The MTA, It's Not "Going Your Way"–Liability of the Metropolitan Transportation Authority Under FELA: Greene v. Long Island R.R.

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INTRODUCTION

Since the invention of the steam engine, railroads have played a key role in the development of industrial and passenger transportation. In the nineteenth century, owners of railroads amassed great fortunes, while the services they provided helped to create a great industrial network and a means for the wealthy to travel from coast to coast.¹ This service came at a cost to the men who worked for the railroads; they suffered grotesque injuries² and endured harsh living conditions.³ In the twentieth

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¹ See Sam Hall Kaplan, The Vanderbilt Homes, LOS ANGELES TIMES, August 27, 1989 at 36H (“During America’s Gilded Age, which lasted from about 1860 to 1927, no family was more gilded than the Vanderbilts. Having accumulated their wealth from railroads, shipping and land in the heady days before income, inheritance and property taxes—and antitrust laws . . . .”). See generally SUSAN DANLY & LEO MARX, THE RAILROAD IN AMERICAN ART: REPRESENTATIONS OF TECHNOLOGICAL CHANGE, (MIT Press 1988); FRANK NORRIS, THE OCTOPUS; A STORY OF CALIFORNIA, (Doubleday & Co. 1901).


³ See Frank N. Wilner, Labor Relation: How CSXT Is Leaving Past Practices Behind, RAILWAY AGE, Nov. 1998, at 72 (“Train crews were required to utilize
century, railroads fell into a state of disarray; financial disaster and abandonment led to governmental control over most of the nation's railways.4 Today, because of their ability to transport a great number of passengers and large amounts of freight, with minimal impact to the environment, railroads are again being developed as a viable mode of transportation.5 State and municipal governments have created transportation "authorities" that coordinate all aspects of mass transportation.6 These authorities are charged with achieving the goal of making railroading more efficient, cost effective, and appealing to both commuters and industry.

Recently, in Greene v. Long Island Railroad,7 a federal district court ruled the Metropolitan Transportation Authority (MTA) was liable under the Federal Employers' Liability Act (FELA)8 to its employees who are involved in interstate railway operations.9 The decision involved a suit brought by an MTA police officer injured while patrolling near a Long Island Railroad (LIRR) train station. This decision, if allowed to stand, holds the MTA, a non profit public benefit corporation that facilitates the coordination of mass transportation in the New York Metropolitan Area, liable to some of its employees under plastic bags to deposit human waste because locomotives weren't equipped with sanitation facilities.

4 See Metro. Transp. Auth. v. Interstate Commerce Comm'n, 792 F.2d 287, 295 (2d Cir. 1986) (noting that federal regulations like the Final System Plan, which was drafted by the United States Railway Association pursuant to statute, attempted to resolve a crisis in railroad transportation through a restructuring of the industry).
5 See U.S. Transportation Secretary Announces Railroad Rehabilitation and Improvement Financing Program, M2 PRESSWIRE, May 20, 1999 (describing the Railroad Rehabilitation and Improvement Financing Program as an effort to promote economic development and environmentally sound solutions for railroads, particularly government sponsored authorities and corporations).
7 99 F. Supp. 2d 268 (E.D.N.Y. 2000).
9 See Greene, 99 F. Supp. 2d at 274–75.
the FELA, even though the MTA does not "operate as a common carrier" within the meaning of the FELA statutory scheme.

On March 4, 1998, Sean Greene (Greene), a MTA police officer, was involved in an automobile accident while on patrol with his partner near the LIRR Ronkonkoma train station. Greene was formerly a member of the LIRR police force. Beginning in 1997, however, the MTA established its own police force, which assumed the duties of the LIRR police. Officers of the former LIRR police were appointed as MTA police officers in 1998.

Greene brought an action under the FELA against the MTA and LIRR, and both parties moved for summary judgment. The MTA argued it was not liable under the FELA because it is not a common carrier within the meaning of the statute, and the LIRR argued it was not the plaintiff's employer. The district court denied defendants' motions, but granted permission to seek an interlocutory appeal, "noting that no case... is directly on point, and it appears none exists."

The court "reluctantly" held that the MTA operates as a common carrier and may be held liable under the FELA. "The court's reluctance comes not from any sense that the common carrier question is close. It arises, instead, from the court's conviction that FELA's liability standard regarding railroad workers injured on the job is one that has become outmoded."

The court focused on the MTA's "extensive involvement" in its subsidiary LIRR, and relied on cases where injured plaintiffs were either employees of railroads, or involved in railroading activities, and sought compensation from a non-railroad parent company.

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10 See id. at 270. Greene was riding with his partner, in an unmarked patrol Jeep owned by the MTA when it collided with another car. See id.
11 See id.
12 See id.
13 See id. at 271.
14 28 U.S.C. § 1292 (1994). An order otherwise not appealable may be certified to for interlocutory appeal while the action is stayed provided the issue is a controlling issue, and for which there is substantial ground for difference. See id.
15 Greene, 99 F. Supp. 2d at 274 ("This precise issue has not heretofore been decided and existing precedent is, accordingly, not helpful.").
16 See id. at 270.
17 Id.
18 See id. at 274.
This Comment analyzes whether the MTA operates as a common carrier and critiques the court’s application of the FELA to the MTA. It is submitted that Greene was decided incorrectly under the prevailing interpretation of the FELA. This Comment asserts that the court overlooked the broad picture of what the MTA actually does, failed to recognize the Supreme Court’s interpretation of “operate” in the context of parent company supervision, and disregarded common law opinions holding that the MTA is not a common carrier. Additionally, the court disregarded the overwhelming policy considerations that compel avoiding an unwarranted expansion of an archaic system of compensation. Part I of this comment discusses the FELA, its history, requirements, and application. Part II describes the MTA, its history, purpose, function, and structure. Part III analyzes how the FELA does not apply to the MTA. Part IV considers the deficiencies of a fault-based workers compensation system like the FELA.

I. THE FEDERAL EMPLOYERS LIABILITY ACT

The FELA created a federal cause of action imposing liability on “common carriers by railroad” engaging in interstate commerce.19 The Act was a predecessor to modern no-fault state compensation systems, and was then seen as a progressive measure aimed at an unusually hazardous job.20 “Cognizant of the physical dangers of railroading that resulted in the death or

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19 45 U.S.C. § 51. Section 51 provides in pertinent part:

Every common carrier by railroad while engaged in commerce between any of the several States or Territories . . . shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce . . . for such injury or death resulting in whole or in part from the negligence of any officer, agents, or employees of such carrier . . . .

Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purposes of this chapter, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this chapter.

Id.

20 See James A. Squires, Regulating Safety Culture in the Railroad Industry: The Time Has Come for Broader Horizons, 27 TRANSP. L.J. 93, 106 (2000) (noting that the FELA was intended to provide compensation to workers injured in the unusually hazardous railroad industry, but improvements in railroad safety standards have resulted in employee casualty rates that are comparable with other transportation and non-transportation industries).
maiming of thousands of workers every year, Congress crafted a federal remedy that shifted part of the 'human overhead' of doing business from employees to their employers.\textsuperscript{21} "The Federal Employers’ Liability Act was designed to put on the railroad industry some of the cost for the legs, eyes, arms, and lives which it consumed in its operations."\textsuperscript{22} Congressional action was necessary because of courts’ tendency to favor railroad owners, who erected barriers to plaintiffs' claims with common law defenses such as the fellow servant rule, assumption of risk, and contributory negligence.\textsuperscript{23} These common law defenses were swept away with the enactment of the FELA in 1908.\textsuperscript{24} In order to further the congressional policy of aiding railroad workers, the Supreme Court has construed the FELA liberally, by applying relaxed standards of negligence, and extending liability for non-accidental injuries such as disease and emotional distress.\textsuperscript{25} The FELA, however, does not make the railroad a virtual insurer of its employees.\textsuperscript{26}


\textsuperscript{22} Wilkerson v. McCarthy, 336 U.S. 53, 68 (1949) (Douglas, J., concurring); see also H.R. REP. NO. 60-1386, at 1 (1908).

\textsuperscript{23} See Wilkerson, 336 U.S. at 67 (Douglas, J., concurring) ("[T]he employer was often effectively insulated from liability even though it was responsible for maintenance of unsafe conditions of work."); see also Tiller, 318 U.S. at 59 (noting that prior to the FELA, the assumption of risk doctrine was applied in most railroad injury cases, based on the notion that railroad employees accepted the additional risks of the job in exchange for the additional compensation that railroad jobs provided, and that these employees were free to resign at any time); Toledo, St. Louis & W. R.R. Co. v. Allen, 276 U.S. 165, 168-69 (1928) (indicating employees assumed the risk of grave injury when working for a railroad company).

\textsuperscript{24} See 45 U.S.C. §§ 51, 53, 55. Additionally, because of continued court bias, illustrated by jury verdicts favorable to employees being overturned by courts, a 1939 amendment, 45 U.S.C. § 54, removed assumption of risk as a valid defense under the FELA. See generally N.Y. Cent. R.R. Co. v. Ambrose, 280 U.S. 486, 491 (1929) (noting that a railroad employer was not liable for the death of an employee who was killed by inhaling poisonous gasses used to kill insects in grain cars, because the employer had warned the employee of the dangers of the fumes, and therefore, the employee must have assumed the risk of entering the car where such fumes were present); Chicago, Milwaukee & St. Paul Ry. Co. v. Coogan, 271 U.S. 472, 474 (1926) (noting that through the FELA, Congress preempted state laws and made railroad employers liable to their employees).

\textsuperscript{25} See Consol. Rail Corp., 512 U.S. at 549–50 (holding a claim for negligent infliction of emotional distress is cognizable under the FELA); Rogers v. Missouri Pac. R.R. Co., 352 U.S. 500, 506 (1957) (articulating a relaxed standard of applicable negligence); Urie v. Thompson, 337 U.S. 163, 180–87 (1949) (rejecting the argument that the FELA applies only to injuries caused by accidents).

Liability under the FELA is limited to interstate “common carriers by railroad.”

“Common carrier” is defined by the FELA as including “the receiver or receivers or other persons or corporations charged with the duty of the management and operation of the business of a common carrier.”

Supreme Court jurisprudence has defined the phrase as “one who operates a railroad as a means of carrying for the public . . . .”

The distinctive characteristic of a common carrier is that it undertakes to carry for the public indifferently, offering service to the public generally. Common carrier status does not apply to companies that are not railroads open to the public. Thus, the FELA does not extend to: carriers by water, express companies, freight forwarders, industrial companies.

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27 45 U.S.C. § 51; see also S. Pac. Co. v. Jensen, 244 U.S. 205, 212 (1917) (noting that Congress limited the liability of railroad employers under the FELA to those employers who were common carriers and engaged in some activity having “a direct and substantial connection with railroad operations”); Garrett v. S. R.R. Co., 278 F.2d 424, 425 (6th Cir. 1960) (concurring with the court below that the defendant railroad was not a common carrier, and therefore not liable to its employees under the FELA because “it was not performing the non-delegable duties of a railroad; it was not the operator of a terminal; and it performed no switching or transportation functions at all”).


29 Edwards v. Pac. Express Fruit Co., 390 U.S. 538, 540 (1968) (holding that based on legislative history, consistent judicial decisions, and the administration of the FELA, refrigerator car companies are not “common carriers by railroad” within the meaning of the Act) (citations omitted).

30 See Wells Fargo & Co. v. Taylor, 254 U.S. 175, 187 (1920) (defining a common carrier by railroad as “one who operates a railroad as a means of carrying for the public . . . .”); Mahfood v. Cont'l. Grain Co., 718 F.2d 779, 781–82 (5th Cir. 1983) (granting defendants' motion for summary judgement on the basis that it was not a common carrier by railroad under the FELA); Kelly v. Gen. Elec. Co., 110 F. Supp. 4, 6 (E.D. Pa. 1953), aff'd, 204 F.2d 692 (3d. Cir. 1953) (stating that a “common carrier has been defined as one who holds himself out to the public as engaged in the business of transportation of persons or property from place to place for compensation, offering his services to the public generally”).

31 See Edwards, 390 U.S. at 540 (stating that a common carrier is one who operates a railroad as a means of carrying for the public).

32 See S. Pac. Co., 244 U.S. at 212–13 (stating that the FELA is applicable “where parties are engaging in something having a direct and substantial connection with railroad operations, and not with another kind of carriage separate and distinct from transportation on land . . . .”).

33 See Wells Fargo & Co., 254 U.S. at 188 (stating that the original Interstate Commerce Act was construed as including carriers operating railroads, but not express companies).

34 See Latsko v. Nat'l Carloading Corp., 192 F.2d 905, 909 (6th Cir. 1951)
maintaining railroad facilities for their own use, companies leasing refrigerator cars, or sleeping car companies. Accordingly, common carrier status should not extend to public benefit corporations whose purpose is to coordinate an efficient management of all aspects of mass transportation.

_Lone Star Steel Co. v. McGee_ articulated a four-part test to determine whether an entity has "common carrier" status: (1) the actual performance of rail service; (2) the service being performed must be part of the total rail service contracted for by a member of the public; (3) the entity must be "performing as part of a system of interstate rail transportation by virtue of common ownership between itself and a railroad or by contractual relationship with a railroad . . . [;]" (4) the railroad receives some form of remuneration for the services performed, "such as a fixed charge from a railroad or by a percent of the

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35 See Mahfood, 718 F.2d at 781–82 (finding that performance of some railroad functions did not qualify the defendant as a common carrier under the FELA when not performed for the public); Duffy v. Armco Steel Corp., 225 F. Supp. 737, 738 (W.D. Pa. 1964) (finding that although a company owned and operated railroad equipment, it was not a common carrier under the FELA because it had not been used to transport the goods of others or offered for public use); Tilson v. Ford Motor Co., 130 F. Supp. 676, 678 (E.D. Mich. 1955) (finding that a company is not a common carrier where the railroad operated was confined to the company's manufacturing area and not offered to the public generally); Malvern Gravel Co. v. Mitchell, 385 S.W.2d 144, 146 (Ark. 1964) (stating that a company owning one switch engine, but neither tracks nor railway cars, was not operating as a common carrier within the meaning of the FELA).

36 See Edwards v. Pac. Express Fruit Co., 390 U.S. 538, 540 (1968) (finding that FELA's references to "operating a railroad" and a "going railroad" would indicate that the business of renting refrigerator cars to railroads or shippers and providers did not qualify as a "common carrier by railroad").

37 See Robinson v. Baltimore & Ohio R.R. Co., 237 U.S. 84, 94 (1915) (stating that an employee of a sleeping car company providing services to a railroad was not an employee of the railroad within the meaning of FELA); Taylor v. New York C. R.R. Co., 294 N.Y. 397, 404 (1945) (citing Robinson in holding that Congress failed to include those persons on interstate trains and engaged in services for other masters among those for whom the railroad companies were to be liable under FELA).

38 380 F.2d 640 (5th Cir. 1967). _Lone Star Steel_ operated an intra-plant rail system, but did not restrict the use of the railroad to its company alone; rather, it transported for others and charged them fees, and received dividends from the service. See id. at 646.

39 See id. at 647.

40 See id.
profits from a railroad. The test is not exclusive, but provides only a list of various considerations of prime importance. Most importantly, "FELA jurisprudence gleans guidance from common-law principles," upon which courts should rely in addition to the enumerated factors. Interpretation of the FELA begins with the statute itself, its purposes, and the construction given to it over the years.

A parent company that does not appear to be a railroad may be subject to the FELA under certain circumstances, "Where one railroad company actually controls another and operates both as a single system, the dominant company will be liable for the injuries due to the negligence of the subsidiary company." A non-railroad parent company must completely dominate the railroad subsidiary, not only with respect to stock ownership, but also management and operations. Additionally, a plaintiff-employee of the parent non-railroad, as in Greene, must be both assigned to railroad work, and injured as a result of negligence in the operation of a railroad which the parent completely

41 See id.

42 See id.; see also Kieronski v. Wyandotte Terminal R.R. Co., 806 F.2d 107, 108 (6th Cir. 1987) (indicating that the four part test in Lone Star Steel is not limited, but only a guidance).


44 Davis v. Alexander, 269 U.S. 114, 117 (1925) (finding that the dominant corporation should be regarded as the principal, and "constituent" companies as agents, when the dominant corporation derives profits and losses from traffic originated on any of the constituents' lines); accord Lehigh Valley R.R Co. v. Dupont, 128 F. 840, 846 (2d Cir. 1904) (stating that "the dominant corporation be regarded as the principal and the constituent corporations as agents when ... the dominant corporation ultimately derives all the profits and incurs all the losses arising from the traffic originating on any of its lines"); see also S. Ry. Co. v. Crosby, 201 F.2d 873, 883 (4th Cir. 1953) ("Where one railroad company actually controls another and operates both as a single system, the dominant company will be liable for the injuries due to the negligence of the subsidiary company." (quoting Davis, 269 U.S. at 117)); Erie R.R. Co. v. Krysinski, 238 F. 142, 145 (2d Cir. 1916) (examining factors in determining whether a dominant carrier has sufficient control over a subordinate carrier to warrant an extension of liability); Wichita Falls & Northwestern Ry. Co. v. Puckett, 157 P. 112, 126 (Okla. 1915) (noting that an engineer, employed by two related companies and injured through the negligence of one or both companies while doing the work of both, may sue one or both companies).

45 See Eddings v. Collins Pine Co., 140 F. Supp. 622, 628 (N.D. Cal. 1956) (finding that one company controlled another so completely that there was "in fact one railroad system").
Therefore, in determining the liability of a parent company under the FELA, the central issue is one of control over actual operation of the interstate railroad. Although this theory of liability has grown out of traditional tort liability of agency, the Supreme Court has consistently held that a master-servant relationship is necessary, implying that actual control is prerequisite for liability.

II. THE METROPOLITAN TRANSPORTATION AUTHORITY

The MTA was created in 1968 in response to the deterioration of the railroads in the New York Metropolitan Area. Created as a public authority of the State of New York, “a body corporate and politic constituting a public benefit corporation,” its purpose was to set the policies and budgets of transportation agencies in New York City and seven suburban counties. The MTA is governed by a board of directors that are collectively appointed by the Governor, the Mayor of New York City, and the Chief Executive of each of the counties into which the MTA’s authority extends. Common directors serve on both

46 S. Ry. Co., 201 F.2d at 882.
47 See Eddings, 140 F. Supp. at 629 (“It simply places responsibility under the Act upon the party performing the railroad functions covered by the Act.”).
48 See Kelley v. S. Pac. Co., 419 U.S. 318, 323 (1974) (holding that a finding of agency is not tantamount to a finding of a master servant relationship).
49 See id; see also Baker v. Texas & Pac. R.R. Co., 359 U.S. 227, 228 (1959) (stating that the “familiar general legal problems” as to whose employee or servant a worker is is a given time is a matter of federal law under the FELA); Hull v. Philadelphia & Reading Ry. Co., 252 U.S. 475, 479 (1920) (noting that Congress used the words “employee” and “employed” in their natural sense); Robinson v. Baltimore & Ohio R.R. Co., 237 U.S. 84, 92 (1915) (distinguishing between an employee of a railroad company and one who is “on the train simply in the character of a servant of another master by whom he was hired, directed and paid, and at whose will he was to be continued in service or discharged”).
50 The Long Island Railroad was financially ruined as of 1965, causing the State of New York to assume operations. See generally JOHN FINK, THE ENCYCLOPEDIA OF NEW YORK CITY 984 (Kenneth T. Jackson ed., 1995).
52 See DERRICK, supra note 51. Agencies that the MTA oversees include: the Long Island Rail Road; Metro-North Commuter Railroad; New York City Transit Authority; the Staten Island Rapid Transit Operating Authority; the Metropolitan Suburban Bus Authority; and the Triborough Bridge and Tunnel Authority. See id.
53 See N.Y. PUB. AUTH. LAW § 1263(1); see also Rose v. Long Island R.R. Pension Plan, 828 F.2d 910, 916 (2d Cir. 1987) (describing the makeup of the MTA and its purposes).
the MTA and the LIRR board of directors. The chairman of the MTA establishes committees to monitor and review the various agencies operating under the MTA, including the LIRR. The purpose in creating the MTA was to unify and assure that railroads around New York City would be stabilized, strengthened, and improved through the flexible and efficient management of services. In order to fulfill its purpose, the MTA was granted broad managerial powers to “do all things necessary, convenient or desirable to manage, control and direct the maintenance and operation of transportation facilities, equipment or real property operated by or under contract, lease or other arrangement.”

The various agencies the MTA manages are categorized as either subsidiary or component units. The LIRR and the Metro-North Commuter Railroad, agencies covered under the FELA, are considered subsidiary units, while other agencies that are not covered under the FELA are considered component units. This difference is significant because subsidiary units are considered to be independent and distinct operational agencies. But the MTA plays an active role in coordinating the

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55 See N.Y. PUB. AUTH. Law § 1263(4)(b) (McKinney 1999).
56 See N.Y. PUB. AUTH. LAW § 1264; see also NY JUR. 2d Rail Transportation § 85 (1999) (describing the MTA).
57 N.Y. PUB. AUTH. LAW §1266(1)–(8). Other specific powers given to the MTA include: the power to acquire, establish, and maintain facilities; establish and collect fares and tolls; establish standards of operation regarding safety; and lease railroad cars. See id.; see also Greene, 99 F. Supp. 2d at 272 (discussing the broad powers given to the MTA to meet its purposes to develop and improve commuter transportation).
58 See Greene, 99 F. Supp. 2d at 273 (stating that the MTA is comprised of “subsidiary units” and “component units”).
59 See id. (noting that the MTA Excess Loss Trust Fund, MTA headquarters, along with the LIRR and Metro North commuter rails are “subsidiary units,” but that the New York City Transit Authority, the Manhattan and Bronx Surface Transit Operating Authority, the Staten Island Rapid Transit Operating Authority, the Metropolitan Suburban Bus Authority, and the Triborough Bridge and Tunnel Authority are “component units” of the MTA).
60 See id. (“MTA apparently attaches significance to denominating its commuter rails as subsidiary units, rather than component units . . . referring to the component units as ‘operationally and legally independent’ of MTA headquarters while making no such similar distinction with respect to commuter rails.”); see also 2 RANDOM HOUSE WEBSTER'S UNABRIDGED DICTIONARY 1896 (2d ed. 1998) (defining “subsidiary company” as “a company whose controlling interest is owned by another company”).
LIABILITY OF THE MTA UNDER THE FELA

Budgets, marketing, and operating policies of all its agencies.61

Railroads that are covered by the FELA occupy only one part of the vast MTA organization. For example, railroads covered by the FELA employ approximately 11,000 of the 64,000 people employed by the MTA as a whole.62 Likewise, on the average weekday, more than five million passengers and 781,000 motor vehicles use MTA facilities.63 Of these, only 491,000 passengers are LIRR and Metro-North riders.64

In 1997 the MTA was authorized to create a uniformed police force to patrol the MTA's trains and facilities.65 Initial appointments to the newly created police force were the members of the old LIRR and Metro-North Railroad police forces.66 The merger of the two police forces was touted to be beneficial to the commuters' needs.67 Practically, the merger expanded the jurisdiction of the former police forces to include the "metropolitan commuter transportation district," encompassing the city of New York and the seven suburban

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62 See id. at 273 (indicating, however, that these numbers were compiled prior to the MTA's creation of the MTA police force); see also Metropolitan Transportation Authority, MTA: Transportation Network, at http://www.lirr.org/mta/network.htm (last visited Jan. 4, 2001) (indicating that the MTA employed 57,551 people in 1998, including 6,096 with the LIRR and 5,443 with Metro-North, totaling 11,539 in commuter rails).
63 See id. (indicating that on the average weekday in 1998, the MTA collected 5,721,834 paid rides, including 269,331 paid rides on the LIRR, 222,580 on Metro-North, 754,821 toll paying vehicles at MTA bridges and tunnels). Interestingly, New York City Transit, which includes New York City busses and subways, collected 5,146,677 on the average weekday in 1998. See id.
64 See John Fink, Railroads, in THE ENCYCLOPEDIA OF NEW YORK CITY 984 (Kenneth T. Jackson, ed., Yale Univ. Press 1995) ("The LIRR, the largest commuter line in the nation, carried about 263,000 passengers a day in 1991, [and] Metro-North about 200,000."); Metropolitan Transportation Authority, MTA: Transportation Network, at http://www.lirr.org/mta/network.htm (last visited Jan. 4, 2001) (indicating that the number of weekday commuters carried by the LIRR and Metro-North combined was 491,911 in 1998).
65 See N.Y. PUB. AUTH. LAW § 1266-h(1) (McKinney 1999) ("The authority is hereby authorized and empowered, to provide and maintain an authority police department and a uniformed authority police force.").
66 See id. § 1266-h(2) ("Initial appointments to [the MTA] police force shall be all incumbent police officers from the Long Island Rail Road Company and/or Metro-North Commuter Railroad Company at the time of such appointment.").
67 See Metropolitan Transit Association—Police Force Creation, 1997 N.Y. Laws 2319, 2320 ("This legislation . . . will enhance the level of police service offered to MTA commuters. The consolidation will provide for greater coordination and efficiency in the provision of services to all of the MTA region.").
The merger empowered MTA police officers to patrol far more territory than before the merger. Recognizing that the new police force employees would not be subject to the Railroad Retirement Act of 1974,69 which provides retirement compensation for employees of railways operating in interstate transportation,70 the New York State legislature authorized the MTA to provide a twenty-year retirement plan for its employees.71

Currently, the MTA plays a minimal role in the operation of the LIRR and Metro-North. Section 1277 of New York’s Public Authorities Law permits the MTA to transfer the “operational costs” of local railroad stations to municipal or county governments.72 In Heimbach v. Metropolitan Transportation Authority,73 the New York Court of Appeals ruled that the MTA

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68 N.Y. PUB. AUTH. LAW §§ 1262, 1266-h(1) (indicating in Section 1266-h (1) that the MTA police force would have jurisdiction in the metropolitan commuter transportation district, that Section 1262 defines to include “the city of New York and the counties of Dutchess, Nassau, Orange, Putnam, Rockland, Suffolk, and Westchester . . . ”).

69 See 45 U.S.C. § 231 (1994) (providing retirement and disability annuities for individuals who have a “current connection with the railroad industry”).


71 See N.Y. PUB. AUTH. LAW § 1266-h(4) (providing the MTA with the power to create a twenty-year retirement plan for its employees and detailing small differences between the MTA retirement plan and the retirement and social security law); Metropolitan Transit Association—Police Force Creation, 1997 N.Y. Laws 2319, 2320 (indicating that a twenty-year retirement plan was a provision negotiated for by the unions of the LIRR and Metro-North); see also, N.Y. RETIRE. & SOC. SEC. LAW § 389 (McKinney 1999) (detailing the twenty-year retirement plan for LIRR police officers, from which the MTA police retirement plan was copied).

72 Under New York’s Public Authorities Law, the transfer of such costs is permitted:

The total cost to the authority and each of its subsidiary corporations of operation, maintenance and use of each passenger station within the district serviced by one or more railroad facilities . . . shall be borne by the city of New York if such station is located in such city or, if not located in such city, by such county within the district in which such station is located.

N.Y. PUB. AUTH. LAW § 1277. see also Heimbach v. MTA, 553 N.E.2d 242 (N.Y. 1990). In Heimbach, the court stressed that “total cost” within Section 1277 was limited by the words “of operation, maintenance and use” and should not include tort claims, in the interests of municipal fiscal planning and tax payer equity. See id. at 244; see also 89 NY JUR 2d Rail Transportation § 54 (1999) (“The operation, maintenance, and use of passenger stations are public purposes . . . and the costs to the Metropolitan Transportation Authority and its subsidiary corporations in that regard are borne by the city if the station is there located and otherwise by the county of its location.”).

73 553 N.E 2d 242 (N.Y. 1990).
could not pass the costs of tort liability on to a county or municipality as “operational costs.” The court noted that operational costs include the costs of cleaning, snow removal, and maintenance, but not the costs of actually operating the railroad itself. Additionally, the MTA has been described as a “regional transportation agency” which has a subsidiary unit that performs “rail carrier” service. The MTA acts as a coordinator, acquiring and leasing property, in order to provide the most efficient and cost effective management of financial operations. This, in turn, entitles the MTA to federal subsidies and subjects it to regulation by agencies like the Interstate Commerce Commission, but not, it is submitted, the FELA.

III. APPLICATION OF THE FELA TO THE MTA

The FELA sets out essentially a two-part test for liability. First, the employer must be a “common carrier by railroad while engaging in commerce between any of the several states . . . .” Second, the injured employee must be “employed by such carrier in such commerce . . . .” In deciding the first prong of the test, the court should consider each element separately: first deciding whether the MTA is a “railroad” under the FELA; if so, whether the MTA is a “common carrier;” and finally, whether the MTA is “engaged in interstate commerce” under the Act.

74 See Heimbach, 553 N.E.2d at 246. In Heimbach, the MTA sought to pass on to Orange County the cost of a $369,722 settlement given to a commuter who slipped and fell on ice at the Goshen station. See id. at 243.
75 See id. at 244.
76 See Metro. Transp. Auth. v. Interstate Commerce Comm’n, 792 F.2d 287, 293–94 (2d Cir. 1986) (holding that the ICC had the power to fix reasonable rates for services and track rights that the MTA could charge to Amtrak as the MTA was a “regional transportation agency” under the RPSA (Rail Passenger Service Act)).
78 See Metro. Transp. Auth., 792 F.2d at 293 (finding the MTA’s argument that § 402(a) of the RPSA does not apply to it untenable).
80 See id.
81 See id.; cf. Pickney v. Oro Dam Constructors, 441 F.2d 806, 808 (9th Cir. 1971) (applying a similar test for determining whether an employee’s injury subjects the employer to liability under FELA, requiring: (1) the employee be employed by a
The initial inquiry involves determining the MTA's status as a “railroad.” Since the earliest days of the Act, it has been well settled that street railway companies did not come within the purview of FELA liability. The MTA is structured in a way that makes its street railways “component units” and its ordinary railroads “subsidiary units.” The MTA is comparable to other transportation conglomerates like the Southeastern Pennsylvania Transportation Authority (SEPTA), which is also composed of intrastate and interstate railroads. Unlike SEPTA, however, the MTA does not claim to operate its interstate railroads, but coordinates their operation as “wholly

common carrier by railroad; (2) the common carrier by railroad be engaged in interstate commerce; and (3) such employee's duties shall be in furtherance of interstate or foreign commerce, or shall somehow "directly or closely and substantially affect such commerce").

See Omaha v. Interstate Commerce Comm'n, 230 U.S. 324, 325 (1912) (holding that "the word 'railroad' as used in the constitutions and statutes of the various states does not include street railway companies"); McKenna v. Washington Metro. Area Transit Auth., 670 F. Supp. 7, 9 (D.D.C. 1986), aff'd, 829 F.2d 186 (D.C. Cir. 1987) (identifying a long-recognized exception within FELA for "street railways"); see also Washington Ry. & Elec. Co. v. Scala, 244 U.S. 630, 637-38 (1917) (stating that ordinary railroads, as opposed to street railways, come within FELA); Mangum Capital Traction Co., 39 F.2d 286, 287 (D.C. Cir. 1930) (stating that street railways are not included within the classification of "common carriers by railroad" as used in the FELA).

Greene v. Long Island R.R., 99 F. Supp. 2d 268, 273 (E.D.N.Y. 2000) (noting that the commuter railways of the LIRR and Metro-North are among the MTA's subsidiary units, but that the New York City Transit Authority is a component unit).

See Felton v. S.E. Pa Transp. Auth., 952 F.2d 59, 61 (1992) (holding that FELA liability should only extend to those workers who are involved in interstate operations of the Authority). The Long Island Railroad is subject to the FELA because in addition to commuter service from Long Island to Penn Station in New York City, it carries freight and has lines that connect to interstate transportation. See Long Island R.R. Co. v. Int'l Ass'n of Machinists & Aerospace Workers, 709 F. Supp. 376, 378 (S.D.N.Y. 1989) (noting the LIRR carries freight in interstate commerce); see also Omaha & Council Bluffs Street Ry. Co. v. Interstate Commerce Comm'n, 230 U.S. 324, 335–36 (1913).

[Ordinary railroads are constructed on the companies' own property. The tracks extend from town to town and are usually connected with other railroads, which themselves are further connected with other railroads, which themselves are further connected with other so that freight may be shipped, without breaking bulk, across the continent. Such railroads are channels of interstate commerce. Street Railroads, on the other hand, are local, are laid in streets as aids to street traffic, and for the use of a single community . . . .]

Id.
owned subsidiary unit[s].” Additionally, the MTA police serve all units of the MTA, including street railways not subject to the FELA and commuter railroads that are liable under the Act. A holding that applies FELA liability to MTA employees who are engaged in interstate operations of the subsidiary unit commuter rails is inappropriate because the MTA police have concurrent jurisdiction with that of local police authorities and patrol commuter rail areas, as well as other transportation agencies such as Long Island Bus and New York City Transit. For example, an MTA police officer patrolling New York City’s Jamaica LIRR station is confronted with the reality of policing the LIRR, New York City buses, subways, and, if need be, the streets adjoining the station. Furthermore, calling the MTA a railroad and allowing MTA police a cause of action under the FELA, while local and municipal police concurrently serve within the same jurisdictions, countermines the Congressional intention for the FELA to apply to those “who were peculiarly exposed to injuries because of the nature of their occupation, i.e., the hazardous business of railroading.” Allowing employees of the coordinating authorities of railroads to be covered by the

86 See N.Y. TRANSP. LAW § 2 (McKinney 1999) (defining street railroads as “a railroad . . . for public use in the conveyance of persons or property for compensation, being mainly upon, along, above or below any highway, including all equipment, switches, spurs, tracks, right of trackage, subways, tunnels, [and] stations . . .”). The MTA’s enabling statute gives local police authorities concurrent jurisdiction to serve the same areas and functions as officers of the MTA. See N.Y. PUB. AUTH. LAW § 1266 (8) (McKinney Supp. 2001) (“Each municipality or political subdivision in which any facilities of the authority . . . are located shall provide for such facilities police, fire and health protection services of the same character and to the same extent as those provided for residents of such municipality or . . . subdivision.”).
87 See Greene, 99 F. Supp. 2d at 275.
88 See N.Y. PUB. AUTH. LAW §§ 1262, 1266-h(1). Long Island Bus maintains a bus depot at the specific Ronkonkoma train station where plaintiff was on patrol. Additionally, MTA police stationed in Penn Station are faced with patrolling a station that contains Long Island Rail Road, New York City Transit and other MTA agencies. See Green, 99 F. Supp. 2d at 273 (discussing the MTA component units that provide transportation services); see also MTA Long Island Railroad, LIRR Ronkonkama Timetable, at http://www.mta.nyc.ny.us/lIRR/html/ttn-/ronkonko.htm (visited Jan. 27, 2001) (displaying the LIRR schedule at the Ronkonkoma station and discussing transfers at Penn Station).
89 Interview with Scott Robinson, MTA police officer (Jan. 5, 2001).
90 See N.Y. PUB. AUTH. LAW §§ 1262, 1266-h(1).
FELA would be an extension of the statute, and another step in the court's "lexicographical" reading of the 1908 Act. 92

Assuming the MTA can be considered a railroad under the terms of the Act, the next inquiry would be whether the MTA is a common carrier. The inquiry made in Lone Star Steel Co. v. McGee93 focused on "actual performance of rail service."94 The MTA, however, "coordinates the planning and overall policies of its agencies, approves operating and capital budgets and performance plans, and monitors financial and operating activities of its agencies . . . [and] is responsible for certain cross agency support functions."95 The MTA police are accordingly one of these "support functions." The police do not operate the LIRR, nor do they play a substantial or intricate role in its operation or management.96

Crucial to the determination of common carrier status is the definition of "operate" under the FELA.97 The district court settled for the plain definition of "operate" as to mean "to perform a function."98 The court did not take into consideration,

92 Id. at 508–09. In 1956, the court construed the 1939 amendment to the FELA that eliminated the assumption of risk defense as extending coverage to clerical workers because they "furthered interstate commerce." This was considered not only "lexicographical," but also a "door opening" decision that was unlimited in scope and ignorant of legal consequences. See id. Similarly, analogous decisions allowing a court to interpret "operate" as merely performing a function would have similar door opening consequences and could permit an unwarranted increase in litigation.

93 380 F.2d 640 (5th Cir. 1967).

94 Id. at 647.


96 See Strykowski v. Northeast Ill. Reg'l Commuter R.R. Co., 827 F. Supp. 468, 469–72 (N.D. Ill. 1993) (dismissing commuter railroad police officer's FELA claims due to insufficiency of evidence concerning "activities that are scarcely even arguably connected in a tangential way with" the requirements of the FELA), rev'd, 30 F.3d 136 (1994) (reversing and remanding for further inquiry into 11th Amendment immunity and a more in-depth analysis of FELA subject matter jurisdiction).

97 See 45 U.S.C. § 57 (1994). Imposes liability to those entities not directly covered by FELA but who are "charged with the duty of the management and operation of the business of a common carrier." Id.

98 Greene, 99 F. Supp. 2d at 274 (relying on the definition of "operate" given in BLACK'S LAW DICTIONARY 984 (5th ed. 1979), and THE RANDOM HOUSE COLLEGE DICTIONARY OF THE ENGLISH LANGUAGE 931 (rev. ed. 1982) meaning "to perform a function"). Conversely, "[w]hile the MTA concede[d] certain management responsibilities, it deny[ed] any responsibilities that [could] be described as 'operating' [the LIRR's] facilities." See id. The MTA argued that "operate" should be interpreted narrowly to include only the actual operation of trains, a function the MTA left to its subsidiaries. See id.
however, the definition the Supreme Court provided in another federal liability act, regarding a parent corporation’s liability for its subsidiary. In *United States v. Bestfoods,* the Court construed the term “operate” under the Comprehensive Environmental Response Compensation and Liability Act (CERCLA), in the context of a parent and subsidiary company, holding that a parent corporation may be held liable for “operating [a] facility” of a subsidiary under CERCLA where the parent actually “directs the workings of, manages, or conducts the affairs of [the] facility.” The Court further explained that certain activities of the parent that “involve the facility but which are consistent with the parent’s investor status, such as monitoring of the subsidiary’s performance, supervision of the subsidiary’s finance and capital budget decisions, and articulation of general policies and procedures, should not give rise to direct liability” for the parent. The MTA’s functions correspond precisely with this notion of management and oversight by a parent company, as the MTA monitors budget decisions and promulgates policies and procedures.

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99 See *United States v. Bestfoods,* 524 U.S. 51, 66–67 (1998). In *Bestfoods,* the Court addressed whether a parent corporation was liable for the costs of cleaning up industrial waste produced by its subsidiary. See id. at 55. The Court ruled that “a parent corporation that actively participated in, and exercised control over, the operations of a subsidiary,” could not be held liable “without more” as an “operator” of the subsidiary’s polluting facility, but that “a corporate parent that actively participated in, and exercised control over, the operations of the facility itself may be held directly liable in its own right as an operator of the [polluting] facility.” See id.

100 *Id.* at 66 (providing a narrow definition of “operate,” noting that “for purposes of CERCLA’s concern with environmental contamination, an operator must manage, direct, or conduct operations specifically related to pollution . . . ”).

101 *Id.* at 72 (quoting Lynda J. Oswald, *Bifurcation of the Owner and Operator Analysis under CERCLA,* 72 WASH. U. L.Q. 223, 282 (1994)). The district court in *Greene,* however, relied on the Supreme Court’s definition of “common carrier” under the Federal Hours Service Act 45 U.S.C. §§ 61–64 (1986) (repealed 1994). In *United States v. Brooklyn Eastern District Terminal,* 249 U.S. 296 (1919), the court held that a terminal, the agent of ten interstate railroads, was a “common carrier” under the Federal Hours Service Act, because its acts were those “of a kind ordinarily performed by a common carrier.” *Id.* at 304–05. This definition is distinguishable, however, because unlike the FELA, the Federal Hours Service Act applied to water ferries as well as interstate railroads. Furthermore, *Brooklyn Terminal* included ten interstate railroads whereas the MTA is only affiliated with two. See id.

102 See N.Y. PUB. AUTH. LAW §1266(1)–(8) (McKinney 1999) (giving the MTA broad managerial powers to “do all things . . . necessary, convenient or desirable to
contrast, the LIRR, as a subsidiary, performs the “operations” of the commuter railroad. Therefore, the MTA’s activities fall within the “accepted norms of parental oversight of a subsidiary’s facility,” which is more than sufficient to insulate the MTA from liability under the FELA.

The district court also disregarded common law decisions involving the MTA as being “neither binding nor persuasive.” The Supreme Court, however, has instructed courts to look to common law principles when interpreting FELA issues where there is no binding precedent. The second circuit courts have ignored these instructions by disregarding the common law requirements of certain actions brought under the FELA. One

manage, control and direct the maintenance and operation of transportation facilities, equipment or real property operated by or under contract, lease or other arrangement”). Other specific powers given to the MTA include: the power to acquire, establish and maintain facilities; establish and collect fares and tolls; establish standards of operation regarding safety; and lease railroad cars. See id.; see also Greene, 99 F. Supp. 2d at 272.

104 See Dellaverson Supp. Aff. ¶ 9. The functions of the subsidiary railways, the LIRR and Metro-North, include operating railroad equipment; maintaining the quality and cleanliness of equipment; scheduling commuter rail service; managing rail operations through separate executive, line and staff personnel; setting fares; and preparing budgets. See id.

105 See Bestfoods, 524 U.S. at 72 (noting that the critical question in determining whether a parent company is liable for its subsidiary under CERCLA, is whether, “in degree and detail,” the actions of the parent or its agent have exceeded the normal practices a parent company’s oversight functions).

106 See Greene, 99 F. Supp. 2d at 275 (indicating that because the cases did not directly address the question of whether the MTA was a common carrier, they were unpersuasive).

107 See Consol. Rail Corp. v. Gottshall, 512 U.S. 532, 544 (1994) (allowing an employee to recover for negligent infliction of emotional distress under FELA, after first examining FELA, its purposes, “and the construction we have given it over the years,” and then considering “the common law’s treatment of the right to recovery asserted”). The Court in Gottshall went on to state, “[A]lthough common law principles are not necessarily dispositive of questions arising under FELA, unless they are expressly rejected in the text of the statute, they are entitled to great weight in our analysis.” Id.; see also Atchison, Topeka. & Santa Fe Ry. Co. v. Buell, 460 U.S. 557, 568 (1987) (pointing out that “FELA jurisprudence glean guidance from common law developments . . .” in deciding whether an employee could bring a FELA claim for emotional injuries); Urie v. Thompson, 337 U.S. 163, 174 (1949) (agreeing with the Missouri Supreme Court that “negligence” should be defined in accordance with federal common law principles since it was not defined within the FELA); Morant v. Long Island R.R., 66 F.3d 518, 522 (2d Cir. 1995) (noting the appropriateness of using common law principles, including that of negligence per se, in applying the FELA).

decision that was disregarded was Noonan v. Long Island Railroad,\textsuperscript{109} where a New York State Supreme Court ruled the MTA was not liable for the negligence of its subsidiary, the LIRR.\textsuperscript{110} Furthermore, the court discussed the parent subsidiary relationship between the two companies stating, "[The MTA's subsidiary corporations are distinct entities.... Each subsidiary is responsible for the maintenance and repair of its own facilities, and the functions of the MTA do not include the operation, maintenance and control of any facility]."

Additionally, the district court did not consider decisions of the National Mediation Board or the Railroad Retirement Board as persuasive or binding.\textsuperscript{112} When the Teamsters Union attempted to represent clerical workers in the MTA's Madison Avenue offices, the National Mediation Board was called upon to consider whether the MTA was a common carrier under the

\textsuperscript{109} Noonan, 551 N.Y.S.2d 232 (1st Dep't 1990) (finding that plaintiff who tripped while crossing tracks and property of LIRR could not hold MTA liable for "the torts committed by a subsidiary arising out of the operations of the subsidiary corporation").

\textsuperscript{110} See id. at 233; see also Thaxton v. Norfolk Southern Ry. Co., 520 S.E.2d 735, 739 (Ga. Ct. App. 1999) (discussing the issue of whether a parent holding company is a common carrier, and thus liable under FELA, and ruling that the parent company must dominate the operations of the subsidiary to be held liable); Montez v. Metro. Transp. Auth., 350 N.Y.S.2d 665, 667 (1st Dep't 1974) (holding the MTA is not liable for the actions of its subsidiary, the LIRR).

\textsuperscript{111} Noonan, 551 N.Y.S.2d at 233 (1st Dep't 1990); see also Cusick v. Lutheran Med. Ctr., 481 N.Y.S.2d 122, 123 (2d Dep't 1984) (holding that a widow of a bus driver could not recover from the MTA because its functions with respect to public transportation are limited to financing and planning, rather than operation, maintenance or control of any facility).

\textsuperscript{112} See generally Greene v. Long Island R.R. Co., 99 F. Supp. 2d 268 (E.D.N.Y. 2000) (lacking any reference to the National Mediation Board or the Railroad Retirement Board). Courts, however, are required to defer to administrative agencies with the authority and expertise to administer regulations. See Chevron, U.S.A., Inc. v. Natural Resources Def. Council, Inc., 467 U.S. 837, 843-44 (1984) (noting that where a statute is ambiguous and an administration has previously interpreted the statute, "the court does not simply impose its own construction on the statute," but considers "whether the agency's [interpretation] is based on a permissible construction of the statute"); Wassenberg v. United States R.R. Ret. Bd., 75 F.3d 294, 296 (7th Cir. 1996) (noting that in reviewing an agency's interpretation of a statute, the court should give the agency "deference" if there is a "reasonable basis" for the interpretation); Int'l Ass'n of Machinists v. Nat'l Mediation Bd., 930 F.2d 45, 48 (D.C. Cir. 1991) (noting that the scope of review of NMB "decisions... 'is one of the narrowest known to the law' " (quoting Int'l Ass'n of Machinists & Aerospace Workers v. Trans World Airlines, 839 F.2d 809, 811 (D.C. Cir. 1988))).
Railway Labor Act ("RLA"). The mediation board reviewed many of the same factors examined by the district court in Greene. While admitting the LIRR was a carrier under the RLA, the Board determined the MTA was not. "[The] MTA is a public body created by a state to run a mass transportation network which incidentally includes several carriers subject to the Board's jurisdiction." Similarly, neither the Railroad Retirement Act of 1974, nor the Railroad Unemployment Insurance Act covers employees of the MTA. Concluding that the MTA is a common carrier under the FELA is inapposite in light of its status under these federal regulations imposed on railroads that rely on similar definitions of "carrier." "

IV. DISADVANTAGES OF FAULT-BASED COMPENSATION SYSTEMS

When first enacted, the FELA represented a milestone in workers compensation and tort reform. It soon became anachronistic due to the implementation of workers compensation laws nationwide. It now is described as "archaic," "unwarranted," and outmoded. The district court should have shown greater deference to these considerations in its application of the FELA to the MTA. The costs of fault

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114 See id. at 3 (noting that the NMB findings of fact included that the "MTA is a public benefit corporation... [serving] over seven million passengers... and 600,000 vehicles").
115 Id. at 4. "In terms of passengers served, number of employees, and allocation of financial resources, the railroad operations are dwarfed by the non-railroad operations. Management of LIRR... on a day-to-day basis is independent of direct control by the MTA." Id. at 5.
118 See Weiss Decl. Ex. E.
123 See Denis J. Brion, The Chaotic Indeterminacy of Tort Law, in RADICAL
based compensation systems have been proven, and they have failed to promote safety in the railroad industry. Furthermore, some scholars link the demise of the railroads to FELA liability. Unfortunately, the statute remains, due in part to intense lobbying by railroad unions and trial lawyers.

Fault based compensation systems for workplace injuries were abandoned early in the twentieth century as they precipitated unfavorable results for both employers and employees. Employers loathed the potentially catastrophic losses that could result, while workers disliked their slim odds of receiving any compensation. Additionally, the fault system was biased against large railroads, as awards against large railroads

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125 See id. (“FELA works against a safe and productive workplace by creating obstacles to objective accident examination.”).

126 See generally Squires, supra note 120, at 93.

127 See Kevin G. Hall, FELA Reformers Gearing Up For Another Battle On Capitol Hill, TRAFFIC WORLD, May 11, 1992, at 23 (“Attempts to repeal FELA in favor of state worker’s compensation programs have invariably been doomed because of intense lobbying by rail labor and the Trial Lawyers Association—a powerful interest group with many former members in Congress.”); see also Squires, supra note 120, at 107 (noting that railroad unions have defeated proposals to “scrap” FELA because they favor the generous benefits it affords).

128 See John Broady, Shark Bait, TRAFFIC WORLD, May 17, 1999 at 4 (describing FELA as a “trial lawyers’ lottery”); Jack Burke, With New Conrail Operating Structure, Hagen ‘Out To Get More Business,’ TRAFFIC WORLD, June 21, 1993, at 23 (“As for FELA, I’m not real fond of that system because of the adversary nature of it. Any time your employees have to sue you to get paid for getting hurt and there’s not some standard—it’s kind of a strange system.”); Frank N. Wilner, Leadership Vacuum Delays a FELA Solution, 197 RAILWAY AGE 12 (1996) (“Some FELA jury awards are in the millions of dollars. Conversely, injured workers unable to prove employer negligence must look to personal savings accounts, family, and friends for rehabilitation funds. There is no equity in a scheme that unduly rewards some and unjustly denies others.”).

129 See id.; Squires, supra note 120, at 107 (describing the FELA injury premium as two to four times higher then workers compensation indemnity payments). See also Scrapping FELA Would Not Change Railroads: Bottom Line, TRB Says, U.S. RAIL NEWS, May 27, 1994 (“Injured workers who are victorious in court may reap benefits under FELA that are generally unavailable in no-fault compensation systems, such as money for pain and suffering. Therefore, the potential windfall for workers is huge and the possible loss for workers is enormous.”).
Thus, the abolition of the FELA has been called for almost since its inception. No-fault systems are superior in that they emphasize rehabilitation and uniformity of payments, require no proof of negligence, and limit recovery strictly to economic damages.

The most compelling policy argument against FELA liability is the statute's impact on safety and profitability of railroads. Deregulation has been viewed as the primary cause of the railroad's return to profitability after years of operating at a financial deficit. The FELA is seen as the nemesis of railroads, and a huge roadblock in the way of profitability. Most notably, the FELA has a tremendous adverse effect on the railroad safety by discouraging productive communications regarding accident causes, and thereby directly reducing preventative measures. Though there have been several suggestions on how to improve or modernize the FELA, none

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130 See Watson, supra note 124, at 8B.
131 See Squires, supra note 120, at 107; see also DON DEWEES, DAVID DUFF, & MICHAEL TREBELCOCK, EXPLORING THE DOMAIN OF ACCIDENT LAW 354 (1996).
132 See Wilner, supra note 128, at 12.
133 See Squires, supra note 120, at 93; see also Jack Burke, Rails Enjoyed A Solid Year In '92, Outlook Is Cautious For Next Year, TRAFFIC WORLD, Dec. 28, 1992, at 14 (noting deregulation triggered railroads return to profit).
134 See Railroad FELA Claims Costs Skyrocket 250% in 16 years, WORKERS' COMP. EXECUTIVE, Apr. 9, 1997 (noting "FELA is both inefficient and subject to serious abuse"); Railroad Injuries, Editorial, J. COMM., June 2, 1994, at 6A ("Century old labor laws that segregate railroads from the rest of American industry make little sense today."). The FELA has been the subject of comical satire:

Franklin Roosevelt had a dog named Fala—and everywhere in the world the President went, Fala was sure to follow. In an attempt to discredit the President, Republicans spread a rumor that Fala and FDR had become separated in a foreign city and a Navy vessel had been dispatched, at great expense to taxpayers, to retrieve the pooch.

FDR had the last laugh, however, chiding Republicans for a politically motivated attack on an innocent and defenseless dog.

While President Roosevelt had a dog named Fala, the railroads have a dog named FELA—but there is nothing loyal or funny about FELA, which stands for the Federal Employers' Liability Act. FELA is a dog in the pejorative sense because it has created excessive mistrust between carriers and their employees.

Wilner, supra note 128, at 12.
135 See Burke, supra note 133, at 14.
136 See Squiers, supra note 120, at 108 ("[E]ach side skews the focus of the investigation. This is due to the potential need to prove the other side's negligence, not just on the facts of an accident, but on how its circumstances are reported and how injuries are described.").
have prevailed.\(^{137}\) The fact remains that the FELA creates a substantial impediment to the management, implementation, and administration of general railroad safety programs.

In addition to these policy considerations, the court should have looked to the realities of its decision. Allowing the FELA to apply to all MTA employees increases the chance of litigation in an area that is already overloaded.\(^{138}\) A compromising decision whereby the FELA would only apply to MTA police working on railroads covered by the Act would produce unfair results. The reality of policing in an urban area may lead to situations requiring coordination between both FELA and non FELA covered officers, or situations requiring covered officers to travel outside their designated jurisdictions. These distinctions would serve to produce unfair results and law enforcement inefficiency.

The practical and economic impacts on the MTA compel a different decision. Ruling that the FELA is applicable to the MTA creates a situation where the MTA is reduced to operate in an inefficient manner by either accepting the higher costs of FELA liability, or forcing a reversion to separate police forces for each subsidiary of the MTA, as it was during the inefficient and unproductive period before the merger of the forces in 1997.

**CONCLUSION**

The Federal Employers Liability Act, at one time a breakthrough for oppressed railroad workers, is now a statute that has outlived its usefulness and is perpetuated as a result of the lobbying efforts of trial lawyers. The FELA threatens the very existence of many railroads, even though railroad workers could, today, be adequately covered under New York State's workmen's compensation laws. The unwarranted extension of FELA liability to the MTA perpetuated an unsound theory of employer liability and evinced an inaccurate judicial perception of the actual functions of the MTA. The MTA functions as a coordinator, managing an integrated public transportation

\(^{137}\) See GAO Weighs FELA, No-Fault; Agency Finds Middle Ground, US RAIL NEWS, Sept. 24, 1996 (reporting that Congress has considered repealing FELA and the GAO recommended capping non-economic damages, limiting attorneys' fees and/or permitting arbitration of claims).

system, which incidentally includes two railroads subject to the FELA. The MTA, itself, does not operate as a common carrier under the meaning of the statute and therefore should not be held liable under the FELA.