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Report to the Chairwoman, Subcommittee on Railroads, Committee on Transportation and Infrastructure, House of Representatives

August 1996

FEDERAL EMPLOYERS' LIABILITY ACT

Issues Associated With Changing How Railroad Work-Related Injuries Are Compensated

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Resources, Community, and
Economic Development Division

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August 15, 1996

The Honorable Susan Molinari
Chairwoman, Subcommittee on
Railroads
Committee on Transportation and
Infrastructure
House of Representatives

Dear Madam Chairwoman:

In response to your request, this report examines the issues associated with changing how railroad workers are compensated for their work-related injuries. In particular, we identify the potential implications for railroad costs and railroad workers of (1) replacing the Federal Employers' Liability Act (FELA) with a no-fault compensation system or (2) modifying FELA. We also discuss FELA's effects on small railroads and the availability and affordability of insurance to protect small railroads against large FELA payouts.

As agreed with your office, unless you publicly announce its contents earlier, we plan no further distribution of this report until 30 days from the date of this letter. At that time, we will send copies to the Secretary of Transportation, the Secretary of Labor, and the Director, Office of Management and Budget. We will also make copies available to others upon request.

Please call me at (202) 512-2834 if you or your staff have any questions. Major contributors to this report are listed in appendix V.

Sincerely yours,

John H. Anderson, Jr.
Director, Transportation and
Telecommunication Issues

Executive Summary

Purpose

Unlike most American workers, railroad workers are not covered by state no-fault workers' compensation insurance systems when they are injured on the job. Instead, railroad workers must recover their losses under the provisions of the Federal Employers' Liability Act (FELA). Under FELA, an injured worker negotiates a settlement with the railroad. If the negotiations fail, the worker may file a lawsuit alleging negligence by the employer to recover losses. No-fault systems do not require that the parties demonstrate negligence. The Chairwoman, Subcommittee on Railroads, House Committee on Transportation and Infrastructure, asked GAO to identify the implications for railroad costs and railroad workers of (1) replacing FELA with a no-fault compensation system or (2) modifying FELA. GAO was also asked to assess how FELA particularly affects small railroads (those with annual revenues of less than $250 million) and determine the availability and affordability of insurance to protect small railroads against large FELA payouts.

Background

FELA was enacted in 1908, a time when the railroads were the nation's largest employer and rail work was especially hazardous. At that time, injured railroad workers had difficulty getting compensated under the common law that governed injury compensation. Railroads often avoided paying compensation for on-the-job injuries by arguing, for example, that a coworker's negligence had caused an injury or that workers assumed the risk of injury at the time they accepted employment. In an effort to better protect workers against financial loss and to make the railroads more accountable and responsible for work-related injuries, FELA limited the railroads' defenses against liability for compensating injured workers. Such limitations provided railroad workers with more protection than other employer liability laws of the time, but workers were still required to establish negligence. At about the same time, the individual states were enacting no-fault workers' compensation systems. Today, most workers in other industries are covered under state workers' compensation systems, but railroad workers continue to be covered under FELA. FELA allows workers to seek recovery for economic damages (such as lost wages) and noneconomic damages (such as pain and suffering), while workers' compensation systems typically limit recovery to economic losses.

Many in railroad management believe that FELA should be replaced or changed. In general, railroad management is dissatisfied with FELA because, among other things, the need to demonstrate negligence creates an adversarial relationship between management and labor. Management also believes that the system is excessively litigious, that FELA lawsuits are

often filed in court jurisdictions that have historically been favorable to plaintiffs, and that the system is unnecessarily costly. Railroad labor officials, on the other hand, believe that FELA is working well and should not be replaced or changed. In labor's view, FELA provides workers with the opportunity to fully recover their losses from on-the-job injuries and provides railroads with an incentive to operate safely. Railroad labor believes the problem is not that FELA provides workers with excessive compensation but that no-fault compensation systems provide too little compensation.

Results in Brief

Whether replacing FELA with a no-fault compensation system would reduce railroad costs depends to a large extent on the number of workers who are permanently disabled by on-the-job injuries. If many of the railroad workers who currently leave a railroad after receiving a FELA settlement are physically capable of returning to work, then total injury compensation costs for the railroads could be less under a no-fault system. On the other hand, if about two-thirds or more of these workers were permanently and totally disabled and unable to return to any work, the costs of a no-fault compensation system could be the same as or higher than under FELA. Railroad management believes that some railroad workers who leave a railroad after taking their FELA settlement are physically capable of returning to work and, therefore, would not receive long-term benefits under a no-fault system. However, little information is available on how many railroad workers who leave a railroad after taking a FELA settlement are physically capable of returning to work. For those workers who can return to work at their preinjury wages, the railroads' compensation costs would be less under a no-fault system because it does not provide compensation for noneconomic losses.

Modifying FELA could reduce the railroads' costs. For example, placing caps on awards for noneconomic damages or on plaintiffs' attorneys' fees might reduce injury compensation costs, depending on what proportion of FELA awards are represented by noneconomic damages and how attorneys' fees relate to settlement amounts. On the other hand, such modifications could adversely affect railroad workers by reducing the compensation they receive and limiting the availability or quality of their legal counsel.

Small railroads' 1994 FELA costs per employee-hour worked were less than those of larger railroads. In part, this is because small railroads had, on average, fewer lost workdays per injury than the large railroads and a lower percentage of injuries that resulted in lost work time. GAO also found

that the small railroads rely heavily on insurance to protect against large payouts under FELA. It appears that at the current time, liability insurance that includes FELA coverage is both available and affordable.

Principal Findings

Cost Impact of Replacing FELA With a No-Fault Compensation System Depends on Many Factors

The cost of replacing FELA with a nationwide no-fault injury compensation system depends on a number of factors. One of the most important is the number of injured railroad workers who are permanently disabled by their injuries and unable to return to work at their preinjury wages. Under FELA, some workers leave their railroad after receiving a lump-sum FELA settlement. Little information is available on how many of these workers are able to work. GAO estimates that if about two-thirds or fewer of the injured workers at four large railroads had been permanently and totally disabled, then the costs under a no-fault compensation system could have been the same as or lower than those under FELA.

To produce this estimate of the potential benefits of replacing FELA with a no-fault system, GAO used a cost analysis model developed for the Association of American Railroads. The model used information on claims under FELA that were closed in 1994 for four railroads that employ about 60 percent of the workers at large railroads. To calculate the costs under a no-fault alternative, GAO used the benefit provisions of the two nationwide systems covering civilian federal workers and maritime workers—the systems under the Federal Employees' Compensation Act (FECA) and the Longshore and Harbor Workers' Compensation Act (LHWCA), respectively. Using the model, GAO found that overall injury compensation costs would have been less under a no-fault system if fewer than 65 or 70 percent (depending on whether FECA- or LHWCA-level benefits are used) of the injured rail workers at these railroads who accepted FELA settlements and left the railroad had been less than permanently and totally disabled and were able to return to work. GAO also estimates that for the group of injured workers who continued to work at their railroad after a settlement, the railroads might have saved about $100 million in compensation costs.

Replacing FELA with a no-fault compensation system would likely reduce the railroads' administrative costs. With the elimination of the need to investigate negligence and assess noneconomic damages, the costs of processing injury claims would be lower than they are under FELA.

Although rehabilitation costs can be compensated under FELA, rehabilitation plays a larger role in no-fault compensation programs, and railroads might incur higher costs for these services.

Modifying FELA Would Likely Reduce Railroads' Costs but Could Also Adversely Affect Workers

In lieu of replacing FELA, the Congress could modify it. GAO found that some modifications have the potential to reduce the railroads' injury compensation costs. For example, placing a cap on compensation for noneconomic losses could reduce costs. Because the data that GAO received from the railroads did not identify the proportion of each FELA award represented by noneconomic damages, a precise estimate of the savings from capping them could not be made. However, on the basis of an examination of the FELA claims that were closed at four large railroads in 1994, GAO found that under a range of assumptions about these proportions and using $250,000 as a cap (an amount considered in recently proposed legislation on the National Railroad Passenger Corporation), the railroads might have saved between $7 million and $48 million of the $479 million they paid out in 1994. Placing a cap on plaintiffs' attorneys' fees is also a way to reduce costs. However, any savings would depend on the relationship between these fees and settlement amounts. Rail labor organizations told GAO that attorneys currently receive no more than 25 percent of a FELA award.

Although these options might reduce the railroads' FELA costs, they could adversely affect injured railroad workers. For example, a cap on noneconomic damages could reduce the compensation that such workers receive. Similarly, placing a cap on plaintiffs' attorneys' fees might affect the availability or the quality of the workers' legal counsel. On the other hand, capping plaintiffs' attorneys' fees might, in some cases, increase the amount of the settlement that goes to the injured worker. The position of current railroad workers could be protected by continuing to cover them under FELA and its present provisions (known as "grandfathering"). This solution, however, could increase the railroads' costs to administer injury compensation cases and could create a situation in which employees with similar injuries have access to different types and amounts of compensation.

Small Railroads Have Lower FELA Costs and Rely on Insurance to Protect Against Large Payouts

Small railroads' experience with FELA has differed somewhat from that of the large railroads. In a survey of 560 small railroads, GAO found that, in general, the small railroads' injury compensation costs under FELA were less than those of the large railroads. In 1994, the small railroads paid about $42 million in FELA costs, or about $0.96 per employee-hour worked. In contrast, the large railroads paid about $2.26 per employee-hour worked. Some of this cost difference may be attributable to the fact that the small railroads had, on average, fewer lost workdays per injury than the large railroads—30 days compared with 77 days—and lower average wages. In addition, in 1994, only 54 percent of the injuries on the small railroads resulted in lost workdays, compared with 67 percent on the large railroads. GAO also found that the small railroads rely heavily on insurance to protect themselves against large FELA payouts. GAO's survey found that about 88 percent of the small railroads are covered by insurance that includes FELA coverage. Most of the large railroads have high deductibles and are generally considered self-insured for FELA purposes. GAO found that for the small railroads, liability insurance covering FELA is currently readily available and appears to be affordable.

Recommendations

GAO is making no recommendations in this report.

Agency Comments

GAO provided officials of the Departments of Transportation and Labor with copies of a draft of this report. GAO met with officials from these agencies, including the Chief of the Industry Finance Staff at the Department of Transportation's Federal Railroad Administration, and the Deputy Director, Division of Federal Employees' Compensation and the Director, Division of Longshore and Harbor Workers' Compensation at the Department of Labor. The Department of Transportation officials said they had no reason to disagree with the reports' contents and had no comments. The Department of Labor officials provided GAO with technical comments on the FECA and LHWCA programs, which GAO incorporated where appropriate.

Contents

Figures

Abbreviations

AAR	Association of American Railroads
AMTRAK	National Railroad Passenger Corporation
FECA	Federal Employees' Compensation Act
FELA	Federal Employers' Liability Act
GAO	General Accounting Office
LHWCA	Longshore and Harbor Workers' Compensation Act

Introduction

Unlike most American workers, when railroad workers are injured on the job, they are not covered by state no-fault workers' compensation insurance systems. Instead, they must seek to recover their losses from the railroads under the provisions of the Federal Employers' Liability Act (FELA). Under FELA, injured workers must either negotiate a settlement with the railroad or file a lawsuit against the railroad to recover their losses. FELA allows injured workers to recover noneconomic damages, such as pain and suffering, in addition to economic damages, such as medical expenses and lost wages. In contrast, the benefits paid under no-fault workers' compensation systems are largely limited to medical expenses and lost wages. Under FELA, if a lawsuit is filed, workers must show negligence on the part of the employer; under no-fault systems, issues of negligence are not a factor.

Railroad management's and labor's opinions differ over how well FELA is working. Management, which favors replacing FELA, believes that FELA creates an adversarial environment between the railroads and their employees and is unnecessarily costly. On the other hand, railroad labor believes that FELA is working well and allows injured employees to receive better compensation for their injuries than they would under no-fault alternatives. Labor also believes that FELA provides railroads with an extra incentive to operate safely.

Railroads' Injury Compensation Differs From That of Other Industries

Compensating railroad workers injured on the job is governed by the provisions of FELA. If negotiations between an injured worker and a railroad fail to result in a settlement, then the worker can sue to recover both economic damages and noneconomic damages. In contrast, most American workers are covered by state workers' compensation systems that are essentially no-fault insurance systems. Although compensation under these systems varies from state to state, the benefits are largely limited to economic damages—lost wages, medical expenses, and rehabilitation costs. There are also two federally administered no-fault workers' compensation systems. Civilian federal employees are covered by the Federal Employees' Compensation Act, and employees in the maritime industry are covered by the Longshore and Harbor Workers' Compensation Act.[1]

[1]For more information about how FELA operates and how it compares with no-fault compensation systems, see Compensating Injured Railroad Workers Under the Federal Employers' Liability Act, Special Report 241, National Research Council, Transportation Research Board (Washington, D.C.: National Academy Press, 1994).

FELA Governs Railroads' Injury Compensation

FELA was enacted in 1908, at a time when railroads were the largest employer in the United States and rail work was particularly hazardous. Prior to the act's passage, injured railroad workers had difficulty recovering losses resulting from workplace injuries. Under the common-law doctrine of negligence, railroads often avoided paying compensation for on-the-job injuries by arguing, for example, that employees assumed the risk of injury at the time they accepted employment or that an injury had been caused by a fellow employee. At about the same time, efforts were underway in various states and at the federal level to enact employers' liability legislation that would limit these defenses and increase employers' liability for workplace injuries. In an effort to better protect workers against financial loss and to make the railroads more accountable and responsible for work-related injuries, FELA limited the railroads' defenses against liability for compensating injured workers. As such, it provided railroad workers with more protection than other employer liability laws of the time.

FELA covers virtually all railroads operating in interstate service, including the freight railroads, the National Railroad Passenger Corporation (Amtrak), and most commuter railroads.[2] Under the act, injured workers can seek recovery of all their losses, including economic losses, such as actual and future wage losses, and noneconomic losses, such as pain and suffering. If negotiations between a railroad and an employee do not produce a settlement, employees can seek recovery of their losses in a state or federal court. Should a lawsuit be filed, an employee must show that the railroad was negligent in order to recover damages. However, an employee's recovery for losses might be reduced to the extent that the employee's own negligence caused an injury, and in some instances, the employee could receive nothing. As a result, injured workers may not recover all of their losses, and some workers might not recover any. In addition to compensation under FELA, injured employees may also be eligible for retirement benefits, sickness benefits, and disability annuities from the Railroad Retirement Board.[3]

In 1994, the railroads paid about $1.2 billion in FELA costs, and nearly 75 percent of all FELA injury claims for the large railroads (excluding the

[2]FELA also covers maritime employees who are governed by the Jones Act but does not cover the Alaska Railroad or railroads operating solely within a company-owned plant.

[3]The Railroad Retirement Board is a federal agency that administers the Railroad Retirement and Railroad Unemployment Insurance acts. Any sickness benefits paid must later be paid back to the Railroad Retirement Board from a subsequent settlement under FELA. Between July 1994 and June 1995, a total of $55.1 million in sickness benefits was paid, and $29.9 million was recovered. Recoveries do not necessarily occur in the same year that the benefits are paid.

occupational illnesses of hearing loss and asbestosis) were settled between the railroads and the injured employees without a lawsuit.[4] While the total number of injury claims has declined since 1990, the number of lawsuits has remained relatively stable at about 3,100 cases per year. (See table 1.1.) Over the same period, railroad employment declined from 296,000 to 267,000. The average payout per negotiated claim increased from about $24,000 in 1990 to about $34,000 in 1994, while the average payout per lawsuit remained relatively stable at about $160,000. (See table 1.2.)

Table 1.1: Number of FELA Injury Claims and Suits Settled by Large Freight Railroads and Amtrak, 1990-94

Year	Railroad employment	Negotiated claims	Claims with lawsuits	Total claims
1990	296,000	14,269	3,129	**17,398**
1991	285,000	12,204	3,120	**15,324**
1992	276,000	11,053	3,178	**14,231**
1993	271,000	9,613	3,109	**12,722**
1994	267,000	8,815	3,210	**12,025**

Note: Excludes the occupational illnesses of hearing loss and asbestosis and those cases where no payments were made.

Source: Association of American Railroads.

Table 1.2: Average Payout Per Settled FELA Injury Claim and Lawsuit for Large Freight Railroads and Amtrak, 1990-94

Dollars in constant 1994 dollars

Year	Negotiated claims	Claims with lawsuits	Average for all claims
1990	$24,414	$159,356	$48,683
1991	29,163	146,369	53,026
1992	29,536	160,159	58,706
1993	32,713	166,500	65,408
1994	33,919	165,421	69,023

Note: Excludes the occupational illnesses of hearing loss and asbestosis and those cases where no payments were made.

Source: Association of American Railroads.

[4]In this report, "large" railroads refer to Class I railroads. Class I is a designation used by the former Interstate Commerce Commission. In 1994, railroads with annual revenues of at least $255.9 million were designated as Class I. Class II railroads had annual revenues of from $20.5 million to $255.8 million, and Class III railroads had annual revenues of less than $20.5 million. We use the term "small railroads" to include all freight railroads other than Class I railroads. A more detailed description of the types of railroads included under this term can be found in chapter 4.

Most Workers in Other Industries Are Covered Under No-Fault Injury Compensation Systems

In contrast to railroad workers, workers in most other industries are covered by state no-fault compensation systems. Workers' compensation legislation was initially enacted by most state legislatures in the early 20th Century.[5] One of the principal goals of this legislation was to provide injured workers with adequate benefits while limiting employers' liability to compensating workers only for their lost wages and medical costs. Payments were to be prompt and predetermined to relieve employees and employers of uncertainty and eliminate the need to litigate the claims.

The benefits available under no-fault compensation programs depend on the nature and extent of an injury. For less serious injuries, only medical benefits might be paid. For more serious injuries or illnesses, in addition to medical benefits, an employee might receive wage-loss benefits, vocational rehabilitation, or "scheduled" benefits—for injuries resulting in permanent impairments, such as the loss of a limb or a bodily function. Each state sets its own benefit levels, and benefits vary considerably from state to state.

Two groups of employees are covered by federally administered no-fault systems. The Federal Employees' Compensation Act (FECA) covers federal civilian employees, and the Longshore and Harbor Workers' Compensation Act (LHWCA) covers those in the maritime industry. Enacted in 1916, FECA covers more than 3 million federal civilian employees and authorizes the federal government to compensate employees when they are temporarily or permanently disabled as a result of an injury or illness sustained while performing their duties.[6] The Department of Labor's Office of Workers' Compensation Programs administers this program. Disputes may be handled in one of the Labor Department's district offices or by the Branch of Hearings and Review. Appeals can also be made to the Department's Employees' Compensation Appeals Board. FECA cases cannot be appealed to a court. Enacted in 1927, LHWCA covers about 500,000 longshore workers for disability due to a job-related injury or occupational disease occurring on the navigable waters of the United States or in adjoining shore areas.[7] The Department of Labor also administers this program. Disputes are handled informally in one of the Labor Department's district offices or before the Department's Office of Administrative Law Judges or the

[5]For more information on workers' compensation programs, see our recent report Workers' Compensation: Selected Comparisons of Federal and State Laws (GAO/GGD-96-76, Apr. 3, 1996).

[6]FECA also covers some nonfederal employees, such as some state and local law enforcement personnel and employees in the Civil Air Patrol.

[7]LHWCA also covers certain other workers, such as some employees on military, air, or naval bases.

Benefits Review Board. Unlike FECA cases, LHWCA cases may be appealed to a federal appeals court.

There are important differences between FELA and no-fault compensation systems. First, both state and federal workers' compensation systems cover an employee's work-related injury regardless of negligence on the part of the employer or employee by imposing strict liability on an employer for compensating most economic damages suffered by injured workers. However, they do not allow compensation for noneconomic damages. Second, benefits under no-fault systems are generally paid as losses occur, rather than in a lump sum as they are under FELA. While some states permit lump-sum payments, at least one state—Texas—has essentially banned them. Under FECA and LHWCA, compensation continues as long as a disability continues. Both FECA and LHWCA authorize higher benefit levels than most state workers' compensation systems.

While many no-fault claims are handled directly between employees and their employers or insurance companies, no-fault systems are not free from dispute or litigation. As the National Research Council reported in 1994, disputes may arise over issues such as eligibility for benefits, the level of benefits, and the readiness of workers to return to work.[8] Disputes may also arise over the permanency of injuries. For the most part, adjudicative bodies within a state (or the Labor Department, in the case of FECA and LHWCA) and the judicial system handle the resolution of these disputes. In recent years, litigiousness has tended to increase in no-fault compensation systems. Some states have also been concerned about increasing medical costs in workers' compensation claims, and some (such as California and Texas) have made efforts to control these costs.

Railroad Management and Labor Differ Over Continued Need for FELA

Railroad management and labor disagree over how well FELA is working and whether it should be replaced or changed. Although the railroad industry has undergone substantial change over the years, including technological improvements designed to improve safety, the nearly 90-year old system for compensating injured railroad workers has changed little. In general, railroad management is dissatisfied with FELA and believes it should be replaced or substantially changed. In particular, management believes that because FELA involves issues of negligence, it creates an adversarial environment between railroads and their employees. Management also believes that FELA is unnecessarily costly. In addition, management sees little reason why railroads should be treated differently

[8]National Research Council, Transportation Research Board, 1994.

from other industries in terms of workers' compensation. Railroad labor, on the other hand, believes that FELA is working well and should not be replaced or changed. In labor's view, FELA is a model system that fairly compensates injured workers and provides an incentive for railroads to operate safely. Labor believes the problem is not that FELA provides workers with excessive compensation but that no-fault compensation systems generally provide too little.

Railroad Management Believes FELA Is Flawed and Should Be Replaced

FELA has remained relatively unchanged in its nearly 90-year history despite substantial changes in the industry. Enhancements in braking and signaling, for example, have improved the safety of train operations. The Association of American Railroads (AAR), the trade association of the major railroads, issued a report criticizing FELA and claiming that it has adversely affected the railroad industry.[9] That report included data showing that, as railroad employment has declined and the number of injuries has fallen since 1981, FELA payouts have increased. In 1994, railroads paid about $4,200 per employee in FELA costs, up from about $2,250 per employee in 1985.[10] AAR believes that FELA needs to be replaced.

Many in railroad management believe that FELA is no longer appropriate to the modern railroad operating environment. Among the problems with FELA cited by railroad management are (1) the adversarial environment created between employers and employees because FELA requires the parties to establish fault, (2) the high degree of involvement by attorneys in FELA cases, (3) the unpredictability of FELA costs, (4) the practice of filing FELA lawsuits in court jurisdictions that have historically rendered judgments favorable to the plaintiffs, and (5) the high administrative costs. In general, railroad management questions why the rail industry must be treated differently from other industries regarding injury compensation.

The National Association of Railroad Trial Counsel, an organization of 1,200 lawyers who provide legal services to railroads, believes that because both the right to recover and the amount of the recovery depend on assigning fault, FELA not only inhibits good employer-employee relations but also frustrates attempts to determine the causes of accidents.

[9]Tort Abuse and the Rail Industry: The Facts About FELA, Association of American Railroads, Washington, D.C. (undated).

[10]In constant 1994 dollars.

Railroad Labor Believes That FELA Is Working Well and Should Not Be Replaced or Changed

In contrast to management's view, railroad labor believes that FELA is effective and should not be replaced or modified. Railroad labor believes that FELA offers the railroads incentives to operate safely and gives workers the opportunity to recover full compensation for their injuries. Railroad labor does not believe that FELA should be replaced with a no-fault compensation system like state workers' compensation because, in labor's view, injured workers would not be adequately compensated under a no-fault system.

Railroad labor also takes issue with the criticisms of FELA voiced by railroad officials. For example, railroad labor points out that FELA is not a particularly litigious system because over 75 percent of the FELA cases are settled without any third-party intervention. Moreover, in labor's view, FELA provides the railroads with an incentive to operate safely and if they do so, they could lower their injury compensation costs. Attorneys representing railroad labor also took issue with railroad management's belief that FELA lawsuits are filed in jurisdictions favorable to plaintiffs. In their view, the practice of selecting court venues favorable to the plaintiffs to try FELA cases is no longer an issue because most states have acted to limit where suits can be filed.

Objectives, Scope, and Methodology

Concerned about the cost of FELA, the Chairwoman, Subcommittee on Railroads, House Committee on Transportation and Infrastructure, asked us to identify the implications for railroads' costs and railroad workers of (1) replacing FELA with a no-fault compensation system or (2) modifying FELA. We were also asked to assess how FELA particularly affects the small railroads and determine the availability and affordability of insurance to protect against large FELA payouts. As agreed with the requester's office, we focused our analysis on comparisons between FELA, FECA, and LHWCA. This approach was taken to avoid duplicating work previously reported by the National Research Council that compared FELA with state workers' compensation programs.

To identify the cost and other effects of replacing FELA with a no-fault system with FECA- and LHWCA-level benefits, we used a computerized cost model developed by Mercer Management, Inc., for AAR. This model and the assumptions we used in performing our cost analysis are described in appendix I. As input for our analysis, we obtained information on all of the FELA claims closed in 1994 by four large railroads—Burlington Northern, CSX, Norfolk Southern, and Union Pacific. These railroads employed about 60 percent of all employees at large railroads in 1994 and also had

previously participated in a 1991 unpublished study of FELA by AAR. To examine how the administrative and dispute resolution mechanisms of no-fault compensation systems compare with those of FELA, we reviewed data from the Department of Labor on the FECA and LHWCA programs. We reviewed similar information on the California, Illinois, Nebraska, Pennsylvania, and Texas workers' compensation systems. We selected these states because they had the largest number of freight railroad employees as of March 1995. Finally, we analyzed information from the Federal Railroad Administration to determine the number of lost workdays resulting from on-the-job injuries by the type of railroad.

To evaluate the cost and other impacts of modifying FELA, we examined a number of proposals selected on the basis of discussions with officials at AAR and with the requester's office. We used data on claims closed under FELA in 1994 provided by the four railroads mentioned in the above paragraph to evaluate the financial impact of capping noneconomic damages under FELA. This information identified the number of claims that could have been affected by a cap and the dollar value of these claims. To analyze the impact of placing a cap on plaintiffs' attorneys' fees under FELA, we interviewed officials at selected railroads and obtained the views of railroad labor organizations. We also reviewed reports prepared by the Workers' Compensation Research Institute—a nonpartisan, not-for-profit organization that conducts research on workers' compensation issues. To assess the use of arbitration, we interviewed officials from selected railroads and obtained information from the Federal Judicial Center on the use of arbitration in FELA cases in federal courts. The National Center for State Courts provided us with information on the use of arbitration in state courts. To evaluate the proposal to limit the jurisdictions where FELA cases might be tried, we reviewed state venue provisions in the 10 states with the most railroad employees in 1995, interviewed officials at selected railroads and attorneys who handle FELA cases, and obtained written comments from railroad labor organizations.

To assess how FELA affects the small railroads compared with the large railroads, we designed a questionnaire to obtain cost and other information from the small railroads. After pretesting the questionnaire with officials from seven railroads, we surveyed 560 small railroads operating in the United States and asked them about their experience with FELA in 1994. To determine the universe, we used AAR's Profiles of U.S. Railroads, 1994 Edition and Supplement, a compilation of information on all railroads offering freight service in 1993, and the July 1995 membership list of the American Short Line Railroad Association. We received 437

responses, for a response rate of 78 percent.[11] The employee hours of the respondents to our survey represented 93 percent of the employee hours worked on the small railroads in 1994. The results of our survey of the small freight railroads are presented in appendix II. We also requested information on 1994 FELA claims and costs from 16 railroads identified by the American Public Transit Association as offering commuter service as well as from Amtrak. We received data from 12 commuter railroads and Amtrak.[12] Information on these railroads' FELA settlements and costs can be found in appendix III.

The organizations we contacted in the course of our review are listed in appendix IV. In addition, we received assistance from a consultant, Mark Dayton, who was the Study Director for the National Research Council's 1994 study of FELA.

Our work was conducted from June 1995 through July 1996 in accordance with generally accepted government auditing standards.

Agency Comments

We provided the Departments of Transportation and Labor with copies of a draft of this report. We met with officials from these agencies, including the Chief of the Industry Finance Staff at the Department of Transportation's Federal Railroad Administration, and the Deputy Director, Division of Federal Employees' Compensation and the Director, Division of Longshore and Harbor Workers' Compensation at the Department of Labor. The Department of Transportation officials said they had no reason to disagree with the contents of the report and made no comments. The Department of Labor officials provided us with technical comments on the FECA and LHWCA programs, which we have incorporated where appropriate.

[11]Of the 437 responses we received, 398 were usable. Two responses were submitted too late to be included in the analysis, and 37 responses were from railroads that were not operating, employed no workers directly, were operated by other railroads, or submitted blank questionnaires.

[12]One commuter railroad, the Southeastern Pennsylvania Transportation Authority did not respond; the Tri-County Commuter Rail Authority did not have FELA data because it was under state workers' compensation; and 2 of the 16 commuter railroads (Dallas Area Rapid Transit and San Diego Northern Railway) had not yet begun operations in 1994.

Cost Savings From Replacing FELA With a Nationwide No-Fault Compensation System Depend on Many Factors

Railroad management advocates replacing FELA with a no-fault compensation system, in part because of a belief that a no-fault system would be less costly. Whether replacing FELA with a nationwide no-fault system with FECA- or LHWCA-level benefits would reduce railroads' injury compensation costs depends on many factors.[1] Prime among these is the number of railroad workers who are permanently disabled and are unable to return to work at their preinjury wages. Some injured railroad workers leave the railroad after receiving their FELA settlement, but railroad management believes that some of these workers are capable of returning to work and, therefore, would not receive permanent disability payments under a no-fault compensation system. However, the number of such workers is not known. The higher the proportion of this group of injured workers that can return to work at their preinjury wages, the higher the probability that railroads' injury compensation costs would be reduced under a no-fault system. A no-fault system could reduce railroads' administrative costs by eliminating the need to investigate negligence and to assess noneconomic damages. However, the time it takes to resolve claims that are contested under no-fault systems might not differ much from what it is under FELA.

Impact of No-Fault System on Injury Compensation Costs Depends on Severity of Injuries

One of the most important factors in determining the cost differences between FELA and a no-fault compensation system is the number of railroad workers who are permanently disabled by on-the-job injuries. On the basis of our analysis of FELA claims at four large railroads, the lower this number is, the greater the likelihood that the railroads' compensation costs would be reduced under a no-fault compensation system. Under no-fault compensation systems, when injured workers recover and return to work at their preinjury pay level, their wage compensation benefits cease. In addition, under a no-fault compensation system, those workers who return to work would likely receive less than they would have under FELA because they would be compensated only for economic damages and not for noneconomic damages as they could have been under FELA. Finally, while it is difficult to estimate precisely the impact on death benefits of replacing FELA with a no-fault system, the cost difference would likely be small because death benefits are a relatively small portion of the total compensation outlays.

[1]The discussion of injury compensation presented here excludes compensation of medical expenses. We assumed that employees would continue to be provided with such expenses under the railroads' health insurance plans regardless of the compensation system. (See app. I for more information.)

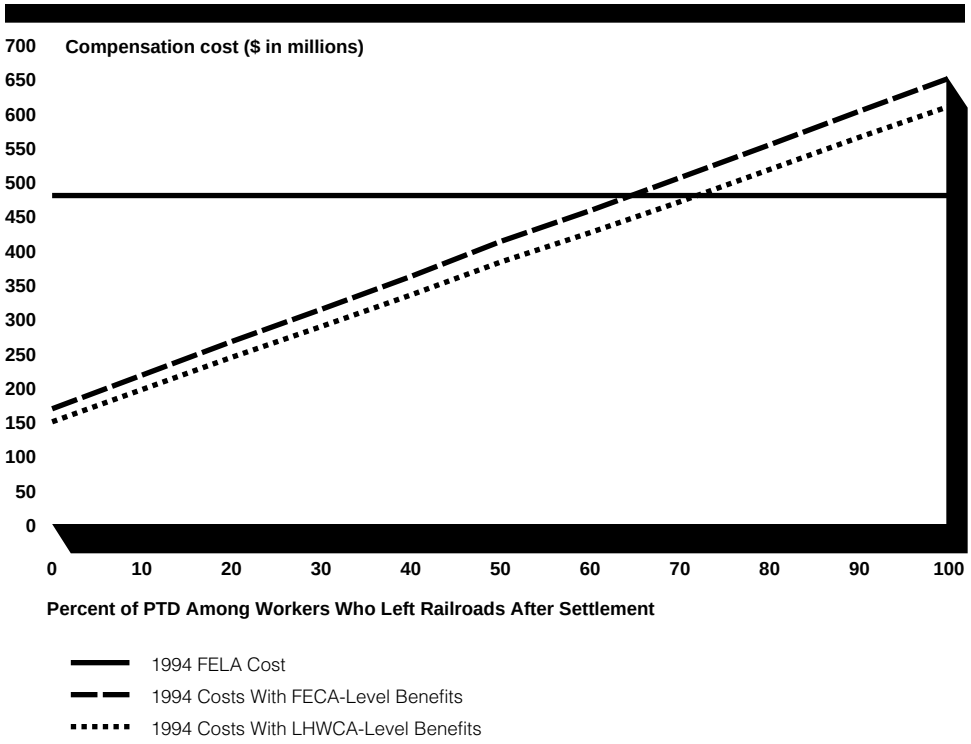
Potential Changes in Railroads' Injury Compensation Costs Are Directly Related to Levels of Permanent Disability

Replacing FELA with a no-fault system with FECA- or LHWCA-level benefits would reduce the railroads' injury compensation costs only if many of the workers who currently leave a railroad after receiving their FELA settlement are physically capable of returning to work. Under a no-fault compensation system, benefits end or are reduced once an injured worker returns to work or takes another job. If those injured railroad workers who did not return to work under FELA were so severely injured that they could not return to any work, then under the no-fault alternative, they would receive permanent total disability payments as long as their total disability continued. The present value of this amount could be considerably greater than the lump-sum payment that a worker actually accepted under FELA. Officials from several railroads told us that once a settlement is made and an employee leaves a railroad, they do not keep information on any subsequent employment of these individuals. However, officials from several railroads believe that at least some of the workers who accept a FELA settlement and leave a railroad are physically able to return to the workforce.

For the four large railroads in our analysis, we estimate that if all of the workers injured on the job who left the railroad after taking a FELA settlement were able to return to work, the railroads' overall injury compensation costs in 1994 under either FECA- or LHWCA-level benefits would have been about one-third what they were under FELA. (See fig. 2.1.)[2] Under FECA, we estimate that injury compensation costs would have been $168 million and that under LHWCA, they would have been $149 million, instead of the $479 million actually paid. But if all of these workers were permanently and totally disabled, we estimate that these railroads' injury compensation costs would have been about one-third higher than they were under FELA—$650 million under FECA and $609 million under LHWCA. As the number of injured railroad workers who are permanently disabled declines, the estimated total compensation costs decline. Conversely, as the number of railroad workers who are permanently disabled increases, estimated compensation costs increase under the no-fault alternatives.

[2]Our compensation cost estimates are the value of the current and future compensation costs for actual and future wage loss, scheduled benefits, rehabilitation expenses, and death benefits that would be payable under a no-fault system for the injury claims closed in 1994 in then-year dollars. We used a 10-percent discount rate to calculate the present value of future FECA and LHWCA benefits payments. (See app. I for our results using different discount rates.) The cost of future health insurance premiums is included for permanent total disability claims.

Figure 2.1: Potential Injury Compensation Costs in 1994 for Four Large Railroads Under FELA and No-Fault Systems With FECA- and LHWCA-Level Benefits, Given Various Rates of Permanent Total Disability



Legend

PTD = permanent total disability

Note: A 10-percent discount rate is used to calculate the compensation costs. The four railroads are Burlington Northern, CSX, Norfolk Southern, and Union Pacific.

As figure 2.1 shows, the estimated compensation costs with FECA-level benefits would have been the same as they were under FELA if 65 percent of the workers who left the railroad after their FELA settlement were actually permanently and totally disabled. This break-even point would be 70 percent with LHWCA-level benefits because of the different benefit levels of FECA and LHWCA.[3]

[3]The degree of permanent disability among workers who leave the railroad likely ranges from low levels of partial disability to total disability, but the actual distribution of permanent disability is unknown. Various percentages of permanent total disability (100 percent disability) are used in figure 2.1 to illustrate the cost differences and break-even points between FELA, FECA, and LHWCA. The compensation costs for these percentages are the same as the costs for other possible permanent disability distributions; e.g., the cost for 50 percent of the workers who are 100-percent disabled approximates the cost for 100 percent of the workers who are 50-percent disabled. (See app. I for more details.)

No-Fault Compensation Systems Would Cost Less for Less Severely Injured Workers

According to our analysis, the four large railroads would have paid less for less severely injured workers under a no-fault system than they did under FELA. For those workers who did not leave the railroad but returned to work after their settlement, these four railroads paid $147 million under FELA. In contrast, we estimate they would have paid $50 million and $42 million under the provisions of FECA and LHWCA, respectively—about a $100 million difference. The benefits paid under both FECA and LHWCA would be limited to lost wages and possibly some scheduled benefits (for the loss of, or the loss of the use of, a body part), which are usually calculated as some number of weeks' wages. Because most economic losses were probably also compensated in the FELA settlement, the difference can likely be attributed to payments for noneconomic damages. Therefore, for those workers who return to work, moving to a no-fault system that does not include noneconomic damages would have saved these railroads about 20 percent of their total compensation costs.

Changes in the Overall Cost of Death Claims Are Difficult to Project but Are Probably Small

Changes in the cost of death claims as a result of replacing FELA with a no-fault system with FECA- or LHWCA-level benefits would likely be small. In 1994, the four large railroads in our analysis paid about $10 million in death benefits. Using the simulation model with a 10-percent discount rate, we estimate that these railroads would have paid about $11 million and $12 million, respectively, under a no-fault system with FECA- or LHWCA-level benefits.

Estimating the change in costs for death benefits is uncertain for two reasons. First, the railroads' data files we examined for our analysis did not identify clearly whether or not some death claims were work-related. Some of the death claims closed in 1994 for the four railroads involved heart attacks and resulted in no payment under FELA. Given this information, it is likely that these deaths were not work-related. However, so as not to underestimate the cost of death claims under the no-fault alternatives, we assumed that all of the death cases reported, whether compensated under FELA or not, were work-related, and we included their costs in our analysis. Second, all federal and state workers' compensation statutes authorize death benefits to the surviving spouse and dependents of an employee whose death results from a job-related injury or illness. Because the railroads do not necessarily need to record information on spouses and dependents for FELA settlements, we do not know the extent to which this missing information affected the estimates of the FECA and LHWCA death benefits. As a result, death benefits could also be underestimated in our analysis, especially for employees with relatively

young surviving spouses and/or dependents. Nevertheless, because death benefits are a relatively small portion of the total FELA costs, it is unlikely that the net effect of any over- or underestimates would significantly affect our estimate of total compensation payments.

Administrative Costs Under a No-Fault System Might Be Less Than Under FELA, but Costs for Rehabilitation Could Be Higher

Replacing FELA with a nationwide no-fault compensation system could reduce the railroads' administrative costs for handling claims. Currently, the large railroads generally handle all of the administrative tasks of negotiating and settling FELA injury claims, including processing claims, investigating injury claims, negotiating settlements, litigating claims, and making payments. Claims for medical benefits are processed within the railroads' overall employee health insurance programs. AAR estimates that railroads paid about $169 million in 1994 in administrative costs under FELA. Under the no-fault alternatives, administrative costs would likely be less because claims administration would be simplified. Railroad claims staff would be primarily concerned with determining how extensive and severe the injury is, whether the injury was job-related, and whether continuing impairment exists. They would not be involved in investigating negligence or negotiating the value of noneconomic losses. As a result, the administrative time and cost required per claim would likely be less than they are under FELA.

However, the costs for employee rehabilitation programs might increase under a no-fault system. Rehabilitation does not appear to receive much emphasis under FELA. Although rehabilitation expenses can be compensated under FELA, it appears that not many employees elect to undergo rehabilitation. According to an official from one railroad, most railroads offer rehabilitation programs to injured employees. However, he said that few employees take advantage of such programs, in part because doing so could jeopardize their FELA settlements. Rehabilitation plays a much larger role in no-fault compensation systems. As we recently reported, both federal and state workers' compensation programs emphasize returning employees to work with their original employer.[4] Under FECA, federal employees who refuse to cooperate in vocational rehabilitation programs or to make a good faith effort to be reemployed could potentially lose benefits. The impact on railroad costs of changing to a no-fault system that emphasizes rehabilitation is difficult to forecast. While the outlays for rehabilitation itself might be higher, overall compensation costs could be less if rehabilitation allows workers to return to work sooner.

[4]See GAO/GGD-96-76, p. 29.

Resolving Disputed Claims May Still Be Time-Consuming

In 1994, the average time from the date of an accident to the date of a settlement for three large railroads from which we obtained data on this issue—Conrail, Norfolk Southern, and Burlington Northern—ranged from about 7 to 10 months for direct settlements, 19 to 25 months for cases in which the claimant was represented by an attorney but there was no lawsuit, and 36 to 46 months for cases in which lawsuits were filed. The time it takes to process cases under FELA may not be that different from what it is under FECA and LHWCA when the claimant is represented by an attorney. Contested cases that went through all appeal levels averaged about 26 months to be decided under FECA and about 30 months under LHWCA. These periods do not include any additional time that might elapse between the time of the injury and the filing of an appeal or any additional time that might elapse if LHWCA cases go to court. Even if this additional time is short, the overall time taken to process contested FECA and LHWCA cases can be lengthy. The resolution of contested cases under state workers' compensation may also take a long time.

Resolution of Contested Cases Under FECA and LHWCA Might Be Similar to Resolution Under FELA

No-fault compensation systems were developed in part to provide injured workers with benefits in a timely manner. However, resolving contested cases under these systems can be lengthy. Although the Department of Labor noted that most FECA claims are approved for payment the first time they are presented—about 92 percent of all claims received in fiscal year 1994—claims can later be appealed.[5] On average, in fiscal year 1995, holding a hearing took about 10 months and obtaining an appeals board decision took about 16 months. Therefore, it could take, on average, about 26 months to resolve a FECA case that requires both a hearing and an appeals board decision. This period does not include any additional time that might elapse between the time of an injury and the time a case is contested or the time it takes to prepare an appeal. The time it takes to receive a decision from the Employees' Compensation Appeals Board has increased substantially over the last 6 years—from about 3 months in 1990 to almost 16 months in 1995. The Labor Department attributed this rise to an increase in the number of appeals and to loss of staff to process the appeals.

Resolving contested LHWCA cases can also take a long time. In fiscal year 1995, it took about 12 months, on average, to process an LHWCA case before an administrative law judge and about 18 months to process a case before

[5]According to a Labor Department official, FECA cases are appealed for a number of reasons, including dissatisfaction with the amount of benefits awarded and disputes over the degree of disability (e.g., permanent or temporary; partial or total).

the Benefits Review Board.[6] Therefore, it could take, on average, about 30 months to process an LHWCA case that is heard by both an administrative law judge and the Benefits Review Board. The time between when the injury occurs and when the case is contested is additional as is the time between the appeal processes. Over the past 5 years, the time taken to process cases at the Benefits Review Board has ranged from 15 months to 27 months; in fiscal year 1995, it averaged about 18 months.

Resolving Contested State Workers' Compensation Cases Can Be Slow

Resolving contested cases under state workers' compensation sometimes can be even slower than it is under FELA. For example, in 1994 in Illinois—a state with a large number of freight railroad workers—a contested case took, on average, about 45 months to be processed through the various levels of appeal at the Illinois Industrial Commission. Cases could then be appealed further to the state court system. According to data from the California Workers' Compensation Institute, a trade organization that collects data on California workers' compensation, in 1994 the percentage of litigated insurance claims open for at least 28 months had increased from 27 percent in 1993 to 38 percent in 1994.[7] However, not all states take a long time to resolve contested claims. For example, in 1994 contested cases took, on average, about 14 months to process in Nebraska.

Conclusions

From a financial perspective, railroads might or might not see their injury compensation costs reduced if FELA were replaced by a no-fault compensation system with FECA- or LHWCA-level benefits. The outcome would depend to a great degree on how many employees who leave the railroads after receiving their settlements would be physically able to resume working. However, without better information on these workers, it is difficult to conclude that the railroads would be better off financially under a no-fault system paying FECA- or LHWCA-level benefits. In evaluating any proposals for replacing the current FELA system, it will be important to obtain a better sense of the likely number of injured railroad workers who are physically able to return to work and those who would be permanently disabled.

[6]LHWCA cases may also be appealed to a U.S. Court of Appeals. We did not obtain information on how long this process may take.

[7]California Workers' Compensation Institute Bulletin, No. 95-3 (Mar. 14, 1995).

Modifying FELA Might Reduce Railroads' Costs but Could Adversely Affect Workers

As an alternative to replacing FELA with a no-fault compensation system, the Congress could modify FELA by adding certain restrictions. Such restrictions could include capping awards for noneconomic losses, limiting the fees received by plaintiffs' attorneys, requiring the use of arbitration to resolve disputes, or restricting where FELA suits can be filed. The Congress could also permit railroads and their employees to opt out of FELA into some other compensation arrangement.

While some of these modifications might reduce the railroads' FELA costs, they could also adversely affect some injured railroad workers by reducing the compensation they receive in a settlement or limiting the availability or the quality of their legal counsel. The Congress could allow workers to continue under the current FELA provisions through "grandfathering" and subject only newly hired employees to any or all modifications. However, the workers would then be under different rules or different systems, and workers with similar injuries would thus have different compensation benefits. In addition, permitting railroads and their employees to opt out of FELA might make disputes about collectively bargained injury compensation subject to the provisions of the Railway Labor Act, possibly leading to federal intervention to resolve these disputes.

Capping the Noneconomic Portion of FELA Awards Could Reduce Costs but Decrease Workers' Benefits

Over the past several years, the Congress has proposed capping awards for noneconomic damages in product liability litigation. Recently, the Congress has considered placing a $250,000 cap on noneconomic damages awarded in personal injury suits arising from accidents involving Amtrak.[1] A similar cap could be placed on the noneconomic portion of FELA awards. Because the railroads do not specifically identify the proportions of FELA awards that are for economic and noneconomic damages, we could not estimate precisely the impact of such a cap on FELA costs. However, using assumptions about the proportion of FELA awards that might be for noneconomic damages, we developed hypothetical estimates of the potential impact of a $250,000 cap on four large railroads' 1994 FELA costs. On the basis of the hypothetical distributions shown in table 3.1, the potential reduction in costs associated with these claims ranged from about $7 million to about $48 million.

[1]See Amtrak and Local Rail Revitalization Act of 1995 (S. 1318). As of June 1996, this bill had not been enacted.

Table 3.1: Potential Effect of $250,000 Cap on Noneconomic Damages for Claims Closed by Four Large Railroads in 1994

Dollars in millions

Percentage of payout for noneconomic damages	Number of claims potentially affected by cap	Hypothetical reduction in FELA costs associated with the cap
30	32	$ 6.7
40	68	13.2
50	107	22.0
60	179	33.4
70	255	48.1

Source: GAO's analysis of FELA claims data.

Although FELA could be modified to cap awards for noneconomic damages, such an action could reduce the benefits received by injured workers. Under the hypothetical distributions shown in table 3.1, the compensation received by an injured worker would be reduced dollar for dollar for any amounts over $250,000 that the worker would have received for noneconomic damages. The railroad labor organizations we contacted uniformly opposed a cap on noneconomic damages, believing it would adversely and unfairly affect their members. Several railroad labor organizations and plaintiff attorneys said a cap would allow railroads to avoid paying the full cost of injuries.

Limits Placed on Plaintiffs' Attorneys' Fees Could Benefit Railroads, but Impact on Workers Is Uncertain

In an effort to reduce FELA's costs, the Congress could place a cap on the amounts payable to plaintiffs' attorneys. Railroad labor organizations told us that attorneys representing injured workers generally receive no more than 25 percent of a FELA award. AAR estimates that in 1994, attorneys representing injured workers at large railroads received between $182 million and $240 million in fees.[2] Whether the railroads' FELA costs would decline as the result of a cap depends to a large extent on what cap was established and the relationship between a cap and a FELA settlement. The railroads' FELA costs could decline if a cap was set at less than the 25 percent that the plaintiffs' attorneys receive from a FELA award, assuming that a lower attorneys' fee would lead to a lower settlement amount. On the other hand, a cap on plaintiffs' attorneys' fees might have little impact on FELA costs if settlement amounts stay the same or increase as attorneys push for higher settlements to compensate for the lower percentage allocated to legal fees. A cap on what the plaintiffs' counsel

[2]This represents 25 to 33 percent of the total FELA payouts in 1994 in cases in which the worker was represented by an attorney ($727.8 million).

could receive might also benefit injured workers to the extent that lower legal fees might allow workers to keep a larger share of a settlement. Railroad officials with whom we spoke were split on the possible effects of a cap on costs, and some suggested that a sliding scale could be a better way to control legal fees. Under a sliding scale, the percentage of an award payable as attorneys' fees would either decline as the size of the award increases or increase if a case is settled quickly.

Other workers' compensation systems limit attorneys' fees. While FECA and LHWCA do not necessarily limit the amount of an attorney's fee, they do require that such a fee be approved before being paid and that the fee be reasonable. In particular, FECA requires that approval of attorneys' fees be based on the actual necessary work performed. In making this determination, such factors as the complexity of a claim and the amount of time spent actually developing and presenting the claim are assessed. State workers' compensation systems also limit attorneys' fees. In four of the five state workers' compensation systems we reviewed—in the states that employed the most railroad workers in 1995—attorneys' fees are in some way limited.[3] In general, attorneys' fees in these four states are limited to between 9 and 25 percent of a worker's compensation award. In Texas, attorneys' fees are limited to no more than $150 per hour, and guidelines are used to determine how many hours can be billed and for what types of services. The total fees are not to exceed 25 percent of a benefit award.

Although limits on the fees received by the plaintiffs' counsel might have financial benefits to railroads and injured workers, such limits could affect the availability and/or quality of the workers' legal representation. This appears to have happened in some state workers' compensation systems. For example, Texas revamped its state workers' compensation program in 1991 and set limits on attorneys' fees. In April 1995, the Workers' Compensation Research Institute reported that initial indications were that the limits placed by Texas on the fees for plaintiffs' attorneys had caused a number of attorneys who previously had practiced workers' compensation law to leave the field.[4] The institute's report concluded that at a minimum, it was more difficult for claimants with low-value claims to find attorneys to handle their cases. The institute noted similar problems in California, reporting in December 1992 that California's typical 9- to

[3]Attorneys' fees are in some way limited in California, Illinois, Pennsylvania, and Texas. In general, Nebraska does not limit attorneys' fees.

[4]P. Barth and S. Eccleston, Revisiting Workers' Compensation in Texas, Administrative Inventory, Workers' Compensation Research Institute, WC-95-1 (Apr. 1995).

12-percent limit on attorneys' fees may have contributed to the devolution of work to paralegals and to the refusal by some attorneys of cases that were more complicated and time-consuming.[5]

Arbitration Offers Time and Cost Benefits but May Be Difficult to Adapt to FELA

Arbitration is a mechanism typically used in contract and other commercial disputes to resolve issues quickly and at low cost.[6] The Congress could modify FELA to require that compensation disputes be arbitrated before being tried in a court of law. As we reported in July 1995,[7] arbitration and other approaches to resolve disputes are being used to avoid the time and cost of litigation and to minimize the adversarial relationship between employers and employees resulting from disputes. The court system has also looked to arbitration and other approaches to resolve disputes quickly and to reduce backlogs in court dockets.

The use of arbitration to resolve workplace injury cases has varied. It does not appear to be widely used in the rail industry. Information from the Federal Judicial Center indicates that for 1990-95, of the approximately 6,600 cases identified as FELA cases in the 18 federal district courts with mandatory or voluntary arbitration programs, about 11 percent (710 cases) were successfully closed as a result of arbitration.[8] The remaining cases either went on to trial or were resolved in some other manner. In all of the courts, arbitration was nonbinding, and a trial could be requested following an arbitration decision. In October 1993, the National Center for State Courts reported that over half of the states had experimented with arbitration programs associated with courts since they were introduced in 1952.[9] However, no information was available on the arbitration of FELA cases at the state level. According to the center, the characteristics of state arbitration programs varied, but typically, arbitration was based on the amount of money at stake—frequently $50,000 or less. Finally, three of the

[5]P. Barth and C. Telles, Workers' Compensation in California, Administrative Inventory, Workers' Compensation Research Institute, WC-92-8 (Dec. 1992).

[6]In arbitration, a third party receives and reviews evidence, hears arguments, and renders a decision, which may, upon prior agreement, be binding.

[7]Employment Discrimination: Most Private-Sector Employers Use Alternative Dispute Resolution (GAO/HEHS-95-150, July 5, 1995).

[8]Not all of the 6,600 cases may have been FELA cases. According to the Federal Judicial Center, the code used to identify FELA cases may also have included some workers' compensation cases and some other types of cases. An additional 266 FELA cases in the 18 federal district courts were not arbitrated because they met the requirements for exemption from the program.

[9]For information on the use of arbitration in state courts, see National Symposium on Court-Connected Dispute Resolution Research, A Report on Current Research Findings—Implications for Courts and Future Research Needs, National Center for State Courts and State Justice Institute (1994).

five state workers' compensation programs we reviewed—in California, Illinois, and Texas—had arbitration programs. The success of these programs appears to be limited. For example, in 1994 over 50 percent of Illinois' arbitration decisions were appealed, and in Texas no arbitration hearings were held.

Although arbitration has the potential for saving time and costs, it may be difficult to adapt to a system like FELA. Railroad officials and their attorneys agreed that so far, arbitration has not been very effective in resolving FELA cases. One railroad official told us that arbitration is not useful when a serious disagreement exists between the parties, such as a dispute about negligence. The National Association of Railroad Trial Counsel commented that without fundamental change to FELA itself, arbitration would merely transfer FELA's negative aspects to an arbitration setting. Some attorneys representing injured workers also do not support arbitration in FELA cases. In their view, for arbitration to be successful, the parties must be able to agree on liability. The larger the gap between the two sides on this and other issues, the more likely it is that a case will proceed to trial and a jury verdict.

The Congress Could Limit Where FELA Suits Can Be Filed, but Effects Are Uncertain

FELA gives plaintiffs the right to bring cases in either a federal or state court. Railroad management frequently complains that FELA permits injured workers and their attorneys to file suit in localities where judges and juries are favorable to plaintiffs. According to the railroads, these jurisdictions are often far from the scene of an accident where the injury occurred.[10] The Congress could modify FELA to limit the places where lawsuits can be filed. The monetary impact of changing the venue rules is hard to forecast because we do not have data comparing awards in similar FELA cases in different jurisdictions. Any potential benefit to the railroads must be weighed against taking away injured workers' right to choose a state court that they believe is the best place for the case to be heard as well as the states' overriding decisions about who can bring cases in their courts.

Jurisdictional Rules Provide Plaintiffs With Choice of Venue

Although FELA gives plaintiffs the right to bring a suit in either a state or a federal court, plaintiffs are still limited to bringing cases in courts that have jurisdiction to hear the case. Jurisdiction over a defendant in state court is limited by the Fourteenth Amendment to the Constitution to those

[10]This discussion focuses on state venue rules, since we heard few complaints of the practice of seeking a favorable venue at the federal level.

instances in which the defendant has at least "minimal contacts with the state." This restriction protects defendants from being sued in a state with which they have no relationship. The rule for determining whether states have jurisdiction is broad and flexible.[11] Suits may generally be brought against companies where they regularly do business.

In addition to the constitutional restrictions, venue laws in the 10 states whose venue statutes we reviewed generally restricted suits to the jurisdiction where the claim arose, where the defendant does business, or where the plaintiff resides.[12] While these laws do not leave plaintiffs free to file in any court they wish, plaintiffs generally have the latitude to choose a locality that they believe will provide them with the best outcome.

Finally, bringing suit in a court with jurisdiction to hear the case does not necessarily obligate the court to hear the case. Many states have adopted the doctrine of forum non conveniens, which permits courts to dismiss a case when it "is a seriously inconvenient forum for the trial of the action provided a more appropriate forum is available to the plaintiff."[13] Such a dismissal is left to the trial judge's discretion and will only be overturned on appeal for abuse of that discretion.

The Congress Could Restrict State Venue, but Cost Impact Is Uncertain

The Congress could restrict the venue in which FELA cases can be heard within a state. Proponents of such a change believe that doing so would reduce the railroads' FELA costs and alleviate inconveniences caused by cases being filed far from where the injury occurred. Opponents believe that restricting where suits can be filed would hinder railroad workers' access to adequate compensation and could be inconvenient for workers who travel for their jobs and are injured away from home.

The cost impact of restricting venue at the state level is uncertain. We did not analyze individual FELA cases, so we are unable to estimate the potential cost savings, if any, of restricting venue. In addition, venue alone does not determine the size of FELA awards. Other factors also play a role,

[11]International Shoe v. Washington, 326 U.S. 310 (1945).

[12]We reviewed the venue rules in 10 states: California, Georgia, Illinois, Kansas, Missouri, Nebraska, Ohio, Pennsylvania, Texas, and Virginia. Freight railroad employment in these states represents about 51 percent of total rail employment (95,474 employees out of 187,945 employees).

[13]Restatement (Second) of Conflict of Laws, Sec. 84 (1971). Only Georgia and Texas do not apply the doctrine of forum non conveniens; the latter does not apply the doctrine for FELA cases only.

such as the comparative negligence of injured workers and the merit of the arguments in individual cases.

Opting Out of FELA May Have Unintended Consequences for Railroads and Labor

Another modification that the Congress could make is to permit railroads and their employees to elect to opt out of FELA. That is, the Congress could allow the railroads and their employees to decide for themselves, through collective bargaining, what workers' compensation arrangement they prefer. FELA would have to be amended to allow for such agreements. While the option to opt out would give both parties more freedom in arriving at a mutually advantageous solution, making injury compensation part of the overall collective bargaining agreement may have the added consequence of bringing disputes over injury compensation under the Railway Labor Act. Also, for railroads without unions, as is typical with many small railroads, the possibility arises that workers at some railroads could be covered by different compensation systems, increasing the railroads' administrative costs and giving employees with similar injuries different compensation opportunities. This situation could negatively affect employees' morale. Finally, opting out would require changes in either federal or state laws to ensure that injured rail workers are covered by a workers' compensation program in the absence of FELA.

Collectively Bargained Injury Compensation Might Increase Federal Involvement in Resolving Disputes

If FELA is made a matter for collective bargaining, federal involvement in the railroad industry might increase. In particular, disputes about the selection of an injury compensation system during contract negotiations could come under the Railway Labor Act. This act governs labor-management relations in the railroad industry and is designed to reduce the likelihood of strikes. The Railway Labor Act does so by mandating a lengthy contract negotiation process and by using federal agencies, such as the National Mediation Board, when necessary, to mediate disputes.[14] If a dispute is not resolved, the President may convene an emergency board to propose recommendations. If a dispute threatens interstate commerce, the Congress may impose emergency board recommendations or other conditions on both railroads and unions. Unless disputes about injury compensation are specifically excluded from the Railway Labor Act, such mechanisms could be triggered, and the federal government could be directly involved with any subsequent settlement of such disputes.

[14]For more information on the Railway Labor Act, see Railroad Competitiveness: Federal Laws and Policies Affect Railroad Competitiveness (GAO/RCED-92-16, Nov. 5, 1991).

Allowing Opting Out Might Cause Problems at Nonunion Railroads

Allowing railroads to opt out in a nonunion environment could also raise the issue of injury compensation coverage. There are two aspects to this issue. One is partial coverage of a workforce. Some state workers' compensation programs do not allow partial coverage of a workforce. Instead, all privately employed individuals must be covered unless certain numerical thresholds are met, employees fall into an excepted group, or a waiver is granted.[15] The second issue is potential exemption from coverage. In January 1995, the Department of Labor reported that 15 states allowed exemptions from their workers' compensation programs if employers had fewer than a threshold number of workers or met other conditions.[16] While the requirements varied, in general, exemptions could be granted for employers with less than three to five employees.[17] Our survey of the small railroads found that 116 railroads (about 30 percent of the 398 respondents) employed five or fewer employees.[18]

Allowing Railroads to Opt Out Would Require Changes in Federal and State Laws

The opting-out alternative would necessitate changes in federal law. Not only would FELA have to be amended, but legislation might be required to provide for alternative coverage. For example, FECA and LHWCA could be modified to cover all railroad workers currently subject to FELA. FECA currently covers employees of the Alaska Railroad who incurred any injuries or illnesses before the railroad was transferred to the state of Alaska in 1985. FECA also covers those railroad workers who are federal civilian employees. LHWCA also covers those workers who work for a railroad but who are engaged in maritime activities, such as loading and unloading vessels. In assessing this option, the Congress would need to consider the extent to which the federal government would be responsible for handling and/or adjudicating railroad workers' claims for benefits and the potential impact on federal agencies' budgets and operations from assuming these responsibilities.

Allowing railroads to opt out of FELA might also require changes in state law. FELA currently preempts state law in the coverage of work-related injury compensation of railroad workers. However, in our review of state workers' compensation law in the 10 states with the most railroad

[15]Some state workers' compensation programs exempt railroad workers, some farm and casual workers, and/or state and local government employees.

[16]State Workers' Compensation Laws, U.S. Department of Labor, Employment Standards Administration, Office of Workers' Compensation Programs (Jan. 1995).

[17]Some states also allowed exemptions if certain financial or payroll conditions were met.

[18]It should be noted that if an employer elects not to be covered, then the employer may be subject to lawsuits by employees under the states' general employer liability laws.

workers, we found that some railroad workers might not be covered if the railroads opt out of FELA and changes are not made in state law. For example, in 3 of the 10 states—Georgia, Nebraska, and Virginia—interstate railroad workers are specifically excepted from state workers' compensation programs. Railroad workers also might not be covered in Texas if a railroad elects not to be covered by state workers' compensation. Coverage of railroad workers in the other six states was less clear and could depend on a number of factors, including legal interpretations about the extent to which states have the power to regulate businesses engaged in interstate commerce.

The Congress Could "Grandfather" the Current Workforce Under FELA

The Congress could elect not to subject the current railroad workers to any one or all of the proposed modifications to FELA. In fact, if the Congress chose to replace FELA with a nationwide no-fault system or allow the railroads to come under state workers' compensation systems, it still could choose to allow existing employees to remain under the current FELA system. Such "grandfathering," however, may have problems. First, the railroads might have to handle injury claims under two systems or under two sets of rules and restrictions, likely adding to costs rather than reducing them. Second, two railroad workers suffering from the same injuries might have access to different types and levels of compensation. Although grandfathering might assuage opposition to replacing or modifying FELA, doing so might create significant problems.

Conclusions

Decisions about modifying FELA are complex and must be viewed in several ways. From the railroads' perspective, there may be opportunities to reduce costs. For example, capping the noneconomic portion of FELA awards and attorneys' fees might act to reduce the railroads' costs, depending on the portion of FELA settlements represented by noneconomic damages and the relationship between attorneys' fees and settlements. Similarly, restricting where FELA suits can be filed might reduce costs, depending on how many suits continue to be filed in jurisdictions perceived as being favorable to plaintiffs. From the injured workers' perspective, however, the issues are different. Modifying FELA could reduce the amount of compensation they receive or limit the availability of legal counsel. There are other complexities as well, such as whether arbitration would actually save time and money if applied to a compensation system that involves issues of negligence like FELA, how opting out could change the character of injury compensation for railroads

and their workers, and whether opting out could lead to federal involvement in resolving disputes about compensation.

If the Congress decides that it wants to modify FELA, it will need to take into account the possible consequences of some of the proposed changes. For example, permitting current employees to remain under FELA while new employees are under a new system could create tension in the workplace.

FELA Is Less Expensive for Passenger and Small Freight Railroads

FELA applies to employees of nearly all railroads regardless of size or type of service provided. We surveyed the small freight railroads to determine, among other things, the impact of FELA on overall operating costs.[1] We also collected information from passenger railroads—commuter railroads and Amtrak—on their experience with FELA in 1994. Our survey found that small freight railroads experienced lower FELA costs than the large freight railroads. In part, small freight railroads have lower costs because, on average, fewer workdays are lost per on-the-job injury and they have a lower percentage of injuries that result in lost-work time. In general, data obtained on passenger railroads showed similar results. Like the large freight and passenger railroads, the small freight carriers purchase insurance to protect against large FELA payouts and other liabilities. Most large railroads have high deductibles and are considered self-insured for FELA purposes.

FELA Costs Were Less for Passenger and Small Freight Railroads

In 1994, the passenger and small freight railroads experienced lower FELA compensation costs than the large freight railroads. As shown in table 4.1, the passenger carriers paid about $83.7 million, or $0.96 per hour worked, while the small freight carriers paid about $42 million in compensation costs, or $0.96 per hour worked. In contrast, the large railroads paid $2.26 per hour worked—more than twice what the passenger and small freight railroads paid.

[1]For the purposes of our analysis, small freight railroads include (1) regional railroads, which are line-haul railroads operating over 350 or more miles of road and/or earning annual revenues of at least $40 million but less than the thresholds for Class I railroads; (2) local railroads, which are line-haul railroads falling below the criteria for regional operations; and (3) switching and terminal railroads, which primarily perform switching services in a terminal area. The passenger railroads include Amtrak, which provides the public with intercity passenger services, and commuter railroads, which provide the public with local and regional passenger services usually between a central city and its suburbs.

Table 4.1: Summary of 1994 FELA Compensation Costs by Type of Railroad

Type of railroad	Claims and suits settled	Claims and suits per 100 employees	Payout for claims and suits	Average cost per employee	Average cost per employee-hour worked
Large freight railroads	21,478	11	$896,706,801	$4,756	$2.26
Small freight railroads	1,284	6	42,043,569	1,966	0.96
Passenger railroads	4,370	10	83,715,524	1,911	0.96

Note: Payouts include amounts paid by insurance companies.

Source: GAO's survey and data from AAR and the passenger railroads.

The cost differences may be traced, in part, to two factors: (1) the average number of lost workdays and (2) the wage rate. Data on injuries from the Federal Railroad Administration showed that the passenger and small freight railroads generally average fewer lost workdays per injury than the large freight carriers. For example, in 1994, the average number of lost workdays per injury for both the small freight railroads and the passenger carriers was less than half that of the large railroads—30 days each compared with 77 days. Also, the proportion of injuries that resulted in lost workdays was lower at the small freight railroads than it was at the large freight carriers and passenger railroads. In 1994, only 54 percent of the injuries at the small freight railroads resulted in lost workdays, compared with 67 percent at the large carriers and 75 percent at passenger railroads. We did not attempt to analyze the reasons for these differences. At the same time, average wages and salaries were more than 20 percent higher at the large railroads—$46,714 compared with $38,730 at the small railroads that responded to our survey—resulting in higher compensation for lost wages per day lost. Average wages and salaries at passenger railroads were even lower—$36,690.

Adding the administrative and legal expenses for FELA increased the passenger and small freight railroads' costs by about 21 percent and 41 percent, respectively. As shown in table 4.2, the small freight carriers paid about $17 million in administrative and legal costs, or $0.39 per hour worked. In contrast, the passenger carriers paid $0.21 per hour worked, and the large freight railroads paid about $0.34 per hour worked for these expenses—about 46 and 13 percent less than the small freight railroads, respectively. In part, this is because of certain economies of scale in processing claims. The passenger and large railroads might have in-house counsel, for example.

Table 4.2: Summary of 1994 FELA Administrative and Legal Costs by Type of Railroad

Type of railroad	Administrative and legal costs	Average cost per employee	Average cost per employee-hour worked
Large freight railroads	$136,089,284	$722	$0.34
Small freight railroads	17,080,437	799	0.39
Passenger railroads	17,183,687	425	0.21

Source: GAO's survey and data from AAR and the passenger railroads.

FELA Costs Were Not the Same for All Small Railroads

Although the small railroads experienced lower overall FELA costs than the large railroads, the costs were not the same for all types of small railroads. For example, in 1994, the switching and terminal railroads experienced significantly higher compensation costs under FELA than the regional and local carriers. As shown in table 4.3, these railroads paid about $1.30 per hour worked, or almost 67 percent more in such costs than the regional carriers and 41 percent more than the local carriers.

Table 4.3: Summary of 1994 FELA Compensation Costs by Type of Small Freight Railroad

Type of small freight railroad	Claims and suits settled	Claims and suits per 100 employees	Payout for claims and suits	Average cost per employee	Average cost per employee-hour worked
Switching and terminal railroads	475	7	$16,508,941	$2,556	$1.30
Regional railroads	523	5	16,804,827	1,644	0.78
Local railroads	286	6	8,729,801	1,857	0.92

Source: GAO's survey.

The higher compensation costs experienced by the switching and terminal railroads may be attributable to at least three factors, including the nature of the work these railroads perform, the degree of union representation, and the average level of wages. First, switching and terminal railroads, by definition, perform switching services in terminal areas; therefore, their employees are exposed to potentially dangerous activities connected with moving and placing freight cars and locomotives. Second, according to our

survey, in 1994, the switching and terminal railroads had more employees represented by labor unions than the regional and local railroads—74 percent of employees compared with 61 percent and 33 percent of employees at the regional and local railroads, respectively. Those switching and terminal railroads that were unionized had higher annual FELA compensation costs than the nonunion switching and terminal companies—$2,858 per employee compared with $874 per employee. Finally, in 1994, the switching and terminal railroads paid average annual wages that were comparable to those of the regional carriers and higher than those of the local railroads—$40,707 compared with $40,204 and $32,806 at the regional and local railroads, respectively.

Switching and terminal railroads also experienced the highest administrative and legal costs. As shown in table 4.4, these railroads paid almost $9 million in administrative and legal costs, or $0.71 per hour worked. In contrast, regional railroads paid $0.24 per hour worked, while local railroads paid $0.31 per hour worked. The switching and terminal railroads' legal costs alone amounted to $7.4 million—about three times the legal costs of either the regional or local carriers. Two factors that may have contributed to this result are the number of cases in which an employee filed a lawsuit and the number of cases in which the railroads hired outside defense attorneys. In 1994, 32 percent of the switching and terminal railroads' FELA cases involved a lawsuit, compared with 23 percent at regional railroads and 13 percent at local railroads. This situation may have necessitated the need for outside defense attorneys. In 1994, the switching and terminal railroads settled 41 percent of their cases with the assistance of outside defense attorneys, compared with 29 percent at the regional railroads and 20 percent at the local railroads.

Table 4.4: Summary of 1994 FELA Administrative and Legal Costs by Type of Small Freight Railroad

Type of small freight railroad	Administrative and legal costs	Average cost per employee	Average cost per employee-hour worked
Switching and terminal	$8,966,643	$1,388	$0.71
Local	2,923,925	622	0.31
Regional	5,189,869	508	0.24

Source: GAO's survey.

Small Railroads Rely on Insurance to Protect Against Large FELA Awards

The availability of insurance to cover a large FELA award is critical to a small railroad because a large FELA award has the potential to severely affect the railroad's financial health. Although liability insurance that includes FELA coverage has not always been readily available and affordable, it appears that it currently is. At the time of our review, most small railroads had liability insurance that included coverage for FELA payouts.

Insurance Is Critical for Protection Against Large FELA Awards

Like the large freight and passenger railroads, most small railroads purchase insurance to protect against large FELA payouts and other liabilities.[2] Fifty percent of the small railroads that responded to our survey had fewer than 13 employees and payrolls under $400,000. Seventy-eight percent had annual operating revenues of less than $5 million. A large FELA award, if paid entirely out-of-pocket, could threaten these railroads' survival. To reduce the impact of large FELA awards, these railroads purchase insurance from private companies.

The results of our survey showed the critical role that insurance plays in protecting the small railroads against large FELA awards. Almost 88 percent of the small railroads had some form of insurance, typically railroad liability insurance that included FELA coverage, and 68 percent of these policies had deductibles that ranged from $25,000 to $100,000 per claim. In the event of a large FELA award, a railroad with liability coverage would be responsible for its deductible.

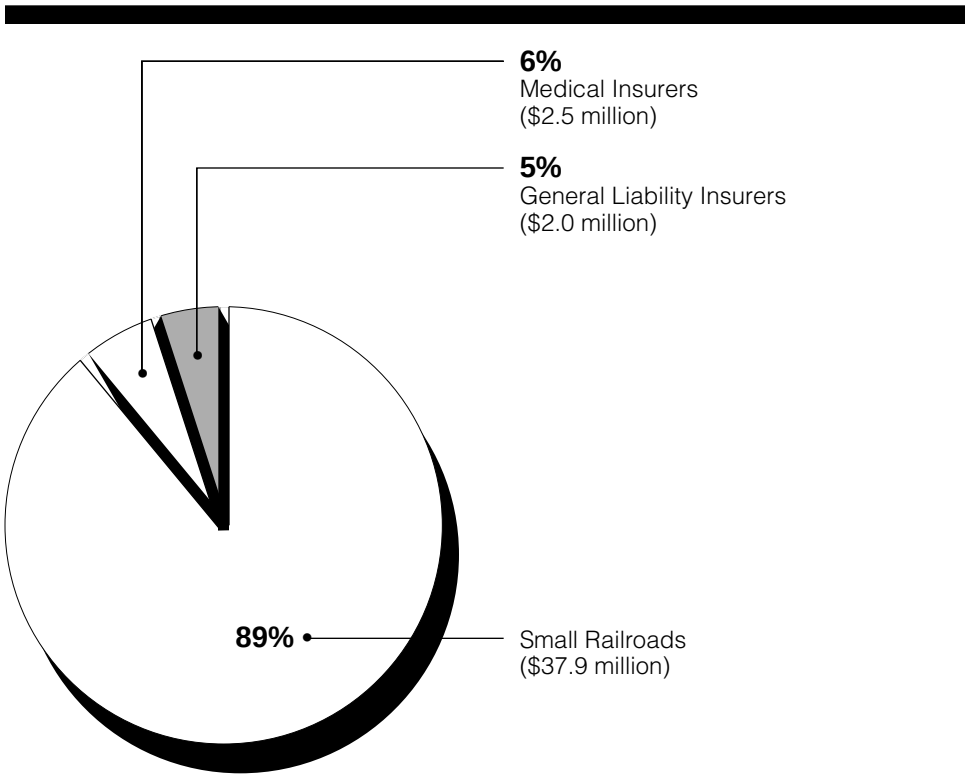
Only about 12 percent of the railroads that responded to our survey reported that they were self-insured. Railroads can self-insure if it is cost-effective to do so. For example, some railroads choose to self-insure themselves because they have the resources to cover their potential liabilities. Similarly, a railroad with a history of only a few minor injuries per year could also choose to self-insure itself for FELA purposes, finding it cheaper than paying insurance costs. Our review of the accident and injury histories of the self-insured railroads that responded to our survey showed that about 25 percent of these railroads had no work-related injuries from 1990 through 1994. An additional 25 percent had five or fewer injuries during this period.

[2]Although the large freight and passenger railroads are generally considered to be self-insured for injury compensation, many of these railroads maintain liability insurance that includes FELA coverage. However, the deductible levels are much higher than those for the small railroads. In 1994, the deductibles for large freight and passenger railroads that provided this information ranged from $2 million to $25 million.

Insurance Does Not Pay All FELA Costs

Although insurance protects the small railroads from paying out-of-pocket for large FELA awards, most FELA settlements are within the limits of the deductible. As shown in figure 4.1, on the basis of our survey results, we estimate that in 1994 the small railroads paid about 89 percent of the FELA compensation costs themselves. Liability insurance paid only about 5 percent of FELA costs, and medical insurers paid the remaining 6 percent. According to our survey, only 10 small railroads had FELA payouts that exceeded their deductible levels. These payouts accounted for $2 million and only 17 of the 1,284 cases settled in 1994.

Figure 4.1: Distribution of 1994 FELA Payouts for the Small Railroads



Source: GAO's survey.

To cover employees' medical expenses, the small railroads either pay the costs directly or, like some large freight railroads, obtain special health

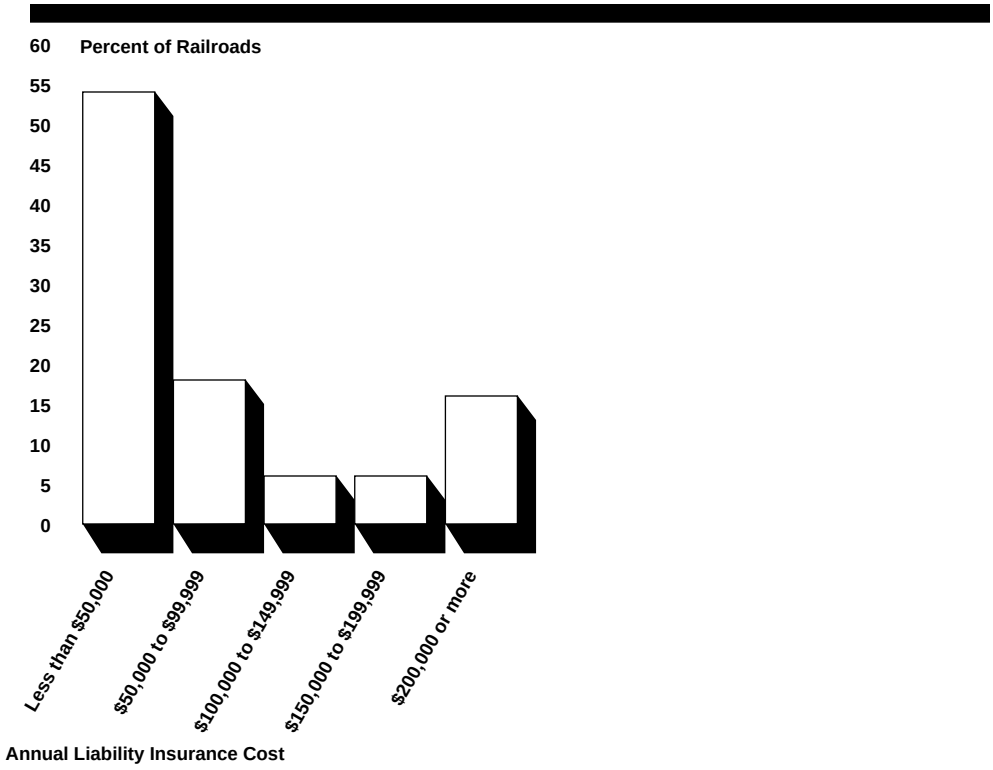
insurance. A special health plan provides for 24-hour coverage of both work-related and off-duty injuries and illnesses. Our survey showed that in 1994, about two-thirds of the small railroads purchased some form of health insurance to cover injured employees' medical costs.

Insurance Is Currently Available and Affordable

FELA insurance has not always been affordable for the small railroads. In the late 1980s, only one domestic company provided small railroads with insurance that included FELA coverage, and according to one insurance company official, premiums were double what they are today. As a result, the small railroads either paid costly insurance premiums or assumed the risk of these liability costs themselves. We identified eight companies that as of August 1995, provided small railroads with liability insurance that included FELA coverage. Because of the increased competition, premiums have declined over the past 5 years. Insurance industry officials estimated that in 1995, small railroads' annual premiums for liability insurance with FELA coverage generally ranged from $25,000 to $50,000. One official described an average policy as costing $50,000 for $5 million in coverage with a deductible of $50,000 per claim.

Our survey results for the small freight railroads generally support the estimates of the insurance providers. Of the 264 railroads that provided us with information on their insurance costs, 54 percent paid less than $50,000 for a liability policy that included FELA coverage. Most of these railroads' deductible levels ranged from $25,000 to $100,000, and just over half of the railroads had annual premium costs that were 10 percent or less of their payroll. Many of the railroads with annual premiums of $200,000 or more had more employees and higher payrolls. The cost of premiums for half of these latter railroads was also in the 10-percent-of-payroll-or-less range.

Figure 4.2: Liability Insurance Costs Paid by the Small Freight Railroads in 1994



Source: GAO's survey.

Insurance Purchasing Groups Are Not Widely Used

A small railroad could reduce its liability insurance costs by pooling its resources with other small railroads and obtaining a group policy. Such purchasing groups were authorized for FELA purposes by the Liability Risk Retention Act of 1986. A purchasing group would spread all or any portion of its members' liability exposure and costs. While 10 percent of the railroads in our survey reported that they were part of purchasing groups, upon further review, we found that most of these railroads were technically not in such groups. Rather, these railroads were subsidiaries of railroad management companies and other entities that owned more than one railroad and had group insurance for their railroads. Like a purchasing group, this arrangement serves to spread the railroads' liability exposure and costs.

Most of the railroads that responded to our survey reported very little interest in participating in a purchasing group, and only 16 percent

indicated that they had ever seriously considered entering into such an arrangement. For the railroads that had not considered a purchasing group, the most common reason given was that no other railroad had suggested it. Another leading reason was that these railroads did not want to depend on the safety records of other railroads in the underwriting process.

Conclusion

FELA does not appear to be any more burdensome for passenger and small freight railroads than it is for the large freight railroads. Our review suggests that compared with the large freight railroads, passenger and small freight railroads are less burdened by FELA and that they currently can insure against catastrophic losses. Therefore, we found no reason, at least on the basis of financial considerations, that these railroads need to be treated differently in any deliberations about whether to either modify FELA or replace it with a no-fault compensation system.

Methodology for Estimating Cost Differences Between FELA, FECA, and LHWCA

The model used in this analysis was developed for the Association of American Railroads (AAR) by Mercer Management, Inc. It is designed to estimate the benefits that injured railroad workers might have received if their injury compensation had been provided under a no-fault compensation system rather than under the Federal Employers' Liability Act (FELA).

If the railroads' files divided information on injury compensation settlements into amounts for each type of loss suffered as a result of an injury (i.e., economic compared with noneconomic losses), comparing FELA payouts with those likely under alternative no-fault systems would be straightforward. Those damages that are not compensable under the no-fault alternatives, such as awards for pain and suffering, would be deleted. Damages that are compensated at different levels would be adjusted, and damages that are not compensated under FELA but are compensated under no-fault alternatives would be added. However, because the railroads do not separate the compensation settlements by the various types of damages, estimating payments under the alternative systems involves estimating the benefits that workers would receive under the alternatives, summing those benefits, and comparing them with the lump-sum settlement that the workers actually received under FELA.

We made some modifications to the model to account for changes in the data supplied by the railroads and to adapt the model to the alternative no-fault systems that we chose to analyze.

Data were supplied by the Burlington Northern, CSX Transportation, Norfolk Southern, and Union Pacific railroads. These four railroads are the same ones that participated in the Mercer Management, Inc., study for AAR, and the model is designed to use the data from these railroads. While only four railroads are used in the estimates, these railroads represent about 60 percent of the employees of Class I railroads.[1] The data supplied are for all 10,158 injury claims closed in 1994 for these four railroads.[2]

We looked at the effect on the railroads' injury compensation costs of adopting a uniform benefit plan that would apply to all workers. We considered two alternatives whose level and structure of benefits were derived from the two existing nationwide no-fault insurance systems that are administered by the federal government. The Federal Employees'

[1]Class I is a designation used by the former Interstate Commerce Commission. In 1994, railroads with revenues of at least $255.9 million were designated as Class I railroads.

[2]We had sufficient data to analyze 10,153 of these claims.

Compensation Act (FECA) defines the compensation system that applies to civilian employees of the federal government, and the Longshore and Harbor Workers' Compensation Act (LHWCA) defines the system that applies to workers employed in the maritime industry.

FECA benefit levels are higher than those under LHWCA, but both systems authorize higher benefits than are generally paid under state workers' compensation systems. If the railroads shifted to state workers' compensation systems, their injury compensation costs would likely be lower than the estimates presented here, as would the benefits received by injured workers.

In this appendix, we describe the structure of the model, the benefits paid under the two alternative systems used in our analysis, the assumptions we made about inflation and various discount rates, and the effect of different assumptions about permanent disability. Finally, we present the results of the model.

Structure of the Model

The Mercer Management model incorporates a main computation model and four small mapping programs. The mapping programs translate the unique data sets of each of the four railroads into a consistent set of inputs for the computation model. The computation model estimates the benefits that a worker would have received under an alternative system by running the claim through a number of modules, each of which computes one of the benefits.

Mapping Programs

The mapping programs translate the data into consistent forms, construct new variables, and estimate missing data. Each railroad tracks information on an employee and the circumstances of an on-the-job injury in its own way. However, the computation model requires that all of the variables used to estimate a benefit be consistent. The primary purpose of the mapping programs is to translate the railroad-unique data into variables that can be used in the computations. Because some railroads do not track all of the data that are required to estimate a benefit, the mapping programs also construct variables (from available data) and supply data for missing variables.

We modified the mapping programs supplied by Mercer Management to reflect changes made by the railroads to their claims files since the model was developed and to provide the specific variables required for

estimating the benefits of FECA and LHWCA. The only additional significant change was our substitution of different wage variables for those used in the original program for missing wage data. For two of the railroads, CSX and Burlington Northern, we used the median wage of injured workers in the year of the claimant's accident from the other railroad in their region (Norfolk Southern for CSX in the East and Union Pacific for Burlington Northern in the West).

Computation Model

The computation model runs each claim through modules that estimate the benefits for current and future wage loss, scheduled benefits, vocational rehabilitation expenses, health insurance premiums (for totally disabled employees), and death benefits, when appropriate. Parameter values that reflect the benefits of the compensation system being estimated must be entered. Medical expenses were not estimated because it is assumed that coverage for medical expenses related to workplace injury (including medical rehabilitation) would continue to be provided as it is now through the railroads' health plan if the railroads adopted a uniform, nationwide no-fault compensation system.[3]

The model produces estimates for each injury claim on the basis of the severity of the injury. For those workers with temporary and permanent partial disabilities who return to work, the model calculates actual wage loss and any scheduled benefits. For those workers who do not return to work, the model estimates actual wage loss, rehabilitation expenses, future wage loss, and future medical premiums. For deaths, the model calculates funeral and survivors' benefits.

The model permits the user to select values for key parameters in the estimates. These include wage compensation rates, the scheduled benefit structure, rehabilitation expenses, health insurance premium benefits, death benefits, inflation rates, the discount rate, and the percentage of permanently totally disabled workers who are unable to return to any employment.

[3]This assumption is based on evidence considered in the National Research Council's 1994 FELA study that indicated that the railroads' current medical costs for injuries may be lower than those of typical no-fault workers' compensation systems. Consequently, if railroads were to join state workers' compensation systems, the medical cost component of their injury compensation costs would likely rise, particularly if medical self-insurance were not permitted. Railroads currently pay 100 percent of the medical costs for work-related injuries. Both FECA and LHWCA also require 100-percent coverage by the employer.

Benefits Paid Under FECA and LHWCA Used in the Analysis

The principal benefits paid under the two alternative systems—and computed by the model—are wage loss, scheduled benefits, rehabilitation expenses, health insurance premiums for permanently totally disabled workers, and death benefits. The benefits of these two systems differ somewhat.

Wage Loss

Wage-loss compensation may be temporary or permanent, depending on the nature of the injury. Temporary disability extends from the time of injury until the employee returns to work. Permanent disability may occur if some lingering impairment from the injury reduces the injured worker's ability to work (permanent partial disability) or prevents any work at all (permanent total disability). The model estimates temporary total, permanent partial, and permanent total disability benefits, where applicable.

For FECA, 100 percent of the wages are paid for the first 45 days of lost work. After that time, either 66.7 percent or 75 percent of the wages are replaced, depending on the number of dependents. For LHWCA, the wage replacement rate is 66.7 percent for all lost time after a minimum period of 3 days for all employees. After 14 days, the first 3 days are also compensated. Under FECA, the employer pays the employee's full wage for the first 45 days of the wage loss due to injury in the workplace. Only if the disability continues past 45 days do the wage replacement and other provisions of FECA apply. At that time, a 3-day waiting period applies before wage replacement benefits begins. Those 3 days are compensable if the disability continues for 14 days or permanent impairment results from the injury.

Both FECA and LHWCA provide for permanent partial disability compensation only if the workers' wages are affected (except for scheduled benefits, which are discussed below). If the worker returns to work at a lower wage than before the injury, a portion of the difference between the new and old wage rates is provided as compensation. This compensation continues as long as the wage loss continues.

Permanent total disability compensation provides wage replacement benefits for those workers unable to return to any employment. Under both FECA and LHWCA, compensation continues as long as the total disability continues.

Under most no-fault systems, the wages paid for wage replacement are about two-thirds of the preinjury wages, are not taxable, and are subject to maximum and minimum amounts. The wage replacement rate is two-thirds of the weekly wages for workers covered by LHWCA and for employees with no dependents under FECA. For married employees or those with at least one dependent, the wage replacement rate is 75 percent under FECA. Under LHWCA, the minimum weekly payment is 50 percent of the national average weekly wage as determined annually by the Department of Labor. The maximum is 200 percent of the national average weekly wage. The minimum for FECA is 75 percent of the salary at the wage rate in the GS (general service) schedule for a GS-2, step 1, or 100 percent of actual pay, whichever is less. The maximum is 75 percent of the salary at the highest step of the wage rate at the GS-15 level.

Scheduled Benefits

The two federal compensation systems, as well as nearly all state workers' compensation systems, have a limited schedule of benefits for specific injuries in addition to compensation for lost wages. These benefits are for injuries that result in the loss of, or loss of the use of, various body parts including fingers, hands, arms, toes, feet, legs, sight in one or both eyes, hearing in one or both ears, and disfigurement.

The benefit schedules for FECA and LHWCA are the same, but because the wage caps and wage replacement rates of the two systems differ; the dollar amount received by an employee may differ as well. Compensation is based on a schedule that provides a certain number of weeks' pay for each injury, although scheduled payments are not made while temporary total disability payments are occurring under FECA. For example, the loss of a leg would entitle the injured worker to 288 weeks pay that is independent of any salary that the employee might also be earning after the injury.

Rehabilitation Expenses

For those employees with serious injuries who may not be able to return to their previous job, vocational rehabilitation is often available in an attempt to return the worker to some gainful employment. Both FECA and LHWCA provide vocational rehabilitation benefits for training and expenses. Rehabilitation expenses depend on the number of employees who receive vocational rehabilitation and the average cost per employee. It is assumed that all employees who did not return to work after their FELA settlement will go through rehabilitation. Those who are assumed to return to work in the model are assumed to have been successfully rehabilitated, and those

who are assumed to be permanently totally disabled are not successfully rehabilitated and therefore are not capable of returning to work.

Health Insurance Premiums for Permanently Totally Disabled Workers

Although permanently disabled workers receive wage replacement, they may or may not be eligible for continued health insurance premium subsidies from their employer. Under FECA, disabled federal employees receive the same health insurance premium subsidy that they received as employees. There is no requirement under LHWCA for firms to subsidize health insurance premiums, although firms may elect to provide injured employees with this benefit.

Death Benefits

Death benefits are typically paid to surviving spouses and dependents of workers who die from job-related injuries. Funeral expenses may also be provided. Both FECA and LHWCA provide survivors' and funeral benefits. Under FECA, the percentage of the deceased employee's wage that is paid to the survivors depends on the number of survivors. For example, a surviving spouse would receive 50 percent, and a spouse and two children would receive 75 percent—the maximum. FECA provides a funeral benefit of $800 and $200 for the administrative expenses for terminating the decedent's employment with the federal government. Under LHWCA, a single survivor receives 50 percent of the employee's wages; if there is more than one survivor, the amount is raised to two-thirds of the wages subject to the LHWCA maximum. The funeral benefit is $3,000.

Assumptions About Inflation

Inflation rates are used to estimate future changes in employees' wage rates, in the national average weekly wage, and in the cost of health insurance premiums. For estimating future wage increases, we used the long-term inflation rate for the consumer price index for urban consumers estimated by the Congressional Budget Office in its August 1995 budget update—3.2 percent. For the health insurance premiums, we used 6.5 percent as the inflation rate. This rate represents the recent trend in estimates of the annual increase in the cost of medical services.

Use of Various Discount Rates

Discount rates are used in the model to discount back to 1994 the estimated future stream of payments that injured employees would receive if they were paid under FECA and LHWCA. Under those systems, wage replacement occurs as it is incurred. Therefore, an employee who is permanently disabled would receive wage replacement extending a

number of years into the future. To compare these payments with the lump-sum settlements made to employees under FELA in 1994, the payments must be discounted back to 1994.

The choice of discount rates can significantly affect the outcome of the estimates, particularly when combined with the permanent disability rate that determines the estimated number of severely injured workers for whom benefits will be calculated. Therefore, we ran the model with three different discount rates: 8 percent, 10 percent, and 12.5 percent. These rates are nominal—not real—discount rates because future benefits have been inflated. These rates cover a range of possible discount rates around the 7-percent real rate used by the Office of Management and Budget for regulatory and benefit-cost analyses, which equates to a 10-percent nominal rate.

Effect of Assumptions About Permanent Disability

As part of their FELA lump-sum settlements, many injured workers do not return to work for their previous employer.[4] We assume that for some, the severity of their injuries may preclude their return to any work. Others may not be capable of returning to their previous job on the railroad, and still others may be capable of returning to work but choose to take their FELA settlement and attempt to find gainful employment in another industry. If all workers who did not return to work under FELA were so severely injured that they could not return to work under the no-fault alternatives, they could receive permanent total disability payments until their death. For lesser levels of permanent disability that result in only a partial loss of wage-earning capacity, workers would receive compensation for a proportion of this wage loss.

The actual distribution of permanent disability and the resulting loss of wage-earning capacity determines the compensation that must be estimated for this group of workers who left their railroad after settlement. However, the information on injuries reported in the railroads' files and used as the input in the model is insufficient to determine with certainty the severity of these employees' injuries. Because this distribution is unknown, assumptions about it must be made. A wide range of distributions is possible, each with a different number of workers at different levels of permanent disability ranging from 5- or 10-percent disability to a 100-percent disability (permanent total disability). Rather than estimating a large number of alternative distributions, various levels

[4]Of the 10,153 claims closed by the four large railroads, 1,327 claims involved workers who did not return to work after their settlement.

of permanent total disability were estimated; each level is equivalent in wage compensation cost to a large number of possible disability distributions.

Assuming that all these workers are not capable of returning to work would be an extreme assumption, and in the estimates reported, this is used as one extreme. The other extreme, in which all these workers are capable of returning to railroad employment, is also estimated, as are various intermediate points.

Model Results

The results of our estimations are presented in table I.1.[5] Besides the benefit levels of the no-fault system being estimated, the results depend primarily on the discount rate chosen and the unknown number of workers who are permanently disabled by their injuries. Table I.1 shows the total estimated payouts for the four large railroads that we examined for three discount rates and for a range of assumptions about the incidence of permanent total disability among the workers who did not return to railroad employment after receiving their FELA settlement. If all workers who did not return to the railroad were actually physically capable of returning to employment at their preinjury wage, then these railroads' costs might have been only about one-third what they paid under FELA in 1994. At the other extreme—if all of these workers are permanently totally disabled and therefore incapable of returning to any work—then these railroads' costs might have been higher by 13 percent (LHWCA at a 12.5-percent discount rate) to 53 percent (FECA at an 8-percent discount rate). In 1994, the four railroads paid $479 million in total FELA payouts.

[5]If a worker was eligible for a Railroad Retirement Board disability or retirement benefit, that benefit was estimated and subtracted from the results reported here.

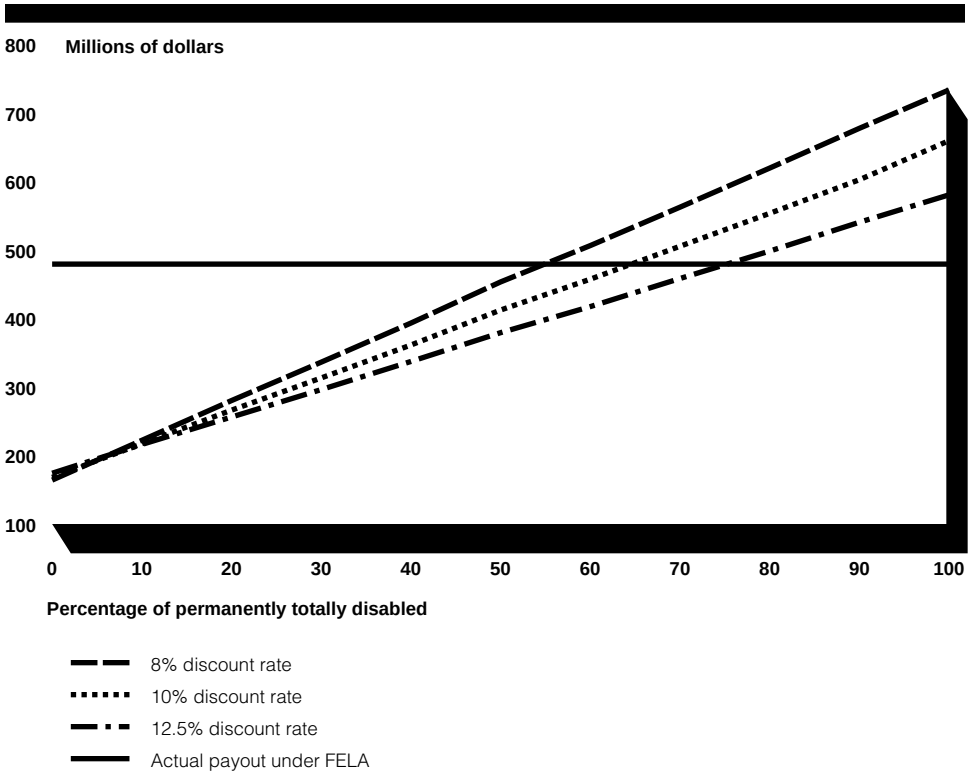
Table I.1: Estimated Payouts in 1994 for Four Large Railroads Using Various Assumptions About the Incidence of Permanent Total Disability Among Workers Who Did Not Return to Work Following a FELA Settlement

Dollars in millions

Incidence of permanent total disability in percents	Total compensation cost with FECA-level benefits			Total compensation cost with LHWCA-level benefits		
	Discount rate in percents					
	8	10	12.5	8	10	12.5
0	$164	$168	$174	$146	$149	$154
10	222	217	216	201	196	195
20	280	266	256	256	243	234
30	336	313	296	310	288	272
40	393	361	337	364	334	310
50	453	412	379	421	382	351
60	506	457	417	471	425	387
70	562	505	458	525	470	426
80	619	553	498	580	517	465
90	677	602	540	635	564	505
100	733	650	580	688	609	543

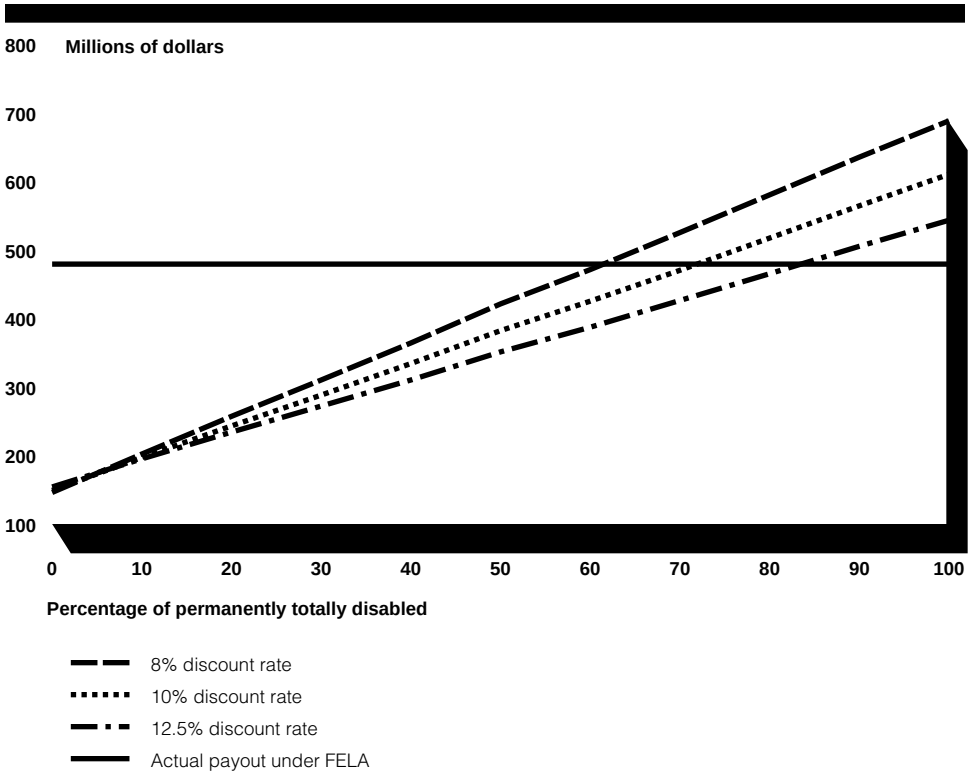
Although the incidence of permanent disability is unknown for this group of workers at these four railroads, the break-even point between FELA and the no-fault alternatives can be seen in the results. The percentage of workers who must be permanently totally disabled for the cost of the no-fault alternative to equal the amounts actually paid under FELA varies with the discount rate applied and the no-fault systems' benefit levels. (See figs. I.1 and I.2.) The lower the discount rate, the more costly the future payments to each injured worker and, therefore, the higher the percentage of workers who must be capable of returning to work for the break-even point to be reached. The break-even point ranges from about 55 to 75 percent for FECA-level benefits and from about 60 to 80 percent for LHWCA-level benefits.

Figure I.1: Estimated 1994 Total Injury Compensation Costs for Four Large Railroads Using FECA-Level Benefits and Different Discount Rates



Source: GAO's analysis of data on FELA claims that were closed in 1994 at four large railroads.

Figure I.2: Estimated 1994 Total Injury Compensation Costs for Four Large Railroads Using LHWCA-Level Benefits and Different Discount Rates



Source: GAO's analysis of data on FELA claims that were closed in 1994 at four large railroads.

For the group of workers who return to railroad employment following their FELA settlement, these four railroads would likely have saved about two-thirds of their actual FELA payouts of $147 million.[6] The payouts with FECA- and LHWCA-level benefits are shown in table I.2. Most of the estimated amounts that these workers would have received under the no-fault options are for wage loss. Under their FELA settlement, these workers likely received an additional amount for noneconomic damages (chiefly pain and suffering) and perhaps for some expected future wage loss or other impairment not shown in their claim file. If the latter is the case, the estimates for FECA and LHWCA would underestimate the costs for these workers. The numbers in table I.1 include the amounts shown in table I.2.

[6]Of the 10,153 claims examined, 8,826 involved workers who continued to work for their railroad after their settlement.

Table I.2: Estimated Payouts in 1994 for Four Large Railroads for Workers Who Returned to Work Following a FELA Settlement

Dollars in millions

Discount rate in percents	Payout with FECA-level benefits	Payout with LHWCA-level benefits
8.0	$48	$40
10.0	50	42
12.5	53	45

Small Railroads' Responses to GAO's Questionnaire on Experiences With FELA

U.S. General Accounting Office

GAO

Short Line and Regional Railroads' Views and Experiences with the Federal Employers' Liability Act (FELA)

Introduction:

The United States General Accounting Office (GAO), an agency that examines issues for the Congress, is conducting a study of possible modifications or alternatives to the Federal Employers' Liability Act (FELA). This law governs compensation to railroad workers for work-related injuries, fatalities and occupational illnesses. This investigation was requested by the Subcommittee on Railroads, House Committee on Transportation and Infrastructure.

As a part of our review we are gathering base line data on the costs and benefits of the FELA process and asking about options that might increase the effectiveness or efficiency of the FELA process. We are also interested in possible alternatives to FELA that could provide similar employee compensation at a lower cost. Finally, we are asking about the availability and affordability of insurance to cover injured workers under FELA. To obtain these data we are sending a questionnaire to all regional and short line railroads.

If you are the president or CEO of more than one regional or short line railroad you will receive more than one questionnaire. Please respond to all questionnaires you receive but respond only for the particular railroad that is identified on the attached label. Please respond within 10 days of receipt of the questionnaire, if possible, in the enclosed self-addressed business-reply envelope. If the envelope is missing or has been misplaced please return the questionnaire to the following address:

U.S. General Accounting Office
Attn: Carol Ruchala
Room 1826
441 G St., N.W.
Washington, DC 20548

If it would be more convenient for you, you can fax your response back to GAO at (202) 512-6171.

If you have any questions, please call Carol Ruchala at (202) 512-6846. Thank you for your assistance.

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* NOTE: N=398 for all questions unless otherwise noted

FELA SETTLEMENTS

Q1. For this question and throughout the questionnaire, a **settlement** is defined as a case where the railroad's total cost (i.e., all medical, wage loss, pain and suffering, and any other costs) has been paid or a structured payment schedule has been agreed upon.

In the following table we are seeking information on your railroad's work-related injury, death, and occupational illness cases settled in calendar year 1994. These are the cases in which the worker received some payments. These payments could be made either directly by your railroad or by its insurance company. Please enter the number of cases settled in each category below and the total payments for each type of expense for those cases. If there were no cases in a category, enter 0s for all amounts in that category.

Settlements in 1994 with employees who **were not** represented by attorneys				
	Number of settlements	$ paid out-of- pocket and by insurance for medical costs	$ paid for current lost wages	$ paid for future lost wages and pain and suffering or other non-monetary losses
Work-related injuries				
Work-related deaths	For a summary of responses to Q1 see table at the end of the questionnaire			
Occupational illnesses				

Settlements in 1994 with employees who were represented by attorneys				
	Number of settlements	$ paid out-of-pocket and by insurance for medical costs	$ paid for current lost wages	$ paid for future lost wages and pain and suffering or other non-monetary losses
Work-related injuries				
Work-related deaths				
Occupational illnesses				

Q2. For those cases settled in 1994, how many, if any, involved an outside claims service at any time during the investigation, negotiation, and/or settlement? (Enter number)

mean=0.1 settlements total=47 N=392

Q3. For those cases settled in 1994, how many, if any, involved the hiring or use of an outside legal counsel by your railroad at any time during the investigation, negotiation, and/or settlement? (Enter number; if none, enter 0)

mean=1.0 settlements total=402 N=392

Q4. Of the cases settled in 1994, how many, if any, involved the filing of a Federal Employers' Liability Act (FELA) law suit by an employee? (Enter number; if none, enter 0)

mean=0.8 cases involving law suits total=311 N=392

Q5. Of the FELA law suits against your railroad closed in 1994 , how many, if any, of those suits resulted in a jury verdict? (Enter number; if none, enter 0)

mean=0.0 law suits resulting in a jury verdict total=18 N=392

Q6. To the best of your knowledge, what was your railroad's total FELA-related legal cost in 1994? (Enter amount)

mean=$32,564 total=$12,536,953 N=385

Q7. To the best of your knowledge, what was your railroad's total FELA-related administrative and investigative cost in 1994? Note, by administrative cost we mean costs that accrue from railroad employees establishing and monitoring claims, assisting in the filing of claims, investigating the merits of a case, monitoring a case during rehabilitation, and negotiating settlements; this does **NOT** include any legal costs. (Enter amount; if none, enter 0)

mean=$11,925 total=$4,543,484 N=381

Q8. At any time in 1994, did your railroad have a permanent in-house staff attorney(s) who worked on FELA-related matters? (Check one)

5.5% Yes

92.5% No

2.0% missing

LIABILITY INSURANCE ISSUES

Q9. What type of insurance coverage, if any, are FELA claims against your railroad covered under? (Check one)

81.2% General liability policy that includes FELA coverage

2.3% Special policy for FELA

12.1%[1] None, self-insured ⟹ SKIP TO Q13

1.0% Other policy ⟹ PLEASE SPECIFY

3.5% missing

Q10. What is the self-insurance retention amount, if any, that your railroad must pay before your insurance covers a FELA claim? (Enter amount; if none, enter 0)

mean=$337,090 per case N=331
median=$50,000

Q11. To the best of your knowledge, in 1994 what percent of the annual cost of your railroad's general liability coverage was attributable to the FELA portion of the coverage? (Enter percent; if have special FELA policy, enter N/A)

mean=34.0% N=202

Q12. In 1994, what was the annual cost of either your railroad's general liability coverage that included FELA or your railroad's special FELA policy as a percent of your railroad's total payroll? (Enter percent on the appropriate line)

mean=17.0% for general liability N=272

mean=7.0% for special FELA policy N=8

Q13. One alternative to individual railroads each buying their own FELA coverage is for a number of railroads to pool their resources to buy insurance that would cover all of them. Has your railroad seriously considered such an arrangement with any other railroads? (Check one)

83.2% No

15.3% Yes ⟹ SKIP TO Q15

1.5% missing

Q14. Why has your railroad never seriously considered entering into a pool with other railroads? (Check all that apply) N=331

- 19.0% Would raise insurance premiums
- 16.6% Would take too much effort to set up the pool
- 16.6% Would take too much effort to administer claims
- 51.1% Don't want to depend on the safety records of other railroads
- 67.1% No other railroad has suggested such an arrangement to us
- 14.5% Other ⟹ PLEASE SPECIFY

Q15. Is your railroad currently in an insurance pool that includes FELA with any other railroads? (Check one)

- 10.3%[2] Yes
- 88.2% No ⟹ SKIP TO Q17
- 1.5% missing

Q16. How many other railroads are in your insurance pool? (Enter number)

mean=13.3 railroads N=37

MEDICAL INSURANCE ISSUES

Q17. In 1994, did your railroad have medical insurance that covered employee work-related injuries and occupational illnesses? (Check one)

- 64.3% Yes
- 33.4% No ⟹ SKIP TO Q19
- 2.3% missing

Q18. To the best of your knowledge, in 1994, what was the annual cost of your railroad's medical insurance as a percent of your railroad's total payroll? (Enter percent)

mean=12.9 % N=210

Q19. In 1994, did your railroad cover 100% of employee costs for medical treatment resulting from work-related injuries and illnesses, either through direct payments or insurance? (Check one)

- 75.9% Yes
- 3.5% No
- 18.3% N/A, no medical treatments
- 2.3% missing

VIEWS ON FELA

Q20. How satisfied or dissatisfied is your railroad with the current FELA system? (Check one)

- 1.0% Very satisfied } SKIP
- 5.5% Somewhat satisfied } TO Q22
- 10.6% As satisfied as dissatisfied
- 12.6% Somewhat dissatisfied
- 62.6% Very dissatisfied
- 7.8% missing

Q21. What are the biggest concerns your railroad has with the current FELA system? (Check all that apply) N=341

- 89.7% Uncertainty or unpredictability of settlement amounts
- 70.4% Jury system determines awards
- 66.6% Award amounts vary by venue
- 75.1% Railroads always considered negligent
- 79.8% Creates an adversarial relationship between management and labor over the settlement of claims
- 75.7% Encourages fraudulent claims
- 50.7% Impedes investigation of accidents or addressing the causes of accidents
- 11.7% Other ⟹ PLEASE SPECIFY

Q22. The following modifications to FELA have been proposed. Would your railroad favor or disfavor each of these changes? (Circle one number for each that best represents your answer)

		Greatly favor	Somewhat favor	Favor as much as disfavor	Somewhat disfavor	Greatly disfavor	missing
1.	Legislative cap on pain and suffering awards	83.7%	8.3%	2.8%	0.0%	0.5%	4.8%
2.	Legislative cap on plaintiff's legal fees	81.9%	8.0%	5.0%	0.3%	0.3%	4.5%
3.	Court venue restrictions . . .	62.1%	17.1%	12.6%	0.5%	0.8%	7.0%
4.	Reduce time limit from 3 to 2 years for an employee to file a law suit as in the original FELA	80.2%	10.3%	4.0%	0.3%	0.8%	4.5%

Q23. The following alternatives to FELA have been proposed. Would your railroad favor or disfavor each of these alternatives? (Circle one number for each that best represents your answer)

		Greatly favor	Somewhat favor	Favor as much as disfavor	Somewhat disfavor	Greatly disfavor	missing
1.	A nationwide no-fault system similar to workers' compensation	54.3%	23.6%	10.3%	2.3%	3.8%	5.8%
2.	Placing railroads and their workers under **state** workers' compensation systems	45.7%	24.4%	10.3%	5.3%	8.5%	5.8%
3.	Permitting railroads and their workers to opt out of FELA and into state workers' compensation systems or a nationwide no-fault system	44.7%	27.6%	12.6%	3.5%	6.3%	5.3%

BACKGROUND INFORMATION

Q24. What was your railroad's average monthly employment in 1994? (Enter number)

All railroads: mean=54.8 N=390
Regional railroads: mean=365.0 N=28
Local railroads: mean=22.7 N=207
Switching and terminal railroads: mean=41.7 N=155

Q25. In 1994, what percent of your railroad's employees were represented by a labor union? (Enter percent; if none, enter 0)

All railroads: mean=23.9% represented N=392
261 railroads had no represented employees
Railroads with representation: mean=71.5% N=131

&Q26. What was your railroad's total payroll in 1994? (Enter amount)

All railroads: mean=$2,190,584 N=378
Regional railroads: mean=$14,675,961 N=28
Local railroads: mean=$767,110 N=201
Switching and terminal railroads: mean=$1,764,595 N=149

Q27. Does your railroad have a profit sharing plan with its employees? (Check one)

37.2% Yes

60.8% No

2.0% missing

Q28. Please provide the name, title, and telephone number of the person filling out this questionnaire in case we need clarification of any of your answers.

Name:_____

Title:_____

Telephone number:(_____)_____

Q29. If you have any additional comments on the FELA process or the topics covered in this questionnaire, please enter them below.

21.4% with comments

[1] Based on follow-up with a random sample of the railroads responding that they were self-insured, we learned that a portion of them actually did have insurance.

[2] GAO determined that the railroads responding they were in an insurance pool were technically not in a pool, but rather were owned by railroad management companies or other entities that owned more than one railroad and had group insurance for their railroads. Like an insurance pool, this arrangement serves to spread the railroads' liability exposure and costs.

Table II.1: Responses to Question 1 on FELA Settlements in 1994

Category	Number of railroads reporting settlements of this type[a]	Number of settlements	Dollars paid out-of-pocket and by insurance for medical costs	Dollars paid for current lost wages	Dollars paid for future lost wages and pain and suffering or other non-monetary losses	Total dollars paid
Settlements in 1994 with employees who were not represented by attorneys						
Work-related injuries	120 N=393	787 N=393	$1,630,165 N=390	$1,181,085 N=390	$3,357,845 N=390	$6,124,536 N=388
Work-related deaths	1 N=391	1 N=391	$339 N=391	$0 N=391	$449,661 N=391	$450,000 N=391
Occupational illnesses	7 N=391	27 N=391	$5,498 N=391	$2,525 N=391	$74,722 N=390	$82,745 N=390
Total not represented	121 N=390	814 N=390	$1,625,401 N=387	$1,183,610 N=388	$3,882,228 N=387	$6,655,841 N=385
Settlements in 1994 with employees who were represented by attorneys						
Work-related injuries	68 N=393	297 N=393	$3,062,812 N=388	$2,679,099 N=386	$25,144,923 N=386	$30,804,459 N=385
Work-related deaths	5 N=390	5 N=390	$2,218 N=391	$0 N=391	$2,944,782 N=391	$2,947,000 N=391
Occupational illnesses	15 N=389	171 N=389	$20,968 N=390	$0 N=390	$1,770,386 N=390	$1,791,354 N=390
Total represented	68 N=389	470[b] N=389	$3,076,622 N=384	$2,679,099 N=384	$29,787,091 N=383	$35,542,813 N=383
Grand total	**145 N=388**	**1,284 N=388**	**$4,697,557 N=380**	**$3,862,709 N=381**	**$33,542,819 N=379**	**$42,043,569 N=377**

Legend

N = number

Note: The numbers in individual rows and columns do not total the numbers in total rows and columns because of missing data.

[a]The number of railroads reporting settlements of each type does not total the numbers in the total rows because of railroads that reported more than one type of settlement.

[b]Out of the 470 cases represented, 311 involved FELA lawsuits and 18 were settled by a jury verdict.

Passenger Railroads' FELA Costs, 1994

	Number of settlements[a]	Amount paid out-of-pocket and by insurance for medical costs	Amount paid for current lost wages
Total	4,370	$ 8,862,462	$ 9,408,850
Mean	336	$ 738,539	$ 784,071
Number of railroads	13	12	12

Amount paid for future lost wages and pain and suffering or other noneconomic losses	Total FELA payout	FELA-related legal costs	FELA-related administrative and investigative costs	Number of employees	Payroll
$ 65,444,212	$ 83,715,524	$ 8,287,210	$ 8,896,477	43,804	$ 1,607,180,022
$ 5,034,170	$ 6,439,656	$ 753,383	$ 808,771	3,370	$ 123,629,233
13	13	11	11	13	13

Notes:

1. Passenger railroads are listed in appendix IV. In 1994, the following commuter rail systems were operated by the National Railroad Passenger Corporation (Amtrak) and are included in the table: Connecticut Department of Transportation (Connecticut DOT), CalTrain, MARC, Massachusetts Bay Transportation Authority (MBTA), Metrolink, and the Virginia Railway Express. The information for Metra includes only operations run directly by Metra, not Metra operations run by Burlington Northern Railroad and Chicago and North Western Transportation Company. The data on MARC include only operations run by Amtrak, not those services operated by CSX Transportation. The information for MBTA includes only cases handled by Amtrak, not those cases directly litigated by MBTA. We did not obtain information on FELA from the following commuter rail systems for the reasons indicated: Tri-County Commuter Rail Authority is under the Florida workers' compensation program, the San Diego Northern Railway and Dallas Area Rapid Transit had not begun operations in 1994, and the Southeastern Pennsylvania Transportation Authority did not provide us with information.

2. In general, when Amtrak operates commuter railroads, it administers and pays for cases related to FELA on behalf of the commuter railroad in return for a fee based on a percentage of payroll. The exception to this is MBTA, which, in 1994, directly handled and paid for its litigated FELA cases itself.

[a]Of the 4,370 settlements, 950 involved lawsuits and 52 involved jury verdicts.

Source: Amtrak and commuter railroads.

Organizations Contacted for This Review

Federal Agencies

Federal Judicial Center
Federal Railroad Administration
Office of Workers' Compensation Programs, Department of Labor
Railroad Retirement Board
Social Security Administration

Freight Railroads

Alaska Railroad
Burlington Northern Railroad
Canton Railroad
Chicago & Illinois Midland Railway
Colorado & Wyoming Railway
Conrail
CSX Transportation
CP Rail Heavy Haul U.S.
Dakota, Minnesota & Eastern Railroad
Eastern Shore Railroad
Emons Transportation Group
Great Western Railway
Gulf & Ohio Railways
Illinois Central
Indiana & Ohio Rail Corporation
Kansas City Southern Railway
Maryland & Delaware Railroad
Norfolk and Portsmouth Belt Line Railroad
Norfolk Southern Corporation
Pinsly Railroad Company
Rail Management and Consulting Group
RailTex, Inc.
Southern Pacific Lines
Union Pacific Railroad Company
Washington Central Railroad
Wisconsin Central Ltd.
(398 small railroads provided us with information through our survey)

Passenger Railroads

Amtrak
CalTrain—Peninsula Corridor Joint Powers Board
Connecticut DOT
Dallas Area Rapid Transit
Long Island Railroad
MARC

Massachusetts Bay Transportation Authority
Metra
Metrolink—Southern California Regional Rail Authority
Metro-North Commuter Railroad
New Jersey Transit
Northern Indiana Commuter Transportation District
Port Authority Trans Hudson Corp.
San Diego Northern Railway—North San Diego Transit Development Board
Southeastern Pennsylvania Transportation Authority
Tri-County Commuter Rail Authority
Virginia Railway Express

Associations

Academy of Rail Labor Attorneys
American Arbitration Association
American Short Line Railroad Association
American Public Transit Association
American Trial Lawyers Association
Association of American Railroads
National Association of Railroad Trial Counsel
Regional Railroads of America

Unions

American Federation of Railroad Police
Railway Labor Executives Association

Safe Transit and Rail Transportation, on behalf of the following unions:

American Train Dispatchers
Brotherhood of Locomotive Engineers
Brotherhood of Maintenance of Way Employees
Brotherhood of Railroad Signalmen
Hotel and Restaurant Employees Union
Firemen and Oilers National Conference, Service Employees International Union
International Association of Machinists
International Brotherhood of Electrical Workers
International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers
Sheet Metal Workers International Association
Transport Workers Union

	Transportation Communications International Union United Transportation Union
Insurance Companies/Brokers	Alexander and Alexander, Inc. American Custom Insurance Canton Agency, Inc. Continental Excess and Select Cigna Specialty Insurance Fireman's Fund Insurance General Star Insurance Leach Agency Lexington Insurance Company Reliance Insurance Company Shortline Railroad Insurance Brokers United Underwriters Agency, Inc. United Shortline, Inc. Zurich American Insurance Group
Railway Claims Services	Railway Claim Services, Inc. Rail Services Incorporated
State Workers' Compensation Organizations	California Division of Workers' Compensation California Workers' Compensation Rating Bureau Illinois Industrial Commission Nebraska Workers' Compensation Court Pennsylvania Bureau of Workers' Compensation Pennsylvania Workmans' Compensation Appeals Board Texas Workers' Compensation Commission
Other	California Workers' Compensation Institute National Center for State Courts National Council on Compensation Insurance

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