manifold challenges that we see in restoring fairness and efficiency to the civil justice system. As such, our association supports the enactment of state and federal liability reform legislation, and speaks out frequently in the media on matters pertaining to the excesses of the civil justice system.

With that perspective, in 1996 ATRA participated as *amicus curiae* in *Metro-North Commuter Railroad Company v. Buckley*, a Supreme Court case concerning the creation of new causes of action under the Federal Employers' Liability Act (FELA). In its decision, which tracked arguments made in ATRA's brief, the Court declined to establish broad causes of action for emotional distress and medical monitoring under FELA.

ATRA believes that in the context of any Congressional focus on improving railroad employee safety, FELA merits careful examination, since the law's adversarial construct influences the behavior of all relevant parties.

My testimony today continues ATRA's commentary on FELA matters relevant to our civil justice system. It has two purposes: 1) to highlight how some of the over-arching challenges with our legal system have manifested within the construct of FELA, to the detriment of both plaintiffs and defendants; and 2) based on our experiences reforming the civil justice system, to provide this committee with some general recommendations on how FELA might be improved as well.

### **A Snapshot of FELA History**

FELA is about to celebrate its centennial. While it has been modified several times, the FELA law with us today was enacted by Congress in 1908, in response to

conditions on railroads that were “far more dangerous and far more deadly than [they are] today.”<sup>1</sup>

At its core, FELA is a federal law that creates an adversarial process – through litigation – to provide compensation for on-the-job injuries incurred by railroad workers. “Under the FELA, lawsuits are pursued to establish that on-the-job injury was the result of employers’ negligence rather than the workers’ negligence.”<sup>2</sup>

At the time FELA was enacted, it was considered to be progressive legislation. Prior to the law’s enactment in 1908, a worker faced more substantial burdens in receiving compensation for a work-related injury. According to a leading casebook on tort law, prior to 1908...

*“...proving the employer’s negligence meant that stumbling blocks were placed on recovery of damages by injured workers. Long, drawn-out litigation created severe financial burdens upon workers. Even though courts cannot be said to have been uniformly hostile to workers’ claims, the realities of wealth and ineffectual representation institutions dictated relatively few instances of compensation.”*<sup>3</sup>

For railroad workers, FELA changed this construct, and “restructured the tort system, making it easier for workers to recover damages,” by limiting the railroads’ affirmative defenses.<sup>4</sup>

FELA’s status at the vanguard of fair workplace injury compensation was, however, short-lived. In 1910, New York became the first state to enact a workman’s compensation law. The following year, Wisconsin’s law became the first to withstand constitutional challenge.<sup>5</sup>

Workmen’s compensation laws were soon adopted across the United States, where they replaced the adversarial litigation process – a process that (for reasons already referenced) disadvantaged employees – with a no-fault system that provided employees with prompt, predictable compensation for their workplace-related injuries.

State-based workers’ compensation systems are by no means problem free or litigation free.<sup>6</sup> They are subject to fraud, and they generate litigation, primarily

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<sup>1</sup> Clayton Boyce, “Time to Go, FELA,” *Traffic World*, September 22, 2003. See also, United States General Accounting Office, “Federal Employers’ Liability Act Issues Associated With Changing How Railroad Work-Related Injuries Are Compensated,” Report to the Chairwoman, Subcommittee on Railroads, Committee on Transportation and Infrastructure, House of Representatives, GAO/RCED-96-199, Page 2. (Hereafter cited as “GAO”)

<sup>2</sup> Boyce, “Time to Go FELA.”

<sup>3</sup> Victor E. Schwartz, Kathryn Kelly, David F. Partlett, *Prosser, Wade and Schwartz’s Torts Cases and Materials*, 11<sup>th</sup> ed. (New York: Foundation Press, 2005), 1192.

<sup>4</sup> *ibid.*, 1192.

<sup>5</sup> *ibid.*, 1192.

<sup>6</sup> GAO, 16.

variances in awards from state to state under workers' compensation systems, workers within the same state are paid against a well-known and well-established schedule, rather than against what a jury might award.

Third, the adversarial tort process places the burden of high transaction costs on both parties. According to recent data, the tort system returns less than 22 cents of each dollar spent to the injured party.<sup>10</sup> Untethered from FELA litigation, at least some of those resources could easily be reallocated toward still-greater investments in safety, in addition to workplace training, or additional compensation for employees.

Finally, many injured parties that cannot afford the up-front costs of legal representation, elect to compensate counsel through a contingency-fee arrangement in which plaintiff's counsel takes a percentage of any settlement or award (typically one-fourth to one-third *after* expenses are deducted).

While these arrangements can be advantageous for employees, such fee arrangements create incentives for plaintiffs' counsel to maximize damages. In addition, these arrangements often create two unappealing policy alternatives in the context of workplace injuries – either: 1) the plaintiff is made less than whole, after counsel has deducted his fee; or 2) the defendant has paid a premium at settlement or judgment to both make the plaintiff whole, and to compensate counsel.

### **Fraud and Abuse in FELA Litigation Parallels Trends Throughout the Civil Justice System**

In the last several years, there have been significant instances of unlawful fraud and abuse permeating our civil justice system. Regrettably, FELA litigation has not been immune from these unseemly trends.

Many on this Committee are probably already familiar with the guilty pleas entered by current and former members of the law firm Milberg Weiss law firm over improper payments to a handful of plaintiffs in shareholder class action lawsuits, and specious silicosis litigation discovered by Judge Janis Graham Jack of the United States District Court in Corpus Christi, Texas.<sup>11</sup> Both of these incidents share a common element – the willingness of plaintiffs' counsel to place their own financial interests ahead of the interests of their clients.' These lawsuits were driven by and for the benefit of lawyers, rather than seeking to compensate truly injured claimants.

From the mid-1990s until 2004, a similar scheme permeated FELA litigation. In 2004, four officials of the Ohio-based United Transportation Union (UTU), which represents some but not all railroad employees, pled guilty to racketeering for accepting payments of as much as \$30,000 each from personal injury lawyers in exchange for steering business to these lawyers, who were then placed on a union-recommended list of

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<sup>10</sup> Tillinghast-Towers Perrin, *U.S. Tort Costs: 2004 Update*, (New York, 2005).

<sup>11</sup> Julie Creswell, "Testing for Silicosis Comes Under Scrutiny in Congress," *New York Times*, March 8, 2006.

plaintiffs' counsel. In exchange for their immunity from prosecution, 37 personal injury lawyers gave information about 159 incidents of improper payments to union leaders.<sup>12</sup>

To its credit, the UTU has taken positive steps to ensure this type of conduct cannot happen again. The UTU has adopted a new code of ethics that prohibits lawyers from influencing union politics, and that prohibits union officials from soliciting gifts or money from lawyers.<sup>13</sup>

At the same time the UTU was resolving its issues, an entirely new set of FELA-related litigation abuses were being unearthed in West Virginia.

There, plaintiff Rodney Chambers and his counsel are alleged to have committed fraud against the freight railroad CSX when they submitted a medical report in FELA litigation that was certified by a "Dr. Oscar Frye," who has never been located, and whose address in Huntington, West Virginia is fictitious.<sup>14</sup>

In a separate but related legal proceeding, CSX has brought suit against Robert Gilkison and his employer – the law firm of Pierce, Raymond & Coulter (which at one time also represented Rodney Chambers at the time of the "Dr. Frye" episode) for "engaging in fraudulent schemes relating to screening mechanisms used by the law firm to find asbestos plaintiffs."<sup>15</sup> Interestingly, Dr. Ray Harron, who also came under national criticism for certifying silicosis claims that found their way to Judge Jack's Texas courtroom, is named as a co-conspirator in the suit because of his work on asbestos cases for the Pierce firm.

## **Solutions**

My purpose in raising these issues is to suggest that there is evidence before this committee from divergent perspectives – labor, management, government and third parties like ATRA – that FELA, the current injury compensation mechanism for railroad employees, fosters behavior that is adversarial in nature, and works against the goal of compensating railroad employees quickly, fairly, and completely for work-related injuries. Further, in considering the perspectives of all involved, ATRA urges Members of the Committee to take into account that the process for resolving workplace-related claims for rail workers is unique in our legal system. The fault-based system in FELA harkens back nearly a century as virtually all other such claims are resolved through a no-fault type process, which began in 1910 with the first workers' compensation program.

Today, existing federal laws – the Federal Employees Compensation Act (FECA) and the Longshore and Harbor Workers Compensation Act (LHWCA) – have been enacted by Congress to create no fault systems to compensate injured workers, which are

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<sup>12</sup> Alison Grant, "Lawyers, leaders, capitalize on railroad workers' injuries. Deals created a system of abuse, leading to probe, guilty pleas," *Cleveland Plain Dealer*, March 26, 2004.

<sup>13</sup> *ibid.*

<sup>14</sup> Juliet A. Terry, "CSX lawsuit could lead to sanctions," *State Journal*, September 8, 2006.

<sup>15</sup> *ibid.*

administered through the Department of Labor.<sup>16</sup> A similar federal law could be enacted and applied to railroad employees.

Another approach advocated in a column appearing in a leading industry trade publication, *Traffic World*, suggests that FELA should be abolished, and the system should devolve to state-based workers' compensation systems.<sup>17</sup>

Alternately, in the past, Congress has explored capping noneconomic damages available under FELA, and examined alternative dispute resolution procedures like arbitration.<sup>18</sup>

In light of what you have heard today, we would urge Congress to explore some of the proposals that have been considered in the past, as well as seek the input of the organizations before you today on what innovative approaches could be implemented to accomplish these objectives.

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<sup>16</sup> GAO, 15.

<sup>17</sup> Boyce, "Time to Go FELA."

<sup>18</sup> GAO, 31.