The Supreme Court and the Federal Employers' Liability Act, 1958-1959 Term

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In this Article, the author analyzes the Federal Employers’ Liability Act cases decided by the Supreme Court of the United States during the 1958-1959 term. Despite the abundance of denials of review and per curiam opinions, Mr. DeParcq draws a number of practical conclusions concerning the attitude of the Court toward FELA litigation.

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Since the 1956-1957 term of the Supreme Court of the United States, the succeeding terms have included increasingly fewer decisions involving the Federal Employers’ Liability Act. In the 1956-1957 term, the Court decided eleven FELA cases, including the landmark case of Rogers v. Missouri Pac. R.R.1 and its companion cases.2 The year which followed was much quieter, with only five relevant decisions, the primary impact of which was merely to illustrate the ramifications of the principle proclaimed in the Rogers case.3 But, the 1958-1959 term has been even quieter. The four FELA cases decided by the Court this term are not of great practical importance, either singly or together. Yet by looking at these cases, together with those which the Court refused to review, and by comparing the Court’s action during this term with its action in the two preceding terms, it is possible to make some important predictions concerning future Supreme Court interpretation of the FELA.

The first pertinent case decided by the Court this term was an old friend, Deen v. Gulf, Colo. & S.F.R.R. Earl Deen’s duties re-

† This Article is the substance of an address made before the National Association of Claimants’ Compensation Attorneys at its annual convention held in Miami, Florida, in August 1959.
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1. 353 U.S. 500 (1957).
quired him to empty a babbitt pot which, with its contents, weighed more than half a ton. His leg was broken when the pot slipped as he and a fellow employee were tipping it to empty it; consequently, a jury awarded Deen damages of $21,450. However, he was to become involved in a flood of appellate litigation before ultimately becoming entitled to any of that amount. A Texas court of civil appeals, regarding the evidence of the employer's negligence as insufficient upon which to base liability, ordered judgment for the defendant; the subsequent per curiam reversal of this judgment by the Supreme Court of the United States in 1957, was accompanied only by the Court's usual terse statement that "the proofs justified with reason the jury's conclusion that employer negligence played a part in producing the petitioner's injury." On remand to the Texas court of civil appeals, the railroad argued that the verdict was excessive and contrary to the manifest weight of the evidence. That court held that the decision of the Supreme Court foreclosed any question concerning weight of the evidence, but it upheld the defendant's contention that the verdict was excessive and ordered a remittitur. On writs of error brought by both parties, the Texas Supreme Court regarded the power of a state court to order a new trial on the ground that a verdict is against the weight of the evidence as a matter of state procedure, over which the United States Supreme Court, on the basis of its previous decisions, has indicated that it will not take jurisdiction. It remanded the case for the court of civil appeals to make its own independent evaluation "wholly apart from the judgment of the Supreme Court of the United States" as to whether the verdict was against the weight of the evidence. At this juncture, it was Deen's turn to retaliate and further complicate the case. He sought a writ of mandamus from the Supreme Court of the United States to vacate the Texas Supreme Court's order remanding the case and to compel entry of judgment in accordance with the verdict of the jury. In another per curiam opinion, agreed to by all the members of the Court except Mr. Justice Stewart, who took no part in the decision, the Supreme Court held that Deen was entitled to the writ of mandamus, saying with regard to the claim about manifest weight of the evidence: "The determination of that issue was foreclosed by Deen v. Gulf, Colorado & Santa Fe R. Co. . . ." It is not entirely clear from this cryptic per curiam opinion what the Supreme Court intended to imply. Its equally cryptic per curiam

6. 312 S.W.2d 933 (Tex. 1958).
7. Id. at 942.
opinion of a few years ago in *Harsh v. Illinois Terminal R.R.* was susceptible of being interpreted to mean that in an FELA case a state appellate court cannot validly order a new trial for the employing carrier on the ground that the verdict is against the weight of the evidence. Of course, a trial judge, whether state or federal, has an undoubted right to set aside a verdict and order a new trial if he considers the verdict contrary to the manifest weight of the evidence. Perhaps erroneously, the Illinois Supreme Court has construed the *Harsh* decision to foreclose an appellate review of the weight of the evidence on appeal by the railroad company where the plaintiff has received the verdict and judgment below; and the Supreme Court of the United States refused to review that decision. Of course, the *Harsh* and *Bowman* cases, foreclosing appellate review of the weight of the evidence when the appeal is by the railroad, must be read and interpreted in the light of the very strong policy of the Supreme Court of the United States and of courts generally to interpret and apply the FELA liberally in favor of the injured employee. What these cases actually mean with reference to appellate power and scope of review generally ought to be made more clear by the Court, as evidenced by the fact that commentators are still offering a variety of possible explanations for the *Deen* decision.

Even the second Supreme Court per curiam opinion did not terminate litigation in the *Deen* case. When the case went back on remand, the Texas Supreme Court acquiesced in the United States Supreme Court's decision and ordered judgment for Deen, but it affirmed the remittitur which the court of civil appeals had imposed. One judge dissented, however, saying:

I think the Act does not contemplate an issue of excessive verdicts or the granting of a remittitur by the trial court or the Court of Civil Appeals. See Neese v. Southern Railway Company, 1955, 350 U.S. 77.

To allow a remittitur would nullify a material portion of the Act. It, no doubt, was the intention of the Congress to place the power of evaluating evidence solely with the jury.

Once more Deen applied for certiorari, this time to review the order of remittitur, but his petition was denied, over Mr. Justice Douglas' dissent. Thus, after three years of litigation, including three trips to the Supreme Court of the United States, Earl Deen

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12. 317 S.W.2d 913 (Tex. 1958).
13. Id. at 915.
finally obtained judgment for a portion of the damages awarded him by a jury.

A curt per curiam opinion also served to dispose of the only other case to reach the Court this term involving issues of negligence and scope of review. John Henry Moore, a baggage handler in St. Louis, was injured while seeking to maneuver a baggage cart through a narrow space on the platform. While he was turning the cart, it pivoted against a car of a train moving on an adjacent track, causing Moore to be thrown against a car of another train which was on the track on the opposite side of the platform. Believing that the evidence showed affirmatively that the injury was caused by Moore’s own act in turning the cart, and not by his employer’s failure to provide him with a safe place to work, the Missouri Supreme Court ordered judgment for the defendant despite a jury verdict for plaintiff.15 The Supreme Court of the United States reinstated plaintiff’s verdict with its now usual brief per curiam opinion, holding “that the proofs justified with reason the jury’s conclusion that employer negligence played a part in producing the petitioner’s injury.”16 Mr. Justice Frankfurter, as usual, voted to dismiss the writ of certiorari as improvidently granted. Mr. Justice Harlan, following his practice of the 1957–1958 term, concurred in the result only.17 Justices Whittaker and Burton dissented, saying: “To hold that these facts are sufficient to make a jury case of negligence under the Act is in practical effect to say that a railroad is an insurer of its employees. Such is not the law.”18

The case of Baker v. Texas & Pac. Ry.19 involved the death of a laborer who was engaged in work along a right of way. The deceased had been hired by a contractor who was performing the work under a contract with the railroad, but there was evidence to show that the work comprised part of the maintenance task of the railroad, that the railroad furnished the material to be used, and that one of its employees supervised the individual workmen. Suit was brought against the railroad under the FELA. A Texas trial court refused to submit a special issue to the jury as to whether the deceased was employed by the railroad, holding as a matter of law that he was not. A Texas court of civil appeals affirmed this decision,

17. Id. at 32. He based his concurrence upon his memorandum opinion in Gibson v. Thompson, 355 U.S. 18, 19 (1957), in which he said that (1) once certiorari has been granted even though improvidently, the court should consider the merits of the case, and that (2) although he disagreed with the reasoning and the view of negligence enunciated in Rogers, he felt presently bound by it.
18. 358 U.S. at 35.
but the Supreme Court of the United States reversed. In its per curiam opinion, the Court said, in part:

The Federal Employers' Liability Act does not use the terms "employee" and "employed" in any special sense . . . so that the familiar general legal problems as to whose "employee" or "servant" a worker is at a given time present themselves as matters of federal law under the Act. . . . [W]e think it perfectly plain that the question, like that of fault or causation under the Act, contains factual elements such as to make it one for the jury under appropriate instructions as to the relevant factors under law.20

Except for Mr. Justice Frankfurter, who again thought certiorari had been improvidently granted, the Court was unanimous in that case, including Mr. Justice Stewart who had by then taken his place on the bench.

The final pertinent decision decided on the merits during the 1958–1959 term raised an interesting question concerning the statute of limitations. Michael Glus contracted an industrial disease in 1952 as a result of unsafe working conditions provided by his employer. He did not bring suit until 1957, by which time the three year statute of limitations of the act21 had of course expired. In his complaint he alleged, however, that "defendant's agents, servants and employees fraudulently or unintentionally misstated to plaintiff that he had seven years within which to bring an action against said defendant as a result of his industrial disease and in reliance thereon plaintiff withheld suit until the present time."22 When defendant moved to dismiss the complaint as barred by the statute of limitations, plaintiff asserted that the statute had been tolled by defendant's fraud or misrepresentations.

Both the trial court and the Second Circuit held that Glus's suit was barred, relying, although somewhat reluctantly, on earlier Second Circuit decisions; these precedents held that where a statute of limitations is "built in" as an integral part of a statute (such as the FELA), creating a new remedy unknown to the common law, the period of limitation is a matter of substance and cannot be tolled.23 However, all nine Justices of the Supreme Court joined in Mr. Justice Black's opinion reversing the lower court decisions and holding that if Glus could prove his allegations that the defendant's responsible agents had induced the delay in bringing suit by false representations, he could collect for his disease.24 The Court merely said that it had been shown nothing in the language or history of the act to indicate that the ancient principle that no man may take advantage of his own wrong was not to apply in suits arising under the statute.

23. Ibid.
Finally, there is one case in which the Supreme Court granted certiorari during the 1958-1959 term but in which it did not reach a decision on the merits until early in the 1959-1960 term. An Ohio court held that an accident in which a grade-crossing watchman was hit by an automobile driven by a drunken driver violating five traffic ordinances was not reasonably foreseeable and that therefore the railroad was under no duty to provide protection against it.

In the four cases decided on the merits, the Court continues to insist on a broad construction of the act and on the historic role of the jury. It has continued to apply the Rogers principle that it is enough for liability that employer negligence played any part, even the smallest, in causing the injury, and it has refused to permit state courts to evade that rule under the guise of judging the weight of the evidence. The question of whether a person is an "employee" and thus within the act has been held to be a question of fact for a jury to determine, and a liberal rule has been applied to the tolling of the statute of limitations.

There were no surprises in the voting patterns revealed by these few cases. The Court was always unanimous, except for Mr. Justice Frankfurter's refusal to vote on the merits in three of the four cases, and in the fourth case, the Moore case, the Court divided along the same line as it had in the two preceding terms. The new member of the Court, Mr. Justice Stewart, held for the injured employee in both of the cases in which he participated. There had been much press comment at the time of his appointment to the Court that his record on the Sixth Circuit was not notably pro-employee in FELA cases, but these two decisions are not enough to shed any light, one way or the other, on that proposition.

What the Supreme Court did this term is actually less enlightening than what it did not do. The cases in which certiorari was denied are in many ways more illuminating than the cases reviewed by the Court on the merits. There were five cases during the year in which the employee was successful below and the railroad petitioned for certiorari. Two of these were the most routine sort of cases, in which state appellate courts held that the evidence justified

26. In the Inman case, an important case decided on the merits early in the 1959-1960 term and subsequent to delivery of the speech which furnished the basis for this Article, the Supreme Court affirmed 5-4 a reversal by the Supreme Court of Ohio of a jury verdict for an injured employee, on the ground that on the basis of the evidence no reasonable man could find the existence of employer negligence in the case. Inman v. Baltimore & O.R.R., 80 S. Ct. 242 (1959). It is interesting to note that of the FELA cases accepted for review during the 1958-1959 term this unfortunate decision is the only one in which the Court wrote more than a per curiam opinion. Another notable feature of the case is the vote of Mr. Justice Frankfurter who abandoned his almost inflexible position in earlier cases of refusal to decide on the merits cases in which he deemed a writ to have been improvidently granted.
submission to the jury of negligence issues.²⁷ It is hard to understand how even the partisanship of counsel could have imagined that the Supreme Court would review such decisions. And a decision of the Third Circuit, affirming a verdict of $250,000 in a wrongful death action where the railroad contended that the deceased, an electrical engineer employed and paid by a locomotive manufacturer to ride on regular train runs and service electric locomotives, was not an “employee” of the railroad, is consistent with the holding in the Baker case this term that it is for the jury to determine the issue of who is an “employee.”²⁸

However, the other two cases in which employer petitions were denied are somewhat more illuminating. In a Florida case, the trial court, quite inadvertently, failed to read to the jury that portion of the instructions agreed upon which informed the jury to reduce plaintiff’s verdict, if any, in the event that they found contributory negligence. Although the defendant’s counsel objected to this omission at the conclusion of the instructions, he did so in an unclear manner. The appellate court held that the inadvertent failure to give this portion of the instruction was not reversible error in the absence of a clear and specific objection.²⁹

The other case came up from the Second Circuit. It involved a car inspector engaged in car commodity classification who, in order to avoid walking in the snow and to keep up with the moving cars, swung up into a gondola car which he thought was empty. When the car stopped, the steel plates in the car shifted, pinning his leg against the side of the car. The jury returned a general verdict for plaintiff but also found specially that his presence in the gondola car was not within the performance of his duties. The Second Circuit said that the inconsistency between the verdict and the answer to a special interrogatory required a new trial. The railroad claimed that judgment should have been entered in its favor on the basis of the special interrogatory, but the court held that the plaintiff was entitled to a new trial so that there might be submitted to the jury the issue of whether the railroad knew or should have known that an employee engaged in car commodity classification might be riding in a gondola car.³⁰

The score, then, for the railroads this term was no petitions


granted out of five submitted, precisely their record in the preceding term. There were thirteen petitions for review filed last term by employees who were unsuccessful in the lower courts. In five such cases, as we have seen, review was granted, and the employee won in the Supreme Court in the four of these cases which were heard this term. In eight cases the employee's petition was denied and the unfavorable judgment below permitted to stand.

Many of the cases in this latter group involved procedural issues, such as a refusal to give an instruction requested by a plaintiff where it was arguable that the matter was not fully covered by the instructions given, a refusal to issue a writ of mandamus to review a transfer order, and a refusal under Rule 60 to reopen a judgment adverse to the employee. Potentially, the most interesting of the cases in this category is one originating in the District Court for the Eastern District of Pennsylvania, in which a local rule providing for pre-trial examination of the plaintiff by an "impartial" medical expert was challenged. The unreported decision of the Third Circuit refusing to entertain an application for a writ of mandamus was issued without the benefit of written briefs or oral argument, and may thus merely reflect a view that the case was inappropriate for mandamus, and that the matter could be reviewed, if necessary, on appeal from a final judgment. In any event, and for whatever reason, the Supreme Court denied review.

In addition to the Deen case, there were three other cases before

31. Of course, the petitioning employee lost in the fifth relevant case accepted for review in the 1958-1959 term, as a result of the Court's decision in Inman v. Baltimore & O.R.R., 30 S. Ct. 242 (1959). However, the evidence of employer negligence in this case was extremely weak, in fact, so weak that the majority said:

In Rogers v. Missouri Pacific R. Co., 1957, . . . , we laid down the rule that "judicial appraisal of the proofs to determine whether a jury question is presented is narrowly limited to the single inquiry whether, with reason, the conclusion may be drawn that negligence of the employer played any part at all in the injury or death." In measuring Ohio's disposition of the case here by the Rogers yardstick, we must affirm. The Act does not make the employer an insurer. . . . [W]e believe that the evidence here was so thin that, on a judicial appraisal, the conclusion must be drawn that negligence on the part of the railroad could have played no part in petitioner's injury. 80 S. Ct. 242, 243–44. (Emphasis added.)

the Court this term which involved issues concerning the sufficiency of the evidence. One rather perplexing case came up from Ohio where the state court,\(^{36}\) in an opinion that seems heedless of the recent Supreme Court decisions concerning the FELA, held that "there must be a proximate cause,"\(^{37}\) relied on state non-FELA cases for the meaning of "proximate cause," and determined that on the facts before it the defendant's negligence was, as a matter of law, not the proximate cause of the plaintiff's injuries. The denial of certiorari in this case would be difficult to understand except for the fact that the Ohio court, rather than ordering judgment for defendant, had merely ordered a new trial. Thus the state court judgment was not "final" as it must be for review by certiorari. This explanation accounts also for another case where a new trial was granted, but where otherwise the holding that the evidence was insufficient would seem improper.\(^{38}\) The only other pertinent case is one in which the Seventh Circuit held that "without a doubt" the district court had correctly directed a verdict for the defendant where the plaintiff's evidence "amounts to nothing more than pure fantasy and contains even less substance than broth brewed from the bones of a stewed pigeon."\(^{39}\) Obviously, this case compels little attention here.

What conclusions can be drawn from this mass of per curiam opinions and denials of review? One conclusion which seems to be rather clearly emerging is that markedly fewer petitions are granted from the lower federal courts than from the state courts. In my review a year ago of the decisions of the 1957-1958 term, I stated: "It is interesting, but it is too early to tell whether it is mere coincidence, that the Supreme Court granted all five petitions by employees for certiorari to state courts, and denied all five such petitions addressed to federal courts. Only time will tell whether this is of significance."\(^{40}\)

What time thus far has told is that this term the Court granted four of the seven petitions for certiorari addressed to state courts, while granting only one of six—in the Glus case involving the tolling of the statute of limitations—to a federal court. Combining the results of the two years, the Court has granted review of state court decisions in nine out of twelve cases but has granted review of a federal court decision in only one case out of eleven. Yet, from reading the opin-


\(^{37}\) Id. at 314, 152 N.E.2d at 423.

\(^{38}\) Simpson v. Kansas City Connecting Ry., 312 S.W.2d 113 (Mo.), cert. denied, 358 U.S. 825 (1958).

\(^{39}\) Baum v. Baltimore & O.R.R., 256 F.2d 753, 756 (7th Cir.), cert. denied, 355 U.S. 891 (1958). The evidence in this case established merely that the plaintiff, a section gang laborer who was off duty but on call, had left the bunkhouse to go fishing, and that seven hours later his mutilated body was found near the tracks.

\(^{40}\) DeParcq, supra note 3, at 32.
ions of lower courts, it is not obvious that the lower federal courts are any happier with the Supreme Court's interpretation of the role of the jury than are the state courts. Perhaps the disproportion in these figures indicates that the Court is more confident that the lower federal courts will apply the law as declared by the Supreme Court, whether they like it or not, than that the state courts will do the same.

One of the most astute observers of the Supreme Court regards the area of protecting jury trial as one in which the Court is unable to make its will felt. He points out that the Court has used its full power in attempting to do so, especially by mass reversals of lower court opinions, and that it has given an extraordinary amount of attention to this question, but, he says: "The results are unimpressive." 41 With respect, I disagree. As I read the cases, it seems that the lower courts, state and federal, are leaving issues to juries today where, even as recently as two or three years ago, they would have resolved the issues as matters of law. Given the attitude which the Supreme Court has expressed in recent terms, I cannot believe that any plaintiff who has been the victim of a directed verdict, or the recipient of a jury verdict only to have it taken away and judgment ordered for defendant, would fail to petition for certiorari. Yet, in the term just ended, there were only two such cases presented to the Supreme Court—the case of the baggage handler, where the Supreme Court reversed the Missouri court, and the decision of the Seventh Circuit involving the laborer whose mutilated body was found on the tracks, which the Supreme Court refused to review. Only two terms ago there were eleven cases involving employees' petitions which the Court actually reviewed.

It seems clear that a majority of the Supreme Court Justices favor a liberal interpretation of the FELA with regard to its scope, available defenses, the meaning of negligence, and the like. But the more important thread in the decisions seems to be the insistence of that same majority on preserving jury trial as it was once known. It is easy for us, who are professionally concerned primarily with FELA litigation, to suppose that the Supreme Court's decisions relating to the role of the jury with which we are familiar are isolated phenomena, peculiar to FELA suits. The fact is, however, that the FELA decisions on the role of the jury are consistent with recent Supreme Court decisions, in all sorts of litigation, in which the Court has sought to restore the jury to the pre-eminent position which it once enjoyed. Thus the rule of Erie R.R. v. Tompkins, 42 requiring federal courts to apply state law in diversity cases, has been made to yield to the requirement of jury trial under the

41. FRANK, MARBLE PALACE 83 (1958).
42. 304 U.S. 64 (1938).
seventh amendment. Even though a particular issue is regarded in a state as an issue for the judge to decide, the jury must decide it in a federal action if it is the type of issue which historically has been for the jury. In cases involving mingled legal and equitable claims, it sometimes happens that a particular fact issue will be common both to the legal and to the equitable claims. The scholars have supposed that in that situation the judge is frequently free to decide the issue for himself, rather than submitting it to a jury, but the Supreme Court has held only this term that in such cases the common issue must always go to the jury. Even in a routine diversity case, the Court has granted review and subsequently reversed the decisions of a court of appeals which thought there was insufficient evidence to submit a particular issue to a jury. It is significant that in that case the Court cited two FELA cases as exemplifying the "federal standard" for sufficiency of the evidence.

One final comment deserves to be made, especially in view of the impassioned protests of the general counsel of the Illinois Central Railroad and other similarly unbiased observers, that the Court has converted the act into a workmen's compensation act. In the term just ended, eight employees who had lost below were denied review of their cases by the Supreme Court. Those who say that the Supreme Court has written absolute liability into the act are simply ignoring the facts. However, despite the view of four Supreme Court Justices and some leading legal scholars that the Court should not grant certiorari in cases involving employees' petitions, I firmly believe that any employee who has lost below as the result of an unjust verdict or decision may confidently expect relief from the Supreme Court.

47. Justices Frankfurter, Harlan, Stewart, and Whittaker.